

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' NOTE SUBMITTED WITH WRITTEN
ARGUMENT**

1 NATURE OF THE PROCEEDINGS:

This is an application for leave to appeal against an interim interdict granted by the North Gauteng High Court on 28 April 2012 restraining the implementation of e-tolling pending the finalisation of a judicial review.

2 ISSUES TO BE ARGUED:

2.1 Whether:

2.1.1 an entirely new test for interim relief, at odds with decided cases of our courts for many decades, should be developed by this Court sitting as a court of first and final instance;

2.1.2 the High Court's judgment should be set aside, despite the fact that this novel test was not proposed to it, and argument before it was based on the premise that the ordinary approach to interim interdicts was applicable;

2.1.3 whether, despite what is said in paragraphs 2.1.1 and 2.1.2 above, this Court should grant leave to appeal against the High Court's judgment.

3 RELEVANT PORTIONS OF THE RECORD:

All.

4 ESTIMATED DURATION OF THE ARGUMENT:

This matter has been set down for one day.

5 SUMMARY OF THE RESPONDENTS' MAIN ARGUMENTS:

5.1 The respondents submit that the applicants press for an entirely novel approach to the granting of interim interdicts pending a review. They do so in circumstances where the new test was not argued before the Court in respect of which leave to appeal is sought. For this reason alone, it is not in the interests of justice for leave to appeal to be granted.

5.2 Leave to appeal an interim order should only be granted exceptionally and where it is in the interests of justice. The respondents submit that this is not the case here.

5.3 If this Court is minded to grant leave to appeal, then it is in any event submitted that the appeal ought to be dismissed:

5.3.1 The papers which form part of the record in this Court show that the respondents established (at a minimum) a prima facie entitlement to the relief sought in the review. This is because:

- 5.3.1.1 Neither the Minister of Transport nor SANRAL, when making the decisions which are the subject of this review, properly considered the true costs of the collection of e-tolls, a highly relevant consideration.
- 5.3.1.2 No attention was paid by the relevant decision-makers to the fact that the system of e-tolls is unworkable, because enforcement is practically impossible.
- 5.3.1.3 Proper notice of the administrative decision was not given because members of the public were, at no time, given proper notice of the amount of tolls which were to be levied.
- 5.3.1.4 The information placed before the Minister of Transport before he made his decision was misleading because it created the impression that adequate transport alternatives would be provided.
- 5.3.1.5 The environmental authorisations sought by SANRAL in terms of section 24 of the National Environmental Management Act 107 of 1998 were vitiated by the fact that the sixth respondent, when granting them,

did not consider the socio-economic impacts of the proposed e-tolling.

5.3.2 The record also shows that the balance of convenience favoured the respondents:

5.3.2.1 The imposition of e-tolls pending the finalisation of the review would cause financial hardship and extreme prejudice to many of the users of the road. Their circumstances were set out in the papers filed by the respondents.

5.3.2.2 By contrast, the dire financial consequences postulated by the applicants if the interim interdict is granted but the review ultimately dismissed, were not substantiated in their papers.

5.3.3 The respondents would suffer irreparable harm if the interim relief were not granted but the review ultimately granted. The users of the road described in the respondents' papers would be made to pay the tolls in potentially financially ruinous circumstances, in the absence of any tender from the applicants to repay those tolls if the review is ultimately successful.

6 MAIN AUTHORITIES ON WHICH THE RESPONDENTS WILL RELY:

- 6.1 International Trade Administration Commission v SCAW South Africa (Pty) Ltd 2010 (5) BCLR (CC)
- 6.2 Minister of Health v Treatment Action Campaign (No 1) 2002 (5) SA 703 (CC)
- 6.3 Minister of Health v Treatment Action Campaign (No 1) 2002 (5) SA 721 (CC)
- 6.4 Chairperson, Standing Tender Committee v FJE Sapela Electronics 2009 (4) SA 628 (SCA)
- 6.5 Eskom Holdings v New Reclamation Group (Pty) Ltd 2009 (4) SA 628 (SCA)
- 6.6 Bengwenyama Mineral (Pty) Ltd v Genorah Resources (Pty) Ltd 2011 (4) SA 113 (CC)
- 6.7 Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Environment, Mpumalanga Province 2007 (6) SA 4 (CC)
- 6.8 Linksfield Grove (Pty) Ltd v Minister of Development Planning and Local Government, Gauteng (21203/3003), unreported

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

ALISTAIR FRANKLIN SC

ALFRED COCKRELL SC

ADRIAN D'OLIVEIRA

ADRIAN FRIEDMAN

**Chambers
Sandton
30 July 2012**