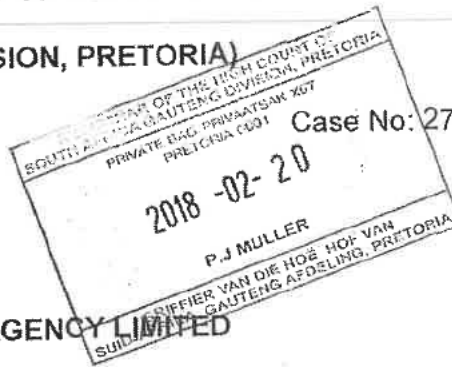


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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)



Case No: 27507/16

In the matter between:

SOUTH AFRICAN NATIONAL ROADS AGENCY LIMITED

Plaintiff

and

[REDACTED]

Defendant

DEFENDANT'S REJOINDER

A. REJOINDER TO *IN LIMINE* GROUNDS

First in limine objection: Alleged delay under PAJA

1. Ad paragraphs 1-6

1.1 The defendant admits the allegations contained in paragraphs 2, 4.3, 5 and 6.

1.2 Save as aforesaid, the defendant denies the allegations contained herein. Without derogating from the generality of the foregoing denial, the defendant pleads in amplification that:

1.2.1 in the special pleas, the defendant pleads that the administrative action referred to in paragraph 1 of the replication ("the decisions") are unlawful and invalid on the grounds set out in section 6(2) of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA");

1.2.2 the defendant pleads such unlawfulness and invalidity as a defence in response to the plaintiff's attempt to coerce payment of e-toll in the action;

1.2.3 the action proceedings instituted by the plaintiff are not proceedings designed to impeach the validity of the decisions;

1.2.4 the defendant:

1.2.4.1 has not instituted a judicial review in terms of section 6(1) of PAJA;

1.2.4.2 seeks no order in terms of section 8 of PAJA in the action;

1.2.4.3 prays only that the plaintiff's claim be dismissed with costs.

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1.2.5 Accordingly, section 7(1) does not apply and the defendant is not obliged to apply to extend the period of 180 days referred to in that section.

1.2.6 In the alternative and in the event that section 7(1) of PAJA applies, then the defendant pleads that it is in the interests of justice that the period of 180 days be extended in terms of section 9 of PAJA and applies for an extension on the following grounds:

1.2.6.1 the defendant first learnt of the plaintiff's intention to toll the sections of the N1, N3, N4, N12 and R21 constituting the GFIP network ("the GFIP highways") in or about February 2011 when construction of a number of e-toll gantries neared completion and the plaintiff published the first e-toll tariff notice. The plaintiff withdrew the notice shortly thereafter, in view of the widespread public outcry in reaction to such notice;

1.2.6.2 the tolling of the GFIP network was suspended in March 2011, pending attempts by the plaintiff, the National Department of Transport and the Gauteng Legislature to engage with the public



and stakeholders. The decision to toll was only reinstated in or about February 2012;

1.2.6.3 the defendant did not know of plaintiff's intention to toll the GFIP highways before that date;

1.2.6.4 in the circumstances, the defendant became aware, and could only reasonably have been expected to become aware, of the decisions for the purposes of section 7(1) of PAJA in or about March 2011;

1.2.6.5 in or about March 2011 *alternatively* at or about the time the 180-day period expired in August 2011:

1.2.6.5.1. the upgrades of the GFIP highways, inclusive of e-toll gantries, had already been completed or were substantially complete; and

1.2.6.5.2. the debt incurred by the plaintiff in upgrading the GFIP highways and installing the infrastructure for the e-toll system had already been

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incurred, or had been substantially
incurred;

1.2.6.6 the defendant, as a small business with limited financial resources, could not afford to instruct legal representatives and institute review proceedings against the plaintiff and/or the State to set the decisions aside, nor did it possess the necessary legal expertise at the time to consider judicial review proceedings;

1.2.6.7 the defendant could in any event not reasonably be expected to institute review proceedings before February 2012, given the prevailing uncertainty over whether e-tolling of the GFIP highways would be proceeded with;

1.2.6.8 the defendant did not pay the first e-toll invoice received by it, because the defendant regarded e-tolling unfair, unreliable, unaffordable and unlawfully imposed by the plaintiff;

1.2.6.9 summons was ultimately served on the defendant on 11 April 2016;

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- 1.2.6.10 the defendant filed notice of intention to defend the action on 20 April 2016;
- 1.2.6.11 the defendant raised the unlawfulness and invalidity of e-tolling as a defence to the plaintiff's claim when delivering its plea in the action;
- 1.2.6.12 it would not be in the interests of justice to refuse an extension of the the 180-day period (if applicable) because the defendant will then be deprived of any opportunity to challenge the decisions at issue and instead coerced into compliance with administrative action that is unlawful and in breach of section 1(c) and 2 of the Constitution, and of PAJA;
- 1.2.6.13 the SCA expressly confirmed, in its decision of October 2013 dismissing the 2012 review of the decision to impose e-tolls, that the 180-day time bar does not limit collateral challenges;
- 1.2.6.14 the defendant cannot avoid the use of the GFIP highways during the course of its business and at the same time retain clients and generate adequate income;



1.2.6.15 should the defendant be compelled to pay e-tolls for the use of the GFIP highways during the course of its business, the business will run at a financial loss and the defendant will have no option but to retrench employees and sell some of its vehicles in an effort to remain in business;

2. Ad paragraph 7

2.1 The defendant denies the allegations contained herein and repeats paragraphs 1.2.1 to 1.2.5 hereof.

2.2 The rule of law does not permit the plaintiff to enforce unlawful administrative action.

WHEREFORE the defendant prays that the plaintiff's first point *in limine* be dismissed with costs *alternatively* that the defendant be granted an extension of time in terms of section 9 of PAJA, in order that it may defend the action on the basis that the decisions are unlawful and invalid

Second in limine objection: Alleged delay in the legality challenge

3. Ad paragraphs 8 to 9

The defendant admits the allegations contained herein.

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4. Ad paragraphs 10-12

- 4.1 The defendant admits that a party reviewing a decision under section 1(c) of the Constitution is obliged to bring that challenge within a reasonable time.
- 4.2 The defendant does not, however, apply to review any decision under section 1(c) of the Constitution.
- 4.3 In the special pleas, the defendant pleads that the decisions are unlawful and invalid as a defence to the plaintiff's attempt to coerce payment of e-toll in the action.
- 4.4 The action proceedings instituted by the plaintiff are not proceedings designed to impeach the validity of the decisions.
- 4.5 The defendant:
- 4.5.1 seeks no order reviewing and setting aside the decisions;
- 4.5.2 prays only that the plaintiff's claim be dismissed with costs.
- 4.6 The rule against unreasonable delay does not apply in respect of the defendant's collateral challenges raised as a defence to the plaintiff's claim.

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4.7 In the alternative, in the event that the rule against unreasonable delay applies, the defendant pleads that the court should condone the defendant's delay in raising the unlawfulness and invalidity of the decisions until doing so as a defence in the action and herein applies for condonation.

4.8 The defendant repeats paragraph 1.2.6 (and sub-paragraphs thereto).

WHEREFORE the defendant prays that the plaintiff's second point *in limine* be dismissed with costs *alternatively* that the defendant's delay in raising the unlawfulness and invalidity of the decisions as a defence in the action be condoned

Third point in limine: Objection of no coercive state action

5. **Ad paragraph 13**

The defendant admits raising a collateral challenge to the decisions as a defence to the plaintiff's claim.

6. **Ad paragraph 14**

The defendant denies the allegation contained herein. The circumstances in which a collateral challenge may be raised are not limited to the raising of a defensive challenge by a private party in response to coercive state action.

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7. Ad paragraphs 15-17

7.1 The defendant denies the allegations contained herein.

7.2 Without derogating from the generality of the foregoing denial, the defendant pleads that coercing payment of e-toll constitutes coercive state action, in defence to which a collateral challenge may be raised.

WHEREFORE the defendant prays that the plaintiff's third point *in limine* be dismissed with costs

Fourth point in limine: Objection that the defendant has "previously confronted the impugned decisions"

8. Ad paragraph 18.1

The defendant admits raising a collateral challenge to the decisions as a defence to the plaintiff's claim.

9. Ad paragraphs 18.2-18.3 (generally)

9.1 The defendant has not at any stage prior to the receipt of the plaintiff's summons confronted:

9.1.1 the toll declarations referred to in paragraph 1.3 of the first special plea;



9.1.2 the environmental authorisations referred to in paragraph 5.2 of the fifth special plea;

9.1.3 the toll tariff notices referred to in paragraph 7.2 of the seventh special plea and paragraph 13 of the plea; and

9.1.4 the decision by the Minister of Finance referred to in paragraph 7.6 of the seventh special plea,

in the manner or in circumstances that preclude the defendant from defending the plaintiff's attempt to coerce payment of e-toll on the basis that such decisions are unlawful and invalid.

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

10. Ad paragraph 18.3-18.3.13

The defendant denies that it has previously confronted the impugned decisions in the respects alleged or at all. Without derogating from the generality of this denial, the defendant pleads in amplification that:

10.1 the public participation processes conducted by the plaintiff in relation to the proposed declarations were neither detailed, nor sufficiently widely publicised, nor adequate;

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- 10.2 the publication of the proposed declarations did not come to the attention of the defendant and it accordingly had no knowledge thereof;
- 10.3 the promulgation of the toll declarations was not widely publicised. The plaintiff only posted a notification of the promulgation of the toll declarations in the Government Gazette and on its own website. The defendant accordingly had no knowledge of such promulgation and/or of the fact that the sections of the N1, N3, N4, N12 and R21 making up the GFIP network had been declared toll roads at the time;
- 10.4 the defendant learnt for the first time that the GFIP highways could be tolled in or about February 2011 when the first tariff notice was published and the purpose of the gantries that had been constructed on such highways thus became apparent;
- 10.5 the first tariff notice was withdrawn and the tolling of Gauteng's highways was suspended in March 2011 pending attempts by the plaintiff, the National Department of Transport and the Gauteng Legislature to engage with the public and stakeholders;
- 10.6 the defendant had no knowledge in March 2012 that OUTA and several other civil society organisations had instituted review proceedings challenging the lawfulness of the toll declarations and the environmental authorisations ("**the 2012 review**");



- 10.7 the defendant had no knowledge prior to receipt of the plaintiffs' replication that the applicants in the 2012 review claimed to have standing in those proceedings on the bases alleged in paragraph 18.3.4.1 to 18.3.4.4;
- 10.8 the defendant was not aware of the Rule 16A notice filed in the 2012 review, did not participate in those proceedings, was not represented therein by OUTA or any of the other applicants, and is not bound by the order ultimately granted;
- 10.9 the defendant was not aware of and/or did not follow the litigation during 2012 or the appeal proceedings during 2013 between the plaintiff and the applicants in the 2012 review;
- 10.10 the defendant is not a "member" of OUTA and is not receiving legal advice from OUTA. OUTA has assisted the defendant by facilitating the instruction of Len Dekker Attorneys and, later, Alet Uys Attorneys as the defendant's attorney of record, and by paying their fees on the defendant's behalf out of funds donated by the public;
- 10.11 the defendant admits that from December 2013 toll regulatory signage was posted at toll points on the GFIP highways;
- 10.12 the defendant regarded e-tolling as unfair, unreliable, unaffordable and unlawfully imposed, and accordingly refuses to pay e-tolls;



10.13 the defendant admits receiving invoices sent to it by the plaintiff from time to time on an irregular and/or inconsistent basis, but denies that the plaintiff informed the defendant of its liability to pay e-tolls on each and every occasion referred to in schedule A.

11. **Ad paragraphs 18.4 to 18.6**

The defendant denies the allegations contained herein. Without derogating from the generality of the foregoing denial, the defendant specifically denies that it has made any election that precludes it from raising a collateral challenge as a defence to the plaintiff's claim in the action.

WHEREFORE the defendant prays that the plaintiff's fourth point *in limine* be dismissed with costs

Fifth point in limine: Objection that there can be no collateral challenge on the grounds dismissed by the High Court

12. **Ad paragraphs 19.1 to 19.3**

12.1 The defendant admits that:

12.1.1 it raises eight special pleas;

12.1.2 in the review proceedings before this court under case number 17141/2012 (i.e. the 2012 review), the applicants

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applied to review and set aside the toll declarations referred to in paragraph 1.3 of the first special plea and the environmental authorisations referred to in paragraph 5.2 of the fifth special plea; and

12.1.3 this court considered and dismissed certain of the grounds on which the applicants claimed the toll declarations should be reviewed and set aside.

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

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

12.3.1 the pleaded grounds upon which the defendant claims the toll declarations are unlawful and invalid in its first, second and fourth special pleas extend beyond, or are different to, the bases relied upon by the applicants in the 2012 review;

12.3.2 in the case of the first special plea, the facts pleaded and/or grounds raised in the following paragraphs were not considered either alone or in conjunction with the balance of the facts and/or grounds pleaded:

12.3.2.1 paragraph 1.5.2.5;



12.3.2.2 paragraph 1.5.2.8 (the procedural challenge on this basis was not persisted with in the 2012 review);

12.3.2.3 paragraph 1.5.4; and

12.3.2.4 paragraphs 1.5.5 to 1.5.5.7.

12.3.3 in the case of the second special plea, the facts pleaded and/or grounds raised in the following paragraphs were not considered either alone or in conjunction with the balance of the facts and/or grounds pleaded:

12.3.3.1 paragraph 2.3.1.4;

12.3.3.2 paragraph 2.3.1.5; and

12.3.3.3 paragraph 2.3.1.6.

12.3.4 in the case of the fourth special plea:

12.3.4.1 in the 2012 review the conduct and decision-making of the plaintiff's Board was not specifically raised or impugned by the applicants and not considered by the court; and



12.3.4.2 the facts pleaded and/or grounds raised in the paragraphs 4.3.2, 4.3.7 and 4.3.8 were not considered either alone or in conjunction with the balance of the facts and/or grounds pleaded;

12.3.5 the pleaded grounds upon which the defendant claims the environmental authorisations and the toll declarations are unlawful and invalid in the fifth special plea were neither considered nor determined in the 2012 review. The applicants in the 2012 review withdrew the application to review and set aside the environmental authorisations prior to the hearing;

12.3.6 the pleaded grounds upon which the defendant claims that the toll declarations are unlawful and invalid in the eighth special plea were not raised by the applicants in the 2012 review. In addition, the applicants in the 2012 sought no relief on the basis of the facts pleaded in paragraphs 8.2 and 8.3 of the eighth special plea and this court neither considered nor determined the issues raised therein.

13. Ad paragraph 19.4

13.1 The defendant admits that the Supreme Court of Appeal dismissed OUTA's appeal against the order of this court dismissing the application.



13.2 The Supreme Court of Appeal did not, however, either consider or uphold the decision of this court on any of the grounds raised by the defendant in the first, second, and fourth special pleas.

14. **Ad paragraphs 19.5 and 20**

14.1 The defendant denies the allegations contained herein.

14.2 Without derogating from the generality of the foregoing denial, the defendant:

14.2.1 repeats paragraphs 12.3.1 to 13.2 hereof;

14.2.2 pleads that the defendant

14.2.2.1 was not a party to the 2012 review;

14.2.2.2 raises the first, second, fourth, fifth and eighth special pleas as a defence to the plaintiff's claim for payment of e-tolls; and

14.2.2.3 has not instituted review proceedings and does not claim the same relief sought by the applicants in the 2012 review; and

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14.2.3 pleads further, and in any event, that the finding by His Lordship Mr Acting Justice Vorster that there was no merit in the grounds raised by the applicants in the 2012 review was, with respect, clearly wrong.

WHEREFORE the defendant prays that the plaintiff's fifth point *in limine* be dismissed with costs

B. REJOINDER TO SPECIFIC ASPECTS OF THE REPLICATION

The plaintiff's plea of non-joinder in relation to the Second Special Plea

15. Ad paragraphs 22.1.1-22.1.2

The defendant admits the allegations contained herein only to the extent that they correctly summarise its defence to the plaintiff's claim.

16. Ad paragraphs 22.1.3 to 22.1.8

16.1 The defendant admits that:

16.1.1 the Minister's approvals have not been set aside by a court of law;

16.1.2 the defendant has not joined the Minister; and




16.1.3 the defendant has not instituted review proceedings to challenge the validity of the Minister's approvals.

16.2 The defendant denies that these steps are required in order for it to raise the unlawfulness and invalidity of the approvals as a defence to the plaintiff's claim in the action.

16.3 The defendant accordingly denies the balance of the allegations contained herein.

The plaintiff's plea relating to the absence of a valid decision by the SANRAL board

17. Ad paragraph 23.2.14

17.1 The defendant denies that the court has a discretion to suspend the unlawfulness and invalidity of the decisions when such unlawfulness and invalidity is raised as a defence to the plaintiff's attempt to enforce payment.

17.2 In the alternative, in the event that the court holds that it has such a discretion, the defendant denies that the court should exercise its discretion to suspend the invalidity of toll declarations, and should instead permit such invalidity to operate with full retrospective effect.

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17.3 Without derogating from the generality of the foregoing denial, the defendant refers to what is set out hereunder in paragraph 25 to 37 hereof.

18. **Ad paragraph 23.2.14.1**

18.1 The defendant admits that the inclusion of the R21 into the network of tolled highways in Gauteng has increased the captive nature of the network.

18.2 The defendant denies that the tolled highway network in Gauteng cannot be operated without the R21.

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

19. **Ad paragraph 23.2.14.2**

The defendant admits the allegation contained herein.

20. **Ad paragraph 23.2.14.3**

20.1 The defendant admits that the plaintiff utilised funds derived from the capital markets to pay for the upgrades to the GFIP highways.



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

21. Ad paragraph 23.2.14.4

The defendant denies the allegations contained herein.

The plaintiff's plea of non-joinder in relation to the Fifth Special Plea

22. Ad paragraph 25.1.1

The defendant admits the allegations contained herein only to the extent that they correctly summarise its defence to the plaintiff's claim.

23. Ad paragraphs 25.1.2 to 25.1.8

23.1 The defendant admits that:

23.1.1 the environmental authorisations have not been set aside by a court of law;

23.1.2 the defendant has not instituted review proceedings to challenge the validity of the environmental authorisations; and

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23.1.3 the defendant has not joined the Department of Environmental Affairs, its Minister, its Director General or any other of its officials in this action.

23.2 The defendant denies that these steps are required in order for it to raise the unlawfulness and invalidity of the environmental authorisations as a defence to the plaintiff's claim.

23.3 The defendant accordingly denies the balance of the allegations contained herein.

The plaintiff's plea of non-joinder in relation to the Seventh Special Plea

24. Ad paragraph 27.2.2.1 to 27.2.2.5

24.1 The defendant admits that:

24.1.1 the Minister of Finance and the Commissioner of the South African Revenue Service are not parties to these proceedings;
and

24.1.2 the defendant has not instituted review proceedings to challenge the validity of any determination by the Minister of Finance and/or any notification by the Commissioner that the plaintiff's supplies and services in relation to toll roads



constitute an enterprise in terms of the Value Added Tax Act
89 of 1991.

24.2 The defendant denies that these steps are required in order for it to raise the unlawfulness and invalidity of the notification referred to in paragraph 7.2 to 7.4 of the seventh special plea as a defence to the plaintiff's claim.

24.3 The defendant accordingly denies the balance of the allegations contained herein.

Rejoinder to the plaintiff's claim for an order in terms of section 172(1)(b) of the Constitution

25. Ad paragraphs 29.1-29.1.4 & 29.1.5 (generally)

25.1 The defendant raises the unlawfulness and invalidity of the decisions only as a defence to the plaintiff's claim in the action, and not as a direct challenge to, or a review of, the decisions. In consequence, the defendant seeks no remedy from the court (other than the dismissal of the plaintiff's claim) and the court is not called upon to exercise such powers as it has under section 172 of the Constitution.

25.2 The defendant accordingly denies that section 172(1) of the Constitution applies in this case.



25.3 In the alternative, should the court find that it has a discretion to suspend the invalidity of the decisions pursuant to upholding one or more or all of the special pleas, the defendant denies that it would be just and equitable for the court:

25.3.1 to suspend the unlawfulness and invalidity of the decisions for 18 months or any period at all in order to allow the plaintiff to correct the defects; or

25.3.2 to order that the defendant and/or road users to pay e-toll for the use of the GFIP highways for the period 3 December 2013 to the end of the suspension,

and contends that to the extent that any declaration of invalidity is granted, it should operate with full retrospective effect and without any suspension.

25.4 Without derogating from the generality of the foregoing denial, the defendant pleads, in addition to the considerations pleaded in paragraphs 26 to 30 below, that:

25.4.1 any order that the defendant pay e-toll for the period 3 December 2013 to the end of the suspension would deprive the defendant of effective relief and render its defensive challenge nugatory.



- 25.4.2 the plaintiff is unable to correct the defects in that the plaintiff is unable at this stage to comply with section 27(1) and 27(4) of the Act;
- 25.4.3 the plaintiff is unable at this stage to make a free and unfettered decision whether or not the Gauteng Highways should be declared toll roads or not;
- 25.4.4 the Minister of Transport is unable to make a free and unfettered decision at this stage to decide whether or not to approve the declaration of Gauteng's highways as toll roads;
- 25.4.5 any public participation process the plaintiff may undertake at this stage in terms of section 27(4) of the Act will be a sham in that the comments and representations made by the public in reaction to any notices of intent to toll that SANRAL may publish will have no meaningful or material influence on the decisions to be made by the Minister of Transport and/or the plaintiff;
- 25.4.6 the unlawfulness and invalidity of the decisions in general, and of the toll declarations in particular, are substantially a consequence of the plaintiff's own failure to make decisions and carry out its obligations in terms of the SANRAL Act in a manner that is lawful, reasonable, and procedurally fair;



25.4.7 in any event, even if the unlawfulness and invalidity of the decisions was suspended and corrected:

25.4.7.1 the enforcement of open road tolling of Gauteng's highways remains practically impossible;

25.4.7.2 the plaintiff would still be unable to raise compliance and/or collect outstanding e-tolls to a level sufficient to repay GFIP debt, pay the toll operator, and fund future maintenance and upgrades of the GFIP highways;

25.4.8 section 34 of the SANRAL Act provides the plaintiff with alternative methods funding with which it will be able to repay the debt incurred in upgrading the GFIP highways and fund the ongoing maintenance and future upgrades of Gauteng's highways;

25.4.9 use of one, or the other, or a combination of such alternative methods instead of tolling will avoid the additional cost in excess of approximately R 1.5-R2.5 billion per year of toll operations on the GFIP highways which the user and/or the South African economy would otherwise have to bear;



25.4.10 the plaintiff's failure and/or inability to collect toll sufficient to service the debt is the result of the plaintiff's own failure to be open to, and properly consider, such methods prior to effecting the upgrades;

25.4.11 the GFIP highways would in any event have been upgraded:

25.4.11.1 in 2008 and 2009, in fulfilment of South Africa's commitments in hosting the 2010 World Cup;

25.4.11.2 on account of being overdue for upgrades already well before 2008;

25.4.11.3 in order to accommodate population growth and economic expansion in Gauteng to the benefit of the country as a whole;

25.4.12 the plaintiff is not at risk of defaulting on the DMTN programme;

25.4.13 the plaintiff is not at risk of being wound up. The plaintiff is a state-owned entity that cannot be wound up and is fully underwritten by Government. In any event, section 10 of the SANRAL Act prohibits the winding up of the plaintiff except by an Act of Parliament for that purpose;



25.4.14 in the event that competing demands on the fiscus prevent Government from funding the maintenance and future upgrades of the GFIP highways from the fiscus, the plaintiff and/or Government are provided by section 34 of the SANRAL Act with funding alternative methods that do not impact upon the fiscus;

25.4.15 the alleged e-toll liability claimed by the plaintiff from the defendant in the amount of R 587 065.92 constitutes only 0.01% of the amount of R4.6 billion that the plaintiff alleges was owed to it in March 2017;

25.4.16 the defendant, on the other hand, will suffer a significant financial loss;

25.4.17 the defendant is a supplier and distributor of chemical neutralisers and emission control systems within the retail and hospitality industry. The defendant's suppliers and customers are situated *inter alia* throughout Gauteng and the defendant is unable to conduct business except using the GFIP highways;

25.4.18 being required to pay toll will cause the defendant to cease to be profitable, run at a financial loss, and force it to retrench some of its employees and sell some its vehicles in an attempt to remain in business;



25.4.19 the upholding of the defendant's special pleas will not result in the calamitous consequences pleaded by the plaintiff;

25.4.20 the upholding of the defendant's special pleas will not result in the reviewing and setting aside of the decisions which will continue to stand;

25.4.21 the plaintiff as an organ of state is obligated by the Constitution to correct unlawful and invalid decisions diligently and without delay. Despite being aware of the defects in the decisions since 2008, alternatively, September 2016 at the latest, the plaintiff has failed to approach the court to review and set aside the decisions, requested the court to suspend the invalidity, or taken any other steps to correct the defects. In this regard, the plaintiff has not acted in good faith;

25.4.22 the cost of the upgrades of the GFIP highways was substantially in excess of reasonable and market related rates. It is inequitable that the defendant and/or users of the GFIP highways be required to fund such excessive cost, interest charges on such cost, and the avoidable massive toll operations cost.

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26. **Ad paragraph 29.1.4.1**

The defendant denies the allegations contained herein and repeats paragraphs 25.4.11 hereof.

27. **Ad paragraph 29.1.4.2**

27.1 The defendant admits using the GFIP highways.

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

27.3 Without derogating from the generality of the foregoing denial, the defendant denies that the benefit of the upgrades outweighs the cost to the defendant and/or the public of e-tolling.

28. **Ad paragraph 29.1.4.3**

28.1 The defendant repeats its above response to paragraphs 18.3.1 to 18.3.13 of the plaintiff's replication.

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

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29. **Ad paragraph 29.1.4.4**

29.1 The defendant admits that the plaintiff is not seeking in the present action to impose a criminal penalty on the defendant.

29.2 The plaintiff in the action is, however, coercively enforcing unlawful and invalid administrative action.

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

30. **Ad paragraph 29.1.4.5-29.1.4.9**

30.1 The defendant admits that the upgrade of the GFIP highways was partly funded by means of the DMTN programme.

30.2 The cost of the upgrades constituted less than 40% of the aggregate debt of approximately R 32 billion due to noteholders in terms of such programme.

30.3 The defendant admits that the Government has guaranteed the DMTN programme.

30.4 The defendant denies that the cessation of the tolling of Gauteng's highways as a consequence of a refusal by the court to suspend the unlawfulness and invalidity of the decisions:

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30.4.1 will constitute an event of default of the DMTN programme;

30.4.2 will constitute a material change to the assets of the plaintiff;

30.4.3 will cause noteholders to demand repayment of all amounts outstanding in terms of the notes held by them.

30.5 In any event, the structure of the guarantee of the DMTN programme is such that any noteholder that demands repayment of all amounts outstanding in terms of a note is not entitled to declare any amount due and payable under a note without first making written demand from Government who must thereupon fail to pay the amount due under the note within 20 days.

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

31. **Ad paragraph 29.1.4.9-29.1.4.10**

31.1 The defendant denies that the assumption by Government of the plaintiff's debt incurred as a result of the Gauteng Freeway Improvement Project:

31.1.1 will place a "*funding strain*" on the fiscus;

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31.1.2 will negatively impact the credit rating of the plaintiff or of Government.

31.2 The defendant further denies that:

31.2.1 the upholding of a defensive challenge results in a declaration of invalidity;

31.2.2 the upholding of the defendant's defensive challenge "*would ... require[...]*" the plaintiff to write-off the "debt" of all users of the GFIP highways to the plaintiff;

31.2.3 the writing-off of the "debt" of all users of the GFIP highways to the plaintiff will negatively impact the credit rating of either the plaintiff or Government.

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

32. **Ad paragraph 29.1.4.12**

32.1 The defendant denies the allegation contained herein.

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33. Ad paragraph 29.1.4.13

33.1 The defendant admits that the plaintiff concluded a Design, Build and Operate contract with ETC (Pty) Ltd.

33.2 The contract was concluded for a period of 8 years as from 18 September 2009.

33.3 The defendant denies the further allegations contained herein.

34. Ad paragraph 29.1.4.14-29.1.15

34.1 The defendant admits that the plaintiff has incurred an infrastructure cost for the construction of the e-toll gantries on the GFIP highways and establishment of the electronic toll collection system.

34.2 The defendant admits that if not used for e-tolling of the GFIP highways, the gantries may be used for traffic monitoring and traffic enforcement.

34.3 The defendant admits that should the plaintiff decide, or be directed by Government, to cease e-tolling the GFIP highways, the electronic toll collection system will continue to be used for electronic toll collection on other toll roads in South Africa.

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

35. **Ad paragraph 29.1.4.16**

35.1 The defendant admits that the GFIP highways, inclusive of lighting and intelligent transport systems, will require maintenance and upgrading over the next 20 years.

35.2 Section 34 of the Act provides the plaintiff with a range of funding options as the means to funding such maintenance and upgrading.

35.3 The funding options provided, other than tolling, avoid the unnecessary added cost of approximately R1.5 to R 2.5 billion per year to be paid to the toll operator by road users and/or South Africa over and above such maintenance and upgrading cost.

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

36. **Ad paragraph 29.1.4.17**

36.1 The defendant denies the allegation contained herein.

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37. Ad paragraph 29.1.4.18.-29.1.4.18.4

37.1 The defendant is not a member of OUTA.

37.2 The defendant, acting on advice of its attorney, requested OUTA's assistance in defending the action after receipt of summons in May 2016.

37.3 The defendant repeats paragraph 10.10 hereof.

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

C. THE REMAINING ALLEGATIONS IN THE REPLICATION

The defendant joins issue with each and every one of the allegations in the plaintiff's replication not expressly or impliedly dealt with herein

DATED at SANDTON on this the 16th day of FEBRUARY 2018


ALET MAGDALEEN UYS

A PRACTICING 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 62 OF 1995




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TO: THE REGISTRAR OF THE ABOVE
HONOURABLE COURT
PRETORIA

AND TO: **WERKSMANS INCORPORATED**
ATTORNEYS FOR THE PLAINTIFF
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Alet Uys Attorneys

From: Alet Uys Attorneys [REDACTED]
Sent: Friday, 16 February 2018 12:54
To: [REDACTED]
Cc: [REDACTED]
Subject: [REDACTED]
Attachments: [REDACTED]

Good day,

1. Kindly find attached hereto our client's rejoinder served in accordance with Rule 4A(1)(c).
2. We trust that you find the above in order.

Kind Regards

 **Brendan Slade** | LLB
Consultant



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