**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA**

Case No. 38/2012

In the matter between:

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| **NATIONAL TREASURY** | First applicant |
| **THE SOUTH AFRICAN NATIONAL ROADS AGENCY LTD** | Second applicant |
| **THE MINISTER, DEPARTMENT OF TRANSPORT REPUBLIC OF SOUTH AFRICA** | Third applicant |
| **THE MEC, DEPARTMENT OF ROADS AND TRANSPORT, GAUTENG** | Fourth applicant |
| **THE MINISTER, DEPARTMENT OF WATER AND ENVIRONMENTAL AFFAIRS** | Fifth applicant |
| **THE DIRECTOR-GENERAL, DEPARTMENT OF WATER AND ENVIRONMENTAL AFFAIRS** | Sixth applicant |

and

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| **OPPOSITION TO URBAN TOLLING ALLIANCE** | First respondent |
| **SOUTH AFRICAN VEHICLE RENTING AND LEASING ASSOCIATION** | Second respondent |
| **QUADPARA ASSOCIATION OF SOUTH AFRICA** | Third respondent |
| **SOUTH AFRICAN NATIONAL CONSUMER UNION** | Fourth respondent |
| **NATIONAL CONSUMER COMMISSION** | Fifth respondent |

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**TREASURY'S HEADS OF ARGUMENT**

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## A. Introduction

1. A major highway construction project (the Gauteng Freeway Improvement Project, "GFIP"), has already been completed at the economic heart of South Africa's economy. It entails capital expenditure by Government of R21 billion in the first phase of the project.[1] So too the physical and electronic infrastructure for tolling the use of this road system is already complete. Government's decisions to authorise both were not the subject of any legal challenge prior to OUTA's urgent application.

2. Government's decision not to embark upon the project, but to finance it through the GFIP is what has precipitated OUTA's application. This is notwithstanding firstly the fact that the series of decisions attacked by OUTA stretch back to 2008; secondly, the fact that there is already pending before the court an expedited application for judicial review in respect of these decisions; and thirdly that the interim interdict sought to restrain Government from recovering the already expended capital debt is sought at a time of unparalleled international financial crisis and instability.

[1] Record vol 16 p 1453 para 47.

3. On 28 April 2012 Prinsloo J granted the interdict in the terms sought by OUTA.

4. This Court has clearly held that courts should be slow to grant interim interdicts stopping Government from fulfilling its constitutional and statutory functions. The test is whether it is "strictly necessary" for the court to do so, on compelling facts.[2] (Interdicts from their inception in South African law have been characterised, even in an ordinary civil setting, as inherently an extraordinary remedy.)[3] It has also held that where such an order is granted, in exceptional circumstances where irreparable harm arises for Government and it is in the interests of justice to do so, it is appealable, even if not final.[4]

5. It is submitted that this is such a case, Prinsloo J having granted a wide-ranging interdict, on inadequate grounds, and with the most serious consequences. In an endeavour however to obviate the need for this application, the applicants immediately thereafter sought the agreement of OUTA to the final relief in the matter – whether or not the relevant decisions are to be set aside by judicially reviewed – to be heard at the beginning of the August term in the North Gauteng High Court. OUTA

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[2] *President of the Republic of South Africa v UDM* 2003 (1) SA 472 (CC) at paras 32-33.
[3] *Commissioner of Mines v Solomon* 1907 TS 51 at 54.
[4] *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2010 (5) BCLR 457 (CC).

refused to commit itself to this (or even to agree to a scheduling meeting with the Deputy Judge President); it has disputed the completeness of the Rule 53 record provided by the Government departments, and has still not filed its supplementary founding affidavit in terms of Rule 53(4). As a consequence, answering and replying affidavits now lie, at best, months ahead, and with no realistic prospect of a final determination even in the High Court of the judicial review before the end of this year.

6. The issues in this matter, it will be shown, are constitutional in nature. At root they raise the question as to the circumstances in which a court will interdict Government from implementing public finance measures resting on ministerial and even Cabinet determination. It echoes the analogous inquiry by the US Supreme Court (regarding "Obamacare"), in which Roberts CJ reiterated that the courts' concern is not "whether [the measure] embodies sound policies. That judgment is entrusted to the nation's elected leaders."[5] Although, as the case has developed, OUTA

[5] *National Federation of Independent Business v Sebelius, Secretary of Health and Human Services* No. 11–393 (28 June 2012) at p 2, available at http://www.supremecourt.gov/opinions/11pdf/11-393c3a2.pdf (accessed on 10 July 2012). He added at p 6:

> "Our permissive reading of these powers is explained in part by a general reticence to invalidate the acts of the Nation's elected leaders. 'Proper respect for a co-ordinate branch of the government' requires that we strike down an Act of Congress only if 'the lack of constitutional authority to pass [the] act in question is clearly demonstrated.' *United States v Harris* 106 US 629, 635 (1883). Members of this Court are vested with the authority to interpret the law; we possess neither the expertise nor the prerogative to make policy judgments. Those decisions are entrusted to our Nation's elected leaders, who can be thrown out of office if the people disagree with them. It is not our job to protect the people from the consequences of their political choices."

has sought to pile up technical challenges, legal and factual, to the implementation of e-tolling, its founding affidavit shows that its challenge is first and foremost to Government's decision to apply a user-pays policy. It is difficult to conceive of a more fundamental constitutional matter.

7. The interests of justice strongly support the grant of this application. There is continuing and irrecoverable harm of a serious nature to South Africa's public finances. The degree of this harm, the importance of the issues and the need to avoid further delay militate against first approaching the Supreme Court of Appeal (this by application for to Prinsloo J thereafter, as might be anticipated, by application to the Supreme Court of Appeal itself).

## B. Procedural issues

### (a) Treasury's replying affidavit and OUTA's further (fourth) affidavit

8. A replying affidavit was filed by the Minister of Finance addressing confined aspects either raised in answer by OUTA (and in the interests of

(The Chief Justice went on to note that this is subject to the court's duty to enforce the limits of legislative, and by inference executive, powers.)

justice requiring correction) or constituting important new facts and figures central, it is submitted, to assist this Court in its determination whether it is in the interests of justice to grant the application.

9. It is submitted that there is no material prejudice to OUTA. The replying affidavit was filed without delay, within days of OUTA's answer. Moreover, OUTA itself has prepared a further affidavit in response (Treasury abides this Court's ruling in that regard).

10. In the circumstances it is respectfully submitted that the replying affidavit is properly to be received by the Court.[6]

(b) Intervention by Road Freight Association

11. At the latest conceivable stage, after the affidavits in this application were filed, the Road Freight Association lodged an application to intervene. On each of the grounds set out in Treasury's affidavit in opposition to that application, it is submitted that there is no proper case for that intervention.[7]

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[6] *Prince v President, Cape Law Society* 2001 (2) BCLR 133 (CC) at paras 21, 23, 29 and 30.

[7] *Gory v Kolver* 2007 (4) SA 97 (CC) at paras 12-13; *Woman's Legal Centre Trust v President of RSA* 2009 (6) SA 94 (CC) at paras 27-28; *Prince v President, Cape Law Society* 2001 (2) BCLR 133 (CC) at para 22.

## C. Leave to appeal

12. The trite requirements for leave to appeal are (a) a constitutional issue must be raised; and (b) it must be in the interests of justice to hear the appeal.[8] For reasons set out separately below, we submit that both requirements are demonstrably satisfied.

### (a) Constitutional issue

13. OUTA does not deny that a constitutional issue is engaged.[9] On this Court's caselaw,[10] this concession is correctly made. Nevertheless OUTA seeks to fence with the "reasons advanced"[11] by Minister Gordhan[12] for an inescapable conclusion.[13] This is that judicial review of decisions by Cabinet members and related interdicts "improperly

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[8] Section 167 of the Constitution; *Fraser v Naude* 1999 (1) SA 1 (CC) at para 7; *Khumalo v Holomisa* 2002 (5) SA 401 (CC) at para 8. The common-law requirement that the subject of the appeal be a "judgment or order" (i.e. that it is final in effect and not open to alteration; definitive of the rights of the parties; and disposing of at least a substantial portion of the relief claimed in the main proceedings) does not apply (*International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2010 (5) BCLR 457 (CC) at para 52, confirming *S v Western Areas Ltd* 2005 (5) SA 214 (SCA) at para 28 and *Philani-ma-Afrika v Mailula* 2010 (2) SA 573 (SCA) at para 20).

[9] Record vol 17 p 1549 para 28.

[10] E.g. *Minister of Health v Treatment Action Campaign (No 1)* 2002 (5) SA 703 (CC) at para 7.

[11] Record vol 17 p 1549 para 28.

[12] Record vol 16 p 1432 para 27.

[13] Record vol 16 p 1444 paras 29.7-30.

trespass[ing] on the exclusive domain of the … Executive"[14] necessarily raise a constitutional issue.[15] (The latter of course includes "issues connected with decisions on constitutional matters").[16]

14. Furthermore the separation of powers doctrine is necessarily engaged when a court order constrains the implementation of social and economic policies,[17] particularly when it stops in its tracks a public finance policy determination confirmed by Cabinet itself. This issue was fully argued on behalf of Treasury before the High Court,[18] but none of the arguments

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[14] *Minister of Health v Treatment Action Campaign (No 1)* 2002 (5) SA 703 (CC) at para 20.

[15] *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2010 (5) BCLR 457 (CC) at paras 42, 44.

[16] Section 167(3) of the Constitution; *Alexkor Ltd v The Richtersveld Community* 2004 (5) SA 460 (CC) at paras 23-30.

[17] *ITAC supra* at para 44. See too *id* at paras 95, 96, 97, 101, 104, 110. As Gubbay CJ held in *Nyambirai v National Social Security Authority* 1996 (1) SA 636 (ZS) at 644F-I for a unanimous Supreme Court of Zimbabwe (Korsah JA, Ebrahim JA, Muchechetere JA and Sandura AJA conc) in comparable circumstances:

> "I do not doubt that because of their superior knowledge and experience of society and its needs, and a familiarity with local conditions, national authorities are, in principle, better placed than the Judiciary to appreciate what is to the public benefit. In implementing social and economic policies, a government's assessment as to whether a particular service or programme it intends to establish will promote the interest of the public is to be respected by the courts. They will not intrude but will allow a wide margin of appreciation, unless convinced that the assessment is manifestly without reasonable foundation. See *James v United Kingdom* (1986) 8 EHRR 123 at para 46; *Mellacher v Austria* (1989) 12 EHRR 391 at para 51; *United States Railroad Retirement Board v Fritz* 449 US 166 (1980) at 175; *Schweiker v Wilson* 450 US 221 (1981) at 230.
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> The Minister has proclaimed that the Pensions and Other Benefits Scheme provides a service in the public interest. That is an assessment which this Court should respect. Certainly, it is not manifestly without reasonable foundation."

The Court further accepted that "Government cannot afford to carry the burden for such a scheme alone. It is necessary to finance it through contributions by employees and employers [i.e. the users and beneficiaries of the project *in casu*]" (*id* at 648D-D/E).

[18] Both in Treasury's heads of argument (at paragraphs 16 to 25) and during oral argument numerous authorities of this Court were cited, including *International Trade Administration*

or authorities cited was referred to (much less analysed) in the High Court's judgment. Discretionary relief constraining the Executive was accordingly granted without any express or apparent consideration of the doctrine of separation of powers. This in itself raises a constitutional issue.[19]

15. Moreover, the constraint placed on the Executive (by imposing the interdict) fetters Government's discretion in fulfilling its constitutional and statutory role. The High Court's order – upholding OUTA's argument (in which it persists in this Court) that the GFIP can be financed differently by government – demonstrably fails to show any respect for Cabinet's assessment as regards the appropriate funding model.[20] This the High Court did without any analysis of the ambit of appreciation it had to allow for government's assessment of how best to fulfil its

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*Commission v SCAW South Africa (Pty) Ltd* 2010 (5) BCLR 457 (CC) paras 99-101; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC) at para 48; *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC) at para 37; *Law Society of South Africa v Minister of Transport* 2011 (1) SA 400 (CC).

[19] Record vol 16 p 1444 para 29.8. *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development* 2009 (4) SA 222 (CC) at para 181; *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC) at para 39. Despite these authorities (and *Von Abo v President of the Republic of South Africa* 2009 (5) SA 345 (CC) at para 50, where this Court held that a High Court must formulate its order with appropriate precision), Prinsloo J paid no regard to the separation of powers doctrine at all.

[20] The unavoidable result is a reallocation of funds earmarked for different governmental priorities to pay for the GFIP. The High Court thus decided for government whether, say, social welfare – instead of users of road transport – should be funded by its users.

statutory mandate.[21] The failure to conduct an analysis of the legal principles involved and the evidence (which showed that the State could not indefinitely continue to fund the GFIP pending the review)[22] constitutes a misdirection resulting in an inappropriate interference with the proper function of a different arm of government.

16. Accordingly, on any approach a constitutional issue of considerable substance is raised.

(b) Interests of justice

17. Also the interests-of-justice requirement has been dealt with fully in the applicants' founding affidavit.[23] We submit that these submissions demonstrably satisfy the requirement, OUTA's arduous opposition notwithstanding.

18. Having conceded that the matter raises a constitutional issue, OUTA extensively[24] argues that (i) this matter must be distinguished from the judgment in *International Trade Administration Commission v SCAW*

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[21] *ITAC supra* at paras 100-101.
[22] Record vol 11 p 1093 paras 21-24, 43-47.
[23] Record vol 16 pp 1445-1473 paras 32-93.
[24] Record vol 17 pp 1551-1555 paras 32.2-33.

*South Africa (Pty) Ltd* ("*ITAC*");[25] (ii) this matter is indistinguishable from *Minister of Health v Treatment Action Campaign (No. 1)* ("*TAC No. 1*");[26] (iii) this matter is no different from any other interdict; and (iv) the High Court's order does not have final effect.[27] None of these arguments has merit.

19. ***ITAC distinguished?*** In OUTA's exhaustive attempt to draw a distinction between *ITAC* and the present case, it advances four legal propositions. We deal with each in turn.

20. The first proposition is that "[t]he constitutional issue raised by ITAC was unique."[28] This premise is misplaced. The constitutional issue relating to just administrative action (which is the one invoked *a quo*, and from which this application follows) is routinely and repeatedly raised in matters before this Court. Uniqueness is thus demonstrably not a requirement for leave to appeal. But in any event, the fact that "[n]ever before had the Court considered the effect of the legislative regime at issue in that case" is a common (not a distinguishing) feature. Like the

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[25] 2010 (5) BCLR 457 (CC). OUTA's reference to the reported judgment is incomplete.
[26] 2002 (5) SA 703 (CC). OUTA sometimes confuses *ITAC* and *TAC No. 1* (see e.g. Record vol 17 p 1555 para 34, where OUTA inaccurately cites "*ITAC (No. 1)*" instead of "*TAC (No 1)*").
[27] Record vol 17 pp 1555-1558 paras 34-39.3. We deal with the fourth issue (irreparable harm) in the section dealing with the merits.
[28] Record vol 17 p 1552 para 32.2.1.

ITA Act (on which the ITAC case turned), this Court has not before dealt with litigation arising from the SANRAL Act. Finally, OUTA's argument that in ITAC "the court's reasoning … would not have been revisited in the review"[29] is equally misplaced. In ITAC this Court held that "[t]hat however, is not the test."[30] The test is the interests of justice.[31] OUTA's three-pronged first proposition is accordingly untenable, self-defeating and contrary to this Court's caselaw.

21. Secondly, it is argued that "two layers" of "separation of powers" were "engaged" in *ITAC*.[32] This is a curious proposition because the notion of "layer" is nowhere to be found in the *ITAC* judgment. Nor do the "layers" identified by OUTA form any part of the Court's reasoning in considering the application for leave to appeal. But even were this proposition to be entertained, it too is self-defeating. Both the "particular expertise" "layer" and the "polycentric" "layer" which OUTA divines apply, at least equally,[33] *in casu*. On the one hand, it is Treasury that is constitutionally tasked, experienced and qualified to devise public finance policy for multi-billion rand procurement projects. On the other, if GFIP

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[29] Record vol 17 p 1552 lines 7-9.
[30] *Id* at para 56.
[31] *UDM v President of the Republic of SA* 2002 (10) BCLR 1086 (CC) at para 6.
[32] Record vol 17 p 1552 para 32.2.1.
[33] In *ITAC* the Ministers involved (the Minister of Trade and industry and the Minister of Finance, the first applicant *in casu*) did not even participate in the appeal before this Court, evidently not themselves concerned about the second "layer". Had OUTA's deponent read this Court's judgment, this would have appeared to him from para 7.

cannot be funded by its users through tolls, other funding must be found. This in turn has the effect that "existing budget allocations to areas such as the implementation of health service, improvements to education, social welfare reform and the provision of housing and basic infrastructure will be threatened".[34] The respondents did not deny this. They accordingly concede that the application concerns precisely what OUTA calls "polycentric" issues.

22. The third so-called distinguishing feature is convoluted and conceptually confused. To the extent that it can be understood, it is clear that OUTA fails to distinguish between the ruling on the merits of the appeal and the anterior question whether leave to appeal should be granted. The third proposition accordingly also fails, and does so already at the level of principle.

23. As regards the fourth distinguishing feature on which OUTA relies (that the Minister was interdicted from exercising his discretion in the *ITAC* case), this too is not a basis for distinguishing *ITAC* from the present case. The Minister of Transport and SANRAL are interdicted even from exercising any discretion to respond to the respondents' concerns over

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[34] Record vol 16 p 1462 para 67. Min Gordhan further deposed that inter-connected logistical, spatial, developmental, economic and social considerations underlay Cabinet's 2007 decision to confirm e-tolling for the GFIP (Record vol 16 p 1437 para 29.2; Record vol 16 p 1441 para 29.5.6).

tolling pending the review in the interim. For instance, public transport vehicles, vehicles conveying paraplegics or people earning less than a certain income could otherwise in the applicants' discretion have been exempted from tolling in the interim. But the interdict categorically precludes tolling, and with it the exercise of any discretion even to remove popular grounds of complaint regarding tolling.[35]

24. Accordingly none of the features of the *ITAC* case invoked by OUTA provides a true basis for it to be distinguished. In any event, it is the principle expressed in cases like *ITAC* – not whether a litigant can point to certain peculiar facts[36] – that is relevant. The principles expressed in *ITAC* are, as noted at the outset, that (a) courts should be slow to grant interim relief restraining another branch of government in fulfilling its constitutional and statutory functions; and (b) where a high court does so, and the order creates irreparable harm, the interdict may be appealable even if it is not final.

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[35] See *TAC No. 2* at para 114: Courts orders "should … not be formulated in ways that preclude the Executive form making … legitimate [policy] choices."

[36] Facts of cases are of necessity peculiar to them. The suggestion that the circumstances in *ITAC* are the blueprint for when leave to appeal may properly be granted is contradicted by the judgment itself. As this Court held in *ITAC*, each case will be considered "in the light of its own facts" (*id* at para 41, emphasis added). A similar observation in *S v Western Areas Ltd* 2005 (5) SA 214 (SCA) at para 28 was approved in *ITAC* at para 51.

25. Treasury expressly relied on *ITAC* and the first of these principles before the High Court (a fact not reflected in the judgment). Treasury, together with the other applicants, now relies on the second principle. That this case concerns the largest public procurement project in the country's history, as opposed to some anti-dumping measure, is not a legally relevant basis for distinguishing the *ITAC* judgment. If anything, this makes the present an *a fortiori* case.

26. Notably this Court itself in its *ITAC* judgment did not approach the question of appealability on any of the four contended bases.[37] The question it posed in fact was "[i]s it in the interests of justice to entertain an appeal against a temporary restraining order?" And this arose precisely in circumstances where "[t]he leave to appeal sought is against a restraining order pending a review to set aside the impugned decision of ITAC."[38] Clearly there is no in-principle distinction to be drawn between the circumstances *in casu* and those prevailing in the *ITAC* matter.

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[37] To the contrary, the four factors referred to by this Court were: (i) "the order … restrains two members of Cabinet from exercising executive powers"; (ii) "the construction of … legislation consistent with the Constitution in itself raises a constitutional issue"; (iii) "[s]eparation of powers and the closely allied question whether courts should observe any level of 'deference' in making orders that perpetuate anti-dumping duties"; and (iv) "procedural justice rights under … PAJA" (*op cit* at paras 42-44). All four considerations apply *in casu.* (Presumably it is the third from which OUTA seeks to construe its layered approach.)

[38] *Id* at para 41.

27. What matters is that the interim interdict has an immediate and serious effect.[39] The uncontested facts show that it does:[40] the expenditure that Government is constrained to make in the interim is “not refundable”,[41] and “[w]hatever the outcome of the review, the order has irreparable consequences and an immediate and final effect”.[42] *ITAC* therefore cannot be distinguished on any relevant legal basis.

28. ***TAC No. 1 applicable “with equal force”?*** The second argument on which OUTA relies is that *TAC No. 1* “rejected” the “notion” that a court making an interim order oversteps the bounds of separation of powers.[43] This argument is misconceived, because it misunderstands *TAC No. 1*, discounts *TAC No. 2*,[44] and misconstrues the applicants’ case.

29. *TAC No. 1* held that a court formulating constitutional relief “will be alert both to the proper functions of the Legislature or Executive under our Constitution, and to the need to ensure that constitutional rights are vindicated.”[45] In *TAC No. 2* the question whether the order “improperly

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[39] *ITAC supra* para 56.
[40] E.g. Record vol 16 p 1417 para 4.3; Record vol 16 pp 1445-1459 paras 33-60. None of these submissions is traversed or plausibly disputed by OUTA.
[41] *Id* at para 58.
[42] *Ibid*.
[43] Record vol 17 p 1554 para 32.3.
[44] *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC).
[45] *TAC No. 1 supra* at para 20.

trespasses on the exclusive domain of the Legislature or Executive"[46] was scrutinised. Neither *TAC No. 1* nor *TAC No. 2* supports OUTA's suggestion that this Court rejected the "notion" that an interim interdict can violate the separation of powers.[47]

30. *TAC No. 2* is the judgment in which the Court analysed the argument on separation of powers. The part of *TAC No. 1* which is invoked by OUTA refers to the Court's analysis in *TAC No. 2*, applying the reasoning underlying the substantive judgment (*TAC No. 2*) to the judgment on leave to appeal (*TAC No. 1*). Thus *TAC No. 2* necessarily requires consideration, something OUTA's argument fails to recognise.

31. *TAC No. 2* dealt with mother-to-child transmission of HIV, in a context where Nevirapine (the medically-indicated and life-saving treatment for new-born babies) had been offered to the Government free of charge.[48] There was accordingly no financial impediment to making available

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[46] *Ibid*.
[47] If that truly were the ratio in *TAC No. 1* at para 20, then this Court either implicitly overruled it in *ITAC* (when it upheld both the application for leave to appeal and the appeal) or otherwise violated the principle of *stare decisis* to which it is bound (*Camps Bay Ratepayer' and Residents' Association v Harrison* 2011 (4) SA 42 (CC) at para 28).
[48] *Id* at paras 11, 48, 50, 71.

Nevirapine to children,[49] whose paramount constitutional rights were imminently threatened by an incurable, terminal disease.[50]

32. The Government could provide no justification for failing – indefinitely[51] – to provide Nevirapine where there was no inability or incapacity to do so.[52] "The cost of Nevirapine … [wa]s admittedly within the resources of the State."[53] This Court thus held that the relief claimed, and order 2 made by the High Court in that regard, did not attract any material additional cost.[54] It merely required the Government to administer Nevirapine, which was "a simple procedure … well within the available resources of the State and … simple, cheap and potentially lifesaving".[55] It is order 2 which was referred to in paragraph 20 of *TAC No. 1*. The argument which the Court rejected was that the doctrine of separation of powers is *per se* violated whenever a court makes any order other than a declaration of rights.[56]

33. Far from categorically rejecting the doctrine of separation of powers as applicable in these circumstances, in *TAC No. 2* the Court made it clear

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[49] *Id* at paras 48, 50, 120.
[50] *Id* at para 74.
[51] *Id* at para 17.
[52] *Id* at para 64.
[53] *Id* at para 71.
[54] *Ibid*.
[55] *Id* at para 73.
[56] *Id* at para 106.

that the doctrine of separation of powers is relevant both to the "deference that Courts should show to decisions taken by the Executive concerning the formulation of its policies" and "in the order to be made where a Court finds that the Executive has failed to comply with its constitutional obligations".[57] The Court cautioned that the judiciary is not

> "institutionally equipped to make the wide-ranging factual and political enquiries … nor for deciding how public revenues should most effectively be spent. There are many pressing demands on the public purse."[58]

It is by acknowledging that "[t]he Constitution contemplates rather a restrained and focussed role for the Courts" that "the judicial, legislative and executive functions achieve appropriate constitutional balance."[59]

34. In sum, the TAC litigation proceeded against a background where (i) children were exposed to a deadly disease; (ii) attracting the disease could have been prevented by the terms of the interim interdict; (iii) the interdict had no adverse financial or practical consequences for the State; (iv) the interdict was sought to be appealed on the basis that no court has

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[57] *Id* at para 20.
[58] *Id* at para 38.
[59] *Id* at para 38.

the power to grant any order other than a declaration of rights (and that to do so axiomatically violates the doctrine of separation of powers).

35. None of these considerations apply *in casu*. To the contrary, the interdict has unprecedented, wide-ranging and irreparable consequences to Government's ability to raise sovereign debt and to allocate national revenue to other developmental programmes. In any event, the argument rejected in *TAC No. 1* forms no part of the applicants' case. The applicants' argument is that in the circumstances of this case, the orders granted and the judgment underlying it demonstrably fails to have regard to this Court's application of the constitutionally-required division of powers. Far from rejecting it, the *TAC* judgments confirm the validity of this argument as a competent constitutional issue.

36. ***No different from any other interdict?*** An issue raised by OUTA as an adjunct to the reliance placed on *TAC No. 1* is that the order granted by Prinsloo J is no different from any other interdict.[60] This is factually untenable, because the incontestable evidence shows that: (i) the GFIP is an unprecedented infrastructure investment; (ii) the approach of challenging it over four years after the relevant decisions by the Ministers had been made is itself unprecedented; and (iii) the nature and scale of

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[60] Record vol 16 pp 1554-1555 paras 32.3-33.

the irreparable harm to Government which is here invoked (not only the risk of an immediate R20 billion liability, but also the risk of an adverse national credit rating) has never been invoked in any litigation in South Africa before. There is accordingly nothing which makes this a run-of-the-mill interim interdict.

37. In any event, OUTA cannot have it both ways. Before the High Court it argued that the unprecedented outcry over the GFIP made its application sufficiently urgent, despite many months' delay in bringing it. The High Court supported its finding on urgency and other aspects, based on "the very nature of this extraordinary case".[61] On the basis of what OUTA itself argued, the High Court held that this was an "exceptional case" with "particular characteristics" which "should be afforded the attention and consideration of a court of final instance."[62] Now OUTA finds it astute to contend that the interdict (once granted in its favour) is an everyday occurrence. The *volte face* is patent.

38. ***No final effect?*** The last leg of OUTA's argument on the application for leave to appeal dealt with here[63] is that the interdict has no final

[61] Record vol 15 p 1404 line 9.
[62] Record vol 15 p 1405 lines 4-7.
[63] We make submissions on irreparable harm in the next section, dealing with the merits of the appeal.

effect.[64] Again caselaw is quoted copiously by OUTA, but without acknowledging that the classic common-law considerations governing the appealability of interim orders has undergone substantial development during the last two decades.

39. The correct contemporary position in a constitutional context (reflecting these developments), is as most recently set out by this Court in *ITAC*.[65] Applying the principles set out there, it is clear that the matter is appealable: because of the interdict, Government must allocate R270 million to the GFIP per month instead of allocating this substantial amount to education, health, infrastructure investment and poverty alleviation programmes.[66] The effect is immediate and final – children who are not optimally educated during the months of review, patients who do not receive adequate medical treatment, necessary infrastructure development projects which are not started or completed, and cutback on poverty alleviation programmes have acute and irreversible effects on hundreds of thousands of people throughout South Africa.

40. In much less serious circumstances many other courts have allowed (and upheld) appeals against interim interdicts. This is demonstrated by the

[64] Record vol 17 pp 1555-1558 paras 34-39.3.
[65] *Supra* at paras 47-55.
[66] Record vol 16 p 1454 para 48.

approach of the Supreme Court of Canada in its judgment in *Lido Industrial Products Limited v Melnor Manufacturing Limited*.[67] It involved a routine issue: granting an interim interdict to protect the registered industrial design of lawn sprinklers. The matter did not raise any novel – or even important – issue of law. It had no fiscal or multi-billion rand consequences. Nevertheless, its appealability was uncontroversial, as appears from the judgment by the Chief Justice himself. In over forty years since the judgment was granted, it has never been criticised. Nor did it result in inundating the Canadian Supreme Court (or any lower court, for that matter). The predictable floodgates argument by OUTA is accordingly misplaced.

(c) Urgency and direct appeal

41. We have already described the applicants' attempt to obviate this application by securing OUTA's agreement to the final relief (judicial review) being heard some three months later in August, and its refusal either to countenance that or even to agree to a scheduling meeting with the Deputy Judge President.[68] If, as a result, a hearing in relation to the final relief is not likely before the end of the October short recess (as we

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[67] [1968] SCR 769 available at http://canlii.ca/t/1xd1c (retrieved on 10 July 2012).
[68] Record vol 16 p 1558 paras 39.1-39.2.

submit the obvious prospect is), the High Court judgment is improbable before the end of the year, with a Supreme Court of Appeal hearing, and thereafter ruling, hardly likely before the middle to later in 2013, at best.[69]

42. The reasons for Treasury's urgent application directly to this Court are set out fully in its founding affidavit.[70] The fundamental issues of constitutional significance[71] (as opposed to the development of the common law);[72] wide-ranging consequences for public finance; and far-reaching effects for national economic involved justifies an urgent direct appeal to this Court.[73]

43. For every month that the GFIP must be funded by revenue allocated to other State projects, Government is frustrated in achieving its statutory, fiduciary and redistributive responsibilities and objectives.[74] This redounds to immediate and irremediable harm to South Africa as a whole.[75] If GFIP users are exempted by the interim interdict from paying for the roads they use during the ensuing months, then beneficiaries of

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[69] Record vol 16 p 1423 para 8.8.
[70] Record vol 16 p 1419-1424 paras 7-9 and Record vol 16 pp 1466-1468 paras 77-79.
[71] Record vol 16 p 1467 para 77.2.
[72] Record vol 16 p 1466 para 77.1.
[73] Record vol 16 p 1420 para 7.2.
[74] Record vol 16 p 1417 para 4.2; Record vol 16 p 1441 para 29.5.6.
[75] Record vol 16 p 1423 para 8.9.

other social service initiatives – not only in Gauteng, but nation-wide – will in effect have to do so. It is in the national and public interest that this Court determine whether it is just and equitable that – instead of 99% of the GFIP's cost being paid by the top first and second quintiles of its users during the months of ensuing review[76] – all South African citizens (the vast majority of whom do not benefit directly, or even indirectly) be subjected to contributing collectively to the GFIP's cost as a result of the North Gauteng High Court's interdict.

44. Further, the High Court's order has immediate and long-lasting consequences[77] which will be felt long after the substantive review has been concluded.[78] There is accordingly a pressing public interest in the expedited, final determination of the question whether, because of the High Court's order, alternative means must in the interim be found to fund the GFIP.[79]

45. In these circumstances, it is not in the interests of justice, the public or the litigants to require the applicants to first apply for leave to appeal from the High Court. It took the High Court two and a half weeks to hand

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[76] Record vol 16 p 1443 para 29.5.9.
[77] Record vol 16 p 1454 para 48.
[78] Record vol 16 p 1417 para 4.3.
[79] *Cf Ferreira v Levin* 1996 (1) SA 984 (CC) at paras 164, on which basis Chaskalson P upheld the standing of the applicants.

down judgment after the interdict was granted.[80] An application for leave to appeal would itself have taken additional time to prepare, argue and determine; and is inherently open to a further delay if a petition to the Supreme Court of Appeal is necessary. Treasury – responsible for maintaining the country's sovereign debt status in highly precarious conditions worldwide – could not responsibly embark on a course which inherently involves further delays, uncertainty and risks.

46. To expect this when OUTA failed to co-operate to achieve an expedited review application[81] (and when the government parties co-operated with OUTA to achieve its expedited application before the High Court) is in any event inequitable.

(d) Conclusion on leave to appeal

47. In our submissions below on the merits of the appeal we deal with two ancillary[82] aspects: prospects of success[83] and irreparable harm.[84] We ask that these be considered also in the present context. These ancillary aspects, in addition to our submissions above, show compellingly that

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[80] Record vol 16 p 1418 para 5.
[81] Record vol 16 p 1421 para 8.3
[82] *ITAC supra* at para 55, where it was held that these considerations are among others which are to be evaluated in the light of the circumstances of a particular case.
[83] The prospects of success are fully dealt with at Record vol 16 p 1473-1490 paras 94 to 123. While this is a relevant consideration, it is of course not determinative of an application for leave to appeal (*Frazer v Naude* 1999 (1) SA 1 (CC) at para 7).
[84] *Machele v Mailula* 2010 (2) SA 257 (CC) at para 24.

leave to appeal should be granted in the "exceptional", "extraordinary" and "particular" circumstances of this case. In any event, in this case the major inquiry on the merits overlaps entirely with the question whether leave to appeal should be granted:[85] whether OUTA established irreparable harm, and whether the irreparable harm to the applicants is outweighed by that of OUTA. This application accordingly requires – more so than ordinary applications for leave to appeal to this Court – a full consideration of the merits before leave to appeal can properly be considered.

48. We accordingly ask that leave to appeal be granted and the appeal be considered on its merits.

## D. <u>Merits of appeal</u>

### (a) <u>Part B relief</u>

45 In Part B of the application (the final relief), OUTA seeks to review and set aside the declaration of certain roads in Gauteng as toll roads, the Department of Transport's approval of SANRAL's application to make

[85] *President of the Republic of South Africa v UDM* 2003 (1) SA 472 (CC) at paras 32-33: establishing (on the facts placed before the court) irreparable harm of a serious nature is a requirement for interim interdictory relief sought to restrain State action which is contended to be unconstitutional; interim relief "should only be granted where it is strictly necessary in the interests of justice".

the above declarations, and the environmental authorisations for the upgrading of those roads granted by the Department of Water and Environmental Affairs.[86] All these decisions, as is apparent from the notice of motion in the court *a quo*, were taken in 2007 and 2008.[87] This is important because:

45.1 it is and has always been common cause that the roads in Gauteng required extensive upgrade and that these upgrades were carried out as part of the GFIP which was approved by Cabinet in 2007[88] and carried out by SANRAL;[89]

45.2 OUTA stood back and watched whilst the roads were being improved and debt raised by SANRAL.[90] Its members also enjoyed the benefits of the improved roads but now wish to effectively to instruct the Government, not via the political processes, but via the courts, on how to pay for that infrastructure;

45.3 OUTA appears to accept, as it must, that someone has to pay for the GFIP and that it is in principle for Government to decide how it is to be paid for;[91]

45.4 the only issue between the parties is how Government is to finance the GFIP expenditure. Government has decided this is to

[86] Record vol 1 pp 5-10 paras 1-3.
[87] Record vol 16 p 1430 para 22.
[88] Record vol 16 p 1436 para 29.
[89] Record vol 16 p 1432 para 27.1.
[90] Record vol 16 p 1433 para 27.1.
[91] Record vol 16 p 1433 para 27.2.

be by tolling and should be based on the user-pays principle. OUTA asserts that it should be by a fuel levy. To this end it continues in the present application to pile up affidavits asserting the correctness of its view against the policy determination made by Treasury after, it is unchallenged, recourse to its own expertise and a consideration of competing economic approaches.

46 As already noted, the roads have been constructed, the gantries have been built, the expenditure for the construction has been incurred, commitments by SANRAL and Government to third party funders have been made and are enforceable. Therefore this case is not about whether GFIP should be undertaken at all, or whether it was advisable to undertake it – let alone whether those decisions are now reviewable. It is about whether a litigant can by means of an interdict prevent the recovery of the cost of construction incurred pursuant to unchallenged decisions.

(b) OUTA's attack

47 It is necessary briefly to set out the nature of OUTA's attack in the court *a quo*. OUTA advanced various grounds (Prinsloo J considered only four)[92] on which the review in Part B would be sought. The full grounds are set out at paragraph 29 of OUTA's founding affidavit in the court *a*

[92] Record vol 15 pp 1397-1400.

*quo*.[93] The central ground however is that the declaration of toll roads by SANRAL, and the approval thereof by the Department of Transport, were so unreasonable that no decision-maker could have taken such decisions.[94] In support of this, the unreasonableness ground, OUTA contends *inter alia* that:

47.1 the expense of levying and collecting toll in the manner proposed is so disproportionate to the costs sought to be recovered that it cannot reasonably be expected of users of the proposed toll network to bear such costs;[95]

47.2 it will be impossible to enforce the road tolling scheme;[96]

47.3 SANRAL and/or the Department of Transport failed to apply their minds to the social impact assessments before them.[97]

48 OUTA then proposes, by way of an alternative to the collection of tolls, a ring-fenced fuel levy which is not based on the user-pays principle but on the idea that every motorist in every province must pay a fuel levy to recover the cost of upgrading roads used only by people in Gauteng. This is how the founding affidavit in the court below puts it:

[93] Record vol 1 pp 58-61.
[94] Record vol 1 p 58 para 29.2.
[95] Record vol 1 pp 58-59 para 29.2.1.
[96] Record vol 1 p 59 para 29.2.2.
[97] Record vol 1 p 59 para 29.2.6.

"An alternative method of funding which is favoured by many interested parties (including the Applicants) is a ring-fenced fuel levy increase. This option entails no cost of collection at all. When this is considered, it becomes clear that the option of open road tolling is so unreasonable that it is not a decision that could have been made by a reasonable administrator.[98] [Emphasis added]

(c) Proper approach to polycentric cases

49 This Court cautioned in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism*:[99]

"… the court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field."

50 Section 216 of Constitution makes clear that the control of revenue collection and expenditure are matters for Treasury (the only department of state specifically set up in terms of the Constitution itself).

51 The doctrine of separation of powers, which is basic to the very structure of the Constitution,[100] precludes courts in this type of case from usurping

[98] Record vol 2 pp 125-6 para 243.
[99] 2004 (4) SA 490 (CC) at para 48.

the powers assigned by the Constitution to Treasury. In *Doctors for Life International v Speaker of the National Assembly*,[101] this Court observed in relation to Parliament:

> "The constitutional principle of separation of powers requires that other branches of government refrain from interfering in parliamentary proceedings. This principle is not simply an abstract notion; it is reflected in the very structure of our government. The structure of the provisions entrusting and separating powers between the legislative, executive and judicial branches reflects the concept of separation of powers. The principle 'has important consequences for the way in which and the institutions by which power can be exercised'. Courts must be conscious of the vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government. They too must observe the constitutional limits of their authority. <u>This means that the Judiciary should not interfere in the processes of other branches of government unless to do so is mandated by the Constitution</u>" (emphasis added).

52 An even closer and yet more compelling application of this principle arose recently in *Law Society of South Africa v Minister of Transport*.[102] The appellants there also challenged interwoven legislative and executive policy choices concerning the rationality and reasonableness of a statutory

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[100] *ITAC supra* at para 91.
[101] 2006 (6) SA 416 (CC) at para 37.
[102] 2011 (1) SA 400 (CC).

scheme providing for compensation (via the fuel levy). A unanimous Constitutional Court dismissed that part of the appeal, following the reasoning in *Doctors for Life*. Nothing in the Constitution requires the interference by the courts with the executive's choice of means by which to fund the GFIP.

53 In summary, then, it is now an established principle of our law that, whilst all exercise of public power is justiciable, the courts will be slow in policy-laden cases to interfere with decisions entrusted to other arms of government. The only question, in this case, is how that general principle is to be applied in the context of interdicts.

(d) The court *a quo*'s approach

54 The High Court considered whether the OUTA respondents had made out a case for the grant of an interim interdict. It did this by summarising at length OUTA's contentions, in particular. It referred to the usual requirements of *prima facie* right, well-grounded apprehension of irreparable harm if the interim interdict is not granted, the balance of convenience, and whether or not the applicants had an alternative remedy

to the interim interdict.[103] On all these requirements the court found in favour of OUTA and accordingly granted the interdict. In doing so, as noted, it did not even deal with the argument advanced by Treasury that, in cases of polycentric complexity, the court was bound, in its application of the requirements for an interim interdict, to refuse the application for an interdict. Nowhere is this more pronounced, we submit, than in the court's assessment of the asserted *prima facie* right, reasonable apprehension of harm, and balance of convenience.

**(i) *Prima facie* right**

55 We understand that this aspect is to be fully addressed in the heads of argument to be filed on behalf of SANRAL.

**(ii) Reasonable apprehension of harm**

56 We submit that the learned judge approached the question of harm in a one-sided manner. Prinsloo J began his discussion in this regard by referring to affidavits filed on behalf of certain commuters who, the judge said, would be "called upon to pay excessive toll monies which they

[103] Record vol 15 p 1395.

cannot afford."[104] Then he referred to OUTA members and the general public who, he said, would suffer "ongoing financial hardship".[105] He concluded that the harm to commuters was "self-evident."[106] He then turned to the balance of convenience, and, in this context, set out the argument advanced on behalf of Treasury and SANRAL regarding the harm they would suffer, which he said was argued with "considerable force".[107] He accepted that the harm that would be suffered by Treasury and SANRAL were "serious considerations" which he "duly reflected upon".[108] He nevertheless rejected these arguments by contrasting them with the harm to be suffered by the "vast numbers of motorists and business people", which harm he said would be "very difficult, if not impossible, to gauge in real terms".[109] He concluded by saying:

> "Given the vast majority of motorists and business people involved, I am, after due reflection, of the view that on the probabilities the applicants have shown that the balance of convenience favours them."[110]

57 There is however no indication in the judgment of the reasoning by which Prinsloo J reached this conclusion. (It is, with respect, of a piece with his

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[104] Record vol 15 p 1402.
[105] *Ibid*.
[106] *Ibid*.
[107] Record vol 15 p 1403.
[108] *Ibid*.
[109] Record vol 15 p 1404.
[110] *Ibid*.

conclusion in his earlier ruling on urgency – this in relation to a legal challenge to decisions taken up to four years earlier – that the matter was urgent *inter alia* because of the level of public disturbance outside his court.) He seems to have regarded as decisive the fact (as he saw it) that it was impossible to gauge the harm to be suffered by commuters and business people. If so, this could only be on the basis that such harm would be greater than that which would be suffered by SANRAL and Treasury. There was simply no evidential basis for this conclusion. We say this for the following reasons.

58 First, the court with respect gave insufficient regard for the extremely limited degree of loss actually pleaded and advanced in evidence by OUTA in its affidavits.

59 Second, it is uncontested that 99% of the burden of tolling will be borne by the first and second quintile of income earners in Gauteng, as already noted.[111]

60 Third, it is uncontested that the funding of both the completed road system <u>and</u> of the completed infrastructure already in place for e-tolling

[111] In fact, in the updated figures provided by SANRAL in its replying affidavit (Record vol 19 p 1870 para 26), as a result of the test-implementation last month, 91% of users will pay less than R200 per month, while less than 0,2% of users will even reach the monthly cap of R550.

must be met by the public. The prejudice to the wider public – those outside Gauteng deriving no direct benefit from usage of the road system and impacting ultimately even on the poorest – is simply not considered in his judgment.

61 Fourth, on the evidence, by way of an extraordinary appropriation of national revenue to the GFIP (in order to reduce tolling fees), some R5.8 billion has already been borne by the wider public.[112]

62 Fifth, Prinsloo J attached no weight at all – his judgment does not so much as mention it – to the fact that a vast number of public transport users would be exempted from paying tolls.[113] Had the court taken this factor into account, this would have significantly reduced the numbers of those who would have had to pay tolls. This in turn would have reduced the extent of harm, if any, which would have been suffered by those who had to pay tolls. Failure by the court to consider this amounted to a failure properly to weigh the evidence before him, which failure necessarily vitiates his conclusion on harm.

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[112] Record vol 16 p 1449 para 39.
[113] *Ibid* and Record vol 6 p 520 para 9.13.

63 Sixth, the court ignored compelling and unchallenged evidence of the harm that the applicants would suffer if the interdict were granted. Merely reciting such evidence, as Prinsloo J did, without saying (while describing the argument as "serious")[114] it is outweighed by other considerations, was plainly insufficient. The evidence which the court did not weigh in the balance, in brief, was the following:

<u>The guarantee</u>:

63.1 Treasury has put up a guarantee in respect of R19 billion of the total debt incurred by SANRAL. Failure by SANRAL to implement tolling might be regarded as an event of default under the Domestic Medium Term Note pursuant to which the SANRAL incurred its debt by which it financed the GFIP. This in turn would lead to the loan being repayable in its entirety or to Treasury taking over the loan under the guarantee.[115] The consequences for SANRAL and the government—SANRAL is a state-owned entity—would be their inevitable downgrading by credit rating agencies. The cost of credit for SANRAL would increase[116] and the ability of the government to raise sovereign debt would be negatively affected.[117]

63.2 As the applicants predicted in their High Court papers, SANRAL's credit rating was downgraded by Moody's after the grant of the

[114] Record vol 15 p 1403 line 17.
[115] Record vol 16 p 1453 para 47.
[116] Record vol 16 p 1454 paras 48-49.
[117] Record vol 16 p 1454 para 48.

interim interdict.[118] The downgrading, as Moody's circular shows, was expressly a consequence of the grant of the interim interdict:

> "The rating [downgrading] action follows the North Gauteng High Court's decision on 28 April 2012 to block the implementation of e-tolling on the country's largest toll road, the Gauteng Freeway Improvement Project (GFIP), pending a final court resolution on the matter. The interdict supersedes the South African government's decision to postpone e-toll collections by one month on 26 April 2012 and adds uncertainty on the future of this controversial toll road project. "The delay in GFIP e-toll collection adds pressure on SANRAL's finances and raises concerns over its medium-term financial sustainability," says Kenneth Morare, Moody's lead analyst for SANRAL"[119] (emphasis added).

63.3 This assessment of SANRAL's financial sustainability is based upon hard fact. The delay in implementing tolling has already cost SANRAL R2.7 billion, 40% of its estimated 2012 toll revenue budget.[120] SANRAL's average monthly expenditure on the GFIP, including operational and capital cost payments and interest on debt, will amount to R601 million in 2012/13, which in the absence of toll revenue will, as a result of the High Court's order, rapidly further erode the R5.75 billion extraordinary appropriation to SANRAL

[118] Record vol 16 p 1449 para 40.
[119] Record vol 16 p 1499 ("FA5").
[120] Record vol 16 p 1449 para 39.

from the government to compensate for its decision to lower the toll tariffs in February 2012.[121] To the extent that expenditure, including interest, exceeds GFIP revenue, there is a further deficit each month that requires more debt to be raised, thus burdening future road users or taxpayers.[122]

The foreseeable consequences of the interdict

63.4 Another consequence of the interim interdict, plainly foreseeable in view of the arguments advanced by the applicants before Prinsloo J, was that Government had to reassure the European Investment Bank and other investors that it would support SANRAL. Without this assurance, any further drawdown on the loan from that institution to SANRAL would have been in jeopardy.[123] This reassurance became necessary in part because, in the difficult international economic situation, access to credit is limited and generally available to countries whose credit reputation is secure. Since 1994, South Africa has never defaulted on its debt.[124] It would be a most unprecedented and regrettable situation in which an interim interdict would have the effect of negatively affecting a country's ability to raise sovereign debt. As this Court put it in *ITAC* at para100:

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[121] *Ibid*.
[122] *Ibid*.
[123] Record vol 16 p 1452 para 45.
[124] Record vol 16 p 1456 para 53.

> "In any event, the formulation and implementation of international trade policy is a matter, as I have earlier said, that resides in the heartland of national executive function."

63.5 So it is, we submit, with the formulation and implementation of a country's sovereign debt policy. That is why it is important that the interim interdict be set aside so as to allow tolling to commence and SANRAL to discharge its debt and operational obligations.

63.6 Undisturbed, the interim interdict stands to have a ripple effect:

63.6.1 the government's capacity to fund future social and developmental programmes will be negatively affected;[125]

63.6.2 the bonds issued by state-owned enterprises (such as Eskom and Transnet) might become unattractive to investors;[126]

63.6.3 large-scale projects and infrastructural programmes, so crucial to a developmental state, and generally undertaken by public private partnerships, would face the risk of being scuppered by means of court interdicts;[127]

63.6.4 the interdict and its ramifications impact indirectly on other projects, programmes and causes for which

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[125] Record vol 16 p 1458 para 56.
[126] Record vol 16 p 1458 para 57.
[127] *Ibid*.

government has budgeted and will in future seek to appropriate resources. The effect of the interdict is to interfere with the current and future budgets, because the *fiscus*, in taking on the debt costs associated with the GFIP, will have less revenue to allocate to other pressing social and economic priorities, particularly health care, education and basic infrastructure nationwide. It is to be stressed that for every poor person so affected, the deprivation is immediate and often irremediable (health and education, if lost, can hardly be restored later).

64 All of these potential consequences were pertinently raised before the court *a quo*. Crucially, the court did not reject them as unlikely. It accepted that they were likely, but held that, compared with the consequences for Gauteng motorists, these harmful consequences paled into relative insignificance. This conclusion was not borne out by the evidence accepted by the court.

65 It follows, in our submission, that OUTA:

65.1 failed to demonstrate any reasonable apprehension of harm; or

65.2 in any event, such harm as was alleged and established on the affidavits is far outweighed by that to the wider South African

public[128] and as regards the management of public finances which OUTA itself significantly anticipated even in its founding affidavit, and which it could not refute. Its simplistic case was that some harm (or inconvenience) of a particularly anecdotal nature would be suffered, in the terms its founding affidavits asserted, while SANRAL would suffer no harm because its liability was wholly underwritten by Treasury.

66 Therefore the court *a quo* erred in holding that OUTA had demonstrated that it would suffer irreparable harm or that such harm outweighed that which would be suffered by SANRAL and Treasury.

**(iii) The OUTA respondents' contentions on the harm to the applicants**

67 OUTA contends that the harm raised by the State applicants is not real; that it would in any event not be as a result of the interim order: it would be a consequence of the applicants' own postponements of tolling,[129] and

[128] It has recently been emphasised that the balance of convenience in interim interdicts is not restricted to that between litigants; the court must also have regard to the wider public interest (*Glaxo Wellcome (Pty) Ltd v Terblanche (No 2)* 2001 4 SA 901 (CAC) at 911B-E; *Corium (Pty) Ltd v Myburg Park Langebaan (Pty) Ltd* 1993 (1) SA 853 (C) at 858E-H and cases there cited).

[129] Record vol 17 pp 1560-1564 paras 42-53.

that, in any event, SANRAL is not ready to toll.[130] We address these points in turn.

68 It is true that there were postponements in implementing tolling, the reasons for some of which are set out in the OUTA respondents' own affidavit.[131] The last postponement on 27 April 2012 has been adequately explained: it was to permit further consultation on regulatory and administrative issues connected with tolling.[132] To move from this to the conclusion that the High Court interdict, if it remains in place, would not lead to further harm is fallacious. It is the High Court interdict, set to remain in place until a final determination of the review at the highest level, which prevents Treasury from recovering the expended costs on the user-pays principle.

69 SANRAL's readiness to toll is to be addressed, we understand, in its heads of argument. We would only add that, quite palpably OUTA has progressively shifted its case from an in-principle assault on Treasury's application of the user-pays principle to a progressively *post hoc* resort to subsidiary and incidental factors which it claims prevent tolling. This shift in its case is both impermissible and, for the reasons to be addressed by SANRAL, unmeritorious.

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[130] Record vol 17 pp 1564-1571 paras 54-59.
[131] Record vol 17 pp 1560-1564 paras 42-53.
[132] Record vol 16 p 1469 paras 81-82.

70 The claim that the harm to the wider South African public is exaggerated and inaccurate is untenable. First, reference is made to the opinion of Mr Chris Hart who says State-owned enterprises have own ways of raising capital but that, should they run into financial difficulties, the government can "choose to intervene."[133]

71 This is of course precisely the applicants' point: the State will ultimately have to carry the burden of State-owned enterprises which cannot raise debt in the bond market. Their inability to raise debt, whatever the technical accounting treatment of their finances, ultimately reflects on badly on the government since such entities are State-owned.

72 Then it is said that should SANRAL face financial difficulties in consequence of the interim interdict, that would be a consequence, not of the interdict, but of the government's "refusal to consider alternative mechanisms" such as the fuel levy.[134] This flatly disregards the evidence: Treasury did consider such alternatives before it made the policy determination, supported by Cabinet itself.[135]

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[133] Record vol 17 p 1572 paras 61.2-61.3.
[134] Record vol 17 pp 1572-1573 paras 6.1.5-6.1.6.
[135] Record vol 16 p 1436-1437 para 29.

73 Next it is contended, by reference to capital expenditure and salary adjustment figures as well as the country's current debt position, that the government has enough flexibility to meet SANRAL's debt should it be in financial trouble because of the court interdict. This at once exposes the nature of this application: it is nothing short of a naked usurpation of executive powers by advocacy groups. It cannot be seriously expected that this Court should uphold an interim interdict, where harm to the interdicted party is clear, on the basis that that party could escape the harm by a rearrangement of its affairs, especially when that party is an arm of government.

74 Finally, by reference to the opinion of Dr Azar Jammine, OUTA contends that, as a percentage of South Africa's total domestic debt, the R21 billion owed by SANRAL pales into an insignificant 2%.[136] Therefore, it is said, the non-implementation of tolling will not jeopardise the country's credit standing. The Minister of Finance has taken a considered view, to which he deposes, on risks regarding the country's credit ratings, this in the context of a current world financial crisis.

75 We submit, therefore, that the harm scantily asserted by OUTA in its founding affidavits on no proper analysis outweighs the serious harm, and

[136] Record vol 17 p 1577 para 62.5.

risk of harm, at a particularly vulnerable time, to the wider public beyond the interest group OUTA constitutes. Manifestly this was not, with respect, properly analysed in the judgment. Prinsloo J's bare conclusion in this regard is with respect unsustainable on proper analysis.

## E. <u>Conclusion</u>

76 For all these reasons, we submit that the application for leave to appeal should be allowed, the appeal upheld and the High Court's orders set aside.

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16 July 2012