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IN THE MAGISTRATE'S COURT FOR THE DISTRICT OF TSHWANE CENTRAL

HELD AT PRETORIA

CASE NO: 38834/2017

In the matter between:

SOUTH AFRICAN NATIONAL ROADS AGENCY LIMITED Plaintiff

and

[redacted] Defendant

FILING SHEET – REPLICATION

DATED at WESTVILLE on THIS 31ST DAY OF JULY 2018.

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TO:
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AND TO:

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PER ELECTRONIC MAIL

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SOUTH AFRICAN NATIONAL ROADS AGENCY LIMITED Plaintiff

and

[redacted] Defendant

REPLICATION

TAKE NOTICE THAT the plaintiff joins issue with each and every allegation in the defendant's plea which is inconsistent with the contents of the plaintiff's declaration, and –

(a) raises five *in limine* grounds upon which the special pleas raised by the defendant should be dismissed; and

(b) replicates to specific paragraphs of the plea.

A. *IN LIMINE* GROUNDS

(i) *Delay under The Promotion of Administrative Justice Act 3 of 2000 ("PAJA")*

1.1 The defendant pleads that –

1.2. the plaintiff's toll declarations identified in paragraphs 1.3.1 to 1.3.7 of the plea ("the toll declarations");

1.3 the Minister of Transport's approvals identified in paragraphs 2.2.1 to and 2.2.2 of the plea ("the Minister's approvals");

1.4 the decisions of the plaintiff's board of directors ("Board") to declare the GFIP highways as toll roads ("the Board's decisions"); and

1.5 the environmental authorisations identified in paragraphs 5.2.1 to 5.2.7 of the plea ("the environmental authorisations");

are invalid and unlawful in terms of PAJA.

2. Section 7(1) of PAJA stipulates that any proceedings for judicial review of administrative action must be brought within a reasonable time and not later than 180 days after the date on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or

might reasonably have been expected to have become aware of the action and the reasons.

3. The special pleas alleging that the impugned decisions are unlawful and invalid in terms of section 6(2) of PAJA are in substance proceedings for judicial review, alternatively are subject to the same considerations concerning delay as such proceedings.

4. The defendant was –

4.1 informed of the toll declarations, the Minister's approvals, the Board's decisions and the environmental authorisations (collectively referred to as "the impugned decisions"); *alternatively*

4.2 became aware of the impugned decisions and the reasons for them; *alternatively*

4.3 might reasonably have been expected to have become aware of the impugned decisions and the reasons for them,

more than 180 days before it filed its plea.

5. Section 9(1) of PAJA stipulates that a Court may extend the period of 180 days in section 7 of PAJA on application by a party when it is in the interests of justice to do so.

6. The defendant did not make (and has not made) application to extend the period of 180 days in section 7 of PAJA.

7. Accordingly, the Court ought to dismiss the defendant's special pleas alleging that the impugned decisions are unlawful and invalid in terms of section 6(2) of PAJA.

(ii) *Delay on legality challenge*

8. The defendant pleads that the impugned decisions are invalid and unlawful in terms of section 1(c) of the Constitution of the Republic of South Africa Act, 1996 ("the Constitution").

9. The most recent of the impugned decisions were taken just less than 9 years before the plea was filed.

10. A party challenging a decision on the basis that it is unlawful and invalid under section 1(c) of the Constitution is under an obligation to bring that challenge within a reasonable time.

11. A period of delay of just less than nine years is unreasonable.

12. Accordingly, the Court ought to dismiss the defendant's special pleas challenging the impugned decisions under section 1(c) of the Constitution because they have not been brought within a reasonable time.

(iii) *No coercive state action*

13. The defendant's defences that it is not liable for the e-toll transactions reflected in schedule A to the plaintiff's declaration because the impugned decisions were unlawful and invalid are raised as a "collateral challenge" to the claim.

14. A collateral challenge is only available to a private party, such as the defendant, in response to coercive state action.

15. Instituting civil proceedings to recover unpaid e-toll debt is not coercive state action because it –

15.1 does not involve the risk of criminal penalty;

15.2 does not involve the imposition of a fine; and

15.3 is a debt-recovery mechanism.

16. In the absence of coercive state action, the defendant's purported collateral challenge to the lawfulness of the impugned decisions is misconceived. It

was required to have taken steps to review and set aside the impugned decision in ordinary judicial review proceedings brought within a reasonable time and failed to do so.

17. The Court ought, accordingly, to dismiss the defendant's "collateral challenge" to the impugned decisions.

(iv) *No collateral challenge because the defendant previously confronted the impugned decisions*

18. In the alternative to (iii) above, the plaintiff pleads as follows –

18.1 the defendant's defences that it is not liable for the e-toll transactions reflected in schedule A to the plaintiff's declaration because the impugned decisions were unlawful and invalid are raised as a "collateral challenge" to the claim;

18.2 a collateral challenge is only available to parties who have never previously confronted the impugned decisions;

18.3 the defendant has previously confronted the impugned decisions in one or more of the following respects –

18.3.1 there was a detailed public participation process prior to the promulgation of the toll declarations in which the public was invited to comment on the proposed declarations;

18.3.2 the promulgation of the toll declarations was widely publicised;

18.3.3 in March 2012, the Organisation Undoing Tax Abuse ("OUTA") instituted review proceedings to challenge the lawfulness of the toll declarations and the environmental authorisations;

18.3.4 OUTA instituted the review proceedings -

18.3.4.1 on behalf of another person who cannot act in such person's own name, in terms of section 38(b) of the Constitution;

18.3.4.2 as a member of, or in the interest of, a group or class of persons, in terms of section 38(c) of the Constitution;

18.3.4.3 in the public interest, in terms of section 38(d) of the Constitution; and/or

18.3.4.4 as a voluntary association acting in the interests of its members, in terms of section 38(e) of the Constitution.

18.3.5 the defendant is a member of OUTA and OUTA is advising and funding the defendant in its defence of this matter;

18.3.6 the review proceedings attracted significant media attention and publicity;

18.3.7 Uniform Rule 16A notices were filed by the parties on 2 April 2012 advising the public that constitutional issues were raised in the case and calling on interested parties to seek leave to be admitted as amicus curiae;

18.3.8 the review proceedings were dismissed by the High Court on 13 December 2012. There was extensive media coverage of this dismissal;

18.3.9 the Supreme Court of Appeal dismissed an appeal against the order in the review proceedings on 9 October 2013. There was extensive media coverage of this dismissal;

18.3.10 since at least 3 December 2013, the toll regulatory signage displayed before and at the toll points along the GFIP roads have alerted users of the roads to their liability to pay e-tolls within the grace period, and provided contact details to assist road users to settle their e-toll debt;

18.3.11 the defendant was informed of its liability to pay e-tolls on every occasion, as set out in Schedule A to the plaintiff's declaration, that an invoice or statement was sent to the last known address of the defendant provided in terms of the National Road Traffic Act 93 of 1996;

18.3.12 on 10 May 2016, the defendant was informed of its full outstanding e-toll liability as at 31 August 2015;

18.3.13 on 8 February 2016 the defendant informed the plaintiff that it was not in a financial position to pay its outstanding e-tolls

18.4 despite the occurrence of each event referred to in paragraphs 02 to 0 above, the defendant elected to disregard the impugned decisions and not to institute judicial review proceedings to challenge their lawfulness within a reasonable time or at all;

18.5 the defendant is not entitled to raise a collateral challenge to the impugned decisions in these circumstances; and

18.6 accordingly, the Court ought to dismiss the defendant's collateral challenge to the impugned decisions.

(v) *No collateral challenge on the grounds dismissed by the High Court*

19. In the alternative to (i) to (iv) above, the plaintiff pleads as follows –

19.1 the defendant raises eight special pleas setting out the grounds on which the impugned decisions are allegedly unlawful and invalid;

19.2 five of those alleged grounds of invalidity were raised and dismissed by the High Court of South Africa, Gauteng Division, Pretoria (under case number 17141/2012) in which some of the impugned decisions were challenged;

19.3 the grounds of invalidity that were dismissed by the High Court of South Africa, Gauteng Division, Pretoria are repeated in the defendant's first, second, fourth, fifth and eighth special pleas;

19.4 the High Court of South Africa, Gauteng Division, Pretoria Court's order was unsuccessfully appealed to the Supreme Court of Appeal (under SCA case number 90/2013);

19.5 the defendant is therefore precluded from raising a collateral challenge to the impugned decisions on the grounds pleaded under its first, second, fourth, fifth and eighth special pleas.

20. Accordingly, the Court ought to dismiss the first, second, fourth, fifth and eighth special pleas.

B REPLICATION TO SPECIFIC ASPECTS OF THE SPECIAL PLEAS

21. **Ad paragraphs 1.1 to 1.7 (First Special Plea)**

21.1 **Ad paragraphs 1.1 to 1.3**

The plaintiff admits the allegations under these paragraphs.

21.2 **Ad paragraph 1.4 read with paragraph 1.4.1 and paragraphs 1.5, 1.5.1, 1.5.2 and 1.5.3**

21.2.1 The plaintiff denies that it failed to comply with section 27(4) of the South African National Roads Agency Limited and National Roads Act 7 of 1998 ("SANRAL Act"). In amplification of this denial, the plaintiff states the following –

21.2.1.1 section 27(4)(a) of the SANRAL Act requires the plaintiff to give notice to the public of the proposed declaration of toll road;

21.2.1.2 in the said public notice, the plaintiff has to give an indication of the approximate position of the toll plaza contemplated for the proposed toll road, and the public notice must invite interested persons to comment and make representations, in at least a period of 30 days from the date of the notice, on the proposed declaration and the position of the toll plaza;

21.2.1.3 the plaintiff gave such notices for the relevant sections of the GFIP highways as follows -

21.2.1.3.1 National Road 1: Section 20: Annandale to Midrand ("N1 Section 20") – Government Notice number 962 Government Gazette No. 30372 on 12 October 2007; The Star, the Sowetan, Pretoria News, and Die Beeld on 12 October 2007; the Mail and Guardian on 13 October 2007 and the Sunday Times on 14 October 2007;

21.2.1.3.2 National Road 1: Section 21: Midrand to Proefsplaas Interchange (N4) ("N1 Section 21") - Government Notice number 963 Government Gazette No. 30372 on 12 October 2007; The Star, the Sowetan, Pretoria News, and Die Beeld on 12 October 2007; the Mail and Guardian on 13 October 2007 and the Sunday Times on 14 October 2007;

21.2.1.3.3 National Road 3: Section 12: Old Barn Interchange to Buccleuch Interchange ("N3 Section 12") - Government Notice number 965 Government Gazette No. 30372 on 12 October 2007; The Star, the Sowetan, Pretoria News, and Die Beeld on 12 October 2007; the Mail and Guardian on 13 October 2007 and the Sunday Times on 14 October 2007;

21.2.1.3.4 National Road 4: Section 1: Koedoespoort to Hans Strijdom Interchange ("N4 Section 1") - Government Notice number 964 Government Gazette No. 30372 on 12 October 2007; The Star, the Sowetan, Pretoria News, and Die Beeld on 12 October 2007; the Mail and Guardian on 13 October 2007 and the Sunday Times on 14 October 2007;

21.2.1.3.5 National Road 12: Section 18: Diepkloof Interchange to Elands Interchange ("N12 Section 18") - Government Notice number 967 Government Gazette No. 30372 on 12 October 2007; The Star, the Sowetan, Pretoria News, and Die Beeld on 12 October 2007; the Mail and Guardian on 13 October 2007 and the Sunday Times on 14 October 2007;

21.2.1.3.6 National Road 12: Section 19: Gillooly's Interchange to Gauteng/Mpumalanga Provincial Border ("N12 Section 19") - Government Notice number 966 Government Gazette No. 30372 on 12 October 2007; The Star, the Sowetan, Pretoria News, and Die Beeld on 12 October 2007; the Mail and Guardian on 13 October 2007 and the Sunday Times on 14 October 2007; and

21.2.1.3.7 Regional Road 21: sections 1 and 2: Rietfontein Interchange (N12) to Hans Strijdom Interchange ("R21 Sections 1 and 2") - Government Notice number 437 Government Gazette No.

30983 on 18 April 2008; The Star, Pretoria News, and Die Beeld on 18 April 2008; the Business Times on 20 April 2008;

21.2.1.4 the notices of intent referred to in paragraph 0 above –

21.2.1.4.1 gave indications of the approximate position of the toll plazas contemplated for the proposed GFIP highways;

21.2.1.4.2 invited interested persons to comment and make representations on the proposed declarations and the position of the toll plazas in the GFIP highways;

21.2.1.4.3 set a closing date for comments and representations of 14 November 2007 for the sections of the GFIP highways referred to in paragraphs 0 to 0 above; and

21.2.1.4.4 set a closing date for comments and representations of 21 May 2008 for R21 Sections 1 and 2.

21.2.2 The plaintiff admits that the notice it published did not contain the details alleged in (a) to (g) of paragraph 1.5.1.1 of the defendant's plea, but denies that it was required to include such details in the notices.

21.2.3 Accordingly, the plaintiff denies that –

21.2.3.1 the content of each of the notices of intent to toll referred to in paragraphs 0 to 0 above was inadequate or irregular as alleged in paragraph 1.5.1 of the defendant's plea;

21.2.3.2 the extent of the publication of the notices of intent to toll referred to in paragraphs 0 to 0 above was inadequate or irregular as alleged in paragraph 1.5.2 of the defendant's plea; and

21.2.3.3 the time afforded to the public to comment on the notices of intent to toll referred to in paragraphs 0 to 0, and paragraphs 0 and 0 above was insufficient as alleged in paragraph 1.5.3 of the defendant's plea.

21.3 **Ad paragraph 1.4 read with 1.4.2 and paragraphs 1.5, 1.5.1, 1.5.2 and 1.5.3**

21.3.1 For the same reasons set out in paragraph 0 above, the plaintiff denies that it failed to comply with section 27(4) of the SANRAL Act.

21.3.2 The plaintiff denies that it was obliged to comply with section 4(1) of PAJA, and therefore denies that section 27(4) of the SANRAL Act ought to be read together with section 4(1) of PAJA as alleged for the following reasons –

21.3.2.1 section 4(1)(d) of PAJA empowers the plaintiff to follow a procedure that is fair but different to that set out in section 4(1) of PAJA; and

21.3.2.2 section 27(4) of the SANRAL Act sets out a fair procedure, but is different to that under section 4(1) of PAJA.

21.3.3 The averments in paragraphs 0 and 0 above are repeated.

21.4 **Ad paragraph 1.5 read with 1.5.4**

21.4.1 The plaintiff did provide the members of the public, who responded to its notices of intent to toll referred to in paragraphs 0 to 0 above, with its proposal in terms of section 27(4)(c) of the SANRAL Act to the Minister or any other material placed before the Minister as part of the applications on 10 January 2008 and 9 July 2008 respectively.

21.4.2 The plaintiff did provide the members of the public who responded to its notices of intent to toll referred to in paragraphs 0 to 0 above, with information and clarification about the way it intended to mitigate the issues that had been raised, in circumstances where contact details were provided by the members of the public who responded to its notices of intent to toll.

21.4.3 The plaintiff admits that it did not inform other members of the public (i.e. members of the public other than those who responded to its notices of intent to toll, referred to in paragraphs 0 to 0 above), how the plaintiff intended to accommodate comments and representations received.

21.4.4 The plaintiff denies that it was under a legal duty to take any action in addition to that referred to in paragraph 0 above.

21.5 **Ad paragraphs 1.5.5, 1.6 and 1.7**

The averments set out under these paragraphs are denied.

WHEREFORE the plaintiff prays that the defendant's first special plea be dismissed with costs.

22. **Ad paragraphs 2.1 to 2.6 (Second Special Plea)**

22.1 **Non-joinder**

22.1.1 The defendant avers that the toll declarations are unlawful and invalid because the Ministerial approvals on the strength of which they were made are unlawful and invalid.

22.1.2 The defendant avers that the Minister's approvals are invalid and unlawful because prior to granting them, the Minister failed to consider,

alternatively failed properly to consider one or more or all of the considerations set out under paragraphs 2.3.1.1 to 2.3.1.6 of the defendant's plea.

22.1.3 The Minister's approval of the toll declarations has not been set aside by a court of law.

22.1.4 The Minister is not a party to these proceedings.

22.1.5 The plaintiff has no knowledge whether the defendant has instituted proceedings to challenge the validity of the Minister's approvals.

22.1.6 The issue of the validity of the Minister's approvals is not an issue that can be determined as between the plaintiff and the defendant, but is an issue that should be determined as between the defendant and the Minister, and in which the plaintiff has an interest.

22.1.7 In the premises, the defendant has failed to join the Minister to the proceedings when it ought to have done so.

22.1.8 Accordingly, the Minister's approvals remain valid and stand until set aside.

22.2 **Replication over**

22.2.1 The averments set out under paragraphs 2.1 and 2.2 are admitted.

22.2.2 The plaintiff has no knowledge of the averments under paragraphs 2.3 and 2.4, does not admit them and puts the defendant to proof thereof. In any event, the Minister's approvals remain valid and stand until set aside.

22.2.3 The averments under paragraph 2.5 are denied. The Minister's approvals have not been set aside and therefore remain valid.

22.2.4 The averments under paragraph 2.6 are denied.

WHEREFORE the plaintiff prays that, subject to joinder of the Minister, the defendant's second special plea be dismissed with costs.

23. **Ad paragraphs 3.1 to 3.5 (Third Special Plea)**

23.1 **Ad paragraph 3.1**

The averments under this paragraph are admitted.

23.2 **Ad paragraph 3.2**

23.2.1 The plaintiff denies that the toll declarations are unlawful and invalid, and further denies that the toll declarations were not preceded by lawful and valid decisions by the plaintiff's Board in terms of

section 27(1)(a)(i) of the SANRAL Act read with section 18(5) of the SANRAL Act.

23.2.2 On 29 May 2007 and 13 November 2007, the SANRAL board approved the implementation of the GFIP project which included upgrading and declaring the following roads as toll roads: N1 Section 20; N1 Section 21; N3 Section 12; N4 Section 1; N12 Section 18, N12 Section 19, and the R21 Sections 1 and 2.

23.2.3 When the SANRAL board resolved as set out in paragraph 0, the R21 was a provincial road.

23.2.4 The resolutions were therefore taken on the basis that the R21 Sections 1 and 2 would be declared a national road in accordance with section 40 of the SANRAL Act.

23.2.5 The resolutions were also taken on the basis that the notice and comment process, as required under section 27(4) of the SANRAL Act, would be duly completed and which, in relation to the R21, would be undertaken later than the remaining roads given the particular circumstances.

23.2.6 In relation to the R21, the resolutions were taken on the basis that the decision would not require to be revisited unless the comments received in respect of that road section raised issues of substance that

had not previously been raised in respect of any of the other proposed toll roads.

23.2.7 Pursuant to due notice having been given and after public comments on the GFIP roads, other than the R21 Sections 1 and 2, were received and evaluated by SANRAL, between 11 and 22 January 2008 SANRAL's board passed, by round robin, a resolution to declare N1 Section 20; N1 Section 21; N3 Section 12; N4 Section 1; N12 Section 18 and N12 Section 19 as toll roads and to seek the Minister's approval thereof.

23.2.8 The Minister approved the declaration of the N1, N3, N4 and N12 sections as toll roads on 11 February 2008.

23.2.9 On 11 April 2008, the R21 Sections 1 and 2 was declared a national road.

23.2.10 Between 18 and 20 April 2008, SANRAL published its notice of intention to toll as set out in paragraph 0 above in respect of the R21 Sections 1 and 2.

23.2.11 Three comments were received from authorities and the public in respect of the R21. These comments raised the same issues that had been raised in relation to the declaration of the N1, N3, N4 and N12 Sections as toll roads and no new issues were raised.

23.2.12 On 9 July 2008, SANRAL requested the Minister's approval for the declaration of the R21 Sections 1 and 2 as a toll road.

23.2.13 The Minister approved the declaration of the R21 Sections 1 and 2 as a toll road on 13 July 2008.

23.2.14 In the alternative, and in the event the Court finds that the declaration of any of the sections of the GFIP toll roads was not preceded by a valid decision of the SANRAL board, the plaintiff pleads that the Court should exercise its remedial discretion to suspend the invalidity of such declaration for a period of 18 months in order for the plaintiff to correct the defect for the following reasons -

23.2.14.1 the different sections of the GFIP operate as an integrated network;

23.2.14.2 the entire network was substantially upgraded between 2008 to 2012;

23.2.14.3 the overall scheme was funded by means of borrowing from the capital markets. SANRAL is liable to repay the entire debt; and

23.2.14.4 it would be inequitable to declare part of the GFIP scheme invalid while the rest remains valid when all the

roads formed part of the same upgrading scheme and road users have received the benefit of the upgrade of all the roads in the network.

23.3 **Ad paragraphs 3.3, 3.4 and 3.5**

The averments under these paragraphs are denied.

WHEREFORE the plaintiff prays that the defendant's third special plea be dismissed with costs.

24. **Ad paragraphs 4.1 to 4.6 (Fourth Special Plea)**

24.1 **Ad paragraphs 4.1 and 4.2**

The averments under these paragraphs are admitted.

24.2 **Ad paragraphs 4.3 to 4.6**

Save for admitting that the considerations set out under paragraphs 4.3.1 to 4.3.6 are relevant considerations that were taken into account by the Board, the rest of the averments under these paragraphs are denied.

WHEREFORE the plaintiff prays that the defendant's fourth special plea be dismissed with costs.

25. **Ad paragraphs 5.1 to 5.7 (Fifth Special Plea)**

25.1 **Non-joinder**

25.1.1 The defendant avers that the toll declarations are unlawful and invalid because "*the grant of the environmental authorisation referred to in paragraph 5.2 of the plea were unlawful and invalid*" (paragraph 5.4 of the plea) for the reasons set out in paragraphs 5.4.1 to 5.4.3 of the plea.

25.1.2 The environmental authorisations referred to have not been set aside by a court of law.

25.1.3 The environmental authorisations referred to were granted in terms of the provisions of the National Environmental Management Act. 107 of 1998 ("NEMA") read with the Environmental Impact Assessment Regulations of 2006 ("the EIA regulations") under the authority of the Director General of the Department of Environmental Affairs.

25.1.4 The Department of Environmental Affairs, the Minister of Environmental Affairs, the Director General of the Department of Environmental Affairs and/or the officials of the Department of Environmental Affairs whose

authority to grant the impugned environmental authorisations is challenged by the defendant, are not party to these proceedings.

25.1.5 The plaintiff has no knowledge whether the defendant has instituted proceedings to challenge the validity of the environmental authorisations.

25.1.6 The issue of the validity of the environmental authorisations is not an issue that can be determined as between the plaintiff and the defendant, but is an issue that should be determined as between the defendant and the Department of Environmental Affairs, the Minister of Environmental Affairs, the Director General of the Department of Environmental Affairs and/or the officials Department of Environmental Affairs whose authority to grant the impugned environmental authorisations is challenged by the defendant, and in which the plaintiff has an interest.

25.1.7 In the premises the defendant has failed to join the Department of Environmental Affairs, the Minister of Environmental Affairs, the Director General of the Department of Environmental Affairs and/or the officials Department of Environmental Affairs whose authority to grant the impugned environmental authorisations is challenged by the defendant, to the proceedings when it ought to have done so.

25.1.8 The environmental authorisations are valid and stand until set aside by a court of law.

25.2 **Replication over**

25.2.1 The averments set out under paragraphs 5.1 and 5.3 of the plea are admitted.

25.2.2 Save for admitting that the environmental authorisations referred to in paragraphs 5.2.1 to 5.2.7 of the plea were granted and published as alleged, the plaintiff has no knowledge of the averments under paragraphs 5.2, 5.4 and 5.5 of the plea, does not admit them and puts the defendant to proof thereof.

25.2.3 In any event, even if the Court were to find that the environmental authorisations were invalid, the plaintiff denies that this would have the consequence of -

25.2.3.1 rendering the toll declarations invalid; or

25.2.3.2 rendering the recovery of e-tolls for use of the GFIP roads invalid.

25.2.4 The averments under paragraph 5.6 of the plea are denied. The environmental authorisations have not been set aside and therefore remain valid.

25.2.5 The averments under paragraph 5.7 of the plea are denied.

WHEREFORE the plaintiff prays that, subject to joinder of the relevant parties, the defendant's fifth special plea be dismissed with costs.

26. **Ad paragraphs 6.1 to 6.8 (Sixth Special Plea)**

26.1 **Ad paragraphs 6.1 and 6.4**

The averments set out under paragraph 6.1 and 6.4 of the plea are admitted.

26.2 **Ad paragraphs 6.2 and 6.3**

The plaintiff admits these paragraphs only in so far as they correctly record the provisions of e-Road Regulations 6(3) and 6(5) (of the e-Road Regulations (published by the Minister of Transport on 9 October 2013 in Government Gazette Notice No. R. 793 in terms of sections 58(1)(dA) and (dC) of the SANRAL Act ("the e-Road Regulations")).

26.3 **Ad paragraph 6.5**

26.3.1 The plaintiff denies that it 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. Its reasonable steps are set out in paragraph 20 to 25 of the declaration.

26.4 **Ad paragraphs 6.6 to 6.7**

26.4.1 The averments set out under these paragraphs are denied. Without derogating from that denial, the plaintiff pleads that properly interpreted, the e-Road Regulations require the plaintiff to take reasonable steps to notify a user of the amount of toll payable by that user and the date for payment. The steps listed in paragraphs 19 to 24 of the declaration are reasonable steps.

26.4.2 Moreover, the plaintiff caused signs to be erected at the entry to each and every toll road, which clearly stipulates, *inter alia*, –

26.4.2.1 that the road concerned is a toll road that forms part of the GFIP;

26.4.2.2 the toll payable in respect of each class of vehicle;

26.4.2.3 the methods of payments; and

26.4.2.4 the plaintiff's contact details.

WHEREFORE the plaintiff prays that the defendant's sixth special plea be dismissed with costs.

27. **Ad paragraphs 7.1 to 7.10 (Seventh Special Plea)**

27.1 **Ad paragraphs 7.1 to 7.4**

The plaintiff admits the averments under these paragraphs.

27.2 **Ad paragraph 7.5 and 7.6**

27.2.1 The averments under this paragraph are denied. In amplification of this denial the plaintiff states that -

27.2.1.1 the plaintiff is the owner of the GFIP highways, but such ownership is irrelevant for the purposes of determining whether the plaintiff is entitled to charge VAT on tolls;

27.2.1.2 the plaintiff was notified by the Commissioner that all supplies and activities directly or indirectly in connection with the aims and objectives of the plaintiff in connection with the toll roads constitute an enterprise as contemplated in part (b)(i) of the definition of enterprise in section 1 of the VAT Act; and

27.2.1.3 the plaintiff is a registered VAT vendor with registration number 4220186250.

27.2.2 To the extent that the defendant avers that the Commissioner's notification of the plaintiff that it is a vendor is invalid (paragraph 7.6.4 of the plea), the plaintiff pleads that -

27.2.2.1 the Minister of Finance and the Commissioner are not parties to these proceedings;

27.2.2.2 the plaintiff has no knowledge whether the defendant has instituted proceedings to challenge the validity of the Minister of Finance's determination and/or the Commissioner's notification of the plaintiff that its supplies and services in relation to toll roads constitute an enterprise in terms of the VAT Act;

27.2.2.3 the issue of the validity of the Minister of Finance's determination and the Commissioner's notification of the plaintiff that its supplies and services in relation to toll roads constitute an enterprise in terms of the VAT Act is not an issue that can be determined as between the plaintiff and the defendant, but is an issue that should be determined as between the defendant and the Minister of Finance and the Commissioner, and in which the plaintiff has an interest;

27.2.2.4 in the premises the defendant has failed to join the Minister of Finance and the Commissioner to the proceedings when it ought to have done so; and

27.2.2.5 accordingly, the Minister of Finance's determination and the Commissioner's notification remain valid and stand until set aside.

27.3 **Ad paragraphs 7.7 to 7.10**

27.3.1 The plaintiff admits that the 2013 and 2015 Toll Tariffs authorise the plaintiff to levy and collect VAT on e-tolls.

27.3.2 The rest of the averments under these paragraphs are denied.

27.3.3 Without derogating from the generality of the denial, the plaintiff pleads that even if the Court finds that the levying of VAT on e-tolls is unlawful, the defendant would still be liable to pay the claimed amount less VAT.

WHEREFORE the plaintiff prays that the defendant's seventh special plea be dismissed with costs.

28. **Ad paragraphs 8.1 to 8.5 (Eighth Special Plea)**

28.1 **Ad paragraph 8.1**

The plaintiff admits the averments under paragraph 8.1 of the plea.

28.2 **Ad paragraph 8.2**

The plaintiff denies that it has or, at the relevant time, had a legal obligation to provide reasonable alternative, non-tolled routes to the GFIP highways.

28.3 **Ad paragraphs 8.3 to 8.5**

28.3.1 The averments under these paragraphs are denied. Without derogating from the generality of that denial, in the event that the Court finds that the plaintiff limited the defendant's rights under section 21(1) and 9(1) of the Constitution, the plaintiff pleads that such limitation was reasonable and justifiable in an open and democratic society in that –

28.3.1.1 the purpose of the limitation was to fund the upgrading of the GFIP highways;

28.3.1.2 the upgrading of the GFIP highways was in the general public interest;

28.3.1.3 in the absence of e-tolling as a funding mechanism for the upgrades to the roads, the upgrades would have been substantially delay;

28.3.1.4 the extent of the limitation is minimal because -

28.3.1.4.1 the GFIP highways are still open to users albeit that users pay a user charge; and

28.3.1.4.2 because the GFIP highways are not a closed system, road users are able to make use of substantial portions of the GFIP highways without incurring liability to pay tolls;

28.3.1.5 there are approximately 55,000 km of roads in Gauteng of which 470 km are national roads (including the approximate 201 km GFIP freeways), 4,830 km provincial roads and 28,885 metropolitan/municipal roads. In terms of the Road Infrastructure Strategic Framework for South Africa of 2006 (RIFSA) classification of roads, approximately 67% of the provincial roads are classified as "Distributor" roads and at least 20% of the roads in the three metropolitan areas are higher order roads that serve a mobility purpose rather than an accessibility purpose such as local streets. There are various alternative route options available between origins and destinations within

Gauteng that do not require the payment of toll on GFIP freeways.

28.3.1.6 There was no less restrictive means available to fund the upgrade of the GFIP highways within a reasonable time.

WHEREFORE the plaintiff prays that the defendant's eighth special plea be dismissed with costs.

29. **AD ALL THE SPECIAL PLEAS (PARAGRAPHS 1 TO 8.5)**

29.1 In the event that the Court upholds any one of the defendant's special pleas, then the plaintiff pleads as follows –

29.1.1 the special pleas all attack the lawfulness of the impugned decisions;

29.1.2 the lawfulness of the impugned decisions is a constitutional matter;

29.1.3 in terms of section 172(1)(b) of the Constitution, when deciding a constitutional matter, a court may make any order that is just and equitable;

29.1.4 even if the Court determines that the impugned decisions are unlawful and invalid on the grounds advanced in the defendant's special pleas (which is denied), then the Court ought to exercise its remedial

discretion to suspend the invalidity of the impugned decisions for a period of eighteen months to allow the plaintiff to correct the defect(s) because –

29.1.4.1 as a result of the impugned decisions, the GFIP roads were substantially upgraded;

29.1.4.2 the defendant and the general public have had the use and enjoyment of the upgraded toll roads for a substantial period;

29.1.4.3 despite the numerous respects in which the defendant confronted the impugned decisions as pleaded in paragraphs 0 to 0 above, the defendant did not take steps to review and set aside the impugned decisions timeously or at all;

29.1.4.4 the plaintiff is seeking to recover a charge for the use of the upgraded toll roads and is not in these proceedings seeking to subject the defendant to criminal sanction or to penalise the defendant;

29.1.4.5 the upgrade of the GFIP highways was funded in the debt capital markets and through the establishment of both guaranteed and non-guaranteed Domestic Term Note Programmes ("DMTN Programmes");

29.1.4.6 the total debt for the plaintiff's tolling projects, including the GFIP, aggregates to approximately R48 billion;

29.1.4.7 both DMTN Programmes provide that any material changes to the assets of the plaintiff will constitute a material breach of the DMTN programmes. In the event of such a breach occurring, noteholders can demand full repayment of all outstanding amounts;

29.1.4.8 if noteholders make this demand, the plaintiff would be obliged to repay the amounts outstanding under the DMTN Programmes of which approximately R32 billion has been directly guaranteed by the Government of the Republic of South Africa;

29.1.4.9 if noteholders do not make this demand, but the plaintiff is unable to service the debts through e-toll recovery, then the Government of the Republic of South Africa would have to assume the obligation to service the outstanding debt on behalf of the plaintiff. This would place additional funding strain on the fiscus;

29.1.4.10 the outstanding tolls due to the plaintiff by road users as at 31 March 2017, in respect of the GFIP highways, was approximately R4.6 billion;

29.1.4.11 if the impugned decisions are declared invalid, the plaintiff would be required to write off this debt. A write off of this magnitude would have a negative impact on investors' and the credit rating of the plaintiff. It may also impact on the sovereign credit rating because the sovereign credit rating is also informed by contingent liabilities of government entities such as the plaintiff;

29.1.4.12 if the impugned decisions are declared invalid, investors will probably not invest in toll projects in the future and may withdraw their investments from the plaintiff and from other toll road projects;

29.1.4.13 the plaintiff entered into a Design, Build and Operate contract with ETC (Proprietary) Limited ("ETC") for the provision of the GFIP toll system as well as the operation of the system. The contract continues for a further two and a half years. If the impugned decisions are declared invalid, this will have a significant impact on the current ETC contract. Services related to, *inter alia*, customer services and violation processing may require dramatic downscaling or cancellation of the contractual requirements. ETC currently employs approximately 1215 people. In addition, more than a 500 people are indirectly

employed via sub-contracts. Cancellation or downscaling of the contractual requirements of ETC will result in job losses. ETC may also be entitled to a claim in terms of such a change in the contract. Despite tolling having to stop, the plaintiff would still need to carry on with some of the operations services for the reasons below and this will have cost implications, although without the benefit of toll revenue;

29.1.4.14 the projects related to tolling of the GFIP and toll infrastructure (including the construction of gantries) and systems costs, in respect thereof, amounted to approximately R2,4 billion. This has already been expended. If the GFIP is no longer tolled, then the infrastructure and systems will no longer be used for the intended purpose. Although certain assets could be sold or used for other purposes, the plaintiff will suffer a significant loss on the initial cost. The systems will need to remain in place for interoperability reasons (that is with other toll roads not affected by this decision) and gantries will likely remain for purposes of traffic monitoring and traffic enforcement;

29.1.4.15 in accordance with the original objectives of the electronic toll collection system to be developed for South Africa,

the plaintiff commenced with the introduction of electronic toll collection at all toll plazas in South Africa. This capability enables automation of toll payment across all existing and future toll schemes in the country, thus eliminating a need for multiple payment systems and ensuring convenience for road users. Electronic toll collection improves user level of service (shorter waiting/queuing), and there is no cash/card payment requirement. Furthermore, it reduces the need for additional toll lanes. If the impugned decisions are declared invalid, the Transaction Clearing House facility (which applies to all toll roads and not only the GFIP) will still need to be maintained for interoperability purposes in order to allow for e-tag payment at other toll plazas, and which will not be affected by any order granted in the above action;

29.1.4.16 even if the impugned decisions are declared invalid, the GFIP toll roads will require the –

29.1.4.16.1 ongoing routine road maintenance and repairs at an approximate cost of R151 million per annum;

29.1.4.16.2 maintenance and operations of overhead lighting at an approximate cost of R86 million per annum;

29.1.4.16.3 ITS and IMS systems to remain in place at an approximate cost of R70 million per annum; and

29.1.4.16.4 periodic maintenance and repairs at an approximate cost of R12 billion expressed in 2017 Rand over the next 20 years,

without the benefit of toll revenue.

29.1.4.17 other GFIP toll roads users have paid tolls and should not, in all the circumstances, be treated differently from those who have failed to do so; and

29.1.4.18 the defendant is a member of, and has aligned itself with, OUTA, which despite the dismissal of its review challenge by the Supreme Court of Appeal, has -

29.1.4.18.1 since the date of that dismissal and consistently thereafter acted on the basis that it would again challenge the legality of the toll declarations through the guise of a "collateral challenge";

29.1.4.18.2 publicly encouraged GFIP toll roads users not to pay tolls with *inter alia* the express objective of rendering collection of e-tolls unmanageable;

29.1.4.18.3 offered to assist every user of the GFIP toll roads in defending any civil actions SANRAL institutes against them on the basis of this "collateral challenge" in exchange for membership fees; and

29.1.4.18.4 funded such users' defences to these SANRAL civil actions, such as the present.

29.1.5 In addition to an order suspending the invalidity of any of the impugned decisions, the plaintiff shall seek an order from the court declaring that "*for the period from 19 November 2013 until the end of the period of suspension referred to above, users of the GFIP roads are liable for the e-tolls incurred as a result of that use*".

C. REPLICATION TO PARAGRAPHS 9 TO 24.2 OF THE PLEA

The plaintiff joins issue with the defendant on the remaining averments in its plea.

DATED AT DURBAN THIS 31ST DAY OF JULY 2018.

CJ SCHUTZLER

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