

"FA5"

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case No: 27507/16

In the matter between:

SOUTH AFRICAN NATIONAL ROADS AGENCY LIMITED

Plaintiff

and

[REDACTED]

Defendant

DEFENDANT'S PLEA



The defendant pleads to the plaintiff's Particulars of Claim as follows.

1. FIRST SPECIAL PLEA

1.1 The plaintiff sues the defendant for e-toll liability allegedly incurred by the defendant in an amount of R 587 065.92 ("the claimed amount").

1.2 In particular, the plaintiff alleges that:

1.2.1 on 28 March 2008 and 28 July 2008, the plaintiff declared the following sections of national road (hereafter collectively referred to as "the GFIP highways") to be toll roads in terms

of section 27(1)(a)(i) of the South African National Roads Agency Limited and National Roads Act 7 of 1998 ("SANRAL Act"):

1.2.1.1 sections 20 and 21 of the N1;

1.2.1.2 section 12 of the N3;

1.2.1.3 section 1 of the N4;

1.2.1.4 sections 18 and 19 of the N12; and

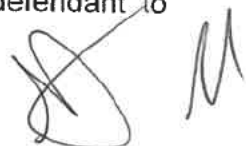
1.2.1.5 sections 1 and 2 of the R21;

(Particulars of Claim paragraphs 4 to 7)

1.2.2 between 3 December 2013 and 31 August 2015, vehicles registered in the name of the defendant passed under e-toll gantries situated on the GFIP highways, which are deemed to be toll plazas for the purposes of section 27(1)(b) of the SANRAL Act;

(Particulars of Claim paragraphs 14 to 15)

1.2.3 the passage of vehicles registered in the name of the defendant under e-toll gantries caused the defendant to

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incur e-toll liability, the total aggregate amount being the claimed amount;

(Particulars of Claim paragraphs 14 to 15 read with annexure A)

- 1.2.4 despite the fact that the 7-day grace period for payment of e-toll liability incurred has lapsed and the defendant has been duly invoiced, the defendant has not paid the amount.

(Particulars of Claim paragraphs 19 to 26)

- 1.3 The plaintiff purported to declare the GFIP highways to be toll roads by publication of the following declarations in terms of section 27(1)(a)(i) of the SANRAL Act ("the toll declarations"):

- 1.3.1 the declaration of National Road N1, Section 20: from Armadale to Midrand as a continuous toll road and the establishment of electronic toll points, dated 28 March 2008 and published as Government Notice No. 349 in Government Gazette No. 30912 dated 28 March 2008. A copy of Government Notice No. 349 is attached hereto as annexure "D1";

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- 1.3.2 the declaration of National Road N1, Section 21, from Midrand to the Proefplaas Interchange as a continuous toll road and the establishment of electronic toll points, dated 28 March 2008 and published as Government Notice No. 350 in Government Gazette No. 30912 dated 28 March 2008. A copy of Government Notice No. 350 is attached hereto as annexure "D2";
- 1.3.3 the declaration of National Road N3: Section 12: from Old Barn Interchange to the Buccleuch Interchange as a continuous toll road and the establishment of electronic toll points, dated 28 March 2008 and published as Government Notice No. 351 in Government Gazette No. 30912 dated 28 March 2008. A copy of Government Notice No. 351 is attached hereto as annexure "D3";
- 1.3.4 the declaration of National Road N4: Section 1: from Koedoespoort to Hans Strydom Drive as a continuous toll road and the establishment of electronic toll points, dated 28 March 2008 and published as Government Notice No. 352 in Government Gazette No. 30912 dated 28 March 2008. A copy of Government Notice No. 352 is attached hereto as annexure "D4";

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- 1.3.5 the declaration of National Road N12: Section 18: from Diepkloof Interchange to Elands Interchange as a continuous toll road and the establishment of electronic toll points, dated 28 March 2008 and published as Government Notice No. 353 in Government Gazette No. 30912 dated 28 March 2008. A copy of Government Notice No. 353 is attached hereto as annexure "D5";
- 1.3.6 the declaration of National Road N12: Section 19: from Gillooly's Interchange to the Gauteng/Mpumalanga Provincial Border as a continuous toll road and the establishment of electronic toll points, dated 28 March 2008 and published as Government Notice No. 354 in Government Gazette No. 30912 dated 28 March 2008. A copy of Government Notice No. 354 is attached hereto as annexure "D6"; and
- 1.3.7 the declaration of National Road R21 (also known as the P157-1 and P157/2) - Sections 1 and 2: from Hans Strydom Drive to Rietfontein Interchange (N12): Province of Gauteng, as a toll road and the establishment of electronic toll points, dated 28 July 2008 and published as Government Notice No. 800 in Government Gazette No. 31273 dated 28 July 2008. A copy of Government Notice No. 355 is attached hereto as annexure "D7".

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1.4 The toll declarations are, however, unlawful and invalid because the plaintiff failed to comply with:

1.4.1 section 27(4) of the SANRAL Act; *alternatively*,

1.4.2 section 27(4) of the SANRAL Act read with section 4(1) of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA")

before applying to the Minister of Transport ("the Minister") in terms of section 27(1)(a) read with 27(4) of the SANRAL Act for approval.

1.5 The plaintiff failed to comply with section 27(4) of the SANRAL Act, *alternatively* section 27(4) of the SANRAL Act read with section 4(1) of PAJA, in that:

1.5.1 the content of each of the notices of intent to toll published by the plaintiff in terms of section 27(4)(a) of the SANRAL Act prior to its applications to the Minister for approval ("the notices of intent to toll") was materially inadequate and/or irregular in that the notices:

1.5.1.1 failed to inform members of the public, in general, and road-users of the GFIP highways, in particular:



- (a) that the proposed toll road in respect of which notice of intent to toll was given was one of seven planned toll roads in a planned open toll road scheme that would involve tolling the entire network of national highways running round, through and between Tshwane, Johannesburg and Ekurhuleni;
- (b) that the GFIP highways would be upgraded, and the nature and extent of such upgrades;
- (c) that the anticipated aggregate cost of the first phase of upgrades of the GFIP highways would be approximately R15 billion (2007 Rand);
- (d) that the cost of the upgrades would be funded entirely by means of tolling;
- (e) that the anticipated amount of toll to be levied from users was 50c per kilometre;

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(f) that the tolling of the GFIP highways entailed a cost of approximately R1.7 billion (2007 Rand) in toll infrastructure, and an anticipated additional annual amount of approximately R447 million (2007 Rand) for administration and collection of toll;

(g) that the cost of toll infrastructure and of toll administration and collection would also be funded entirely by means of tolling;

1.5.1.2 were objectively misleading in that they created the erroneous impression that the existing road (without upgrades) would be tolled;

1.5.1.3 failed, by reason of the omissions referred to in paragraph 1.5.1.1 above, to place the public in a position to meaningfully comment and make representations;

1.5.2 the extent of the publication of the notices of intent to toll was materially inadequate and/or irregular in that:

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- 1.5.2.1 in the case of the N1, N3, N14 and N12, the notices of intent to toll were published only in a single edition of the Government Gazette and in the inner pages of a single edition of the Beeld, the Star, the Sowetan, Mail & Guardian and the Sunday Times;
- 1.5.2.2 in the case of the R21, the notice of intent to toll were published only in a single edition of the Government Gazette and in the inner pages of a single edition of the Beeld, the Pretoria News, the Star and the Sowetan;
- 1.5.2.3 in all instances there was no indication on the front page of the newspapers referred to above drawing the attention of the reader to the notice of intent to toll contained therein;
- 1.5.2.4 in most instances, the publication of the notices of intent to toll in the newspapers referred to above were contained in the business section, or the business section contained within the international section of the newspaper;

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- 1.5.2.5 the notices of intent to toll were only published in English and Afrikaans, and not in any other language;
- 1.5.2.6 notice of intent to toll the GFIP highways was not provided in the mass media, and in particular no use was made of television, radio, mobile telephone campaigns or social media;
- 1.5.2.7 notice of intent to toll was not brought to the attention of the public in general, and road users of the GFIP highways in particular, by the posting of suitable road signs on the proposed toll roads to ensure that such notices were effectively brought to the attention of the commuters and other road users who would be materially affected by the proposed toll declarations;
- 1.5.2.8 notice of intent to toll was not given to clearly identifiable institutions or organisations whose members would be materially affected by the declaration of the roads as toll roads;

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1.5.3 the public was afforded insufficient time to comment and make representations in response to the notices of intent to toll in that the plaintiff provided only the statutory minimum of 30 days to the public and 60 days to affected provincial and municipal authorities to comment and make representations in the context where:

1.5.3.1 the notices of intent to toll provided materially inadequate information about the proposed declaration and about the planned open toll road scheme;

1.5.3.2 the proposed toll road scheme was unique in its size, magnitude, complexity and potential impact on secondary municipal and provincial roads;

1.5.3.3 open road tolling of the kind and scale planned for the GFIP highways had never before been implemented or experienced in South Africa;

1.5.3.4 large scale urban tolling had never before been implemented or experienced in South Africa;

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- 1.5.3.5 South Africa had never before been confronted with the plan by the roads agency to toll all the major arterial routes in an urban area without making provision for reasonable alternative routes;
- 1.5.3.6 the potential social and economic impact of the toll road scheme was far-reaching and unexplored by all the intended recipients of the notices of intent to toll;
- 1.5.4 interested and affected parties who responded to the notices of intent to toll were not provided with the plaintiff's subsequent proposals to the Minister, or with any of the other material placed before the Minister as part of the applications on 10 January 2008 (in respect of the various sections of the N1, N3, N4 and N12) and 9 July 2008 (in respect of the two sections of the R21) for approval, and were not otherwise informed how the plaintiff intended to accommodate comments and representations received;
- 1.5.5 the plaintiff did not, alternatively did not fairly and properly, consider comments and representations received from the public pursuant to the notices of intent to toll that the GFIP highways should not be declared toll roads in that:

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- 1.5.5.1 the plaintiff's Board did not read and consider the comments and representations made by respondents at all;
- 1.5.5.2 complaints by those who did respond that the extent of the publication had been insufficient to adequately inform the public of the intent to toll the GFIP highways were ignored;
- 1.5.5.3 complaints by those who did respond that the notices of intent to toll contained insufficient information to enable the public to meaningfully respond were ignored;
- 1.5.5.4 the fact that not a single respondent demonstrated any knowledge of the indicative cost of tolling of 50 cents per kilometre, and a number of respondents positively stated that such costs were unknown, was ignored;
- 1.5.5.5 objections that there were not any, or not sufficient, reasonable public transport alternatives available for use was not properly considered;



- 1.5.5.6 objections by those who responded that there were not any, or not sufficient, reasonable alternative routes were ignored;
- 1.5.5.7 proposals that the future maintenance or future upgrades of the proposed toll roads be funded instead by means of the fuel levy were either ignored (in the case of the sections of the N1, N3, N4 and N12 forming part of the GFIP highways) or not properly considered (in the case of the R21).
- 1.6 The toll declarations are therefore unlawful and invalid in terms of
- 1.6.1 sections 6(2)(b), 6(2)(c), 6(2)(f) and/or 6(2)(i) of PAJA; and/or
- 1.6.2 section 1(c) of the Constitution.
- 1.7 In the premises, the defendant is not liable, and cannot be ordered, to pay the claimed amount.

WHEREFORE the defendant prays that the plaintiff's claim be dismissed with costs



2. SECOND SPECIAL PLEA

2.1 Paragraphs 1.1 to 1.3 hereof are repeated.

2.2 The toll declarations were made on the strength of the following approvals ("the Minister's approvals") granted by the Minister in response to the applications for approval received by him in January 2008 and July 2008:

2.2.1 the approvals dated 11 February 2008 that the following sections of national road be declared toll roads:

2.2.1.1 sections 20 and 21 of the N1;

2.2.1.2 section 12 of the N3;

2.2.1.3 section 1 of the N4;

2.2.1.4 sections 18 and 19 of the N12;

2.2.2 the approvals dated 13 July 2008 that sections 1 and 2 of the R21 be declared toll roads.

2.3 The Minister's approvals are unlawful and invalid in that:



2.3.1 prior to granting them, the Minister failed to consider, *alternatively* failed properly to consider one or more or all of the following materially relevant considerations:

2.3.1.1 the costs of toll operations;

2.3.1.2 alternative methods of funding the GFIP;

2.3.1.3 whether road users in Gauteng had any reasonable alternative routes to the GFIP highways available to them;

2.3.1.4 the feasibility and/or practical impossibility of enforcing open road tolling of the GFIP highways; and/or

2.3.1.5 in deciding whether to grant approval, the Minister improperly fettered his discretion and/or abdicated his decision-making power by considering himself to be bound to follow the Cabinet decision in July 2007 to approve the Gauteng Freeway Improvement Project ("GFIP") as a state implemented toll road scheme; and/or

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2.3.1.6 in deciding whether to grant approval, the Minister failed to consider the substance of the application and instead limited his role to checking whether the plaintiff had complied with the letter of section 27(4) of the SANRAL Act.

2.4 In the premises, the Minister's approvals are unlawful and invalid:

2.4.1 in terms of sections 6(2)(b), 6(2)(d), 6(2)(e)(iii), 6(2)(e)(iv), 6(2)(e)(vi), 6(2)(f)(ii)(aa), 6(2)(h) and/or 6(2)(i) of PAJA; *alternatively* section 1(c) of the Constitution;

2.4.2 because the process followed by the Minister in deciding to grant the approvals was irrational and in conflict with Section 1(c) of the Constitution;

2.4.3 because the Minister's decisions to grant the approvals were irrational and in conflict with Section 1(c) of the Constitution.

2.5 In consequence, the toll declarations, made on the strength of the Minister's approvals, are unlawful and invalid.

2.6 Paragraph 1.7 hereof is repeated.

WHEREFORE the defendant prays that the plaintiff's claim be dismissed with costs

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3. **THIRD SPECIAL PLEA**

3.1 Paragraphs 1.1 to 1.3 hereof are repeated.

3.2 The toll declarations are unlawful and invalid because they were not preceded by lawful and valid decisions by the plaintiff's Board in terms of section 27(1)(a)(i) read with section 18(5) of the SANRAL Act to declare the GFIP highways toll roads.

3.3 The plaintiff's Board did not:

3.3.1 resolve prior to or on 28 March 2008, that the sections of the N1, N3, N4 and N12 referred to in paragraph 1.2.1.1 to 1.2.1.4 hereof be declared toll roads; or

3.3.2 resolve prior to or on 28 July 2008, that sections 1 and 2 of the R21 be declared toll roads.

3.4 The toll declarations are accordingly unlawful and invalid in terms of

3.4.1 section 6(2)(a)(i), 6(2)(a)(ii), 6(2)(b), 6(2)(d) and/or 6(2)(i) of PAJA; and/or

3.4.2 section 1(c) of the Constitution.

3.5 Paragraph 1.7 hereof is repeated.

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WHEREFORE the defendant prays that the plaintiff's claim be dismissed with costs

4. **FOURTH SPECIAL PLEA**

4.1 In the event that the court finds that the plaintiff's Board in fact resolved to declare the GFIP highways to be toll roads in terms of section 27(1)(a)(i) read with 18(5) of the SANRAL Act, the defendant pleads as follows in the alternative to the Third Special Plea.

4.2 Paragraphs 1.1 to 1.3 hereof are repeated.

4.3 The decisions by the plaintiff's Board to declare the GFIP highways to be toll roads are unlawful and invalid because in making them, the plaintiff's Board:

4.3.1 failed to consider alternative methods of funding;

4.3.2 improperly and/or unlawfully excluded the fuel levy as a method of funding for GFIP;

4.3.3 failed to consider whether the enforcement of open road tolling was practically possible in the case of GFIP;

4.3.4 failed to consider whether there were reasonable alternative routes to the GFIP highways available to the road using public;

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- 4.3.5 failed to consider the cost of toll operations;
 - 4.3.6 failed to consider the social and economic impact of tolling GFIP highways;
 - 4.3.7 failed to consider the comments and representations made by the public in response to the notices of intent to toll published on 12 October 2007 and on 18 April 2008 respectively; and/or
 - 4.3.8 fettered its discretion by regarding as binding upon it the Cabinet decision in July 2007 to approve GFIP as a state implemented toll road scheme.
- 4.4 Each of the considerations set out paragraphs 4.3.1 to 4.3.6 above was a materially relevant consideration that the plaintiff's Board was required to have taken into account.
- 4.5 In the premises, the decisions by the plaintiff's Board to declare the GFIP highways toll roads were unlawful and invalid
- 4.5.1 in terms of sections 6(2)(c), 6(2)(d), 6(2)(e)(iii), 6(2)(e)(iv), 6(2)(e)(vi), 6(2)(f)(ii)(aa), 6(2)(f)(ii)(cc), 6(2)(h) and/or 6(2)(i) of PAJA; *alternatively* Section 1(c) of the Constitution;

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- 4.5.2 because the process followed by the plaintiff's Board making such decisions was irrational and in conflict with Section 1(c) of the Constitution;
- 4.5.3 because the decisions by the plaintiff's Board to declare the GFIP highways toll roads were irrational and in conflict with Section 1(c) of the Constitution.

4.6 Paragraph 1.7 hereof is repeated.

WHEREFORE the defendant prays that the plaintiff's claim be dismissed with costs

5. **FIFTH SPECIAL PLEA**

- 5.1 Paragraphs 1.1 to 1.3 hereof are repeated.
- 5.2 The toll declarations are unlawful and invalid because they were not preceded by lawful and valid decisions by the Minister for Environmental Affairs *alternatively* the Director General of Environmental Affairs, to grant the following environmental authorisations in terms of section 24 of the National Environmental Management Act 107 of 1998 ("NEMA") and the Regulations and Notices made thereunder:
- 5.2.1 Environmental Authorisation Reference 12/12/20/918 for the proposed upgrading of National Route 1 Section 20 and 21

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between Buccleuch and Brakfontein Interchanges to commence and continue with activities 1(m), 1(v), 4, 7, 14 and 15 listed in the schedule to Government Notice No. R386 published in Government Gazette No 28753 dated 21 April 2006 ("GNR 386");

- 5.2.2 Environmental Authorisation Reference 12/12/20/919 for the proposed upgrading of National Route 1 Section 20 between Buccleuch and Fourteenth Avenue Interchanges to commence and continue with activities 1(m), 1(v), 4, 7, 14 and 15 listed in the schedule to GNR 386;
- 5.2.3 Environmental Authorisation Reference 12/12/20/920 for the proposed upgrading of National Route 1 Section 20 between Misgund and Fourteenth Avenue Interchanges to commence and continue with activities 1(m), 1(v), 4, 7, 14 and 15 listed in the schedule to GNR 386;
- 5.2.4 Environmental Authorisation Reference 12/12/20/922 for the proposed upgrading of National Route 3 Section 12 between Dwars in die Weg and Geldenhuys Interchanges to commence and continue with activities 1(m), 1(v), 4, 7, 14 and 15 listed in the schedule to GNR 386;

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- 5.2.5 Environmental Authorisation Reference 12/12/20/923 for the proposed upgrading of National Route 12 Section 18 between Uncle Charlies and Elands Interchanges to commence and continue with activities 1(m), 1(v), 4, 7, 14 and 15 listed in the schedule to GNR 386;
- 5.2.6 Environmental Authorisation Reference 12/12/20/926 for the proposed upgrading of National Route 1 between Brakfontein and the Waterkloof Interchanges to commence and continue with activities 1(m), 1(v), 4, 7, 14 and 15 listed in the schedule to GNR 386;
- 5.2.7 Environmental Authorisation for the proposed upgrading of the Regional Route 21 between the N12 and Hans Strijdom Drive Interchanges to commence and continue with activities set out in paragraph 1 of section B of the undated basic assessment report compiled by Arup/ Tswelopele Environmental.
- 5.3 The issue of lawful and valid environmental authorisations was a condition precedent to the toll declarations.
- 5.4 The grant of the environmental authorisations referred to in paragraph 5.2 above were unlawful and invalid in that:

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- 5.4.1 the content of each of the plaintiff's applications for an environmental authorisation and/or of the notices to the public of such applications was materially defective because it failed to disclose:
- 5.4.1.1 in addition to the plaintiff's intention to undertake the upgrades and improvements constituting the GFIP highways, its intention to fund such upgrades and improvements through e-tolling;
 - 5.4.1.2 the socio-economic impacts that the proposed tolling would have on the environment;
- 5.4.2 those environmental authorisations were granted by the Chief Director: Environmental Impact Management who lacked authority to take such decisions;
- 5.4.3 in granting those environmental authorisations, the Chief Director failed to consider one or more or all of the following materially relevant considerations:
- 5.4.3.1 the socio-economic impact that the proposed tolling would have on the environment;



- 5.4.3.2 the cumulative impact on the environment of recouping costs through tolling on the environment;
 - 5.4.3.3 the feasible and reasonable alternatives to recouping costs through tolling; and
 - 5.4.3.4 the appropriate conditions and mitigation measures to be imposed, given these impacts.
- 5.5 In the premises, the environmental authorisations are unlawful and invalid:
- 5.5.1 in terms of sections 6(2)(a)(i), 6(2)(b), 6(2)(c), 6(2)(e)(iii), 6(2)(e)(vi), 6(2)(f)(ii)(aa), 6(2)(h) and/or 6(2)(i) of PAJA;
 - 5.5.2 in terms of section 1(c) of the Constitution.
- 5.6 In consequence, the toll declarations, made on the strength of the environmental authorisations, are unlawful and invalid.
- 5.7 Paragraph 1.7 hereof is repeated.

WHEREFORE the defendant prays that the plaintiff's claim be dismissed with costs



6. **SIXTH SPECIAL PLEA**

- 6.1 Paragraphs 1.1 to 1.3 hereof are repeated.
- 6.2 Regulation 6(3) of the e-Road Regulations requires the plaintiff to notify a registered user, within 32 days after its use of a toll road, of the amount of toll payable and the date for payment, by sending an invoice to the user's last known address.
- 6.3 Regulation 6(5) of the e-Road Regulations requires the plaintiff to notify an alternate user, within 32 days after its use of a toll road but after the expiry of the grace period as defined in the 2013 and 2015 Conditions of Toll and if it has not registered as a user in the interim, of the amount of toll payable and the date for payment, by sending an invoice to the user's last known address provided in terms of the National Road Traffic Act.
- 6.4 The plaintiff alleges that:
- 6.4.1 it sent various invoices in respect of each of the toll transactions to the defendant by post, at its last known address provided in terms of the National Road Traffic Act 93 of 1996; and

(Particulars of Claim paragraphs 20 to 23)

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6.4.2 it brought the full outstanding amount of e-tolls as at 31 August 2015 to the defendant's attention on or about 30 November 2015, by sending a statement to an (unspecified) email address of an unidentified representative of the defendant.

(Particulars of Claim paragraph 24)

6.5 The plaintiff has not taken reasonable steps to apprise the defendant of the outstanding toll amount and/or to ensure that the invoices would have come to the attention of a reasonable user, in that it:

6.5.1 failed to send invoices to the defendant's last known address as recorded on the its e-toll account, despite the fact that the defendant, on the plaintiff's version, held an e-toll account;

6.5.2 failed to send an electronic message to the defendant's e-mail address or cellular telephone;

6.5.3 failed to cause the invoices to be sent by registered mail, rather than ordinary mail;

6.5.4 failed to ensure that the invoices were sent to an address at which they would come to the defendant's attention and/or be timeously collected; and/or

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- 6.5.5 failed to send invoices at all during the periods referred to in paragraph 21 of the Particulars of Claim.
- 6.6 The plaintiff has therefore failed to effect delivery of the invoice and/or to notify the defendant of the toll payable within the prescribed period.
- 6.7 In the premises,
- 6.7.1 the defendant is not liable for the alleged use of the GFIP highways during the period 3 December 2013 to 31 August 2015; *alternatively*
- 6.7.2 the plaintiffs claim is premature.
- 6.8 Paragraph 1.7 hereof is repeated.

WHEREFORE the defendant prays that the plaintiffs claim be dismissed with costs

7. **SEVENTH SPECIAL PLEA**

- 7.1 Paragraphs 1.1 to 1.3 hereof are repeated.
- 7.2 The plaintiff alleges that:
- 7.2.1 On 19 November 2013, the Head of the Department of Transport made known by publication in GNR887 in

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Government Gazette 37038 that the Minister had determined, in terms of section 27(3)(a) of the SANRAL Act, the tolls to be levied on the GFIP toll road from 3 December 2013. A copy of that notice (“the 2013 Toll Tariffs”) is attached as “E1”;

(Particulars of Claim paragraph 12.2)

- 7.2.2 On 17 June 2015, the Head of the Department of Transport made known by publication in GNR524 in Government Gazette 38884 (as corrected by GN579 in Government Gazette 38949, GN645 in Government Gazette 39027 and GN972 in Government Gazette 39298) that the Minister had determined, in terms of section 27(3)(a) of the SANRAL Act, the tolls to be levied on the GFIP toll road from 2 July 2015. A copy of that notice (“the 2015 Toll Tariffs”) is attached as “E2”;

(Particulars of Claim paragraph 13.2)

- 7.2.3 The 2013 and 2015 Toll Tariff prescribe the toll tariff that must be paid by registered and unregistered alternate users for the various classes of vehicle during the period referred to in Schedule A to the Particulars of Claim.

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(Particulars of Claim paragraph 18)

- 7.3 The 2013 and 2015 Toll Tariffs both stipulate a toll tariff amount inclusive of value-added tax ("VAT"), such that VAT is payable on every e-toll transaction recorded.
- 7.4 Section 7(1) of the Value-Added Tax Act 89 of 1991 ("the VAT Act") permits and requires VAT to be levied and paid in respect of:
- 7.4.1 the supply by any vendor of goods or services supplied in the course or furtherance of any enterprise carried on by such vendor;
 - 7.4.2 the importation of goods into the Republic; and
 - 7.4.3 the supply of imported services.
- 7.5 The activities engaged in by the plaintiff *vis-à-vis* the defendant do not constitute the supply of services, in that:
- 7.5.1 The plaintiff does not own, alternatively only owns in trust, the GFIP highways or supply or make them available to the defendant and other road users. The GFIP highways are a national asset that are controlled and managed by the plaintiff.

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- 7.5.2 The defendant and other road users are entitled to use the GFIP highways by virtue of their status as public roads, and not because of any grant by the plaintiff. It is not the plaintiff's gift to confer an entitlement to use the GFIP highways on the public.
- 7.5.3 Insofar as the plaintiff supplies services in relation to the rehabilitation, maintenance and control of the GFIP toll roads, it supplies those services to the State and/or to national government, and not to the defendant and other road users.
- 7.6 Alternatively, if the Court determines that the plaintiff provides goods or services, the defendant alleges that they are not supplied in the course or furtherance of an enterprise by the plaintiff, in that:
- 7.6.1 SANRAL is a "public authority" as defined in the VAT Act, and the provisions of paragraph (b)(i) of the definition of "enterprise" in section 1 accordingly apply to it;
- 7.6.2 Paragraph (b)(i) gives the Commissioner the power to notify a public authority that its supplies will "be treated as supplies made in the course or furtherance of an enterprise", if the Minister is satisfied that such supplies "are of the same kind or are similar to taxable supplies ... which are or might be



made by any person other than such public authority in the course or furtherance of any enterprise”.

- 7.6.3 The Commissioner has not notified the plaintiff that its supplies are to be treated as supplies made in the course or furtherance of an enterprise, and the plaintiff's supplies are consequently not made in the course or furtherance of any enterprise carried on by it, as contemplated in section 7(1).
- 7.6.4 Alternatively to paragraph 7.6.3 and to the extent that the Commissioner has so notified the plaintiff, such notification is invalid because the Minister was not, or could not rationally and reasonably have been, satisfied that the plaintiff's supplies are of the same kind or are similar to taxable supplies which are or might be made by any person other than such public authority in the course or furtherance of any enterprise.
- 7.7 The plaintiffs' activities vis-à-vis the defendant are consequently not subject to value-added tax.
- 7.8 The 2013 and 2015 Toll Tariffs purport to authorise the plaintiff to levy and collect VAT, when it has no lawful entitlement or duty to do so. They are consequently ultra vires and invalid.



7.9 No toll tariff exclusive of VAT has been determined by the Minister in terms of section 27(3)(a) of the SANRAL Act, or published in the Gazette in terms of section 27(3)(c). There is accordingly no lawful toll amount that may be levied.

7.10 Paragraph 1.7 hereof is repeated.

WHEREFORE the defendant prays that the plaintiff's claim be dismissed with costs

8. **EIGHTH SPECIAL PLEA**

8.1 Paragraphs 1.1 to 1.3 hereof are repeated.

8.2 The plaintiff failed to provide reasonable alternative, non-tolled routes to the GFIP highways.

8.3 That failure violated the defendant's constitutional rights to:

8.3.1 freedom of movement (as entrenched in section 21(1) of the Constitution);

8.3.2 equal benefit of the law (as entrenched in section 9(1) of the Constitution) in that, by imposing the toll, the plaintiff arbitrarily burdened the use of national roads such that people who cannot afford to pay the toll are limited in their use and enjoyment of a public facility.

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8.4 The toll declarations are consequently unconstitutional and invalid.

8.5 Paragraph 1.7 hereof is repeated.

WHEREFORE the defendant prays that the plaintiffs claim be dismissed with costs

PLEA OVER

9. **AD PARAGRAPHS 1-3**

The defendant admits the allegations contained herein.

10. **AD PARAGRAPHS 4-7**

10.1 On 28 March 2008 and 28 July 2008, the plaintiff purported to declare the sections of national road identified in paragraphs 5.1 to 5.4 and 7.1 to 7.2 of the Particulars of Claim to be toll roads. Copies of such purported declarations are attached hereto as "D1" to "D7".

10.2 Save as aforesaid, the allegations contained herein are denied.

10.3 Without derogating from the generality of the foregoing denial, the defendant repeats paragraphs 1 to 5, and 8 hereof.

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11. ADPARAGRAPH 8

11.1 The defendant admits the GFIP highways are located within the court's jurisdiction.

11.2 Save as aforesaid, the defendant notes the allegation contained herein.

12. AD PARAGRAPHS 9-11

The defendant notes the allegations contained herein.

13. AD PARAGRAPHS 12-13

13.1 The defendant admits:

13.1.1 that on 19 November 2013:

13.1.1.1 the plaintiff purported to publish the 2013 conditions of toll in terms of section 27(1)(b) of the SANRAL Act;

13.1.1.2 the head of Department of Transport purported to publish the 2013 toll tariffs in terms of section 27(3)(a) of the SANRAL Act;

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13.1.2 that on 17 June 2015:

13.1.2.1 the plaintiff purported to publish the 2015 conditions of toll in terms of section 27(1)(b) of the SANRAL Act; and

13.1.2.2 the head of department purported to publish the 2015 toll tariffs determined by the Transport Minister in terms of section 27(3)(a) of the SANRAL Act.

13.2 The defendant denies that the 2013 conditions of toll, the 2013 toll tariffs, the 2015 conditions of toll or the 2015 toll tariffs are lawful and valid.

13.3 Without derogating from the generality of the foregoing denial, the defendant pleads that:

13.3.1 the validity of the administrative action identified in paragraphs 12.1, 12.2, 13.1 and 13.2 of the Particulars of Claim depended on the legal validity of the toll declarations;

13.3.2 the toll declarations were unlawful and invalid for the reasons set out in paragraphs 1 to 5, and 8 hereof; and

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13.3.3 by consequence, the 2013 conditions of toll, the 2013 toll tariffs, the 2015 conditions of toll or the 2015 toll tariffs are unlawful and invalid.

14. AD PARAGRAPHS 14-17

14.1 The defendant denies the allegations contained herein.

14.2 Without derogating from the generality of the foregoing denial, the defendant denies each and every alleged e-toll transaction contained in annexure "A" to the Particulars of Claim.

15. AD PARAGRAPH 18

15.1. The defendant repeats paragraphs 13.2 and 13.3 hereof.

15.2. Save as aforesaid, the defendant denies the allegations contained herein.

16. AD PARAGRAPH 19

16.1 The defendant admits not paying the plaintiff the amount, or part thereof, for e-toll liability allegedly incurred between 3 December 2013 and 31 August 2015.

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16.2 The defendant denies it is liable to pay the plaintiff the claimed amount, or any amount at all.

17. **AD PARAGRAPHS 20-25**

The defendant denies the allegations contained herein.

18. **AD PARAGRAPH 26**

18.1 The defendant admits not paying the plaintiff the claimed amount, or part thereof, for e-toll liability allegedly incurred between 3 December 2013 and 31 August 2015.

18.2 Save as aforesaid, the defendant denies the allegations contained herein.

19. **AD PARAGRAPHS 27**

The defendant denies the allegations contained herein, including the entire content of the schedule.

20. **AD PARAGRAPH 28**

20.1 The defendant notes the allegations contained herein.

20.2 The defendant denies, however, that:

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- 20.2.1 it is lawful for the plaintiff to charge VAT on tolls;
- 20.2.2 the 2013 and 2015 tariffs notices comply with section 7(1) of the VAT Act;
- 20.2.3 invoices issued by the plaintiff for e-toll liability comply with and/or section 20(2) or 20(4) read with section 20(1) of the VAT Act.

20.3 Without derogating from the generality of the foregoing denial, the defendant repeats paragraphs 7.1 to 7.9 hereof.

21. AD PARAGRAPH 29

The defendant denies the allegations contained herein.

22. AD PARAGRAPHS 30-31

22.1 The defendant denies that it is liable to pay to the plaintiff the amount claimed or any amount at all.

22.2 Save as aforesaid, the defendant denies the allegations contained herein.

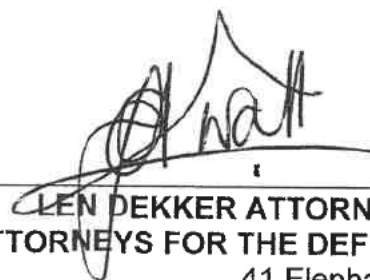
WHEREFORE the defendant prays that the plaintiff's claim be dismissed with costs

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DATED AT SANDTON ON THIS THE 21st DAY OF SEPTEMBER 2017



JOHANNES CHRISTIAN VAN DER WALT
 practising attorney with Right of Appearance
 In the High Court of South Africa in terms of
 section 4(2) of the Right of Appearance in Court
 Act, Act 62 of 1995



LEN DEKKER ATTORNEYS INC
ATTORNEYS FOR THE DEFENDANT

41 Elephant Street
 Monument Park
 Pretoria
 Tel: 012 346 8774
 Fax: 086 517 4770
 Ref: JCvdW/mn/IH0585.01

TO: **THE REGISTRAR OF THE ABOVE
 HONOURABLE COURT**

AND TO: **WERKSMANS INCORPORATED**
 Plaintiff's Attorney
 155 - 5th Street Sandown, Sandton
 Tel: 011 535 8459 / 011 535 8157
 E-mail: [REDACTED]
 Ref: Mr T Boswell/ Ms D Pisanti / SOUT1.1/6
C/O BRAZINGTON MCCONNELL ATTORNEYS
 Second Floor, Hatfield Mall 424 Hilda Street
 Hatfield, Pretoria Tel: 012 430 4303
 E-mail: [REDACTED]
 Ref: Mr A McConnell

