IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: 38/12

In the matter between

NATIONAL TREASURY	First Applicant
THE SOUTH AFRICAN NATIONAL ROADS AGENCY LTD	Second Applicant
THE MINISTER, DEPARTMENT OF TRANSPORT	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 ENVIRONMENT AFFAIRS	Sixth Applicant

and

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

FIRST TO FOURTH RESPONDENTS' HEADS OF ARGUMENT

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INTRODUCTION

1. The directions of this Court require us to address not only the application for leave to appeal, but also the merits of the appeal.[1] Our heads of argument will approach the matter as follows. We begin by dealing with the issues that are relevant to the merits of the appeal. Thereafter, we canvass some self-standing reasons why leave to appeal should be refused (quite apart from the merits).

THE ELEPHANT IN THE ROOM

2. It is necessary to deal at the outset with a matter that receives the most cursory treatment in the applicants' affidavits and heads of argument, namely the agreement struck between the ANC and COSATU to postpone the commencement of e-tolling on 26 April 2012. It is the elephant in the room that the applicants pretend is not there.

3. The facts are set out in the respondents' answering affidavit,[2] and have not been disputed even though the respondents elected to file replying affidavits before this Court. The common-cause facts are as follows:

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[1] Directions volume 18 page 1706

[2] Corcoran paras 49 to 52 volume 17 page 1562

3.1. At the time when the urgent application was argued in the High Court, e-tolling was scheduled to commence on 30 April 2011. It was argued strenuously on behalf of SANRAL, the Transport Minister and Treasury during the course of 26 April 2012 that e-tolling could under no circumstances be postponed and that there would be catastrophic consequences for the country if it did not commence on 30 April 2012.

3.2. At the very time when this was being argued, the ANC and COSATU were concluding a deal that e-tolling would be postponed for a month in order for a task team to investigate alternative funding mechanisms. The postponement of e-tolling announced by the ANC and COSATU on the afternoon of 26 April 2012 was confirmed that evening by SANRAL and the Transport Minister.

3.3. By the time the High Court handed down its judgment on Saturday 28 April 2012, the commencement of e-tolling had already been postponed by the Transport Minister. As Mr Gordhan accepts, the decision to delay the postponement of e-tolling operated "independently of the High Court's order".[3]

[3] Gordhan para 80 volume 16 page 1468

4. The applicants do their best to ignore the inconvenient truth that – irrespective of the High Court interdict – the commencement of e-tolling on 30 April 2012 would have been postponed pursuant to the ANC's agreement with COSATU. The postponement is fatal to the applicants' claim that "the consequences of any delay in the implementation of e-tolling are … dire for the entire country".[4] But the implications go even further, because the applicants say that "the postponement was decided in order for a process of consultation to be embarked upon to finalise regulations following input on regulatory and administrative issues from the public and interested stakeholders".[5] In his founding affidavit seeking leave to appeal to this Court, Mr Gordhan stated that the Minister of Transport "intends withdrawing the toll tariff determination which was published on 13 April 2012"[6] and that a new notice would be published after government continues to "engage with the public and to consult on the draft regulations, the conditions of toll, and the amount of the toll that will be payable".[7] The respondents relied on this to draw the inference that it would not be possible to commence e-tolling even at the present time.[8] Although SANRAL and Treasury filed replying affidavits, they did not deny that this was the case. SANRAL states in reply that it is ready to begin e-tolling from a

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[4] Mahlalela para 48 volume 10 page 977. It also confirms that the present delay in the commencement of e-tolling is, as OUTA contended before Prinsloo J, no different from the four previous postponements that were similarly at the will of SANRAL and/or the Minister of Transport: Corcoran para 42 – 52 volume 17 pages 1560 – 1563

[5] Gordhan para 81 volume 16 page 1469

[6] Gordhan para 91 volume 16 page 1472

[7] Gordhan para 92 volume 16 page 1472

technical perspective, but the respondents' point was a different one: the regulatory arrangements are not in place to commence e-tolling.[9] As we shall indicate below, this is fatal to large tracts of the applicants' argument.

THE TEST FOR INTERIM RELIEF

5. Before the High Court, SANRAL and Treasury accepted the "standard test for the grant of an interim interdict as set out in *Setlogelo v Setlogelo* [1914 AD 221]".[10] Unsurprisingly, the judgment of the High Court proceeded to apply that test.

6. In its heads of argument before this Court, SANRAL now argues for a heightened test in which interim relief should be granted "only in the clearest of cases".[11] In a surprising criticism, SANRAL contends that the High Court judgment should be set aside on the grounds of "failure to apply [a] test"[12] that the High Court had never been asked to apply. It means that this Court is being asked to sit as a court of first and final instance in relation to the development of a new test for interim relief. As we shall submit below, this provides an additional reason why leave to appeal should be refused.

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8 Corcoran para 59 volume 17 page 1571
9 Corcoran paras 56 – 57 volume 17 pages 1565 - 1571
10 SANRAL heads of argument para 21
11 SANRAL heads of argument para 50
12 SANRAL heads of argument para 51

7. SANRAL contends that the heightened test for interim relief should apply for three reasons. We address each of these in turn.

Scaw, Glenister and UDM

8. In the first instance, SANRAL relies on the judgments of this Court in *Scaw*,[13] *Glenister (1)*[14] and *UDM*[15] as raising the bar for interim relief.

9. In *UDM*,[16] the court a quo had granted an order suspending the commencement of legislation (including amendments to the Constitution) pending the outcome of an application to this Court for final relief. On appeal, this Court set aside the order. It held that the High Court has jurisdiction to grant interim relief where legislation is alleged to be unconstitutional, but that "such interim relief should only be granted where it is strictly necessary in the interests of justice".[17] This test was borrowed from section 80(3) and section 122(3) of the Constitution. As this borrowing makes clear, the strict test was adopted out of a desire "not to thwart the will of <u>the Legislature</u> save in extreme cases".[18]

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13 ITAC v Scaw South Africa (Pty) Ltd 2010 5 BCLR (CC)
14 Glenister v President of the RSA 2009 1 SA 287 (CC)
15 President of the RSA v UDM 2003 1 SA 472 (CC)
16 President of the RSA v UDM 2003 1 SA 472 (CC)
17 Para 32
18 Para 31 (emphasis added)

10. In *Glenister (1),*[19] the applicant had applied for an order interdicting the relevant Ministers from persisting with the passage of legislation before Parliament that sought to disband the Scorpions. The question was whether it was appropriate for a court to intervene when draft legislation was being considered by Parliament, in order to set aside the decision of the Executive to initiate the legislative process.[20] This Court held that "intervention would only be appropriate if an applicant can show that there would be no effective remedy available to him or her once the legislative process is complete".[21] It adopted this strict test because "it is not the introduction of a Bill that affects rights; it is the making of a law that does that".[22]

11. In *Scaw,*[23] this Court held that the effect of the interim order granted by the court a quo was "to extend the legislatively determined duration of the existing anti-dumping duty"[24] in a manner that may have placed South Africa in breach of its treaty commitments under the WTO Anti-Dumping Agreement. This was held to trench upon "the polycentric policy terrain of international trade and its

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19 Glenister v President of the RSA 2009 1 SA 287 (CC)
20 Para 36
21 Para 44
22 Para 47
23 ITAC v Scaw South Africa (Pty) Ltd 2010 5 BCLR (CC)
24 Para 104

concomitant foreign relations or diplomatic considerations reserved by the Constitution for the national executive".[25]

12. *Scaw*, *Glenister (1)* and *UDM* were exceptional cases. They provide no authority for Treasury's general proposition that "courts should be slow to grant interim interdicts stopping Government from fulfilling its constitutional and statutory functions".[26] *Scaw*, *Glenister (1)* and *UDM* dealt with interdicts that would have interfered with the legislature's processes or with the Republic's international-trade commitments. None of them dealt with the situation that arises in the present case, where the status quo is sought to be preserved pending the judicial review of administrative action.

Foreign law

13. In the second instance, SANRAL contends that the heightened test for interim relief "is consistent with the approach adopted in England, Australia and Canada".[27] It is inappropriate to borrow from foreign jurisdictions without having proper regard to differences in context. SANRAL's heads of argument, in any event, do not accurately reflect the legal position in those jurisdictions.[28]

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25 Para 104

26 Treasury heads of argument para 4

27 SANRAL heads of argument para 34

28 See Factortame Ltd and others v Secretary of State Transport (No 2) [1991] 1 All ER 70 (HL) at 119-120; Castlemaine Tooheys Ltd v South Australia 161 CLR 148 at 153-156; Re Minister for Immigration &

14. The position in England may be summarised as follows. An order restraining a public authority from enforcing an apparently authentic law is regarded as exceptional, but this is primarily because in England, unlike here, there is a presumption that public authorities act in the public interest. However, when considering whether to grant interim relief, even against public authorities, the courts have an unfettered discretion.

15. In Australia, in cases in which a party seeks interim relief pending a challenge to the constitutionality of a statute, the ordinary requirements of an interim interdict (as we know it) are applicable. However, the public interest in enforcing the legislation will be a factor militating against the granting of the interdict. This does not have the effect of fettering the discretion of the courts and they will apply a balance of convenience test on the facts of each case. In cases of interim relief pending a judicial review (as is the case in e-tolls case), the same test as applicable in private law applies, although different factors may arise in giving practical effect to the test.

16. In so far as Canada is concerned, the extract in the SANRAL heads over-simplifies the position. A consideration of the *RJR MacDonald* case as a whole demonstrates that the test applicable to interim interdicts is not dissimilar from the

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Multicultural Affairs: Ex Parte Fejzullahu 171 ALR 341 (HCA) at para 7; RJR MacDonald Inc v Canada [1994] 1 SCR 311 at paras 48, 49, 53, 54, 55, 70, 71 and 85.

South African test. Furthermore, the distaste for granting interim interdicts against the enforcement of laws which are the subject of challenge is motivated by a presumption that private litigants generally pursue their private interests. Therefore, the starting point is that, when balancing is to be done between the purely private interests of a particular litigant and the public interest reflected in the statute, the balance of convenience will generally favour the public. However, the dicta from *RJR MacDonald* make clear that it is open to any applicant for an interim interdict to show that the granting of the interim interdict will be to the public benefit. It is clear that, in the present case, the OUTA respondents are not pursuing a private interest.

Policy-laden decisions

17. In the third instance, SANRAL contends that the heightened test applies because this is an interim interdict "impinging upon executive policy decisions".[29] SANRAL makes it clear that its heightened test will not apply in *all* cases where interim relief is sought but only in *some* cases,[30] viz. those cases that have to do with "policy-laden decisions of government".[31] Treasury beats the same drum when it contends that "in cases of polycentric complexity, the court was bound, in its

29 SANRAL heads of argument para 36
30 SANRAL heads of argument para 43
31 SANRAL heads of argument para 25

application of the requirements for an interim interdict, to refuse the application for an interdict".[32]

18. We make the submission later in these heads that the respondents' challenge is not against a policy-laden decision made by Government but against the unlawful implementation of a tolling system in terms of section 27 of the SANRAL Act. But there are further reasons why SANRAL's heightened test does not apply.

19. SANRAL's call for a heightened test is based on the premise that interim relief will hinder government in the discharge of its executive functions regarding fiscal allocation. Treasury says that 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".[33] The same could have been said in *TAC (No.2)*, but it did not stop this Court from granting the order that it did.[34] But in any event, these averments are simply incorrect:

    19.1. If the GFIP debt remains on SANRAL's balance sheet, it could be financed from revenue raised from alternative sources (such as a fuel levy).[35] This

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32 Treasury heads of argument para 54
33 Treasury heads of argument para 39
34 Minister of Health v Treatment Action Campaign (No 2) 2002 5 SA 721 (CC)
35 Corcoran fourth affidavit para 42 supplementary volume 2 page 1856

would not require the reallocation of any government funds earmarked for other sources.

19.2. If Treasury funds the GFIP debt from the fiscus, Government's budget contains a contingency reserve of R5.8 billion for 2012/13, R11.8 billion for 2013/14 and R24 billion for 2014/15.[36] The debt servicing requirements could easily be accommodated by Treasury within this contingency reserve, without the need to reallocate funds earmarked for other sources.[37]

20. In an effort to ratchet up the polycentric consequences of the interdict, the applicants state that "the decisions brought under review and the interdict sought bear upon <u>the fiscal policies and decisions of the state and its agencies</u>".[38] Mr Gordhan explains that Government derives revenue from various sources, including personal tax, VAT and "road tolls",[39] and then states that "the overall burden of toll revenue on South African taxpayers is moderate by comparison to the burden of <u>other taxes</u>".[40] As this makes clear, the applicants' case is that the Court should not intervene in relation to the exercise by the executive of its taxing powers. But if the applicants' stance were correct, it would mean that

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[36] Volume 18 page 1677
[37] Corcoran para 62.4 volume 17 page 1577. This is not denied in Treasury's replying affidavit
[38] Alli para 18 volume 17 page 1525 (emphasis added)
[39] Gordhan replying affidavit para 27 supp volume 1 page 1722
[40] Gordhan replying affidavit para 29 supp volume 1 page 1723 (emphasis added)

sections 27(1)(a), 27(1)(b) and/or 27(3) of the SANRAL Act impose national taxes, levies, duties or surcharges within the meaning of section 77(1)(b) of the Constitution. This would be fatal to the validity of those sections, because the SANRAL Act deals with matters other than those listed in sections 77(2)(a) to (d) of the Constitution and was therefore not enacted in accordance with the requirements of section 77(2) of the Constitution.

21. SANRAL goes out of its way to state that it is *not* its case that organs of state should be immune from judicial oversight. In a crucial passage, SANRAL contends as follows:[41]

> "If a court finds in due course that SANRAL has acted outside the law, then it will grant effective relief; it is quite a different thing for a court to intervene to the extent to which Prinsloo J has when unlawfulness has not been established." (own emphasis)

22. This passage contains the seeds of its own destruction because it may be impossible for the court to grant "effective relief" in Part B if no interim relief has been granted in Part A. If the implementation of e-tolling is not halted on an interim basis, then SANRAL has made it clear that it will contend in Part B that no review relief or interdictory relief should be granted because of the steps that have already been taken to implement e-tolling.[42] Interim relief may therefore be

[41] SANRAL heads of argument para 24
[42] Alli para 11.23.3 volume 6 page 547

necessary to hold SANRAL to its word that the Court hearing Part B must be able to “grant effective relief”.

Conclusion

23. For the reasons set out above, we submit that this Court should refuse SANRAL’s invitation to apply a heightened test for interim relief. But even if the heightened test were to be applied, we submit that the respondents have satisfied this test for the reasons that follow.

THE TOLL DECLARATIONS AND THE MINISTER’S CONSENT ARE IRREGULAR

The decisions that are challenged in the review

24. It is necessary to begin by identifying the decisions that form the subject matter of the review. Treasury says that the challenge “is first and foremost to Government’s decision to apply a user-pays policy”;[43] describes the relevant decision as “a public finance policy determination confirmed by Cabinet itself”;[44] and then makes the remarkable submission that the challenge is directed at “the

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43 Treasury heads of argument para 6

44 Treasury heads of argument para 14

formulation and implementation of a country's sovereign debt policy".[45] SANRAL suggests that the challenge is directed at a series of "interlinked decisions" that were influenced by Cabinet,[46] although it concedes that "strictly speaking" the decisions were not made by Treasury or by Cabinet.[47]

25. In making these submissions, SANRAL and Treasury conflate a series of discrete decisions. Those decisions may be summarised as follows:

25.1. In July 2007, Cabinet approved the implementation of the GFIP ("the Cabinet approval").[48] The memorandum that served before Cabinet forms part of the papers.[49] It is apparent from this memorandum that the Cabinet approval was not made in terms of any statutory power. It envisaged that "normal procedures for toll schemes will apply including the declaration of all identified roads in the scheme as national roads, execution of the toll declaration process and the determination of toll tariffs".[50]

25.2. On 11 February 2008, the Transport Minister gave approval for the toll declarations in respect of the GFIP network ("the Minister's approval").[51] The approval was given in terms of section 27(1)(a) of the SANRAL Act.[52]

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45 Treasury heads of argument para 63.5
46 SANRAL heads of argument para 20
47 SANRAL heads of argument footnote 43
48 Alli para 37 volume 6 page 567
49 Annexure NA7 volume 9 page 917ff
50 Annexure NA7 volume 9 page 921 para 5.1
51 Mahlalela volume 10 page 966 para 15

25.3. On 28 March 2008 and 28 July 2008, SANRAL declared the GFIP roads as toll roads ("the toll declarations").[53] The toll declarations were made in terms of section 27(1)(a)(i) of the SANRAL Act.

25.4. In order for e-tolling to commence, the Transport Minister will have to publish a tariffs notice in terms of section 27(3) of the SANRAL Act ("the tariffs notice"). This has not yet occurred because two earlier tariffs notice have been withdrawn.

26. Part B of the notice of motion makes it plain that the review is directed only at the toll declarations and the Minister's approval (i.e. the second and third of the above-mentioned decisions). In order to advance their contention that the impugned decisions are polycentric, the applicants seek to elide the impugned decisions *backwards* into the Cabinet decision and *forwards* into the tariffs notice:[54]

26.1. The elision backwards into the Cabinet approval generates the applicants' argument that the toll declarations were "informed by government policy on the appropriate funding mechanisms for infrastructure development and the decisions which had been made by Cabinet in its efforts to balance all

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52 The request made by SANRAL in terms of section 27 is at NA5 volume 9 page 828

53 Volume 11 pages 16 to 22

54 Corcoran paras 24 and 25, Supplementary vol 2 page 1849

competing claims made on the public purse".[55] However, the Cabinet approval did not amount to "administrative action" in terms of PAJA (whether because it fell within an express exclusion[56] or because it did not have a "direct, external legal effect"). Since the Cabinet approval was not reviewable in terms of PAJA, it is impermissible for the applicants to contend that the PAJA-based review of the tolls declaration and the Minister's approval amounts, in substance, to a review of the Cabinet approval.

26.2. The elision forward into the tariffs notice generates the applicants' argument that the tolls declarations are inextricably tied up with governmental decisions regarding public funding. But this elision is inconsistent with the stance that has hitherto been adopted by the applicants. Mr Gordhan has stated "the levying of toll is a distinct administrative act from the declaration of the toll roads back in 2008".[57] SANRAL adopted the same stance before the High Court, where it stated that "complaints about the payment of a toll cannot be used to justify a

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55 SANRAL heads of argument para 48

56 Exclusion (aa) of the definition of "administrative action" in PAJA read with section 85(2)(b) of the Constitution. See Permanent Secretary, Department of Education and Welfare, Eastern Cape and Another v Ed-U-College (PE) Section 21 (Inc) 2001 2 SA 1 (CC) para 18 ("Policy may be formulated by the executive outside of a legislative framework. For example, the executive may determine a policy on road and rail transportation, or on tertiary education. The formulation of such policy involves a political decision and will generally not constitute administrative action.")

57 Gordhan para 111.2 volume 16 page 1481. See also para 90 volume 16 page 1472.

legal challenge to the declaration of roads as toll roads"[58] and accused the respondents of conflating the declaration of toll road and the determination of tolls.[59] SANRAL's decision to declare the toll roads need not have any fiscal consequences. This is illustrated by the fact that the Finance Minister in his 2012 budget speech made a special appropriation to SANRAL of R5.8 billion "in order to contribute to a further reduction in the toll burden".[60] In principle, the Finance Minister might have appropriated (or might still appropriate) the full R21 billion to SANRAL, in which case there would be no need to toll. The applicants are therefore quite wrong when they state that the consequence of the Cabinet approval is that "SANRAL was obliged in terms of the SANRAL Act to finance the GFIP through raising debt, and not through funds appropriated by Parliament for non-toll roads".[61] If this statement were correct, the appropriation in the 2012 budget speech would have been unlawful.

27. In short, the correct question is whether the actual decisions under attack – the toll declarations and the Minister's approval -- have prima facie been shown to be irregular. We submit that this has indeed been established for the reasons that follow.

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[58] Alli para 9.6.10 volume 6 page 516

[59] Alli para 276.2 volume 8 page 760

[60] Budget speech volume 4 page 333. See also Gordhan volume 16 page 1449 para 39

Decisions are subject to judicial scrutiny

28. It is trite that in our constitutional democracy all public power is subject to constitutional control.[62] Some deference ("respect") must be shown by courts to ensure they do not trespass into the terrain of the other areas of government, but only where, for instance, the subject is a complex policy- laden executive decision best suited to an expert in that sphere.[63] Even then, it was emphasised in *Bato Star*[64] that a court should not rubber-stamp an unreasonable decision simply because of its complexity or the identity of the decision maker, and in *New Clicks*[65] that courts should not refrain from examining the lawfulness of a decision simply because it involves economic and political considerations.

29. The decisions under attack by the respondents are not political, economic, or so policy-laden as to warrant judicial deference. They do not fall into the same camp as the decision in *SCAW* ("a policy-laden executive decision that flows from the power to formulate and implement domestic and international trade policy")[66] and certainly have little in common with the decisions based upon the material which has been produced in *UDM* or *Glenister (1)*. Even if they were of the same sort,

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61 Gordhan volume 16 page 1436 para 29

62 ITAC v Scaw South Africa (Pty) Ltd 2010 5 BCLR (CC) para 92

63 ITAC v Scaw South Africa (Pty) Ltd 2010 5 BCLR (CC) para 92; Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs 2004 4 SA 490 (CC)

64 At para 48

65 Minister of Health v New Clicks of South Africa (Pty) Ltd 2006 (2) SA 311 (CC) para 313

66 Scaw para 44

they are so patently unreasonable that a court is bound to intervene to ensure the decisions are not allowed to stand.

Costs involved in collecting e-tolls

30. One of the factors that will necessarily be relevant to a decision to collect revenue from a particular source, concerns the costs involved in collecting that revenue. In the case of e-tolling, those costs involve setting up and operating an infrastructure to collect e-tolls.[67]

31. The letter from SANRAL to the Transport Minister seeking approval for the toll declarations, provided the Minister with a summary of the capital costs involved in setting up a tolling infrastructure but made no mention of the operational costs.[68] It its answering affidavit before the High Court, SANRAL admitted that when it sought approval from the Transport Minister for the declaration of the toll roads, it furnished him with information regarding the capital costs of setting up the e-toll infrastructure but not of the costs involved in the collecting and enforcing of e-tolls.[69] In other words, it was common cause on the papers that the Minister had not been given any indication of the operational costs that would be incurred in collecting the e-tolls.

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67 Volume 9 page 838
68 Annexure NA5 volume 9 page 844
69 Alli para 303.2 volume 8 page 775 read with Pauwen volume 2 page 121 para 220

32. In its heads of argument before this Court, SANRAL attempts to claw back from this admission on the papers. Now SANRAL says[70] that it cannot be suggested that no information was placed before the Transport Minister regarding the costs of toll collection, because the 2006 Proposal stated that "the yearly estimated operations and maintenance costs amounts to R200m (excl VAT, 2006 rands)".[71] But the 2006 Proposal did not serve before the Minister when he made the decision to approve the toll declarations 15 months later in January 2008. Moreover, the very same page of the 2006 Proposal states as follows:[72]

> "The income generated at such a tariff seems adequate to finance the capital, maintenance and operational costs of the scheme. It still needs to be confirmed by means of specialist studies, which will commence after the principles of a freeway improvement scheme have been agreed upon." (own emphasis)

33. SANRAL contends that the word "it" in the second sentence of this passage refers to "whether the income generated from the tolling scheme will be sufficient to cover the entire costs of the system".[73] But as the first sentence makes clear, those costs include "operational costs". It cannot be seriously suggested that the drafters of the 2006 Proposal envisaged that specialist studies would focus on one variable (i.e. income) but not the other variable (i.e. costs) in order to decide if income would exceed costs. This is especially so since the 2006 Proposal made

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70 SANRAL heads of argument para 79

71 Volume 9 page 911 lines 1 to 2

72 Volume 9 page 911 lines 15 to 18

it plain that it was based on a "preliminary financial analysis of the scheme",[74] and that "financial modelling"[75] would be necessary in order to take the scheme forward.

34. If SANRAL were correct, it would mean that the Transport Minister gave his approval for e-tolling on the basis of a ten-word thumbsuck – not supported by any empirical evidence or calculation – that "the yearly estimated operations and maintenance costs amounts to R200m (excl VAT, 2006 rands)". Such a decision would in and of itself be irrational and unreasonable. This is all the more so because the evidence before the High Court established that this estimate bears no relation to reality:

    34.1. The founding affidavit alleged that, over a 20 year period, the public would be required to pay not less than R21.5688 billion for the operation of the open-road tolling system. Since the total capital cost of Phase 1 of the GFIP was R20.5 billion, this meant that road users would be required to pay more for *the collection of e-tolls* than for *the upgrading of the roads*.[76]

    34.2. In its answering affidavit, SANRAL accepted that the figures set out in the founding affidavit were correct but added the rider that they were "based

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73 SANRAL heads of argument para 82
74 Volume 9 page 904 line 41
75 Volume 9 page 916 line 24
76 Pauwen volume 2 page 125 paras 238 to 241

on a public non-compliance in excess of 60%".[77] There is, however, no basis for the rider because the figures were taken from the Steering Committee report which made no reference to a presumed 60% rate of non-compliance.[78] Remarkably, SANRAL refused to disclose to the High Court the true cost of collecting e-tolls or the contract concluded with the ETC Joint Venture that would reflect the true cost of collecting e-tolls,[79] despite being expressly invited to do so.

35. This fact that road-users would be required to pay more for *the collection of e-tolls* than for *the upgrading of the roads* was not appreciated by the Transport Minister when he gave approval for SANRAL to declare the toll roads. We know this because the Minister's answering affidavit in the High Court continued to deny the correctness of the very figures that SANRAL had admitted to be correct.[80] The failure to consider this highly relevant consideration vitiates the Minister's decision to give approval for the declaration of the toll roads. It also vitiates SANRAL's decision to declare the toll roads since no reasonable decision-maker could have made such decision.

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[77] Alli volume 8 page 77 para 305.1

[78] Pauwen volume 12 page 1115 para 23

[79] Pauwen volume 12 page 1114 para 20 and 21; volume 2 page 124 para 236

[80] Mahlalela volume 10 page 986 para 70.1

36. SANRAL's heads of argument state that it is "simply not factually correct" that "the costs of toll collection would exceed the costs of the road upgrades themselves".[81] The only basis for this contention is a document that never served before the High Court but was annexed to the application for leave to appeal to this Court.[82] When SANRAL sought to hand up this document in the course of argument on the last day of the hearing before the High Court, the respondents opposed this on the basis that it was not only late but constituted new evidence at odds with SANRAL's answering affidavit. The High Court refused to accept the document from the bar. Since the question on appeal is whether the High Court made the correct decision on the basis of the record before it, the new document is simply irrelevant.[83]

Enforcement of e-tolls

37. The founding affidavit in the High Court alleged that the decision to declare the GFIP network as a toll road was unreasonable (within the meaning of section 6(2)(h) of PAJA) because enforcement of the system would be virtually impossible.[84] Detailed reasons were offered for this allegation.

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81 SANRAL heads of argument paras 66 and 67

82 Annexure NA1 volume 17 page 1528

83 It should be disregarded in any event because SANRAL continues to withhold the full ETC Contract and related tender documents despite requests that they be produced.

84 Pauwen volume 2 page 128ff paras 250 to 275

38. SANRAL's answering affidavit states that there will be "approximately one million vehicles who utilise the proposed toll road network each day".[85] When this figure is put together with the statement by Mr Alli that non-compliance "will stabilise in the order of 7%",[86] it follows as a matter of simple arithmetic that – on SANRAL's own version – within seven days of the implementation of e-tolling there will be 70 000 non-compliant defaulters from whom toll collection will have to be made each day. Practically speaking, it will be impossible to enforce collection.[87]

39. However, the difficulties are more deep-seated than this and they are studiously avoided in the applicants' heads of argument. SANRAL's answering affidavit states that liability to pay toll "is determined by legislation"[88] and that "the Act and not the system utilized determines the liability for tolls".[89] What SANRAL overlooks is that this serves to render unworkable the entire system of e-tolling:

39.1. Section 27(1)(b) of the SANRAL Act provides that SANRAL may levy and collect a toll for the driving or use of any vehicle on a toll road, "which will be payable at a toll plaza by the person so driving or using the vehicle, or at any other place subject to the conditions that the Agency may determine and so make known" (emphasis added). The important point is that the toll

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85 Alli volume 7 page 697 para 153
86 Volume 4 page 295 – in his letter to Business Unity South Africa
87 Pauwen volume 13 page 1117 para 35
88 Alli volume 8 page 729 para 217.2

is payable by the person "driving or using the vehicle". It is not payable by the owner of the vehicle (unless he or she also happens to be the person driving or using the vehicle at the relevant time).

39.2. The imposition of liability to pay tolls on the person "driving or using the vehicle" creates few difficulties where the toll is paid at a physical toll plaza. However, it creates insuperable difficulties in the case of e-tolling because SANRAL simply has no way of identifying the person who was "driving or using the vehicle" in circumstances where that vehicle does not come to a halt. At best for SANRAL, it may be able to access the identity of the registered owner of the vehicle. However, knowing the registered owner of the vehicle will not assist SANRAL in identifying the person "driving or using the vehicle" in order to exact toll.

39.3. The extent of SANRAL's misapprehension is laid bare by the following statement in its answering affidavit:

> "In relation to the issuing of summonses and legal notices, the current process for conducting these activities exists throughout the country in relation to road traffic users. <u>The application of these principles to the e-tolling system is similar</u> and there are therefore no anticipated logistical difficulties that will cause the system to become impractical."[90] (own emphasis)

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[89] Alli volume 8 page 783 para 310.2. It follows that the problem cannot be corrected by regulations, as suggested in paragraph 75 of SANRAL's heads of argument.

[90] Alli volume 8 page 782 para 309.6 (emphasis added)

39.4. As this makes plain, SANRAL has simply not appreciated that it will be required to go after the person driving or using the vehicle, rather than the registered owner, in order to recover e-tolls. Mr Alli puts this beyond doubt when he states that "the vehicle renting and leasing industry dealt with the issue of the imposition of road penalties and fines and there is no reason why such a similar process should not be adopted in relation to the recovery of tolls incurred by these drivers while using a rented vehicle".[91] What Mr Alli has overlooked is that section 73(1) of the National Road Traffic Act 93 of 1996 does not assist SANRAL in the present circumstances. It provides as follows:

> "Where in any prosecution in terms of the common law relating to the driving of a vehicle on a public road, or in terms of this Act, it is necessary to prove who was the driver of such vehicle, it shall be presumed, in the absence of evidence to the contrary, that such vehicle was driven by the owner thereof." **(own emphasis)**

The presumption in this section does not apply where (as here) liability to pay tolls in terms of section 27(5) of the SANRAL Act is in issue.

39.5. These fundamental difficulties were appreciated by the drafters of the Report of the GFIP Steering Committee.[92] The Report identified the need for legislation to be enacted or for Regulations to be made dealing with

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91 Alli volume 8 page 783 para 310.3

92 Annexure AA3 volume 11 page 991ff

"enforcement and recovery of tolls".[93] It then concluded with this ominous warning:

> "Failure to do will place SANRAL at great risk of being subject to valid legal challenges from many angles and being unable to effectively implement and enforce tolling."[94]

39.6. Since there has been no legislation or Regulations of the sort envisaged by the Steering Committee, SANRAL now faces the real risk of being "unable to effectively implement and enforce tolling".

40. The decision to approve the declaration of the GFIP network as a toll road was therefore not a decision that could have been made by a reasonable administrator.

Failure to give proper notice

41. Section 27(4)(a) of the SANRAL Act requires SANRAL to "give notice, generally, of the proposed declaration" of a toll road. SANRAL purported to do so when it published notice of its intention to declare the GFIP network as toll roads.[95] Although these notices indicated that the toll roads would operate on the basis of

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[93] Volume 11 page 1083. See also pages 1031 to 1032

[94] Volume 11 volume 8 page 743

[95] Annexures FA13 to FA18 volume 3 page 255ff; Pauwen volume 2 pages 111–113 paras 203– 203.10

open-road tolling, they furnished no indication whatsoever of the likely amounts of the tolls.[96]

42. This much is common cause. The only dispute is whether the notices were required to give an indication of the likely amount of the tolls. SANRAL contends that this was not required because "the declaration of a road as a toll road is a different procedure to the determination of a toll in respect of that particular piece of road".[97] SANRAL's attempt to draw a watertight division between the declaration of the toll road and the determination of the toll is remarkable in circumstances where the public was not afforded any opportunity to comment on the proposed tolls prior to the publication of the tariffs notice in February 2011. If SANRAL were correct, the public would be deprived of any right to comment on the amount of the proposed toll because such a right would not exist at either stage of the process (i.e. neither when the toll road is declared nor when the amount of the toll is determined). It would mean that the public has a right to comment on the declaration of the toll road and the location of a gantry, but has

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96 Pauwen volume 2 pages 108-111 paras 202 – 202.8. SANRAL also failed to bring the intent to toll effectively to the attention of the public and Gauteng freeway users when it easily could have done so: Pauwen volume 2 pages 111-113 paras 203 – 203.10. The inadequacy of the notice – both as to content and extent of publication – was made clear by the stark contrast between the paltry response to the respective notices of intent to toll at the time that they were issued and the overwhelming response to the tariff determinations in February 2011: Pauwen volume 1 page 85 paras 107; volume 1 page 90 para 125. This should be contrasted with the extent of the public participation and interest following the publication of toll tariffs in February 2011: Corcoran volume 17 pages 1542-1543 paras 10 – 14

97 Alli volume 8 page 763 para 285.3

no right to comment on the amount of the tolls that will have to be paid. Such an outcome would be absurd.

43. Section 4(1) of PAJA imposes an obligation to allow public participation in the case of administrative action which "materially and adversely affects the rights of the public". The declaration of the GFIP network as a toll road "materially and adversely affects the rights of the public" because the public will have to pay tolls when using that road at some time in the future. In order to give effect to section 4 of PAJA, the notice of intention to declare the tolls roads had to afford the public at least some indication of the likely amount of the tolls.[98] Its failure to do so amounted to a failure to comply with section 27(4)(a) of the SANRAL Act read with section 4 of PAJA.

Adequate public transport alternatives

44. The GFIP Interim Social Impact Report stated that "it is important that the toll option is only considered as part of an integrated transport plan and in the event of there being viable alternatives which will be addressed below".[99] It went on to

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98 For instance, the indicative tariff rates were before the Transport Minister when approval was applied for: volume 9 page 842 lines 11-29

99 Annexure FA59 volume 4 page 383 (emphasis in original)

state that "existing public transport alternatives are currently not viable and would have to undergo considerable expansion".[100]

45. It was in this context that the founding affidavit alleged that the application placed before the Minister[101] "was misleading in that it created the impression that adequate public transport alternatives would be provided by SANRAL simultaneously with the upgrading and tolling of the proposed toll road network",[102] whereas the truth is that "the measures referred to would not even scratch the surface of the problem of a lack of viable public transport alternatives in the context of Pretoria and Johannesburg's urban sprawl".[103] These averments were not disputed by the applicants. The Transport Minister's answering affidavit did not deal with the allegations because it stated that SANRAL would deal with them.[104] SANRAL's answering affidavit did not deal with the allegations because it stated that the Transport Minister would deal with them.[105] SANRAL is therefore wrong to state in its application for leave to appeal to this Court that "SANRAL denied that the Minister had been misled".[106]

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[100] Volume 4 page 384 lines 12 to 13. SANRAL's letter to the Minister seeking approval for the declaration of the toll roads made no mention of this critical consideration. Annexure FA60 volume 4 pages 385 and 386; Pauwen volume 2 pages 139-140 paras 279-279.9

[101] Annexure FA61 volume 4 page 387

[102] Pauwen volume 2 page 140 para 280.1

[103] Pauwen volume 2 page 141 para 280.2

[104] Mahlalela volume 10 page 987 para 71.1

[105] Alli volume 8 page 789 para 312

[106] Alli volume 17 page 1523 para 15.1

46. In sum, it is common cause on the papers that the Transport Minister was misled into believing that adequate public transportation alternatives were in place (or would be put in place) in circumstances where this was not in fact the case and he granted approval on that basis. The decision was therefore vitiated by material irregularities.

Issues that will arise in Part B

47. The applicants rely on two issues that will arise in Part B, as being relevant to Part A.

Discretion to condone non-compliance with the 180-day rule in PAJA

48. Since the review of the decision to approve the declaration of the toll roads was launched outside of the 180-day period in section 7(1) of PAJA, the respondents have applied for condonation in terms of section 9(1) of PAJA.[107] For the reasons set out in the founding affidavit, we submit that the respondents have made out a proper case for condonation.[108]

49. SANRAL contends that "Prinsloo J completely failed to consider the question of delay or the provisions of section 7(1) of PAJA when he granted the interdict".[109] That is unfair. The question of delay was fully argued before Prinsloo J, and

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[107] Notice of motion prayer B6 volume 1 page 11

amounted to a repetition of the earlier argument on urgency. When he gave his order refusing to strike the matter from the roll for lack of urgency, Prinsloo J dealt comprehensively with the respondents' explanation for why they had waited until when they did before launching this application. The identical considerations are relevant to section 7(1) of PAJA.

Discretion to refuse to grant review relief

50. SANRAL contends that "a reviewing court would likely exercise its discretion not to set aside the decisions because of the reliance which has been placed on them over the four intervening years".[110]

51. The power of the reviewing court to exercise its discretion to decline to grant relief is very limited. *Sapela*[111] has been described by the SCA as an "exceptional case".[112] In light of the decision of this Court in *Bengwenyama*,[113] the Court hearing Part B will have no discretion to refuse to grant an order declaring that the decision to declare the tolls road was invalid. Such an order would be sufficient to give rise to the interdict which is sought in prayer B1 restraining SANRAL from collecting tolls on the GFIP network.

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108 Pauwen volume 2 page 166ff paras 323 to 429. See also Corcoran volume 17 pages 1589 – 1590 paras 86.4 – 80.5
109 SANRAL heads of argument para 98
110 SANRAL heads of argument para 99.2
111 Chairperson, Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd 2009 4 SA 628 (SCA)
112 Eskom Holdings v New Reclamation Group (Pty) Ltd 2009 4 SA 628 (SCA) para 16
113 Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd 2011 4 SA 113 (CC) para 84

Conclusion

52. We submit that the applicants have established (at a minimum) a *prima facie* right to have the decisions to declare the toll roads reviewed. If the heightened test for interim relief applies, then that hurdle has also been overcome.

THE ENVIRONMENTAL AUTHORISATIONS ARE IRREGULAR

53. In Part B of their notice of motion, the respondents seek orders reviewing and setting aside the environmental authorisations granted to SANRAL in relation to the GFIP network.[114] The environmental authorisations were granted in terms of section 24 of the National Environmental Management Act 107 of 1998 ("NEMA"), and are annexed to the notice of motion ("the environmental authorisations").[115]

The environmental authorisations were vitiated

54. In September 2007, SANRAL submitted Basic Assessment Reports ("the BARs") in terms of the EIA Regulations in order to obtain authorisation to perform construction activities on various parts of the GIFP network.[116] Paragraph 13 of the BARs dealt with the socio-economic value, as well as the need and

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114 Notice of motion prayer B3 volume 1 page 7
115 Annexures B1 to B6 volume 1 pages 23 to 41
116 Annexure FA62 volume 5 page 396ff

desirability of the activities for which environmental authorisation was sought.[117] However, the BARs made no reference to the fact that SANRAL intended to fund a substantial portion of the costs of the proposed upgrades by requesting the Minister of Transport to declare the GIFP network as a toll road.

55. By virtue of this omission in the BARs, it is common cause that the sixth applicant did not consider the socio-economic impacts of the proposed e-tolling to fund the road upgrades when she granted the environmental authorisations.[118]

56. SANRAL accepts that the sixth applicant did not have regard to these issues when she granted the environmental authorisations, but contends that there was no obligation on her to do so.[119] But SANRAL's contention is entirely at odds with the jurisprudence of this Court. In *Fuel Retailers*,[120] Ngcobo J held that "NEMA makes it abundantly clear that the obligation of the environmental authorities includes the consideration of socio-economic factors as an integral part of its environmental responsibility".[121] This Court set aside the decision of the authority

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117 Volume 5 pages 406 and 4070

118 Pauwen volume 2 page 155 para 308. Since the fourth and fifth respondents in the High Court did not file answering affidavits, this averment is uncontested.

119 Alli volume 8 page 795 para 329.2

120 Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Environment, Mpumalanga Province 2007 6 SA 4 (CC)

121 Para 62

because it had taken the view that it was not required to have regard to socio-economic factors.[122]

57. We submit that the same irregularity vitiated the decision in the present case. If the BARs had assessed the significant socio-economic impact of the proposed tolling (as they were obliged to do by sections 24 and 28 of the NEMA read with regulation 23(2)(d) of the EIA Regulations), the evaluation of the impacts of the listed activities would have been substantially different. The reason is that, once a toll is introduced in order to pay for the upgrades, the socio-economic impacts change dramatically. For example, some motorists are likely to deviate from using the upgraded freeways to using the secondary road network in order to avoid the tolls, which will have exactly the opposite impact on congestion and degradation as described by the EAP in the BAR.[123]

58. We submit that the socio-economic impact of the funding of the upgrades through the collection of tolls should have been considered by the sixth applicant when she granted the environmental authorisations. Her failure to do so vitiates the decision to grant the environmental authorisations. Significantly, none of the applicants contends otherwise. Treasury does not address this issue in its heads of argument at all. SANRAL only addresses the environmental authorisations in

[122] Para 85
[123] FA volume 2 page 152 para 303

its heads of argument in order to make submissions regarding "procedural deficiencies" that we shall address below.[124]

Issues that will arise in Part B

59. In an attempt to resist the grant of interim relief based on the environmental authorisations, the applicants rely on three issues that will be relevant to Part B. Two of those issues (failure to comply with the 180-day rule in PAJA and discretion to refuse to grant relief in Part B) are covered by what we have submitted above in the context of the toll declarations. The third issue involves SANRAL's contention that, in terms of section 43 of NEMA, the respondents were afforded a right to appeal to the Environmental Minister against any decision of the Director-General. Since the respondents did not exhaust their internal appeal or seek condonation for their failure to do so, SANRAL contends that the review of the environmental authorisations is barred by section 7(2) of PAJA.[125]

60. The current wording of section 43 of NEMA was inserted by Act 62 of 2008, which came into operation on 1 May 2009. It did not apply when the environmental authorisations were issued in the present case. At that time, section 43(1) of NEMA provided that "any affected person may appeal to the Minister against a

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124 SANRAL heads of argument para 53
125 SANRAL heads of argument para 99.1

decision taken by any person acting under a power delegated by the Minister under this Act”.

61. A right of appeal was therefore only vested in an “affected person”. Regulations 62(1), 10 and 57 of the 2006 EIA Regulations (which were in operation at the relevant time) made it plain that the “affected persons” who were given a right of appeal in terms of section 43(1) of NEMA, were the parties who had participated in the procedures resulting in the initial decision.

62. This submission is supported by the unreported judgment in *Linksfield Grove (Pty) Ltd v Minister of Development Planning and Local Government, Gauteng* (21203/3003), which dealt with the appeal process in the Town-planning and Townships Ordinance 15 of 1986. In that context, the Court held that the phrase “other interested person”

> “cannot possibly have been intended to include every person or body with an interest in the matter, irrespective of whether such person or body lodged an objection or made representations in terms of the Ordinance or not. If that was the correct interpretation, anybody with sufficient interest could simply arrive at the hearing of an application and present oral evidence and argument” (para 28).

The court held that only those persons who had participated during the application process were entitled to appeal the decision. We submit that a similar principle applies to section 43(1) of NEMA.

63. In the present case, none of the respondents was registered as interested and affected parties during the basic assessment process. It follows that they had no right to appeal in terms of section 43(1) of NEMA, and are therefore not hit by section 7(2) of PAJA.

Conclusion

64. We submit that the respondents have established (at a minimum) a *prima facie right* to review and set aside the environmental authorisations. If the heightened test for interim relief applies, then that hurdle has also been overcome.

BALANCE OF CONVENIENCE AND IRREPARABLE HARM

65. We turn now to address the issues of balance of convenience and irreparable harm.

Irreparable harm

66. If e-tolling were to commence, road-users in Gauteng would be obliged to pay tolls that are (in the respondents' submission) invalid. SANRAL has not tendered to refund those payments if the review in Part B were to succeed. SANRAL

nevertheless contends that all road-users would have an enrichment claim for reimbursement.[126] This contention is lacking in merit:

66.1. The only authority cited by SANRAL in its heads of argument[127] held that no distinction should be drawn in the application of the *condictio indebiti* between mistake of fact and mistake of law. It is unclear why this is said to support SANRAL's contention that road-users will be entitled to recover the monies paid by them.

66.2. If a court were to set aside the toll declarations or the environmental authorisations, this may not necessarily invalidate with retrospective effect the contract concluded between SANRAL and a road-user. Since the tolls would have been paid pursuant to the contract, they would not have been paid *sine causa*. It may also be open to SANRAL to contend that it has not been unjustly enriched by receipt of the money because the road-user has indeed obtained a benefit in the form of use of the GFIP network.[128]

67. Even if an enrichment claim existed in law against SANRAL, it could not be seriously suggested that each individual road-user must sue SANRAL for recovery in circumstances where SANRAL refuses to tender reimbursement. This

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126 SANRAL heads of argument para 103
127 Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue 1992 4 SA 202 (A), as cited in fn 67
128 Wynland Construction v Ashley-Smith 1985 3 SA 798 (A) at 817A-C

is what would have to be done by a person such as Hilda Maphoroma[129] if the review application were to succeed after she has already been paying tolls for a period of some months. The applicants' contention that there is no threat of irreparable harm shows scant appreciation of the position of road-users such as Hilda Maphoroma,[130] Denis Tabakin[131] or Tshidi Leatswe,[132] who have no alternative to using the GFIP road network and who simply cannot afford to pay the e-tolls.

68. If interim relief were not granted, e-tolling would commence and the court hearing the application in Part B would inevitably be urged not to grant any relief because of the steps that have already been taken to implement the system. The applicants have made it clear that this is what they intend to argue in relation to Part B. If interim relief is not granted, this may make it difficult for the Court hearing Part B to grant relief even if it were persuaded that the decisions were irregular. This would amount to irreparable harm.[133]

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129 Annexure FA5 volume 3 page 209ff
130 Annexure FA5 volume 3 page 209ff
131 Annexure FA6 volume 3 page 217ff
132 Annexure FA8 volume 3 page 226ff
133 Pauwen volume 12 pages 1127-1128 paras 78-85; Pauwen volume 2 pages 192- 3 paras 447-449

Balance of convenience

69. If interim relief is not granted and if final relief is in due course granted, all road-users will have been obliged to pay unlawful tolls for the intervening period. SANRAL has not offered to refund those tolls. Since many people are unable to afford the tolls and have no viable alternatives to using the GFIP network, this would have had a significant impact on how they will have conducted their lives. Some of them may have given up their jobs or relocated. These are very dire consequences indeed.

70. If interim relief is granted and if final relief is in due course refused, the consequence will be that SANRAL will not have recovered tolls for the intervening period of time. The applicants suggest that this will result in fiscal Armageddon. But their description of Armageddon is so lacking in particularity that it should be rejected:

    70.1. Before the High Court, Treasury stated on oath that "under the [Domestic Medium Term Note], should SANRAL fail to implement GFIP, that is, should it fail to collect tolls from 30 April 2012, that will be an event of default triggering the immediate payment of the entire loan. In practice, this will mean that the guarantee stands to be called upon."[134] In other words,

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[134] Donaldson volume 11 page 1103 para 44

Treasury testified (*a*) that failure to collect e-tolls on 30 April 2012 would be an act of default and (*b*) that the entire loan would become repayable.

70.2. This is entirely inconsistent with what Treasury says in its application for leave to appeal to this Court. Treasury now states (*a)* that the suspension of tolling "is liable to interpretation as an event of default under SANRAL's domestic medium term note programme"[135] and (*b*) that, in the event of default, "approximately half of SANRAL's total debt … would immediately become due and payable".[136] What is beyond doubt is that Treasury's prediction before the High Court that the entire loan would become repayable in the event of a failure to commence e-tolling on 30 April 2012, was incorrect. The same applies to Treasury's statement that the guarantee would be called up.[137]

71. In any event, the grant of interim relief will not result in the sort of catastrophic consequences that the applicants loudly assert but never fully explain:

71.1. Treasury states that, if SANRAL defaults on its debt obligations, "Treasury would have to take over the payment obligations".[138] Treasury then goes on to state that this would mean that "the credit rating of South Africa, and

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135 Gordhan volume 16 page 1451 para 42 (emphasis added)
136 Gordhan volume 16 page 1452 para 43 (emphasis added)
137 Gordhan volume 16 page 1455 para 52
138 Donaldson volume 11 page 1094 para 24

therefore the government's ability to raise sovereign debt, would be in jeopardy".[139] But the credit rating of the South African government would only be negatively affected if it is unable to meet its guarantee commitments, and there is no suggestion that this would the case. The fact that the South African government was honouring its guarantee commitments would have no more effect on its ability to "raise debt" than the fact that it was honouring its other contractual commitments.[140]

71.2. SANRAL will not suffer irreparable harm. To the extent necessary, it will be funded in the interim by Treasury. The government can easily afford to fund SANRAL in the interim.[141]

71.3. Government has already postponed the commencement of e-tolling in the past, and this did not result in fiscal Armageddon. Most recently, the commencement of e-tolling was postponed on 26 April 2012 at the very time when the present applicants were arguing in the High Court that no further postponement could possibly be countenanced.

71.4. The applicants make much of the Moody's downgrade in the week following the High Court judgment. Treasury says that this was "expressly

139 Donaldson volume 11 page 1104 para 45
140 Corcoran vol 14 page 1351 paras 93-94
141 Corcoran vol 17 pages 1572-1579 paras 61-69; supplementary volume 2 pages 1849-1855 paras 23-36

a consequence of the grant of the interim interdict",[142] and SANRAL states that Moody's "specifically linked the downgrade to the uncertainties brought about by the interdict".[143] But this is incorrect. The Moody's document records that the High Court 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 the controversial toll road project".[144] Moody's lead analyst on South Africa subsequently stated that the negative outlook given to South Africa's credit rating arose from the fact that populism was having the effect of pressuring the state into changing its policy.[145]

Conclusion

72. The commencement of e-tolling will have prejudicial consequences for many thousands of people in Gauteng. In contrast, the grant of interim relief will merely serve to preserve for a few months longer the status quo that has existed for some time. In such circumstances, we submit that the balance of convenience favours the grant of interim relief.

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142 Treasury's heads of argument para 63.2
143 Treasury heads of argument para 10.7.1
144 Annexure FA5 volume 16 page 1499
145 Annexure OUTA1 volume 18 page 1625

LEAVE TO APPEAL

73. Quite apart from the prospects of success on appeal, there are other reasons why leave to appeal should be refused,

74. As this Court pointed out in *Scaw*, "Courts are loath to encourage wasteful use of judicial resources and of legal costs by allowing appeals against interim orders that have no final effect and that are susceptible to reconsideration by a court a quo when final relief is determined".[146] Unlike in *Scaw*, the order of the High Court in the present case has no final effect and does not dispose of a substantial portion of the relief claimed in the main proceedings.

75. Moreover, there is no urgency of the sort claimed by the applicants. The applicants' case for urgency died when e-tolling was postponed on 26 April 2012. It is for this reason that SANRAL did not proceed with its intimation that it would apply for leave to appeal to the SCA as soon as the judgment had been handed down by Prinsloo J on 28 April 2012.[147] We record that the respondents filed their supplementary founding affidavit in Part B on 18 July 1012.

76. There is also no reason why it should be considered in the interests of justice for the appeal to come directly to this Court and to leap-frog the SCA. As indicated above, SANRAL asks this Court to sit as a court of first and final instance in order

to develop a new test for interim relief that was never argued before the High Court. That is a matter on which this Court should have the benefit of the SCA's thinking.

RELIEF SOUGHT

77. The respondents ask for the following relief:

77.1. that the application for leave to appeal be dismissed with costs (including the costs of three counsel); *alternatively*

77.2. that the appeal be dismissed with costs (including the costs of three counsel).

78. In the event that the application for leave to appeal or the appeal were to succeed, the respondents submit that there should be no costs order against them.[148]

ALISTAIR FRANKLIN SC

ALFRED COCKRELL SC

ADRIAN D'OLIVEIRA

ADRIAN FRIEDMAN

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[146] Para 50

[147] Corcoran volume 17 page 1618 para 105

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30 July 2012

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148 Biowatch Trust v Registrar, Genetic Resources 2009 6 SA 132 (CC)