

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

Case No:

In the matter between:

OPPOSITION TO URBAN TOLLING ALLIANCE	First Applicant
SOUTH AFRICAN VEHICLE RENTING AND LEASING ASSOCIATION	Second Applicant
QUADPARA ASSOCIATION OF SOUTH AFRICA	Third Applicant
SOUTH AFRICAN NATIONAL CONSUMER UNION	Fourth Applicant

and

THE SOUTH AFRICAN NATIONAL ROADS AGENCY LTD	First Respondent
THE MINISTER, DEPARTMENT OF TRANSPORT	Second Respondent
THE MEC, DEPARTMENT OF ROADS AND TRANSPORT, GAUTENG	Third Respondent
THE MINISTER, DEPARTMENT OF WATER AND ENVIRONMENTAL AFFAIRS	Fourth Respondent
THE DIRECTOR-GENERAL, DEPARTMENT OF WATER AND ENVIRONMENTAL AFFAIRS	Fifth Respondent
NATIONAL CONSUMER COMMISSION	Sixth Respondent

FOUNDING AFFIDAVIT

I, the undersigned,

LEOPOLD JEAN JOSEPH PAUWEN

do hereby make oath and state that:

1. I am a major male and General Manager of the Second Applicant currently residing at 17a Mervyn Road, Glenhazel.
2. As General Manager of the Second Applicant, I have been involved with the investigation of, the attendance of meetings relating to, and making of representations on behalf of the Second Applicant in respect of, the Gauteng Freeway Improvement Project ("GFIP").
3. I am duly authorised to depose to this affidavit on behalf of the First to Fourth Applicants.
4. The facts contained herein are, unless otherwise stated or the contrary appears from the context, within my own knowledge and are, to the best of my knowledge and belief, both true and correct.
5. Where I rely on information conveyed to me by others, I believe such information to be correct and have no reason to believe otherwise. Moreover, where possible, such information is confirmed by confirmatory affidavits.

6. Where I make submissions of a legal nature herein, I do so on the advice of the Applicants' legal representatives.

THE APPLICANTS

7. The First Applicant is the OPPOSITION TO URBAN TOLLING ALLIANCE, a voluntary association with perpetual succession authorised by its constitution to acquire, own or dispose of property apart from its members and to launch or oppose legal proceedings in its own name with its main place of business situated at c/o Alchemy Financial Services, Unit 3 Bush Hill Office Park, Jan Frederick Avenue, Northriding.
8. I attach a copy of the constitution of the First Applicant hereto as “**FA1**”.
9. The Second Applicant is the SOUTH AFRICAN VEHICLE RENTAL AND LEASING ASSOCIATION, a voluntary association with perpetual succession and authorised by its constitution to acquire, own or dispose of property apart from its members and to launch or oppose legal proceedings in its own name with its principal place of business situated at c/o Alchemy Financial Services, Unit 3 Bush Hill Office Park, Jan Frederick Avenue, Northriding.
10. I attach a copy of the constitution of the Second Applicant hereto as “**FA2**”.

11. The Third Applicant is the QUADPARA ASSOCIATION OF SOUTH AFRICA, a voluntary association with perpetual succession and authorised by its constitution to acquire, own and dispose of property apart from its members and to launch or oppose legal proceedings in its own name, with principal place of business at 25 Hamilton Crescent, Gillits, KwaZulu Natal.
12. I attach a copy of the constitution of the Third Applicant hereto as “**FA3**”.
13. The Fourth Applicant is the SOUTH AFRICAN NATIONAL CONSUMER UNION, a voluntary association with perpetual succession and authorised by its constitution to acquire, own and dispose of property apart from its members and to launch or oppose legal proceedings in its own name, with principal place of business at SABS Campus, 1 Dr Lategan Drive, Groenkloof. The Fourth Applicant is an accredited consumer protection group in terms of section 78 of the Consumer Protection Act 68 of 2008 entitled to represent consumers individually and collectively.
14. I attach a copy of the constitution of the Third Applicant hereto as “**FA4**”.
15. For the sake of convenience, I shall hereafter refer to:
 - 15.1 the First Applicant by its abbreviated name “OUTA”;
 - 15.2 the Second Applicant by its abbreviated name “SAVRALA”;

- 15.3 the Third Applicant by its abbreviated name "QASA";
- 15.4 the Fourth Applicant by its abbreviated name "SANCU"; and
- 15.5 the First to Fourth Applicants collectively as "the Applicants".

THE RESPONDENTS

- 16. The First Respondent is THE SOUTH AFRICAN NATIONAL ROADS AGENCY LIMITED, a duly registered public company with registration no. 1998/009584/06 and with registered address at Ditsela Place, 1204 Park Street, Hatfield, Pretoria.

The First Respondent

- 16.1 was formed and incorporated as a public company in terms of the provisions of section 2 of the South African National Roads Agency Limited and National Roads Act 7 of 1998 ("the Act");
- 16.2 exercises public power and performs a public function in terms of section 2 read with section 25(1) of the Act which includes the performance of all strategic planning with regard to the South African national roads system, as well as the planning, design, construction, operation, management, control, maintenance and rehabilitation of national roads for the Republic;

16.3 is controlled by the State which, as the First Respondent's only member and shareholder in terms of section 3(2) of the Act, exercises its rights as member and shareholder through the Minister of Transport.

17. The Second Respondent is the MINISTER OF THE DEPARTMENT OF TRANSPORT, REPUBLIC OF SOUTH AFRICA, c/o the State Attorney, Fedsure Forum, 4th Floor South Block, Van der Walt Street, Pretoria. The Second Respondent is the Minister referred to in section 1 of the Act who must give his approval in terms of section 27(1) read with 27(4) of the Act before the First Respondent may declare any specified national road or any specified portion thereof to be a toll road for the purposes of the Act.

18. The Third Respondent is the MEC OF THE DEPARTMENT OF ROADS AND TRANSPORT, GAUTENG, c/o The State Attorney, Fedsure Forum, 4th Floor South Block, Van der Walt Street, Pretoria. The Third Respondent is cited herein insofar as the Third Respondent may have an interest in the subject matter of the application. No relief is sought against the Third Respondent and no costs are sought against him, save in the event that the Third Respondent opposes the application.

19. The Fourth Respondent

19.1 is the MINISTER OF WATER AND ENVIRONMENTAL AFFAIRS, Republic of South Africa (known prior to 1 July 2009 as the Minister of

Environmental Affairs and Tourism), care of the State Attorney, Fedsure Forum, 4th Floor South Block, Van der Walt Street, Pretoria;

19.2 is the Minister referred to in section 1 of the National Environmental Management Act 107 of 1998 (“the NEMA”);

19.3 is the Cabinet member to whom the administration and the powers and functions entrusted by the NEMA were transferred under section 97 of the Constitution of the Republic of South Africa, 1996 (“the Constitution”) by the President in terms of Proclamation No. 44 of 2009 published in Government Gazette No. 32367 dated 1 July 2009;

19.4 is the competent authority charged by section 24C(2) of the NEMA with evaluating the environmental impact of the listed or specified activities for which SANRAL obtained the environmental authorisations set out in paragraph 4 of the Notice of Motion to which this affidavit is attached and further described herein below.

20. The Fifth Respondent

20.1 is the DIRECTOR-GENERAL OF THE DEPARTMENT OF WATER AND ENVIRONMENTAL AFFAIRS, Republic of South Africa (known prior to 1 July 2009 as the Department of Environmental Affairs and Tourism), care

of the State Attorney, Fedsure Forum, 4th Floor South Block, Van der Walt Street, Pretoria;

20.2 is the authority who apparently granted the environmental authorisations set out in paragraph 4 of the Notice of Motion to the First Respondent, alternatively granted the environmental authorisations on behalf of the Fourth Respondent to the First Respondent.

21. The Sixth Respondent is the NATIONAL CONSUMER COMMISSION, a juristic person established in terms of section 85(1) of the Consumer Protection Act 68 of 2008 and situated at The DTI Campus, Mulayo (Block E), 77 Meintjies Street, Sunnyside. The Sixth Respondent is cited herein insofar as the Sixth Respondent may have an interest in the subject matter of the application. No relief is sought against the Sixth Respondent and no costs are sought against it, save in the event that the Sixth Respondent opposes the application.

22. For the sake of convenience, I will hereafter refer to

22.1 the First Respondent as “SANRAL”;

22.2 the Second Respondent as “the Minister of Transport”;

22.3 the Third Respondent as “the MEC”;

22.4 the Fourth Respondent as “the Minister of Environmental Affairs”;

22.5 the Fifth Respondent as “the Director-General of Environmental Affairs”;

22.6 the Sixth Respondent as “the Commission”.

OVERVIEW OF THIS APPLICATION

23. The application is brought in two parts.

Part A

24. In the first part of the application, that is Part A, the Applicants seek urgent interim interdictory relief against SANRAL to interdict and restrain it from levying and collecting toll on the following sections of the freeways in Gauteng:

24.1 Sections 1 and 2 of National Road R21 (also known as the P157-1 and P157-2) from Hans Strydom Drive to Rietfontein Interchange (N12):
Province of Gauteng;

24.2 National Road N1: Section 20: from Armadale to Midrand;

24.3 National Road N1: Section 21: from Midrand to the Proefplaas Interchange;

- 24.4 National Road N3: Section 12: from Old Barn Interchange to the Buccleuch Interchange;
- 24.5 National Road N4: Section 1: from Koedoespoort to Hans Strydom Drive;
- 24.6 National Road N12: Section 18: from Diepkloof Interchange to Elands Interchange; and
- 24.7 National Road N12: Section 19: from Gillooly's Interchange to the Gauteng/Mpumalanga Provincial Border;

("the proposed toll roads" or "the proposed toll road network")

- 25. In the alternative or in addition to paragraph 24, the Applicants seek urgent interim interdictory relief against SANRAL to interdict and restrain it from levying and collecting toll on the proposed toll road network in terms of SANRAL's "*e-Toll Terms and Conditions*" on the basis that those terms contravene the Consumer Protection Act 68 of 2008.
- 26. The planned date for the commencement of the levying and collection of toll on the proposed toll road network is 30 April 2012.
- 27. The interdictory relief in Part A is sought pending the final determination of the application for the relief sought in Part B of the Notice of Motion and/or the

resolution of the complaint filed by the Fourth Applicant with the Sixth Respondent.

Part B

28. In the second part of the application, Part B, the Applicants seek the following final relief in the ordinary course:

28.1 The Applicants seek orders reviewing and setting aside the following declarations made by SANRAL, with the approval of the Minister of Transport, in terms of section 27(1)(a)(i) of the Act:

28.1.1 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;

28.1.2 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;

- 28.1.3 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;
- 28.1.4 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;
- 28.1.5 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;
- 28.1.6 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;
and

28.1.7 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.

28.2 The Applicants seek also to review and set aside the decision by the Minister of Transport to approve the making of the above declarations of toll roads in terms of section 27(1) read with 27(4) of the Act.

28.3 The Applicants seek further, or in the alternative, that the following environmental authorisations granted to SANRAL in terms of section 24 of the National Environmental Management Act 107 of 1998 ("NEMA") be reviewed and set aside:

28.3.1 Environmental Authorisation Reference 12/12/20/918 for the proposed upgrading of National Route 1 Section 20 and 21 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. R 386 published in

Government Gazette No 28753 dated 21 April 2006 (“GN R386”).

A copy of Environmental Authorisation Reference 12/12/20/918 dated 23 November 2007 is attached to the Notice of Motion as annexure “**B1**”;

28.3.2 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 GN R386. A copy of Environmental Authorisation Reference 12/12/20/919 dated 23 November 2007 is attached to the Notice of Motion as annexure “**B2**”;

28.3.3 Environmental Authorisation Reference 12/12/20/920 for the proposed upgrading of National Route 1 Section 20 between the Misgund and Fourteenth Avenue Interchanges to commence and continue with activities 1(m), 4, 7, 14 and 15 listed in the schedule to GN R386. A copy of Environmental Authorisation Reference 12/12/20/920 dated 23 November 2007 is attached to the Notice of Motion as annexure “**B3**”;

28.3.4 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), 4, 7, 14 and 15 listed in the schedule to GN R386. A copy of Environmental Authorisation Reference 12/12/20/922 dated 19 February 2008 is attached to the Notice of Motion as annexure “**B4**”;

28.3.5 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), 4, 7, 14 and 15 listed in the schedule to GN R386. A copy of Environmental Authorisation Reference 12/12/20/923 dated 18 February 2008 is attached to the Notice of Motion as annexure “**B5**”;

28.3.6 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), 7, 14 and 15 listed in the schedule to GN R386. A copy of Environmental Authorisation Reference 12/12/20/926 dated 7 November 2007 is attached to the Notice of Motion as annexure “**B6**”;

28.3.7 Environmental Authorisation for the proposed upgrading of the Regional Route 21 between the N12 and Hans Strijdom Drive Interchanges to commence and continue with the activities set out in paragraph 1 of section B of the undated basic assessment report compiled by Arup / Tswelopele Environmental, a copy of which report is attached hereto as annexure “**FA62**”.

28.4 The Applicants also seek orders:

28.4.1 that SANRAL be interdicted and restrained from levying and collection toll on the proposed toll road network on the strength of the aforementioned declarations;

28.4.2 that the respective applications by SANRAL corresponding to the above environmental authorisations be remitted to the Minister of Environmental Affairs with directions for SANRAL to comply with the relevant EIA Regulations and for the Minister to afford the Applicants and other interested parties an opportunity to submit further representations to him and that he then considers those submissions before making a decision anew on such applications.

28.5 Finally, the Applicants also seek appropriate costs orders and ancillary relief in the second part of the application, including costs orders in respect of the reserved question of costs in the first part of the application.

29. The grounds upon which the Applicants approach the Honourable Court for the above relief are dealt with in detail below. In summary, these are:

29.1 that SANRAL failed to give proper notice under section 27(4)(a) of the Act of the intent to toll the proposed toll network in that:

29.1.1 the content of the notice given was defective and/or insufficient;

29.1.2 SANRAL failed to ensure that such notice was brought to the attention of the public generally as well as to interested entities that would be materially affected by the tolling of the proposed toll network which were either known to or reasonably identifiable by SANRAL and/or the Minister of Transport; and

29.1.3 the time period allowed by SANRAL for comment from the public was manifestly insufficient in the circumstances;

29.2 that the approval by the Minister of Transport and/or the declaration by SANRAL under section 27(1) of the Act that the proposed toll road network be tolled was so unreasonable that no reasonable decision maker could have so decided, in that:

29.2.1 the expense of levying and collecting toll in the manner proposed is so disproportionate to the costs sought to be recovered that it

cannot reasonably be expected of users of the proposed toll network to bear such costs; and

- 29.2.2 the proper enforcement of the open road tolling scheme on the proposed toll network is practically impossible;
- 29.2.3 there was a manifest failure on the part of SANRAL to meet the mandatory conditions set out in section 27;
- 29.2.4 SANRAL and/or the Minister of Transport were not open to and did not properly consider alternative methods of funding;
- 29.2.5 SANRAL's application to the Minister of Transport for approval omitted material information in the form of the inordinate cost of the levying and collection of toll on the proposed toll road network;
- 29.2.6 SANRAL and/or the Minister of Transport failed to apply its/his mind and/or take into consideration that the social impact assessment before him was "*based on the assumption that an integrated transport plan is successfully implemented*" and "*in the event of there being viable alternative [routes]*";

- 29.2.7 SANRAL's application to the Minister of Transport for approval omitted material information on the extent of the inadequacy of public transport and/or viable alternative routes;
- 29.2.8 SANRAL's application created the impression (and the Minister of Transport's approval was granted on the basis) that adequate public transport alternatives were or would be put in place when in fact this would not be so;
- 29.2.9 SANRAL's application created the impression (and the Minister of Transport's approval was granted on the basis) that valid environmental authorisation would be obtained by SANRAL prior to the implementation of GFIP Phase 1 when in fact this would not be so;
- 29.3 that SANRAL failed to follow the proper procedure for the obtaining of the necessary environmental authorisation for the road works necessary for the upgrading of the roads that would form part of the proposed toll network;
- 29.4 that the basis upon which the environmental authorisation was obtained was materially defective and/or misleading in substance in that it was not brought to the Fourth and Fifth Respondent's attention that the road works

to be conducted were for the purposes of the establishment of a toll road network;

29.5 that the operative clauses of the “*e-Toll Terms and Conditions*” are unfair, unreasonable or unjust in terms of the Consumer Protection Act 68 of 2008.

THE APPLICANTS’ STANDING TO BRING THIS APPLICATION

OUTA

30. OUTA is a voluntary association that was established for the purpose of opposing the electronic tolling of the freeways in Gauteng.
31. The organisation was established after the presentation of the budget speech in the National Assembly on 22 February 2012 which definitively signalled that the National Executive were resolved that the implementation of e-tolling would proceed notwithstanding resistance from civil society and political opposition in the form of COSATU. The organisation came into being on or about 12 March 2012 and launched its website (www.outa.co.za) on 15 March 2012.
32. As is set out on the organisation’s website, OUTA supports the need for the upgrades and road additions that have been effected and have been planned in terms of the Gauteng Freeway Improvement Project as well as all future urban

and other route construction and improvements as and when these become necessary to meet transportation needs in South Africa.

33. However, the organisation opposes e-tolling as a means to fund such construction and road improvements, in particular in this instance, as well as the unlawful manner in which the First and Second Respondents have sought to implement the proposed toll road network.

34. OUTA was established with the purpose of providing a platform for interested individuals, companies or organisations to meet and co-ordinate their efforts in opposing e-tolling.

35. OUTA was also established for the purpose of acting in the public interest and in order to represent those members of society who are economically or socially disenfranchised and who were otherwise not able to oppose the tolling of Gauteng's freeways in their own name.

36. The organisations that are members of OUTA include:

36.1 SAVRALA, which represents its 22 member companies that conduct business in the vehicle rental and leasing industry and which collectively own 160 000 motor vehicles and manage a further 390 000 motor vehicles, 220 000 of which are on the road in Gauteng;

- 36.2 the South Africa Tourist Service Association ("SATSA"), an organisation representing 740 companies operating in the inbound tourism industry;
- 36.3 the Retail Motor Industries of South Africa ("RMI"), representing 7 500 members in over 14 sectors in the retail motor and related industries, including service stations, franchise car dealers, panel beaters, spare outlets and tyre fitment centres, many of which will be impacted not only by the cost of paying toll, but also by the increased cost of motor parts and related products 60% of which come from Gauteng. RMI also is concerned about the adverse effect on the employees of its members, numbering approximately 300 000, who will suffer increased cost of transport and food;
37. The Automobile Association of South Africa ("AA"), an organisation conducting business on the roads of South Africa and in Gauteng with a membership of 2.5 million drivers nationally and 1.125 million drivers in Gauteng, has also formally associated itself with OUTA and supports the present application.
38. I am informed by Gary Ronald, Head of Public Affairs, that the level of opposition to tolling amongst the AA's members of is overwhelming.
39. OUTA also represents the interests 94 businesses that have registered as supporters of OUTA since the launch of its website. The names of such businesses appear on the website. In order to avoid prolix papers, the list of

names will not be attached hereto but will be produced for the Honourable Court at the hearing of the application.

40. OUTA further represents the 1831 individuals who have registered as supporters of OUTA since the launch of its website. The names of the individual supporters also appear on the website. Likewise, in order to avoid prolix papers, the list of names will not be attached hereto but will be produced for the Honourable Court at the hearing of the application.

41. It is expected that after the launch of the application when the public become aware of the existence of OUTA, the above numbers will dramatically increase. The Honourable Court will be informed of the updated numbers at the hearing of the application.

42. Included in the above list, are the following individuals who in addition are individual members of OUTA and who will be prejudiced should the relief sought in the application not be granted and on behalf of whom OUTA brings the present application:

42.1 Hilda Maphoroma, whose affidavit is attached hereto as “**FA5**”. Maphoroma is a wife and mother of two children who is resident of Leondale Gardens and who works as a cashier at Norwood Spar. Her affidavit sets out how she and her husband, a policeman commuting from Leondale Gardens to his workplace have no option but to drive the toll

routes to work, how toll fees will swallow 9% of their combined income and drive their expenditure R 1090 in excess of their combined income;

42.2 Dennis Tabakin, whose affidavit is attached hereto as “**FA6**”. Tabakin is a pensioner who is forced to continue working as a travelling salesman in order to support himself, his wife who has alzheimers, and their son. Tabakin’s job, for which he drives 400-500km per week, compels him to make use, *inter alia*, of the proposed toll road network. Tabakin is already forced to live off saved capital in order to pay for his wife’s care and medical expenses of approximately R 18 000 per month. The extra R 6 600 per annum that he will have to pay for toll fees will severely prejudice him and will erode his capital further;

42.3 Wayne Benjamin Osrin, whose affidavit is attached hereto as “**FA7**”. Osrin is a sole proprietor who runs a small plumbing business that uses two vans and a motor car. Like many in his industry, Osrin and his crew have to travel to diverse suburbs (listed in the affidavit) for work and in so doing often are required to make use of the proposed toll road network. Osrin explains the financial difficulty that he presently experiences (as do many plumbers says Osrin) and how paying toll will negatively impact his business and make the retrenchment of one of his crew unavoidable, and ;

42.4 Tshidi Leatse, whose affidavit is attached hereto as “**FA8**“. Leatse is a receptionist living in Boksburg who travels on the N3 and N12 freeways to her place of work in Illovo each day. Leatse has a salary, after tax, of R 7,000, and her monthly expenses amount to R 6,000. Accordingly, should she have to pay approximately R 500 in toll fees every month (approximately 7% of her after tax income) she will have only R 500 to save, or use for unexpected expenses;

43. I am advised and I respectfully submit that OUTA has standing. It brings the present application:

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

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

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

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

SAVRALA

44. As I have mentioned above, SAVRALA is a voluntary association that represents 22 member companies which conduct business in the vehicle rental and leasing industry.
45. The members of SAVRALA will suffer material financial and administrative prejudice on account of the implementation of open road tolling, or e-tolling, a system that attaches liability and directs enforcement against the owner of motor vehicles as opposed to the individual driving the motor vehicle on the toll road.
46. I am advised and I respectfully submit that SAVRALA has standing. It brings the application:
- 46.1 in its own interests, or alternatively as an association acting in the interests of its members in terms of section 38(a) and/or 38(c) of the Constitution;
 - 46.2 as a member of, or in the interest of, a group or class of persons being the road users that make use of the proposed toll road network and will be affected by the implementation of e-tolling, in terms of section 38(c) of the Constitution; and
 - 46.3 acting in the public interest, in terms of section 38(d) of the Constitution.

47. The Fourth Applicant, QASA, is an organisation that protects and promotes the rights and interests of people with disabilities and people with mobility impairment.
48. The facts contained herein concerning QASA and its members are provided to me by the CEO of QASA, Aristides Seirlis, whose confirmatory affidavit, attached hereto, is referred to below.
49. QASA strives for the development and provision of projects, products and services, together with lobbying and advocacy, to assist and develop the capacity of quadraplegics and paraplegics to integrate and function within mainstream society.
50. There are approximately 6 000 active members of QASA nationwide, 2 000 of whom are based in Gauteng. 78% of the members of QASA are black, and less than 1% are gainfully employed.
51. The sole source of income for 99% of QASA's members (and the same would apply to quadraplegics and paraplegics who are not members of QASA) is the disability pension of R 1200 per month provided by the state.
52. The only viable mode of transport for QASA's members is private road transport. The vast majority of QASA's members do not own a car of their own and cannot afford to. They rely on friends, relatives and community members to transport

them and typically will contribute to the cost of the transport provided by paying towards fuel costs.

53. Public transport is of no use to QASA's members. Seirlis, who actively inspects public transport offerings in Gauteng on behalf of QASA members, informs me that

53.1 the Bus Rapid Transport System is not accessible for persons with mobility impairment, the horizontal variance between the bus and the bus-stop platform is not safe for wheelchair users, and the route map or "footprint" of BRT is too small;

53.2 the Metrorail service is also not accessible to QASA's members, is unsafe, and has no supplementary service assisting QASA's members to move from station to destination;

53.3 the Gautrain is far too expensive and its reach and/or routes are of no assistance to the vast majority of QASA's members.

54. Seirlis informs me further that minibus taxis are not equipped to and do not cater for persons with mobility impairment. Persons with mobility impairment are assisted by minibus taxi drivers on the rarest of occasions.

55. The members of QASA will be severely prejudiced by the tolling of the proposed toll road network in that they will have to pay for tolls out of the minimal amount they receive as a disability pension.

SANCU

56. The Third Applicant, SANCU, is an independent consumer organisation that protects and promotes the rights of millions of consumers in South Africa.

57. SANCU has a statutory right of standing as an accredited consumer protection group in terms of section 78(1) of the Consumer Protection Act, which permits it to

“commence or undertake any act to protect the interests of a consumer individually, or of consumers collectively, in any matter or before any forum contemplated in [the Consumer Protection] Act”

58. In addition to section 78(1), I am advised and I respectfully submit that SANCU has standing and brings the present application:

58.1 as a member of, or in the interests of, a group or class of persons being the road user in Gauteng making use of the proposed toll road network who will be affected by the implementation of tolling insofar as such persons are consumers, in terms of section 38(c) of the Constitution; and

58.2 in the public interest, in terms of section 38(d) of the Constitution.

THE PROPOSED URBAN TOLL ROAD NETWORK: THE FIRST OF ITS KIND IN SOUTH AFRICA

59. The modern tolling of roads is not a new phenomenon in South Africa.
60. The first modern toll road was established on the N2 between George and Cape Town at Tsitsikamma.
61. Since then, South African citizens have witnessed and experienced the addition of a further 25 toll plazas on various sections of South Africa's national roads, including the N1, N2, N3, N4 and N17.
62. I attach hereto a map of the South African national road network with the location of the toll roads indicated thereon together with a publication by SANRAL in March 2011 of the toll tariffs which bears the names of the respective toll plazas, as annexure "**FA9**".
63. As is evident from annexure "**FA9**", the above sections of toll road, together with their respective toll plazas, are essentially examples of "rural" or "long haul" tolling.
64. The proposed toll road network that is the subject matter of the present application, and that has been the subject of major public controversy in South Africa since February 2011, is entirely different.

65. It is different, firstly, because the proposed toll road network is an urban toll road scheme.
66. I attach a map of the proposed toll road network hereto as "**FA10**".
67. The sections of road that have been earmarked for tolling constitute the main arteries for the movement of motor vehicles in and around the two major cities of South Africa that constitute the economic and administrative heartland of the country.
68. It is different, secondly, because of the massive numbers of citizens who make use of the proposed toll roads.
69. The proposed toll roads are used every day by hundreds of thousands of commuters, urban residents and employees of businesses that drive north/south between Johannesburg and Pretoria, and in all directions in and around both cities and their adjoining municipal areas, and from both centres to and from the country's major international airport (O R Tambo) situated on the outskirts of Johannesburg.
70. The proposed toll road network that is the subject matter of this application is different, thirdly, because of the extent to which the road users referred to above are captive to the use of the network.

71. Just as well known as the fact that the proposed toll roads are massively populated on a daily basis, is the fact that they are so populated precisely because there are no viable alternative metropolitan or secondary roads available for the use of urban commuters.
72. This is because the metropolitan and secondary roads referred to, which include, amongst others, the R55, the R515, the M1 and M2 and the Old Johannesburg Road, R101, are themselves heavily congested on account of the use by such roads of persons residing or working locally as well as spill over from those road users that try to avoid the congestion of the major arterial network.
73. Even more captive to the proposed toll road network, are the long-haul road users, many of whom are members of the Road Freight Association, who travel through the two metropolitan centres. The long-haul road user travelling from the south of Johannesburg to the north of Pretoria, for all practical purposes, has no option but to use the main arteries forming part of the proposed toll road network.
74. In reality, ordinary as well as long-haul road users, have little or no choice but to make use of the proposed toll roads.
75. In the case of commuters or ordinary private road users, the extent to which they are captive to the proposed toll road network is exacerbated by the acknowledged inadequacy of the public transport system in Johannesburg and Pretoria as well as between the two centres.

76. Although efforts have been made recently by, *inter alia*, local and provincial government to improve public transport infrastructure and effect modal upgrades of buses, mini-buses and railway options, public transport remains hopelessly inadequate as a viable alternative option to a very high proportion of residential and business road users within Gauteng.
77. Contributing to the problem is the spread-out nature of the two urban centres, a feature known as urban sprawl.
78. Local and provincial government are dedicated to addressing the inadequacy of public transport in Gauteng. On a national level, the Department of Transport's public transport strategy, which has the aim of developing a system that places over 85% of the metropolitan cities' population within one kilometre of an integrated rapid public transport network, constitutes recognition by the Minister of Transport of this problem and of the need to solve it. I attach the relevant extracts from the Department of Transport's public transport strategy hereto as "**FA11**".
79. Another unique feature of the proposed toll road network relates to the manner in which toll is to be levied and collected.
80. The proposed scheme is an open road tolling system.
81. This means that the toll system is designed to levy and collect toll electronically on a free-flowing road by using electronic transponders fitted to motor vehicles or

vehicle number plate recognition of motor vehicles passing through a toll collection point, instead of requiring users to slow down or stop at a traditional toll plaza and make payment before proceeding further on the road.

82. Open road tolling or e-tolling is not new internationally. It has been implemented and has worked with varying degrees of success or failure in countries such as Australia, the United Kingdom, New Zealand, Chile, Argentina, the United States of America, and Singapore.
83. Should open road tolling be implemented on the proposed toll road network, it would be a first for South Africa.
84. Part of this application will address the question whether open road tolling was a viable option for consideration by SANRAL and the Minister of Transport *in the case of the proposed toll road network*. The application does not address the broader question whether open road tolling may reasonably and usefully be implemented in other cases on other road networks in South Africa.
85. I now turn to set out the history of the proposed toll road scheme and the procedure adopted by the First and/or Second Respondents in their establishment of the scheme.

BACKGROUND TO THE PROPOSED TOLL ROAD SCHEME

86. The proposed toll road network has its origins in a policy document produced in April 1998 by the Gauteng Department of Transport and Public Works entitled "*Gauteng Toll Roads - Growth Meets Transport: A Toll Road Strategy for Gauteng*".
87. The Applicants have learned of this and other relevant facts in the brief historical background that is provided from the response of the MEC for Roads and Transport, Gauteng, dated 24 October 2011 to a petition brought via the Petitions Committee of the Gauteng Provincial Legislature ("the DRT's response"). I attach a copy of the DRT response hereto as "**FA12**". The Applicants are not in possession of the annexures to the DRT's response save those attached.
88. In 2003, the former MEC for Transport and Public Works introduced the Gauteng Toll Roads Bill (Notice 1880 of 2003 in the Provincial Gazette) to give effect to above policy which allegedly had been approved.
89. The Gauteng Toll Roads Bill sought to make provision, amongst other things, for the MEC to declare, in consultation with the Premier, an existing or new provincial road to be a toll road.
90. The Bill was never passed into law.

91. In 2005 SANRAL proposed to the Minister of Transport a toll road scheme to upgrade and expand the freeway network in Gauteng.
92. Between 2005 and July 2007, the proposal was further developed and, in July 2007, the National Department of Transport submitted the GFIP toll road scheme as a proposal to the National Cabinet.
93. In July 2007, Cabinet improved the implementation of GFIP as a state implemented toll road scheme.
94. And on 8 October 2007, the then Minister of Transport, Mr Jeffery Radebe, officially announced the launch of the GFIP.

THE PROCESS FOLLOWED BY THE FIRST RESPONDENT IN ESTABLISHING THE TOLL ROAD SCHEME

95. On 12 October 2007, days after the Minister's announcement, SANRAL, acting in terms of section 27(4) of the Act, published its notice of intent to toll sections of the N1, N3, N4 and N12 surrounding Johannesburg and in between Johannesburg and Pretoria.
96. In total, there were six notices of intent to toll published by SANRAL which corresponded to the various sections of the abovementioned national roads that SANRAL intended to declare to be toll roads. These were:

- 96.1 Government Notice No 962 of 12 October 2007 published in Government Gazette No 30372 of 12 October 2007 in respect of "National Road N1: section 20: N1 from Armadale to Midrand. Government Notice No 962 is attached hereto as "**FA13**";
- 96.2 Government Notice No 963 of 12 October 2007 published in Government Gazette No 30372 of 12 October 2007 in respect of National Road N1: Section 21: N1 from Midrand to the Proefplaas Interchange. Government Notice No 963 is attached hereto as "**FA14**";
- 96.3 Government Notice No 964 of 12 October 2007 published in Government Gazette No 30372 of 12 October 2007 in respect of National Road N4: Section 1: N4 from Koedoespoort to Hans Strydom Drive. Government Notice No 964 is attached hereto as "**FA15**";
- 96.4 Government Notice No 965 of 12 October 2007 published in Government Gazette No 30372 of 12 October 2007 in respect of National Road N3: Section 12: N3 from Old Barn Interchange to the Buccleuch Interchange. Government Notice No 965 is attached hereto as "**FA16**";
- 96.5 Government Notice No 966 of 12 October 2007 published in Government Gazette No 30372 of 12 October 2007 in respect of National Road N12: Section 19: N12 from Gillooly's Interchange to the Gauteng/Mpumalanga

Provincial Border. Government Notice No 966 is attached hereto as "FA17"; and

96.6 Government Notice No 967 of 12 October 2007 published in Government Gazette No 30372 of 12 October 2007 in respect of National Road N12: Section 18: N12 from Diepkloof Interchange to Elands Interchange. Government Notice No 967 is attached hereto as "FA18".

97. The abovementioned notices were published in both English and Afrikaans.

98. As the content of the notices is material to the grounds on which the present application is brought, I will, for the convenience of the Honourable Court, include herein the content of one of the notices. The form has been replicated in the case of the other notices:

"THE SOUTH AFRICAN NATIONAL ROAD AGENCY LIMITED

REGISTRATION NO 1998/009584/06

NOTICE OF INTENT

***NATIONAL ROAD N1: SECTION 20: NOTICE OF INTENTION TO DECLARE
THAT SECTION OF THE NATIONAL ROAD N1 FROM ARMADALE TO
MIDRAND AS A CONTINUOUS TOLL ROAD***

In terms of Section 27(4)(a) of The South African National Road Agency Limited (SANRAL) and National Roads Act, 1998 (Act No. 7 of 1998), The South African National Roads Agency Limited hereby gives notice of its intention to recommend to the Minister of Transport the declaration of the following National Road section as a toll road:

A Portion of existing National Road N1 : Section 20 ... [technical description of the road omitted].

The total length of the proposed toll road is approximately 50km and approximate positions of the toll plazas, being the place at which the liability to pay toll will be recorded, are depicted on the attached plan. In this regard it is recorded that as the toll road will operate on the basis of open road tolling, there will be no requirement on motorists to stop and pay toll at the toll plaza, but rather the toll plaza, which will merely be a portal fixed over the road with electronic monitoring equipment, will electronically record the liability to pay toll.

In terms of Section 27(4)(a)(ii) of the said Act all interested persons are hereby invited to comment and make written representations, by 14 November 2007 ("closing date"), being a date not less than 30 days from the date of this notice. All written representations must reflect the details of the proposed toll road in question and as described in this notice and must be addressed to the Regional Manager: Northern Region, The South African National Roads Agency Limited ("SANRAL") and be:

- telefaxed to the following number 086 647 0694; and/or*
- posted to the following postal address, PostNet Suite 110. Private Bag X19, Menlo Park, 0102, save that SANRAL shall not be obliged to take into*

account any representations sent by post but not actually received and processed by SANRAL by the closing date, for whatever reason, and/or

- *delivered to SANRAL, Northern Region, 38 Ida Street, Menlo Park, 0081 and deposited in the dedicated box available for purposes of written representations, save that SANRAL shall not be obliged to take into account any written representations delivered to the aforementioned address but which have not been deposited in the box provided for this purpose.*

SANRAL shall only consider written representations forwarded to them in the manner contemplated above and which are actually received and processed by the closing date. All other representations may be disregarded.

[SIGNED]

*NAZIR ALLI **

CHIEF EXECUTIVE OFFICER"

99. At or about the same time, the above notices, together with accompanying diagrams of the relevant road sections, were published in the same form in the following newspapers:

99.1 The Star dated 12 October 2007 on pages 6 and 7 of the Business Report, a copy of which is attached hereto as "**FA19**". All the Notices published in the newspapers between 12-14 October 2007 (save Mail and Guardian

where several notices were omitted) were the same double spread, although the Mail and Guardian and Sowetan were smaller in size;

99.2 The Sowetan dated 12 October 2007 on page 24, a copy of which is attached hereto as "**FA20**";

99.3 The Mail and Guardian dated 13 October 2007 on pages 16 and 17, a copy of which is attached hereto as "**FA21**";

99.4 The Beeld dated 12 October 2007 on pages 4 and 5 of Sake24News, a copy of which is attached hereto as "**FA22**"; and

99.5 The Sunday Times dated 14 October 2007 on pages 8 and 9, a copy of which is attached hereto as "**FA23**".

100. According to what was reported to the then Minister of Transport in SANRAL's application for approval for the first six sections of the proposed toll road network, at or about the same time, letters to the same effect were sent to the Premier of Gauteng, the Gauteng MEC for Transport and the Executive Mayors and City Managers of the following local and district municipalities:

100.1 Ekurhuleni Metropolitan Municipality;

100.2 City of Johannesburg Municipality;

100.3 City of Tshwane Municipality;

100.4 Metsweding Municipality;

100.5 MokengtsaTaemane Municipality; and

100.6 Kungwini Municipality.

101. I attach an excerpt (pages 20 to 25) of the application to the Minister of Transport dated 10 January 2008 hereto as "**FA24**".

102. I pause to state that:

102.1 the Applicants obtained a copy of that application from the applicant in legal proceedings under the name of *HMKL 3 Investments (Pty) Ltd v The South African National Roads Agency Limited and Others (NGP Case No. 67620/2010)* which in turn received the application and addenda thereto in those proceedings from SANRAL in terms of the Rule 53 (which requires the production of the record in review proceedings). I shall hereafter refer to such application and addenda thereto as "the HMKL record";

102.2 the HMKL record is composed of a 69 page application to the Minister of Transport plus six addenda marked "Addendum A" to "Addendum F" respectively;

102.3 I am advised that despite the fact that the HMKL record has been produced in terms of the Rules of this Honourable Court, it is not yet a public document until the application is called in open court;

102.4 I am advised further, however, that since the content of the HMKL record is material to the present application and constitutes the very basis for the administrative action sought to be set aside in this application, the Applicants are entitled to refer to the HMKL record in this application;

102.5 for brevity sake, the whole HMKL record will not be attached hereto but will be made available to the Honourable Court hearing the application should the Honourable Court request it.

103. According to the HMKL record, letters were also sent to local and district municipalities that were identified by SANRAL as not necessarily being indirectly affected by the proposed toll road sections, namely, West Rand District Municipality, Westonaria Local Municipality, Mogale City Local Municipality, Midvaal Local Municipality, Emfuleni Local Municipality, Randfontein Local Municipality, Sedibeng Local Municipality and Lesedi Local Municipality.

104. The closing date for the representations by the general public in regard to the tolling of the above sections of the national road was 14 November 2007 while public authorities were given until 14 December 2007.

105. The time period allowed for representations by the general public and public authorities respectively was the minimum period of 30 days allowed by the Act.
106. I will return to deal with this and other aspects of the notice given by SANRAL in due course.
107. According to the HMKL record, there were only 82 written representations in total that were received from the public in respect of the toll declaration process that commenced on 12 October 2007, 53 of which were contained in a single petition.
108. SANRAL responded to these representations in writing with the use of pro forma responses that had been prepared by SANRAL and collated by an organisation called Afrosearch which SANRAL had appointed to assist with the implementation of the toll declaration process.
109. Copies of the representations received from the public as well as public authorities together with SANRAL's written responses thereto are included in the record as a bundle marked Addendum A.
110. It is apparent from the HMKL record (as I shall deal with below), that SANRAL did not properly consider the representations of the public or public authorities.

111. On 10 January 2008, SANRAL applied to the Minister of Transport for approval for the declaration of sections of national roads N1, N3, N4 and N12 to be declared toll roads.
112. In and during the period 14 December 2007 and 28 March 2008, and on a date unknown to the Applicants, the First Respondent apparently received approval from the Minister of Transport in terms of section 27(1)(a) read with 27(4) of the Act in respect of the above sections of road in respect of which SANRAL had published notice of intent to toll.
113. On 28 March 2008, SANRAL declared the above sections of the national road as toll roads for the establishment of electronic toll points. The declarations are already contained as annexures "A1" to "A6" to the Notice of Motion and I pray that they be deemed to be attached to this Founding Affidavit.
114. The above notice and comment process followed by SANRAL in respect of the above six sections of national road was repeated about four months later in respect of the R21.
115. Prior to this, and as a necessary prerequisite to the inclusion of the R21 in the proposed toll network, the R21 had been transferred from the Gauteng Provincial Government to SANRAL. The circumstances under which the transfer took place are somewhat curious:

- 115.1 In regard hereto as “**FA25**” I attach a copy of the "Transfer of Road Memorandum of Agreement" entered into on 2 April 2008 between the Gauteng Provincial Government and SANRAL (“the April agreement”).
- 115.2 The April agreement, the operative terms of which cover less than half a page, makes provision in Clause 1 for the transfer by the Gauteng Provincial Government of "*all its rights, interest and obligations in respect of the land under the control of the [Third Respondent] on which the P157-1 and P157/2 (also known as the R21 – Albertina Sisulu Highway) are situated*" and envisages in Clause 2 that "*the CEO [of SANRAL] may request the national Minister of Transport to declare the sections of Provincial Roads P157-1 and P157/2, as toll roads, as part of the Scheme*".
- 115.3 The two remaining clauses of the April agreement envisage the proclaiming of the relevant section of the R21 as a national road and provide that the costs regarding the transfer of land and all rights would be borne by SANRAL.
- 115.4 Finally, and significantly, the preamble to the April agreement refers to the fact that the parties "*recognise that the transfer of custodianship of roads from one sphere of government to another is one of the most crucial*

aspects of the Scheme" and refers to a "*Main Agreement*" which has been entered into between the Gauteng Provincial Government and SANRAL.

115.5 The Applicants are not in possession of the main agreement referred to and are therefore unable to attach it hereto.

116. As the Honourable Court will note, in the conclusion of the April agreement SANRAL was represented by its Chief Executive Officer, Mr Nazir Alli ("Alli") and the Gauteng Provincial Government by its Premier, Mr Mbhazima Shilowa. I am advised and I respectfully submit that the Premier of the Gauteng Provincial Government in fact had no power to enter into the April agreement by reason of the fact that, in terms of the Gauteng Transport Infrastructure Act 8 of 2001, only the MEC responsible for provincial roads or a member of his department to whom he has delegated his power may enter into such agreement.
117. I am advised further, however, that the subsequent declaration by the Minister of Transport of the relevant section of the R21 as a national road on request of the Premier in terms of section 40 of the Act would probably be sufficient to cure this defect since section 40(1)(a) of the Act empowers the Minister to declare "*any existing road*" to be a national road after which declaration the Registrar of Deeds will endorse such fact on the title deeds of the land affected by the declaration in terms of section 40(4) of the Act.

118. On 11 April 2008, nine days after the April agreement was concluded, the Minister of Transport declared sections 1 and 2 of the then provincial road R21 as a national road. I attach a copy of the Government Notice No 409 of 11 April 2008 published in Government Gazette 30961 of 2008 hereto as annexure "**FA26**".
119. A week later, on 18 April 2008, SANRAL published a notice of intent to toll the newly-proclaimed national road R21. The notice of intent to toll was published in Government Notice No 437 of 18 April 2008 published in Government Gazette No 30983 of 18 April 2008, a copy of which I attach hereto as "**FA27**".
120. On or about the same date, SANRAL caused the notice to be published in:
- 120.1 The Pretoria News dated 18 April 2008 in the international section of the business report, a copy of which is attached hereto as "**FA28**". The real size copy of the Pretoria News is provided as an example;
- 120.2 The Beeld dated 18 April 2008 on page 24 of Sake24News, a copy of which is attached hereto as "**FA29**";
- 120.3 The Star dated 18 April 2008 in the international section of the Business Report insert on page 8, a copy of which is attached hereto as "**FA30**".
121. Notwithstanding that the DRT's response records that notice of intent to toll was also published in the Sunday Times on 20 April 2008, the attorneys of record

instructed by the Applicants have been unable to find such notice in the Sunday Times dated 20 April 2008, or in the editions of the Sunday Times preceding or following 20 April 2008.

122. The closing date for representations by the public in response to the notice of intent to toll the R21 was 18 May 2008 and 18 June 2008 for public authorities.
123. According to the DRT's response, also on 18 April 2008 letters of the intention to toll the national road R21 were delivered to the Premier of Gauteng, the MEC of the Department of Public Works in Gauteng and the head of department of Public Transport Roads and Works.
124. The same document reports that letters were also sent to the executive mayor and city managers of Ekurhuleni Metropolitan Municipality, City of Tshwane Municipality, Kungwini Municipality and Metsweding Municipality.
125. Only two responses were received from the public in reaction to the notice of intent to toll the R21.
126. In and during the period 18 June 2008 and 28 July 2008 and on a date unknown to the Applicants, SANRAL apparently applied for and the Minister of Transport apparently approved the declaration of the tolling of sections one and two of national road R21.

127. Sections one and two of national road R21 were declared to be toll roads on 28 July 2008.
128. I attach a copy of the relevant Government Notice 800 of 28 July 2008 published in Government Gazette No 31273 of 28 July 2008 hereto as "**FA31**".
129. The Applicants are not in possession of the application made by SANRAL to the Minister of Transport for approval of the declaration of the R21 as a toll road, nor the report to the Minister in terms of section 27(4) and will rely on the production of the record in order to obtain same.

PHASE 1 OF THE GAUTENG FREEWAY IMPROVEMENT PROJECT COMMENCES

130. On 9 May 2008, SANRAL issued a media release to the effect that it had awarded seven contracts for the first phase of GFIP.
131. I attach a copy of this media release dated 9 May 2008 that I have only recently obtained from the SANRAL website as "**FA32**".
132. To the best of my knowledge, the seven contracts referred to above corresponded to the first seven of 19 work projects making up Phase 1 of GFIP.

133. According to SANRAL's CEO, Alli, in a letter written to the Acting Executive Director of Business Unity South Africa on 16 August 2011, the works implemented for the Phase 1 of GFIP included the following:

"● Widening and upgrading of freeways:

- 201 km upgraded
- 585 additional lane km
- 265 fully-reconstructed lane km

- New road surfacing

- 34 interchanges are significantly upgraded which will result in less congestion

- 4 new directional ramps (fly-overs)

- 47 new bridges

- Widening 134 existing bridges

- 186 km of freeway lighting

- 127 km of concrete median barriers

- Implementation of ITS (CCTV, VMS, etc)"

134. I pause to state that it is my understanding that "ITS" refers to "intelligent transport system" which includes, amongst others things, 24 hour video surveillance,

electronic vehicle monitoring and electronic communication to road users in order to facilitate the smooth flow of traffic and to warn such users of accidents and congestion.

135. I attach a copy of the letter dated 16 August 2011 as "**FA33**" ("the BUSA letter"). The Applicants are not in possession of the annexures to this letter.
136. On 24 June 2008, work commenced in earnest on GFIP and continued for the next two years in order to prepare certain sections of the proposed toll road network for the FIFA 2010 World Cup.
137. After the three-month period of inactivity during the FIFA 2010 World Cup, work on the freeways recommenced and continued into 2011.
138. The BUSA letter contains a breakdown of the actual construction cost in schedule format.
139. The same schedules were included in a written reply dated 23 September 2011 by the Minister of Transport to a parliamentary internal question paper (No. 2288). I attach a copy of the reply dated 23 September 2011 hereto as "**FA34**" ("the Minister's reply").
140. The Minister's reply also mentions that Phase 1 of GFIP, originally set for completion on or about 10 November 2010, would be completed in 2011.

141. According to the schedules, the actual cost of construction was R 20,562 billion.
142. Notwithstanding the scheduled costs, according to Alli in the BUSA letter, the "*total debt for GFIP*" as at 16 August 2011 "*is approximately R23 billion*". Alli explains in the BUSA letter that the difference between the figure of R23 billion and the actual construction costs is made up by "professional fees" not incorporated in the actual construction cost schedule and interest.
143. The amount of R 20,562 billion also, apparently, includes the cost of the design and construction of the open road tolling gantries, 42 of which were constructed on the proposed toll road from or about 2010 to 2011.
144. The precise dates of the construction of the electronic gantries are unknown to the Applicants who are only able to state that the construction of such gantries became a feature of the Gauteng landscape in the period following the World Cup and into 2011.
145. I will return to the emergence of the gantries in due course.

PUBLIC OUTCRY AT THE ANNOUNCEMENT OF THE TOLL TARIFFS

146. On 4 February 2011, the Director-General for Transport in the National Government, Mr George Mahlalela, published the toll tariffs for the proposed toll network in terms of section 27(3)(c) of the Act.

147. I attach Government Notice 52 of 4 February 2011 published in Government Gazette No 33987 of 2011 as "**FA35**".
148. When the news that toll would be payable and the amounts of such toll ultimately reached the public, there was a massive outcry. The outcry was so great that the Department of Transport very soon suspended the application of the toll tariff, set to begin at 00h00 on 23 June 2011, and made plans to meet with representatives of the Gauteng Provincial Government in order to determine a way forward.
149. The Minister of Transport met with the Premier of Gauteng, Ms Nomvula Mokonyane and the MEC for Transport, Mr Ismail Vadi, on 22 February 2011.
150. In his address of 8 March 2011, in a media briefing on the formation of the Gauteng Freeway Improvement Project Steering Committee ("the GFIP Steering Committee"), the Minister of Transport reports that the Premier and the MEC had explained to him, at the meeting of 22 February 2011, "*that consultation on the tariffs had not been adequate*".
151. In the address of 8 March 2011, a copy of which is attached hereto as "**FA36**", the Minister of Transport went on to explain that it had been decided, on 22 February 2011, that "*a Steering Committee would be formed to address all the concerns surrounding e-tolling in Gauteng*".
152. In particular, the Minister went on to state:

"Today we announced the government-side of the Steering Committee, as a result of concerns surrounding the e-tolling in Gauteng. We decided on an intensive consultation process. We are consulting because we do not want to choke the economy and the people of Gauteng. At the same time, we want to meet our commitments for the repayment of this R20 billion debt.

In this regard, we have formed a Steering Committee to address on a consultative basis the proposed tariff structure and to explore the possibilities of increasing the Public Transport offering to provide more options and ease the burden on the Gauteng commuter.

The Steering Committee is chaired by the Director-General of the Department of Transport, Mr George Mahlalela, who will after consultation with all stakeholders compile a report for consideration of the political principles by the end of April 2011.

On the financial side, the Steering Committee is charged with reviewing the financial assumptions underpinning the proposed tariff structure. The Steering Committee will consider various funding options, including the financial implications of each and a recommendation on the most appropriate option."

153. The GFIP Steering Committee duly held public hearings on 24 March, 4 April, 5 April and 6 April 2011.

154. Marc Corcoran, who was tasked by SAVRALA to investigate and co-represent SAVRALA members in all matters pertaining to GFIP and the proposed toll scheme, attended every day of the public hearings.
155. Corcoran left for business abroad on 21 March 2012. The original of Corcoran's confirmatory affidavit will be obtained and filed in due course.
156. According to Corcoran, each day commenced with an introduction by one of the members of the GFIP Steering Committee who made it clear that the principle of "user pays" and the tolling of the proposed freeway network had been accepted and that the subject of discussion would be a revisiting of the proposed tariff only.
157. This is repeated in the GFIP Steering Committee report itself at p. 4 in the introduction to that report:

"The Steering Committee was formed after a meeting held between the Minister of Transport and the Premier of Gauteng. The meeting, held on the request of the Gauteng government, acknowledged the public outcry over the tariff finalisation process. The Minister agreed to put the process on hold, subject to the formation of a Steering Committee that would revisit the proposed tariff, implement a broad consultative process and also explore the possibilities of increasing the Public Transport offering, to provide more options and ease the burden on the commuter."

158. I attach the relevant excerpt to the GFIP Steering Committee Report hereto as “**FA37**“. In order to avoid prolix papers the whole report will not be attached, but will be produced for the Honourable Court at the hearing of the application should the Honourable Court request it.
159. I also pause to state that despite the fact that the Minister of Transport announced that the GFIP Steering Committee would include representatives of the private sector such as members from organised business, organised labour and commuter organisations, it was ultimately only composed of members or employees of national government and SANRAL.
160. After the end of the last day of the scheduled public hearings in which presentations had been made by the public and heard by the GFIP Steering Committee, the public hearing was adjourned to 30 June 2011 and those who attended were informed that on 30 June 2011 a final session would be held where the presentations that had been made would be discussed with a view to achieving consensus, as far as possible, on the solutions to the problems facing the project.
161. On 30 June 2011, however, no consultations took place.
162. Instead, prior to the start of the hearing, the Director-General held a press conference in which he announced that the GFIP Steering Committee had drawn

its conclusions and was ready to make its representations to the Minister on the revised tariff structure.

163. The Director-General told the media:

"We have listened to and taken on board what stakeholders said, and now are in a position to make our recommendations...The steering committee investigated the proposals made by all stakeholders, as well as all other options to revise the toll tariffs and make it more affordable. It was made clear right at the outset that the principle of tolling has been accepted, and that the matter under review was the proposed tariff of 66c/km, initially suggested as the charge for a vehicle without an e-tag account."

164. I attach a media release by SANRAL, dated 30 June 2011, providing a record of the above statements of the Director-General hereto as "**FA38**".

165. At the hearing that day, the members of the public and interest holders present were not engaged in consultation but were merely informed of the outcome of the GFIP Steering Committee's deliberations.

166. On 10 August 2011, Cabinet approved the revised toll tariffs for Phase 1 of GFIP.

167. On 11 August 2011, SANRAL issued a media release in which it stated it welcomed Cabinet's decision that, in due course, the revised toll tariffs would be formally published and the public would be informed of the commencement date of e-tolling.

168. I attach a copy of the media release, which I similarly obtained during the course of the preparation of this application, as “**FA39**”.
169. On 23 October 2011, after further public outcry at the news that the tolling of the proposed toll roads was set to proceed on revised tariffs, the Minister of Transport instructed SANRAL to halt all processes relating to the tolling of national roads.
170. I attach a copy of the statement by the Minister of Transport dated 23 October 2011 as “**FA40**”.
171. The statement made express reference to further public hearings that were scheduled to be held at the Gauteng Provincial Legislature concerning GFIP and the need for these to first reach a conclusion.
172. Despite the above statement by the Minister of Transport on 27 October 2011, SANRAL issued a statement to the effect that the GFIP project would go live in February 2012 and advertised the commencement of e-toll registration from 7 November 2011.
173. On 6 November 2011, the Department of Transport issued a statement clarifying that the instruction to halt tolling processes did not include Phase 1 of the GFIP.
174. I attach a copy of the statement dated 6 November 2011 hereto as “**FA41**”.

175. Corcoran attended the hearing at the Gauteng Provincial Legislature held on 11 November 2011 at which members of civil society were afforded an opportunity by the Gauteng Government to give their views on GFIP. (To the best of my knowledge, the further days for the hearing that had been scheduled were not proceeded with for reasons unknown to me).
176. As with the GFIP Steering Committee hearings, however, the hearing on 11 November 2011 turned out also to be held on the premise that the tolling of the proposed roads and the so-called “user pay” principle were in place and that this would not be changed.
177. The public hearings were chaired by the MEC for Transport in Gauteng, Ismail Vadi, who had in the DRT’s response several weeks earlier expressed to the Petitions Committee that neither the Gauteng Provincial Government nor the Gauteng Department of Roads and Transport had *"the constitution power or authority to either further reduce the toll tariffs or to abolish the tolling system in respect of the GFIP"*.
178. On 13 January 2012 SANRAL issued a media statement that e-tolling would not start in February as SANRAL had previously indicated. This was reported widely in the media.
179. I attach a copy of the media release hereto as “**FA42**” which was contained in an email received by Corcoran on 13 January 2012.

180. At the end of January 2012, on less than 36 hours' notice, SAVRALA and other stakeholders were invited to make representations on GFIP to the new SANRAL board that had been elected.
181. SAVRALA agreed to the invitation, preserving the hope that the new board may be open to reconsidering the toll scheme.
182. I attach a copy of the invitation sent to me by Felix Sebata on 30 January 2012 as "FA43" and my reply thereto on 1 February 2012 as "FA44".
183. Disappointingly, the hearing before the new SANRAL board which I attended and in which Corcoran and I were allowed to address the board for no more than 30 minutes, was most unproductive. The SANRAL board were evidently uninterested in the presentation made by SAVRALA and refused to enter into a discussion with Corcoran and me despite our efforts to initiate one by inviting questions and comments about the presentation. It was very obvious to me that the SANRAL board were simply "*going through the motions*".
184. SAVRALA was not given feedback on the meeting either at the time or subsequent thereto.
185. The hope that SANRAL and the Minister of Transport may be seriously reconsidering the raising of funds for Phase 1 of GFIP by means of e-tolling was further shaken on 7 February 2012 when the Minister of Transport made a public

announcement that the State would not be abandoning the “user pay” principle but was exploring "modalities" which would be "not so burdensome" for Gauteng motorists.

186. I attach a copy of the news report on the above statement by the Minister of Transport hereto as “**FA45**”.
187. This hope was nevertheless kept alive by the growing and continued opposition of civil society to the tolling of the proposed toll road network, and the politically powerful opposition of COSATU.
188. The hope of a change was however, definitively put to an end in the delivery of the budget speech by the Minister of Finance, Pravin Gordhan, on 22 February 2012 in which the Minister said:

"Mr Speaker, I am mindful that the introduction of tolling to finance the Gauteng Freeway Improvement Programme has caused considerable public reaction. We have listened carefully to the various suggestions and appreciate the difficulties that might be faced.

The total debt associated with the project is R20 billion. In order to contribute to a further reduction in the toll burden, a special appropriation of R5.8 billion is now proposed, to be included in the 2011/12 expenditure. This will reduce the debt to be repaid through the toll system, and will make a steeper discount payable for regular road users."

189. I attach a copy of this portion of the 2012 budget speech which I obtained from an online database containing an electronic copy of the budget speech on 22 February 2012 as "**FA46**".
190. There has not, to the best of the Applicants' knowledge, been a further publication of the revised toll tariffs payable in terms of section 27(3) of the Act.
191. The Applicants expect that such tariffs will be duly published at least 14 days prior to 30 April 2012, since SANRAL will not be entitled to levy and collect toll on the proposed toll road network without such publication having been made.
192. I will return to the significance of the publication of the tariffs in due course.
193. I now turn to deal with the grounds on which the Applicants approach the Honourable Court for relief.

THE DECLARATION OF THE TOLL ROADS SHOULD BE REVIEWED AND SET ASIDE

194. It is clear from section 27, that while SANRAL is empowered to declare a portion of national road to be a toll road, and may make an in-principle decision to fund a project by levying and collecting toll, it is the Minister of Transport who must consider and approve the levying and collecting of toll on a specified portion of national road. I am advised and I respectfully submit that should SANRAL's

proposals in its application to the Minister be unreasonable, irrational or otherwise unconstitutional or unlawful in substance, the Minister should decline approval.

195. Furthermore the approval by the Minister of an application to toll is the last stage of a four-stage enquiry required by section 27. Section 27(4) provides that the Minister of Transport "*will not give approval*" unless

195.1 first, SANRAL publishes notice of its intent to toll to the public, to the premier of the province in which the road is situated, and the municipalities that may be affected thereby; and

195.2 secondly, receives, properly considers and seeks to accommodate such representations and comment as may be received; and

195.3 thirdly, provides a report to the Minister on the issues set out above together with its application for approval for tolling. The report by SANRAL "*must*" indicate to what extent the comments and representations have been accommodated in its proposals and only if the Minister is satisfied that SANRAL "*has considered those comments and representations*" may approval for the tolling of the road be granted.

196. The approval of the Minister of Transport as well as the declaration by SANRAL following upon such approval will be invalid if, apart from the choice of tolling as a

funding mechanism, the mandatory procedures and further requirements referred to above are not followed.

197. I am advised and I respectfully submit that the prescriptions contained in section 27(4) referred to immediately above constitute a statutory notice and comment procedure that has the aim of protecting the rights and interests of those who would be materially affected by the tolling of a particular portion of the national road.

198. I am advised and respectfully submit further that as such, a proper interpretation of section 27(1) and 27(4) and the obligations imposed by these sections on SANRAL and the Minister of Transport

198.1 should be informed by section 33 of the Constitution of the Republic of South Africa which guarantees "*the right to administrative action that is lawful, reasonable and procedurally fair*"; and

198.2 should be measured against and, if necessary, supplemented by sections 3 and 4 of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA").

199. Section 4 of PAJA that deals with administrative action materially affecting the rights of the public is of particular relevance. Section 4 of PAJA, in turn, is linked to, and its content is informed by, section 3.

200. It is the Applicants' submission that SANRAL failed to comply with all three of the mandatory procedures prescribed by section 27 and moreover that the proposal to toll the proposed toll road network was substantively unreasonable. I elaborate below on the reasons for this.

SANRAL failed to give proper notice

201. Section 27(4) of the Act requires SANRAL to “[give] notice ... of the proposed declaration”.

202. I am advised and I respectfully submit that the first respect in which SANRAL failed to comply with the requirements of section 27(4) was because SANRAL failed to give proper notice:

202.1 The notices published by SANRAL in the Government Gazette and in the newspapers referred to above, were inherently defective in that they did not contain sufficient information for road users who would be affected by the tolling of the roads to make a proper assessment of the extent to which they would be affected by such tolling.

202.2 The main defect in the notice was the failure by SANRAL to provide an indication in such notice of the anticipated cost of the toll. No mention whatsoever was made of the likely quantum of the tariffs in the notices.

- 202.3 The DRT's response records that an "*indicative cost of 50c per kilometre*" had been given to Cabinet prior to its approval of GFIP in July 2007.
- 202.4 This critical information did not make its way into the notice given to the public itself.
- 202.5 It is submitted that this defect was fatal as was underscored by the massive public outcry that followed on the declaration of the toll tariffs in February 2011.
- 202.6 The result was that in 2007 and 2008, even those persons to whose attention the notices of intent to toll did come, had no idea of what financial implications the toll roads would have for them.
- 202.7 Consequently, the notices were not meaningful, and the public had no reason to take steps to defend their rights because they were unaware of the extent to which such rights would be affected.
- 202.8 The manifest defects in the notice were identified by a number of members of the public who complained that such notices were inadequate. An example is the representations of Mr I van Rooyen at page 220 (the same representations are repeated by van Rooyen in respect of each of the 6 portions of road) of Addendum A to the record which I attach as "**FA47**" hereto.

"As an interested and affected party, I am against this proposal for the reasons outlined below.

1. *The process of application by SANRAL for the proposed toll road extension is flawed. It favours SANRAL to the detriment of the public in the form of motorists and consumers, will have to fund this venture...*
- *A double spread advertisement does not give one the full picture how the proposed tolling will affect the public. For a venture aimed at extracting huge amounts of money from the public, SANRAL should put up boards at the intended toll spots, indicating an approximate proposed fee for that toll point and the distance covered by this fee. A telephone number for public enquiries should also be shown.*
 - *This way the public can see exactly how the tolling will affect them financially and give them a chance to explore ways of using other roads to avoid toll stretches. These boards should form part of the public consultation process.*
 - *Until this information is displayed on the route affected, the application process should be put on hold and the date for closure on comment should be extended until 4 weeks after such boards have been displayed.*
 - *The public can then raise informed comments and objections to the toll road proposal. At this stage only readers of newspapers who have read and reflected on this*

application will write to you. Most people are unaware of this application and its implication.

(2) The only agenda addressed in this application is the creation of toll roads and possible toll points. The costs to motorists, the effect on the surrounding roads and method of payment have been left completely out of this application. As all these form an integral part of the impact of this application, the public cannot be expected to take a stand on this proposal. Ignoring these basics does not provide the public with a transparent application by SANRAL.

- *Once these toll roads are implemented, the public will have no say as to the placing of toll booms, the fees charged or future increases in toll fees.*
- *One must oppose this application for the toll road, as SANRAL is not acting in good faith by withholding this additional information."*

203. The second respect in which the Applicants contend the First and Second Respondents failed to comply with section 27(4)(a) of the Act, is the failure by SANRAL to publish notice of intent to toll "*generally*":

203.1 I am advised and accordingly submit that the obligation to publish "*generally*" in terms of section 27(4) is informed by sections 3 and 4 of PAJA, read with section 33 of the Constitution of the Republic of South Africa.

- 203.2 The obligation to publish generally is accordingly an obligation to effectively bring to the attention of as wide a spectrum of the public as is practically possible, as well as those sections of the public who would be materially affected by the tolling of the roads in particular, the notice of intent to toll.
- 203.3 SANRAL therefore firstly bore the duty to publish its notice of intent to toll to the public in a manner proportionate to the vast size and impact of the project on the public. Adherence only to the minimum requirements of section 27(4)(a), which may have been appropriate in the case of rural tolling, was glaringly insufficient in the case of the proposed toll road system.
- 203.4 SANRAL secondly bore the obligation to specially bring the notice of intent to toll to those discernible groups within the public that would be materially affected by the tolling of the roads.
- 203.5 The most obvious, and most important group, was the group made up of the hundreds of thousands of urban and residential commuters who use the proposed toll road network every day.
- 203.6 As I have indicated above, the proposed toll road network carries an extremely large (captive) portion of the public. The Minister of Transport in his announcement of GFIP in 2008, gave the figure of 180 000 commuters

on the Ben Schoeman portion of the highway running between Johannesburg and Pretoria every day.

203.7 The traffic and toll feasibility report contained in the record as Addendum D suggests that the figure is much higher than this. Paragraph 4 of the expanded report, an excerpt which I attach hereto as “**FA48**”, indicates that (on 2006 figures) there are 40 000 road users on the stretch of road referred to by the Minister in the peak hour of the morning peak period alone, and that there are 219 323 road users on the proposed toll road network (excluding the R21) in the same period.

203.8 I am advised and I submit that SANRAL had an obligation in terms of section 27(4)(a), properly interpreted, to effectively bring to the attention of this group of Gauteng road users that it held the intention to toll the roads that were used daily by such persons.

203.9 SANRAL could easily, and should at the very least, have set up large signs beside the road at points throughout the entire proposed toll road network of the intention to toll and in addition ought to have commissioned radio and television broadcasts informing Gauteng residents of the same message.

203.10 The publication of the notices in the Government Gazette and in a single edition of only four newspapers circulating in the Gauteng area and one

nationally in the case of the N1, and in only three area newspapers in the case of the R21, without any reference on the front pages of such newspapers that such notices were contained therein, was hopelessly inadequate.

204. The third respect in which I am advised and I respectfully submit the First and Second Respondents failed in their obligation to publish notice of their intent to toll was that they failed to bring the notice of intention to toll to the attention of significant individual stakeholders known or reasonably identifiable to SANRAL who would be materially affected by the tolling of the roads:

204.1 SAVRALA is a clear case in point. SAVRALA has been in regular and on-going engagement with the Department of Transport, both nationally and in Gauteng, concerning the implementation of the electronic traffic enforcement system known as "AARTO" in terms of the Administrative Adjudication of Road Traffic Offences Act 46 of 1998, since at least 2003.

204.2 The members of SAVRALA are particularly sensitive to this system in that it is premised on driver ownership of vehicles and essentially fails in the case of the members of the SAVRALA who rent or lease vehicles owned by them to the public.

- 204.3 In addition, the presence on the roads of the members of the SAVRALA (in particular the big vehicle-rental companies) is otherwise well-known to SANRAL and indeed all road users.
- 204.4 Neither SAVRALA, nor its members, were informed of the toll declaration procedures initiated by SANRAL. Nor were they informed of the implications that the tolling of the proposed toll road network would have on them.
- 204.5 I am advised and I respectfully submit that the failure of SANRAL to bring the notice of the intent to toll to the attention of the SAVRALA constituted clear non-compliance with section 27(4)(a) on the part of SANRAL and simultaneously a violation of SAVRALA's right to administrative action that is procedurally fair.
- 204.6 I am advised and I respectfully submit that, for different reasons, QASA (or at least the South African Disability Alliance) should also have been given individual notice. Neither was given notice of the intent to toll nor consulted on how tolling may impact persons with disabilities or mobility impairment, despite that this clearly identifiable group of person would be adversely affected.
205. The fourth respect in which the procedure followed by SANRAL was defective in the circumstances was the provision by SANRAL of only 30 days' and 60 days'

notice for representations to be made by the public and by public authorities respectively:

205.1 I am advised and I respectfully submit that the provision of only 30 days' notice to the public and 60 days' notice to public authorities, which is the minimum allowed by section 27(4), was entirely disproportionate to the gravity and impact that the proposed declarations to toll would have on the public. A far longer period ought to have been allowed.

205.2 It was neither necessary nor appropriate that SANRAL push the declaration procedures through as quickly as it did.

205.3 The magnitude of the consequences and the prejudice to the public living and working in and about Johannesburg and Pretoria and the surrounding areas, as well as to affected municipalities, demanded that the notice and comment procedures be significantly lengthened in order for those parties to properly digest the implications that tolling of the proposed toll road network would have for them and properly engage with SANRAL on the issue.

205.4 I am advised and I respectfully submit that the speed of the procedures decided upon by SANRAL is in fact so obviously inappropriate that it provides an indication that SANRAL has at no stage been open to the possibility of funding Phase 1 of GFIP in any manner other than by tolling.

205.5 Indeed, the brick-walled response of SANRAL after the public outcry in February 2011 to alternative proposals of funding far less burdensome on the public and far less expensive to implement, has demonstrated a lack of reasonableness and openness of the kind that I am advised (and I submit) should be brought to bear by a public functionary on any administrative decision or action and especially one of this magnitude.

205.6 SANRAL's fixation on tolling the proposed network and its fettering of its discretion and that of the Minister of Transport in this respect is borne out by the content of the HMKL record. I deal with this below.

205.7 I am advised and I submit that the limitation of the period in which the public and public authorities had to respond to the notice of intent to toll made the statutory notice and comment procedure followed by SANRAL defective and in contravention of section 27(4)(a) of the Act and sections 3 and 4 of PAJA read with section 33 of the Constitution.

The decision to toll was unreasonable because the collection costs are disproportionate

206. The Applicants contend that the decision by SANRAL to choose, and the decision by the Minister of Transport to approve, open road tolling of the proposed toll road network was so unreasonable that no reasonable decision maker could have taken such decision (within the meaning of section 6(2)(h) of PAJA). The

Applicants also submit that the decision is not rationally connected to the purpose for which it was taken or the information before SANRAL and the Minister (within the meaning of section 6(2)(f)(ii) of PAJA) and was arbitrary (within the meaning of section 6(e)(vi) of PAJA).

207. According to the GFIP Steering Committee Report, the relevant extract of which I attach hereto as “**FA49**”, the initial working capital used by SANRAL for Phase 1 of the GFIP came in the form of its own capital and loans on the capital market.
208. SANRAL then had to decide upon how these funds would be recouped. SANRAL, with the Minister of Transport’s approval, chose tolling.
209. Section 25(1) of the Act provides that it is SANRAL which is responsible for "*the financing of all those functions [assigned to it in this Act] in accordance with its business and financial plan*".
210. Section 34 of the Act sets out the sources of SANRAL's funds together with the funding mechanisms that SANRAL may utilise for the financing of its projects. The tolling of roads is one of twelve funding options listed in section 34 of the Act.
211. I am advised and I respectfully submit that while SANRAL and the Minister of Transport (where his involvement and/or approval is required) determine how a particular project such as Phase 1 of GFIP should be funded, the exercise of that discretion and the choosing of a particular option in exercise of such discretion:

211.1 may not contravene a law; or

211.2 may not be so unreasonable that no reasonable administrator could have so exercised the power or performed the function;

211.3 may not be otherwise unconstitutional or unlawful.

212. It is the Applicants' respectful contention that, for the reasons I set out below, the decision to toll the proposed toll road network by open road tolling or e-tolling offends against these principles and is therefore liable to be reviewed and set aside.

213. It appears from the HMKL record, the relevant extract of which I attach hereto as "FA50", that once SANRAL determined that the proposed network be tolled, it was inevitable that the toll collection mechanism would be open road tolling.

214. This is because the sheer volumes of traffic on the network made the option of tolling by traditional means (where a vehicle comes to a stop before a boom and toll is paid by the driver), or even the slowing of the vehicle in front of a boom, the lifting of which would be triggered by an e-tag, as there are in some toll plazas in the country) would cause such congestion in the proposed toll road network that it would be completely unworkable.

215. The choice of the type of tolling was further narrowed by the fact that the high frequency of freeway on-ramps and off-ramps, which are typical in an urban setting, meant that there would have to be a high density of toll collection points along the proposed toll road network in order to ensure that persons who made use of the roads would not escape without paying toll. It is for this reason that there is such a large number of electronic toll gantries (42 in total) that cover the proposed toll road network.
216. In short, if the choice for funding the upgrading and expansion of the proposed toll road network was going to be tolling, it was inevitable that the choice would be open road tolling by electronic means.
217. Open road tolling is, however, technically sophisticated and its implementation and enforcement is extremely expensive.
218. SANRAL must have contemplated at the time of the declarations under attack that the system to be put in place was one of open road tolling and therefore must have known that the cost of enforcing the levying and collection of toll would be very high.
219. I am advised and so submit that if SANRAL did not know this, or did not inform the Minister of this fact, its decision to declare the proposed toll road network a toll road would be arbitrary, and this would also vitiate the Minister's approval. In the absence of consideration of such a critical fact, the decision of SANRAL and/or

the Minister would be liable to be reviewed and set aside on the basis that SANRAL and/or the Minister failed to apply their minds to a relevant consideration.

220. The HMKL record indicates that no mention is made of the cost of the collection and enforcement of e-tolling. Both the application, and the Economic Feasibility Report (Addendum C in the HMKL record) refer only to the cost of setting up e-tolling infrastructure, namely R 1.5 billion. This is a startling omission.
221. Worse than that, the Economic Feasibility Report is misleading in that under the heading of "Toll Collection Costs" it represents to the Minister of Transport that the toll infrastructure cost (of setting up the gantries, clearing house etc) "*is the cost that would be incurred to pay for improved equity*". No mention at all is made of the exorbitant cost of operating e-tolling, to which I shall now refer.
222. The GFIP Steering Committee, composed in part by members of the Department of Transport and representatives of SANRAL, provide details in their report concerning the cost of e-tolling. I attach the relevant excerpts of the GFIP Steering Committee report hereto as "**FA51**".
223. As the Honourable Court will note, it is reported that SANRAL had conducted a procedure in order to pre-qualify potential contractors for the building and operation of an open road tolling system and that such process had been completed by December 2008.

224. There were three joint ventures which qualified.
225. In April 2009, the pre-qualified contractors were invited to submit tenders to design, build and operate an open road toll system on the proposed toll road network.
226. The GFIP Steering Committee Report states that the components of the tender were:
- 226.1 that the tenderer had to design and implement all equipment, hardware and software requirements for the e-tolling system in Gauteng;
 - 226.2 that the tenderer had to perform toll collection that comprised three components, namely:
 - 226.2.1 e-toll roadside, back office points of presence, systems maintenance and facilities for eight years;
 - 226.2.2 the operation of the transaction clearing house for five years; and
 - 226.2.3 the running of the violation processing centre for five years;
 - 226.3 at the end of eight years the contractor would have to replace the components of the toll system that had reached the end of their design life.

227. The GFIP Steering Committee Report goes on to record that the lowest (or apparently the lowest) of the three tenders that were received was that of the Electronic Toll Collection Joint Venture between KapschTrafficcom and TMT Services ("ETC JV") in an amount of R6.22 billion.
228. This amount is stated by the GFIP Steering Committee Report to exclude VAT, inflation and other ancillary costs.
229. The operations or toll collection aspect of the tender is also given in the GFIP Steering Committee Report and is in the amount of R4.73 billion, excluding VAT, or R5.3922 billion with VAT.
230. I pause to state that as is intimated in the GFIP Steering Committee Report, this amount of R5.3922 billion is not the actual cost to SANRAL of the implementation of the open road tolling system.
231. The actual figure is unknown to the Applicants, but is believed by the Applicants as well as by economists to be much higher.
232. Significantly, key representatives of SANRAL and the National Department of Transport have either refused outright to disclose this cost or have studiously avoided doing so.

233. At a briefing of the media at the Johannesburg Press Club, a journalist of the Star, Angelique Serrao, asked Nazir Alli, SANRAL's CEO, directly what the cost of the collection of e-toll was. Alli first avoided answering by questioning whether Serrao did not trust the Auditor-General. Serrao repeated the question only to have Alli put up his hand to block further communication while stating words to the effect that "*You will not understand*".
234. I attach a confirmatory affidavit of Gary Ronald, who was present and witnessed the interchange, hereto as "**FA52**".
235. A second example was a briefing held on 27 September 2011 which I attended where the Director-General for Transport, George Mahlalela, studiously avoided the same question by continually redirecting the conversation each time it was asked.
236. The Applicants invite SANRAL to take the Honourable Court and the public into its confidence and disclose its contract with ETC JV and the actual amount that it will cost to operate the open road toll system over the next five years.
237. Pending the voluntary disclosure by SANRAL (who has in effect recently been instructed by the Minister of Transport to make full disclosure of such contracts to the public) or alternatively the discovery that will be made by SANRAL in its lodging of the record in due course, I will make use of the figure set out in the Steering Committee Report, namely, R5.3922 billion.

238. Payment of R5.3922 billion for the operation of the open road tolling system for five years implies that the road user paying toll will be paying an amount of R1.07844 billion towards ETC JV for the operation of the open road tolling system every year.
239. When this figure is considered in light of the fact that SANRAL predicts that the debt incurred for Phase 1 of GFIP will only be repaid after 20 years of operation, it becomes apparent that the road user will be required to pay not less than R21.5688 billion for the operation of the open road tolling system alone.
240. According to the schedules contained in the Minister's reply and the BUSA letter referred to above, the total capital cost of Phase 1 of GFIP was R 20.562 billion.
241. In the result, the choice of tolling the proposed toll road network means that the road user will be required to pay as much (or more) for *the collection of e-toll* as for the *actual cost of the upgrading of the roads themselves*.
242. This means that the mechanism of e-tolling chosen by SANRAL and the Minister of Transport is wasteful and grossly disproportionate to the capital cost incurred in upgrading and improving the road itself (inclusive of CCTV, VMS and lighting).
243. An alternative method of funding which is favoured by many interested parties (including the Applicants) is a ring-fenced fuel levy increase. This option entails no costs of collection at all. When this is considered, it becomes clear that the

option of open road tolling is so unreasonable that that it is not a decision that could have been made by a reasonable administrator.

244. The cost of tolling, compared to the capital amount owing after the appropriation from the budget of R 5.75 billion towards the debt, is such that the user would be expected to pay much more for toll collection than for the capital amount owed of the debt.

245. I pause to state that, in regard to the option of a ring-fenced increase in the fuel levy, the answers received by its proponents from SANRAL and representatives of National Treasury (the same answers are contained in the Steering Committee Report) was that this cannot be done because (a) it is not national treasury's policy to ring-fence tax revenue as this brings about inefficiencies in government spending and causes lack of transparency; and (b) residents in other parts of the country cannot be expected to contribute towards improved infrastructure in Gauteng. However, these answers are are inconsistent with national treasury and/or government's own practices and are in any event no answer to the excessive cost argument set out above:

245.1 Firstly, amounts are already ring-fenced on the fuel levy for both the Road Accident Fund and the Transnet Multi-Product Pipeline.

245.2 Secondly, approximately R 200 billion of the R 260 billion in fiscal income derived by the National Revenue Fund from residents of Gauteng is used

inter alia for the development and infrastructure of other parts of the country. In this regard, I attach as “**FA53**” an article prepared by Corcoran with references to SARS statistics incorporated therein.

246. I must make it clear that, notwithstanding my remarks above, the Applicants are not by reference to the ring-fenced fuel levy option seeking to dictate to SANRAL or the Minister of Transport how their discretion should have been exercised. The ring-fenced fuel levy as a funding mechanism for Phase 1 of GFIP is mentioned as one of a range of options that illustrate that the one option chosen by SANRAL and the Minister of Transport was, in fact, so unreasonable that it cannot be said to have been an option open to them at all.
247. I am advised and I respectfully submit further that the decision by SANRAL and the Minister of Transport to toll the proposed toll road network was also contrary to their duty in terms of the Public Finance Management Act 1 of 1999 to take effective and appropriate steps to prevent irregular, fruitless and wasteful expenditure.
248. SANRAL and the Minister of Transport have a fiduciary duty to the public in general, and in the present instance the citizens of Gauteng in particular, not to waste public funds.
249. I am advised and I respectfully submit that the choice of implementing open road tolling on the proposed toll road network was a dereliction of that duty.

The choice of open road tolling is unreasonable because enforcement is practically impossible

250. In addition to what has been set out above, the Applicants contend that the choice of open road tolling was unreasonable within the meaning of section 6(2)(h) of PAJA because the enforcement of the system is virtually impossible in practice. I elaborate below upon the reasons for this.
251. Traffic flow volumes are measured at “peak” and “off-peak” times. In the absence of a clearer definition of the meaning of peak or off-peak “hour”, the traffic and toll feasibility report at Addendum D in the HMKL record is somewhat equivocal.
252. At the lower end, should peak “hour” refer to the periods of 06h00-09h00 and 16h00-19h00 respectively and the off-peak “hours” to the period between 09h00-12h00 in the morning and 12h00-14h00 in the afternoon, the table substantiates a total of 756 440 trips on the proposed toll road network (or part thereof) per day. This is the sum total of the doubling of the morning peak and off-peak hours in order to add the afternoon traffic and without allowing night time off peak hours.
253. On the higher end, the report substantiates a total of 438 646 trips in a single hour of morning and afternoon peak traffic respectively, plus a total of 3 495 734 trips in the remaining off peak hours, both morning and afternoon (being 158 897 multiplied by 22).

254. Apart from these two measures, the Applicants have had sight of an article published in *Toll Roads News* on 31 August 2011 in which the Chief Executive Officer of ETC JV states that it is expected there will be 2 million transactions per day on the proposed toll road network at an average of 2.5 toll transactions per user, which approximates to the lower of the above two interpretations of the data. Consequently I will make use of this figure in what follows below.
255. In the same article, the CEO of ETC JV asserts that it is the JV's aim to secure 60% registration of e-toll vehicle transponders and that the balance of 40% will be processed by means of vehicle licence plate number recognition.
256. I attach a copy of the article dated 31 August 2011 as "**FA54**".
257. The following may be deduced from the figures made public by ETC JV's CEO:
- 257.1 SANRAL and ETC JV do not expect to achieve a high number of voluntary e-tag registrations;
- 257.2 there will be 800 000 users of the proposed toll road network every day (at an average of 2.5 transactions per user);
- 257.3 1 million toll transactions per day, corresponding to 400 000 users, will not be automated but will be subject to manual vehicle licence plate

recognition by individuals working at SANRAL's central clearinghouse in Midrand;

257.4 if Alli is correct that there will be only 7% non-compliance by users according to international experience (the Honourable Court is respectfully referred to the BUSA letter), then at least 28 000 individuals will need to be sent invoices and later summonses to appear in Court per day.

258. This means that 840 000 invoices would have to be sent by mail to road users per month. The postal system would simply be flooded.

259. I am advised that even if the figure of 28 000 per day were to be artificially reduced to a factor of 10%, the proper enforcement of the scheme would still be unachievable.

260. The logistical and administrative impossibility of administering the system is also demonstrated with reference to the collection stage, which should require the serving of civil summons (whether by sheriff or by registered post) or the laying of criminal complaints with a view to the arrest of toll avoiders.

261. I am advised that it would be practically impossible for SANRAL to effect the service of 1 000 summonses per day, let alone a figure higher than that.

262. Further, neither the criminal nor the civil Magistrates' Courts through whose districts the proposed toll road network runs, have the capacity to deal with the flood of cases that would result from the open road tolling system.
263. The problem of enforcement is exacerbated by the fact that offences relating to the avoidance of toll will often have been perpetrated by road users using the network without paying in multiple jurisdictions.
264. I, together with other representatives of SAVRALA, have pointedly asked of representatives of SANRAL, as well as representatives of the National Prosecuting Authority, *inter alia*, at a meeting on 13 December 2011, held on the implementation of open road tolling, how what appear to be insurmountable logistical problems of enforcement and of cloned number plates will be dealt with.
265. The answers that were given were absurd, the best being that the authorities would select one "big fish" to prosecute and everybody else would fall into line.
266. The Applicants regard this approach as arbitrary and irresponsible.
267. I attach an email sent by me following the meeting referred to above to representatives of the NPA and the Department of Justice on 18 December 2011 as "**FA55**".

268. Be that as it may, I am advised and I respectfully submit that the rudimentary analysis I have set out above, using the numbers that emanate from SANRAL's contractor, ETC JV, clearly illustrates that the enforcement of open road tolling in the case of the proposed toll road network is practically impossible.
269. To make matters worse, the e-tolling system also has material deficiencies that will exacerbate the problem of enforcement and cause severe prejudice to members of the public.
270. First, the system (which is based on driver-vehicle ownership or vehicle owner responsibility), is unable to cater for the charging of road users who are not the owners of the vehicles they drive. Persons will be charged for toll transactions they did not enter into when their cars are used by others. The vehicle renting and leasing industry, which owns the vehicles used by their clientele, will be severely burdened with the cost of administering and collecting tolling charges incurred by hirers of motor vehicles owned by them. This is an aspect to which I will return below.
271. Secondly, the e-tolling system is unable to deal with cases of cloned vehicle licence plates. It is a well-known fact within SAVRALA's industry, (and known to SANRAL), that 10% to 15% of vehicle licence plates are cloned. Cloned number plates are a reality that SAVRALA's members struggle with. I have had to deal with the problem on behalf of SAVRALA and Corcoran has raised the problem of

cloned number plates on various occasions with SANRAL concerning the toll road proposal without satisfactory response.

272. Because of the presence of cloned number plates, people who did not use the toll network will nevertheless be charged as if they had.
273. SANRAL has not put forward any proper solutions to the problem of cloned number plates nor made provision for effective remedies for those persons affected by it.
274. The problem faced by SAVRALA's members will also be faced by those persons whose vehicles are used on the proposed toll road network by others without their knowledge and consent.
275. I am advised and so respectfully submit that the factors outlined in this section demonstrate that the choice of open-road tolling was not properly considered and it was so unreasonable an option that no reasonable administrator could have chosen to adopt it.

Review grounds arising from the HMKL record

276. The HMKL record came into the possession of the Applicants on or about Thursday, 15 March 2012. The HMKL record gives rise to a series of additional review grounds which serve to vitiate SANRAL's decision to declare the proposed

toll road network as a toll road, and the Minister's decision to give approval for this. I set these out below.

277. I have already dealt with the apparent failure by SANRAL to disclose to the Minister the excessively high cost of e-tolling, as well as the misleading nature of the application placed before the Minister in that respect.

278. A second and further ground for the review (at least in relation to the first six sections of national roads declared as toll roads that were the subject of the record), was the failure of SANRAL and/or the Minister of Transport to be open to and properly consider methods of funding other than tolling:

278.1 The sum total of the discussion on the topic of funding options in the application is contained at pp 11, 14 and 52 thereof, which I attach hereto as "**FA56**".

278.2 The Honourable Court will note that at pages 11 and 14 of the application, there is no more than a superficial comparison between the option of tolling and the funding of GFIP from the National Treasury.

278.3 Further, while there is reference to what might constitute "politically the only likely option", there is no discussion of the real implications, including the cost and administrative implications, of the two options.

- 278.4 Page 14 contains a brief reference to the "user pay" system which, in that context, is said to be more equitable than the drawing of large budgetary allocations from the national fiscus, which allocations could be put towards "poverty alleviation" instead.
- 278.5 The fact that the ring-fencing of an increased amount on the fuel levy would not contravene those principles and would, at the same time, have the marked benefit of costing nothing to collect, is not even mentioned.
- 278.6 The Honourable Court will note further, at page 52, that once again, there is no detailed discussion of any alternative funding methods. There is no discussion of tolling versus any other model at all.
- 278.7 In Addendum "C", the interim economic impact report, there is a brief discussion on funding options that involves a weighing up of the fuel tax versus tolling.
- 278.8 The discussion, once again, is superficial. Even though the fuel tax is expressly acknowledged to be the "most cost-effective way to pay" in combination with special levies to be imposed on heavy vehicles, this method is quickly dismissed by reference to the (inaccurate) statement that it is fiscal policy that there should be no earmarking of funds and that "equity" requires the imposition of tolling.

278.9 The cost of achieving “equity”, that is of tolling, is misleadingly given as the cost of the tolling infrastructure only. No mention is made of collection costs.

278.10 Moreover, the record provides no critique of the "user pay" principle and it ignores the fact that under the fuel levy option the user is paying for the road infrastructure, and to the extent that persons in other parts of the country are also contributing to the infrastructure, such persons would, in turn, benefit on the increased contribution made by Gauteng to the GDP of the country.

278.11 I attach copies of the relevant pages of Addendum "C" hereto as "**FA57**".

278.12 It is clear from the above that SANRAL had no real intention at any stage to entertain an alternative funding model and was not willing to permit the Minister of Transport to apply his mind to the real advantages and disadvantages of tolling versus the various other funding models which were available.

278.13 The Minister, in turn, was not given information that was material to his decision. Tolling was presented as the only option.

278.14 As a consequence of the failure of SANRAL and the Minister to take account of relevant considerations concerning the various funding options

on offer under section 27(1)(a), the Minister's approval, and the declaration of tolling by SANRAL that followed it, are liable to be reviewed and set aside.

279. A third ground of review was the failure of SANRAL to properly consider the representations that were received in the notice and comment procedure and to indicate to the Minister the extent to which such representations had been accommodated in its proposals, as it was required to do under section 27(4)(c) of the Act:

279.1 I have already said that SANRAL did not in fact engage with the representations made by or on behalf of the public in response to the respective notices of intent to toll. Instead, a response procedure was put in place by SANRAL in terms of which a third party company was provided with *pro forma* answers and prepared letters of response for SANRAL to the representations of the public on the basis thereof.

279.2 While this might not at first blush appear to amount to a failure on the part of SANRAL to properly consider the representations made by the public, when read in light of the parts of the application to the Minister purporting to deal thematically with the representations and comments received from the public, the lack of attention on the part of SANRAL to the substance of the representations is unmistakable.

279.3 In this regard, I attach hereto pages 53, 54 and 55 of the application as **“FA58”**.

279.4 The responses of SANRAL to the objections that "tolling will be of no benefit and use of public transport is of no consequence", "tolling of existing non-tolled national road is unacceptable" and "tolling will increase diversion to an already congested secondary network and aggravate traffic congestion" show no willingness on the part of SANRAL to meaningfully deal with the heart of the difficulties raised by the public, namely:

279.4.1 that there is no adequate public transport alternative to driving on the toll roads;

279.4.2 that the tolling of an existing main traffic artery already and originally paid for by the taxpayer, is unjust; and

279.4.3 that there are no real viable alternative routes available to road users.

279.5 I am advised and I submit that in failing to properly consider and meaningfully engage with the very real objections raised by the public, SANRAL failed to comply with a mandatory requirement of section 27(4).

279.6 The Minister of Transport, in turn, could and should not have been satisfied that SANRAL had met the requirements of section 27 and therefore should not have granted approval for the tolling of the network.

279.7 The failure by SANRAL, and in turn the Minister of Transport, to properly apply their minds to the very real need for viable alternatives to use of the proposed toll road network is borne out by a further serious omission on the part of both SANRAL and the Minister, namely, to ignore the condition attached to the analysis of the interim social impact assessment, to the effect that the tolling of the proposed toll road network could only be accepted if there were viable alternative routes for road users and viable alternative means of public transport available for the use of the public.

279.8 I attach hereto pages 50-51 of Addendum "B" as "**FA59**" which makes very clear the opinion of the experts there being consulted:

*"It is important that the toll option is only considered as part of an integrated transport plan and in the event of there being **viable alternatives** which will be addressed below..."*

The viability of alternate routes is an extremely important issue, first in respect of fairness towards the public and secondly with regard to the viability of the project. Charging a fee on an existing road system with few or no alternatives raises questions of fairness that will be challenged by the public. If no practical alternatives exist the viability of the project will also encounter serious difficulties.

The viability of alternate choices of transport closely relates to the previous impact with regard to fairness and the viability of the project...Existing public transport alternatives are currently not viable and would have to undergo considerable upgrading. Serious consideration needs to be given to the development of an integrated transport system that provides user friendly access to all forms of public transport across the province...

Prior to the implementation of a toll fee option on the Gauteng freeway it is important to undertake an extensive public participation process over an extended period. The public participation process must provide ample opportunity for the public to enter the debate concerning the prevailing situation and the various solutions."

279.9 If the above quotation and the attached pages as a whole are compared with what SANRAL put into the application for the Minister, which I attach hereto as "**FA60**", it is evident that the important findings in the social impact assessment were not drawn to the attention of the Minister of Transport and, in all probability, were not properly considered by him.

280. Fourthly, the Minister's approval was granted on the basis that adequate public transportation alternatives were or would be put in place when, in fact, this was and would not be the case:

280.1 With regard to the former, Addendum "F" to GFIP, as well as page 8 of the application, which I attach hereto as "**FA61**", was misleading in that it created the impression that adequate public transport alternatives would

be provided by SANRAL simultaneously with the upgrading and tolling of the proposed toll road network.

280.2 I am advised and I respectfully submit that this was misleading and the approval of the Minister is invalid to the extent that he relied thereon, because, in truth and in fact, the measures referred to would not even scratch the surface of the problem of a lack of viable public transport alternatives in the context of Pretoria and Johannesburg's urban sprawl.

280.3 I am advised and I respectfully submit that the representations made to the Minister by SANRAL dealing with measures taken to enhance public transport and road user efficiency should, at the very least, have been realistic and framed in such a manner that the Minister of Transport was left under no illusion that the public in Gauteng would have at their use an adequate alternative transport system to the main arterial networks that were to be tolled.

280.4 The complete inability of today's public transport in Johannesburg and Gauteng to serve as a realistic alternative to the proposed toll road network (even with the measures referred to in the application which were put in place, such as BRT, park and ride and links with public transport hubs), speaks for itself.

Summation

281. For the reasons set out above, I respectfully submit that SANRAL's decision to declare the roads forming the subject matter of this application to be toll roads (together with the Minister's decision to give approval for such a declaration), should be reviewed and set aside. I am advised that the Applicants will be entitled to supplement these review grounds when the record is made available in terms of Uniform Rule of Court 53.

SANRAL'S ENVIRONMENTAL AUTHORISATIONS ARE LIABLE TO BE REVIEWED AND SET ASIDE

282. SANRAL applied for and obtained several environmental authorisations to commence with and continue the upgrade of the freeways for Phase 1 of GFIP. Construction of the road upgrades and improvements commenced during June 2008 after the Director-General of Environmental Affairs granted the various environmental authorisations during November 2007 and February 2008.

283. These upgrades included *inter alia* the construction of toll platforms on which the toll gantries were eventually erected, which platforms entail structures that are below or at the height of the surface of the highways. It is extremely difficult for a lay person or even for an engineer who is not directly involved in that project to distinguish between an ordinary road widening and a toll platform. The upgrades also included the installation of support infrastructure such as engineering services and cables for the toll gantries.

284. SANRAL's decision at the outset to recoup the costs to upgrade and improve the Gauteng freeways through e-tolling prior to embarking on the GFIP not only permeated the procedures followed it under section 27 of the Act as set out above, but also vitiated the process followed by SANRAL when it applied in terms of the NEMA to the Minister of Environmental Affairs for the requisite environmental authorisations to construct such upgrades and improvements.
285. In this section of the founding affidavit the Applicants will first establish that SANRAL failed to discharge its obligations under the Environmental Impact Assessment Regulations ("the EIA Regulations") published under section 24(5) of the NEMA in terms of Government Notice No. R385 in Government Gazette No. 28753 dated 21 April 2006 ("GN R385") when it submitted its applications for the requisite environmental authorisations. In this regard SANRAL's failures relate to the contents of the notices and the applications prescribed by the NEMA and the EIA Regulations.
286. Secondly, the Applicants will demonstrate that as a result of SANRAL's failure to disclose its intention to recoup the costs of the GFIP through e-tolling the Director-General, alternatively the Minister of Environmental Affairs failed to consider relevant considerations when he decided to grant the environmental authorisations and imposed certain conditions to such authorisations.

287. The Applicants have obtained copies of the following environmental authorisations granted by the Director-General of Environmental Affairs to SANRAL under section 24 of the NEMA:

287.1 Environmental Authorisation Reference 12/12/20/918 for the proposed upgrading of National Route 1 Section 20 and 21 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. R 386 published in Government Gazette No 28753 dated 21 April 2006 (“GN R386”). A copy of Environmental Authorisation Reference 12/12/20/918 dated 23 November 2007 is attached to the Notice of Motion as annexure “**B1**”;

287.2 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 GN R386. A copy of Environmental Authorisation Reference 12/12/20/919 dated 23 November 2007 is attached to the Notice of Motion as annexure “**B2**”;

287.3 Environmental Authorisation Reference 12/12/20/920 for the proposed upgrading of National Route 1 Section 20 between the Misgund and Fourteenth Avenue Interchanges to commence and continue with activities

1(m), 4, 7, 14 and 15 listed in the schedule to GN R386. A copy of Environmental Authorisation Reference 12/12/20/920 dated 23 November 2007 is attached to the Notice of Motion as annexure “**B3**”;

287.4 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), 4, 7, 14 and 15 listed in the schedule to GN R386. A copy of Environmental Authorisation Reference 12/12/20/922 dated 19 February 2008 is attached to the Notice of Motion as annexure “**B4**”;

287.5 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), 4, 7, 14 and 15 listed in the schedule to GN R386. A copy of Environmental Authorisation Reference 12/12/20/923 dated 18 February 2008 is attached to the Notice of Motion as annexure “**B5**”;

287.6 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), 7, 14 and 15 listed in the schedule to GN R386. A copy of Environmental Authorisation

Reference 12/12/20/926 dated 7 November 2007 is attached to the Notice of Motion as annexure "**B6**";

287.7 Environmental Authorisation for the proposed upgrading of the Regional Route 21 between the N12 and Hans Strijdom Drive Interchanges to commence and continue with the activities set out in paragraph 1 of section B of the undated Basic Assessment Report compiled by Arup / Tswelopele Environmental, a copy of which report is attached hereto as annexure "**FA62**".

288. I shall hereinafter refer to the above environmental authorisations collectively as "the environmental authorisations". Where it is necessary to refer to a particular environmental authorisation I shall do so expressly.

SANRAL failed to comply with the NEMA and EIA Regulations

289. On 23 May 2007 SANRAL published Notice No. 2192 of 2007 in terms of regulation 16(a) of GN R386 under the EIA Regulations in Provincial Gazette No. 136. A copy of the notice is attached hereto and marked annexure "**FA63**".

290. In the notice SANRAL advised that it intended to apply for environmental authorisation from the competent authority for the proposed road upgrades and minor improvements described in the notice and invited comment thereon.

291. The Applicants have been advised that the reference in the notice to regulation 16(a) of GN R386 is inappropriate if SANRAL intended to refer to item 16(a) of the schedule published in GN R386, as the item refers to “(t)he transformation of undeveloped, vacant or derelict land to establish infill development covering an area of 5 hectares or more, but less than 20 hectares”. If on the other hand, SANRAL intended to give notice in terms of regulation 16(3) of the EIA Regulations, the Applicants point out that such notice is only directed to the owners of the land on which the proposed activities are to be undertaken by SANRAL and cannot be construed as a notice required in terms of regulation 56 of the EIA Regulations (GN R385).
292. Regulation 56 sets out the public participation process that had to be followed by SANRAL when it submitted its applications to the Department of Environmental Affairs and Tourism (as it then was). Sub-regulation 56(5) provides that if an application is for a linear activity, such as in the case of the applications by SANRAL, strict compliance with sub-regulation 56(2) is inappropriate and the person conducting the public participation process may deviate from the requirements of that sub-regulation to the extent and in the manner as may be agreed to by the competent authority. In this regard I respectfully refer the Honourable Court to section D of the Basic Assessment Reports (“BARs”) attached hereto as “**FA62**”. The Applicants submit that the public participation process set out in the table before paragraph 1 of section D of the BAR is wholly

inadequate on the same grounds *mutatis mutandis* as set out above in respect of the notices published under section 27(4) of the Act.

293. Regulation 56(6) is also relevant and therefore I quote it in full:

"When complying with this regulation, the person conducting the public participation process must ensure that –

(a) information containing all relevant facts in respect of the application is made available to potential interested and affected parties; and

(b) participation by potential interested and affected parties is facilitated in such a manner that all potential interested and affected parties are provided with a reasonable opportunity to comment on the application."

294. The content of the notice published by SANRAL does not refer to the intention of SANRAL to recoup through e-tolling the costs associated with the road upgrades and improvements constituting the GFIP. If the notice came to the knowledge of interested and affected parties, despite the inadequate publication of the notices as set out in the BAR, such parties would not have been properly advised of the socio-economic impacts that the proposed tolling will have on their environment. In this regard the notice did not adequately inform the public of the nature and the

purpose of the proposed administrative action as required by section 3(2)(b)(i) of PAJA.

295. Even if interested and affected parties were to respond to the invitation in the notice to investigate the information offered to be available in the application, they would not have been informed of the intention of SANRAL to recoup the costs of the road upgrades and improvements through e-tolling, as shown herein below.
296. In the premises the notices did not serve the purposes for which the notice and comment procedures in the NEMA and EIA Regulations were intended to achieve by informing the Applicants and the general public of the nature and purpose of the proposed administrative action as contemplated in section 3(2)(b)(i) and (ii) of PAJA by providing a reasonable opportunity to make representations.
297. The locations of the proposed road upgrades and improvements listed in the numbered paragraphs on the first page of the notice published by SANRAL appear to correspond to the separate applications by SANRAL for the requisite environmental authorisations under the NEMA. If this is indeed the case, the Applicants have been unable to obtain from SANRAL's website or elsewhere copies of all the relevant environmental authorisations issued to SANRAL for the GFIP. The Applicants request the First, Fourth and Fifth Respondents to include in the record requested in the Notice of Motion those BARs and environmental authorisations not incorporated into this application. The Applicants reserve their

rights to supplement this application in respect of the environmental authorisations not brought under review hereby.

298. It appears from the environmental authorisations that they were granted by the Director-General of Environmental Affairs after SANRAL submitted applications in terms of the provisions of Chapter 3 of the relevant EIA Regulations. It is further evident from the environmental authorisations that they were granted after basic assessment as described in the aforesaid Chapter and based on several BARs submitted during September 2007 by:

298.1 Arup/Tswelopele Environmental, who SANRAL apparently appointed as environmental assessment practitioner (“EAP”) for the applications that culminated in the environmental authorisations with references 12/12/20/918, 12/12/20/919, 12/12/20/920, 12/12/20/922 and 12/12/20/923; or

298.2 Knight Pièsold Consulting, who SANRAL apparently appointed as EAP for the application that culminated in the environmental authorisation with reference 12/12/20/926.

299. The Applicants’ legal representatives obtained from SANRAL’s website a copy of a BAR for one of the sections of the GFIP, namely the upgrade of Regional Route 21 between the N12 and Hans Strijdom Drive Interchanges, which BAR was compiled by Arup/Tswelopele Environmental. Although the website contains a link

to the environmental authorisation that was granted in respect of the aforesaid upgrade, the Applicants are advised that no document can be downloaded from the link. The Applicants point out that as at date hereof SANRAL's website does not contain any of the other relevant BARs or environmental authorisations required for the GFIP. The Applicants trust that the Fourth and Fifth Respondents will in due course deliver the record of the proceedings that culminated in the environmental authorisations set out in the Notice of Motion being granted.

300. The Applicants respectfully request that the contents of the BAR attached hereto be regarded as specifically referred to and incorporated herein. In particular, the Applicants refer the Honourable Court to the fact that there is no reference in the BAR that SANRAL intended to fund a substantial portion of the costs of the proposed upgrades that constitute the GFIP by requesting the Minister of Transport to declare as toll roads those sections of the National and Regional Roads described elsewhere herein and thereafter to collect toll from certain members of the public.

301. The Honourable Court is also respectfully referred to paragraph 13 of the BAR where the socio-economic value, as well as the need and desirability of the listed activities, was motivated. The Applicants point out that the EAP did not address in the BAR any of the significant impacts that the proposed tolling of sections of the Gauteng freeways will have on the environment. In particular the socio-economic

impacts of funding the listed activities for which SANRAL sought authorisation through tolling were not addressed.

302. The environmental authorisations are substantially similar to each other and the references in each of the environmental authorisations to the BARs on which such authorisation is based correspond to the contents of the BAR attached hereto. In the premises the Applicants respectfully submit that on a balance of probability the contents of the other BARs that founded the environmental authorisations attached to the Notice of Motion are substantially similar to the contents of the BAR attached to this founding affidavit. In this regard the Applicants reserve their rights to supplement the Notice of Motion and this founding affidavit once the Respondents have delivered the records of the proceedings brought under review.
303. The Applicants respectfully submit that if the EAP assessed the significant socio-economic impact of the proposed tolling by SANRAL in the BARs, as it was obliged to do by sections 24 and 28 of the NEMA read with regulation 23(2)(d) of the EIA Regulations, the EAP's evaluation of the various impacts of the listed activities would have been substantially and materially different. For example, the Applicants and the general public would in principle welcome the upgrading of the freeways in Gauteng as it can be expected that such upgrades will alleviate congestion and degradation of the secondary road network in the province. This fact probably explains the limited comments and responses elicited by the public participation process as recorded by the EAP in paragraph 1 of section E of the

BAR. However, the moment a toll is introduced for the use of the upgrades the socio-economic impacts change dramatically, as illustrated by the overwhelming negative response by the public thereto. A considerable number of motorists will probably deviate from using the upgraded freeways to using the secondary road network in the province due to the increased costs through tolling, which will have exactly the opposite impact on congestion and degradation as described by the EAP in the BAR. The Applicants can only speculate in this regard, as the socio-economic impacts were simply not evaluated in the BAR.

304. In similar vein, if the EAP disclosed the significant negative socio-economic impacts of the proposed e-tolling in the BAR, the competent authority or the EAP should have realised that the basic assessment process is inadequate and rather followed a more comprehensive scoping process as contemplated by regulations 21 and 22 of the EIA Regulations. In the scoping process the nature and extent of the impacts would have been investigated and reported on and interested and affected parties could have responded thereto.

The Director-General, alternatively the Minister of Environmental Affairs failed to consider relevant considerations

305. Regulation 8 of the EIA Regulations compelled the Director-General, alternatively the Minister of Environmental Affairs when considering SANRAL's applications to take into account all relevant factors, including

305.1 environmental impacts likely to be caused if the application is approved [sub-regulation 8(b)(i)];

305.2 the cumulative impact on the environment [sub-regulation 8(b)(ii)];

305.3 measures that could be taken to prevent, control, abate or mitigate any environmental impacts [sub-regulation 8(b)(iii)]; and

305.4 any feasible and reasonable alternatives to the activity which is the subject of the application and any feasible and reasonable modifications or changes to the activity that may minimise harm to the environment [sub-regulation 8(b)(v)].

306. The significant negative socio-economic impacts of the funding of the upgrades through the collection of toll should have been considered by the Director-General, alternatively the Minister of Environmental Affairs. If duly considered, it should have resulted in the imposition of substantially different conditions than those imposed in the absence of such considerations when the environmental authorisations were granted. The Director-General, alternatively the Minister of Environmental Affairs may well have curtailed the extent of the upgrades to limit the costs thereof, or directed that the costs be recouped through alternative means other than tolling by SANRAL, or imposed any other mitigation measures recommended by the EAP or considered appropriate by the Director-General, alternatively the Minister.

307. In any event, the Applicants respectfully submit that the costs of the proposed road upgrades and improvements, as well as the manner in which such costs were to be recuperated, had to be weighed against all the perceived benefits highlighted by the EAP in the BAR when the Director-General, alternatively the Minister of Environmental Affairs considered SANRAL's environmental applications.
308. The environmental authorisations describe the proposed upgrades to be effected under each of the authorisations, but do not refer to the declaration of any of the roads referred to in the environmental authorisations as toll roads or the establishment of electronic toll points on such roads. As a consequence of the failure to address the socio-economic impacts of the proposed tolling by SANRAL to fund the road upgrades described in the BARs such impacts were evidently not considered by the Director-General, alternatively the Minister of Environmental Affairs when he granted the environmental authorisations.
309. In response to the application by HMKL 3 Investments (Proprietary) Limited against SANRAL, the Minister of Transport and a construction company in the above Honourable Court under case number 67270/2010 to *inter alia* obtain interim interdictory relief to stop the erection of any toll structures on National Road N1 adjacent to Erf 2441 Lyttelton Manor Extension 8, Mr Ismail Noormahomed Essa, who is the Project Manager and the Regional Manager: Northern Region of SANRAL, provided the following explanation in paragraph 67.2

of SANRAL's answering affidavit for the omission of any references to tolling in the environmental authorisations:

*“The Applicant alleges that the environmental authorisation does not refer to the declaration of a toll road or the establishment of electronic toll points. The reason for this is twofold: First, the environmental authorisation was granted in November 2007, whereas the declaration of the toll road only occurred in March 2008. **Secondly, and more importantly, an environmental authorisation is not required for the declaration of the establishment of toll points because it has no impact on the environment.** The construction of a toll plaza is not a listed activity in terms of the National Environmental Management Act, 1998 and does not require environmental approval. It is not a situation where a new road is to be built which obviously would impact on the environment. Rather, it is the upgrading of an existing road within the road reserve. This point is made clearly in the environmental authorisation annexed to the founding affidavit as ‘JVN16’.”* [emphasis added]

310. I interpose to point out that annexure “JVN16” to the founding affidavit by HMKL 3 Investments (Pty) Ltd was Environmental Authorisation Reference 12/12/20/926, which is attached to the Notice of Motion in this application as annexure “**B6**”. To avoid prolixity the Applicants have been advised not to attach copies of the affidavits delivered by the parties under case number 67270/2010 hereto, but copies of these affidavits will be provided on request to any of the parties or the

Honourable Court if required. In any event, the Applicants will ensure that the Court file of the aforesaid case is available to the Honourable Court at the hearing of this application in due course.

311. It will be argued at the hearing of this application that SANRAL is wrong when it contends that “... *an environmental authorisation is not required for the declaration of the establishment of toll points because it has no impact on the environment.*” The costs and funding of listed activities are relevant, significant and material aspects of such listed activities, especially if the public is expected to contribute in a prescribed manner to the costs of conducting the listed activities. In terms of the NEMA and the EIA Regulations SANRAL and its EAP had to incorporate an assessment of *inter alia* the socio-economic impacts of the proposed method of funding the costs attributable to the listed activities in its applications for the environmental authorisations. In terms of the aforesaid legislation the Director-General, alternatively the Minister of Environmental Affairs had to consider such assessment and socio-economic impacts when the environmental authorisations were granted and imposed suitable conditions imposed as part thereof.

Infringement of the Applicants' rights

312. Section 2 of the Constitution provides that the Constitution is the supreme law of the Republic and conduct inconsistent with it is invalid and the obligations imposed by it must be fulfilled.

313. As a result of the failures by SANRAL to comply with the relevant provisions of the NEMA and the EIA Regulations as set out above, the rights of the Applicants and those whom the Applicants represent to administrative action that is lawful, reasonable and procedurally fair were infringed in contravention of the provisions of section 33(1) of the Constitution, read with paragraphs (b), (c) and (e)(iii) of subsection 6(2) of PAJA.

314. The following are some of the principles in section 2 of the NEMA that are of relevance to this application:

314.1 Section 2(3) which provides as follows:

"Development must be socially, environmentally and economically sustainable."

314.2 Section 2(4)(a) provides as follows:

"Sustainable development requires the consideration of all relevant factors including the following:

...

(viii) that negative impacts on the environment and on people's environmental rights be anticipated and prevented, and where they cannot be altogether prevented, are minimised and remedied."

314.3 Section 2(4)(c) provides as follows:

"Environmental justice must be pursued so that adverse environmental impacts shall not be distributed in such a manner as to unfairly discriminate against any person, particularly vulnerable and disadvantaged persons."

314.4 Section 2(4)(g) provides as follows:

"Decisions must take into account the interests, needs and values of all interested and affected parties ..."

314.5 Section 2(4)(i) provides as follows:

"The social, economic and environmental impacts of activities, including disadvantages and benefits, must be considered, assessed and evaluated, and decisions must be appropriate in the light of such consideration and assessment."

315. The above-quoted principles dictate that the Director-General, alternatively the Minister of Environmental Affairs when making the decision to approve SANRAL's applications under the NEMA, had to take into account the environmental impact

thereof, which would include the socio-economic impact on the Applicants and the general public.

316. This the Director-General of Environmental Affairs has clearly not done. It makes his actions reviewable on the basis of a failure to take into account relevant considerations, as is contemplated by section 6(2)(e)(iii) of PAJA.

317. The Applicants are further advised that in terms of section 3 of the Development Facilitation Act 67 of 1995 (“the DFA”) certain general principles apply to all land development, including the road upgrades and improvements embarked upon by SANRAL as part of the GFIP. The Applicants respectfully submit that the following principles are relevant for purposes hereof:

317.1 in terms of section 3(1)(d) of the DFA members of communities affected by land development should actively participate in the process of land development;

317.2 in terms of section 3(1)(f)(i) of the DFA policy, administrative practice and laws should encourage and optimise the contributions of all sectors of the economy (government and non-government) to land development so as to maximise the Republic’s capacity to undertake land development and to this end, and without derogating from the generality of this principle national, provincial and local governments should strive clearly to define and make known the required functions and responsibilities of all sectors

of the economy in relation to land development as well as the desired relationship between such sectors;

317.3 in terms of section 3(1)(g) of the DFA laws, procedures and administrative practice relating to land development should -

317.3.1 be clear and generally available to those likely to be affected thereby;

317.3.2 in addition to serving as regulatory measures, also provide guidance and information to those affected thereby;

317.3.3 be calculated to promote trust and acceptance on the part of those likely to be affected thereby; and

317.3.4 give further content to the fundamental rights set out in the Constitution;

317.4 in terms of section 3(1)(h) of the DFA policy, administrative practice and laws should promote sustainable land development at the required scale in that they should -

317.4.1 promote land development which is within the fiscal, institutional and administrative means of the Republic;

317.4.2 promote the establishment of viable communities;

317.4.3 promote the sustained protection of the environment;

317.4.4 meet the basic needs of all citizens in an affordable way.

318. Section 2 of the DFA provides that the above general principles apply throughout the Republic and shall also apply to the actions of the State, including the First, Second, Fourth and Fifth Respondents.

319. In light of the conduct by SANRAL by failing to give proper notice of its environmental applications and by omitting relevant facts such as its intention to recuperate the costs of the road upgrades and improvements of the GFIP through e-tolling from the notice and environmental applications, the Applicants' and the public's rights entrenched by the DFA principles were infringed:

319.1 Members of communities affected by the land development were precluded from actively participating in the process of land development by the fact that they were not adequately informed of the socio-economic impacts of such development.

319.2 The First, Fourth and Fifth Respondents failed to clearly define and make known the required functions and responsibilities of all sectors of the

economy in relation to the proposed land development as well as the desired relationship between such sectors.

319.3 The procedures and administrative practice by the First, Fourth and Fifth Respondents were not clear and generally available to those likely to be affected thereby and cannot be considered to have promoted trust and acceptance on the part of those likely to be affected thereby. The huge public outcry demonstrates that exactly the opposite was achieved.

319.4 The First, Fourth and Fifth Respondents failed to give content to the fundamental rights set out in sections 24 and 33 of the Constitution by allowing significant negative socio-economic impacts and infringements of the constitutionally protected environment and rights to just administrative action respectively.

319.5 The administrative practice of the First, Fourth and Fifth Respondents evidently exceeded the fiscal, institutional and administrative means of the Republic by writing a cheque that SANRAL is unwilling or unable to pay. The Applicants and other tax payers are now called upon to bail out SANRAL without having been consulted regarding the manner and extent of such payments.

319.6 The administrative practice by the First, Fourth and Fifth Respondents threatens the viability of communities and fails to meet the basic needs of all citizens in an affordable way.

Relief in respect of the invalid environmental authorisations

320. The Applicants are advised that ordinarily a Court will not exercise its discretion to set aside the environmental authorisations and remit the applications to the Fourth Respondent with directions under circumstances where the road upgrades and improvements constructed in terms of such authorisations are completed or nearly completed. However, the Applicants respectfully submit that there are compelling reasons to set aside the environmental authorisations and refer SANRAL's applications back to the Minister of Environmental Affairs for reconsideration:

320.1 The procedures for public participation and consideration of applications under the NEMA and EIA Regulations as amended are much more comprehensive than the commensurate procedures under the Act. The Minister of Environmental Affairs has to consider the impacts that the proposed e-tolling by SANRAL will have on the environment within a much broader context as they will be (or should have been) considered by the Minister of Transport under the Act. The NEMA and EIA Regulations require the EAP to assess and the competent authority to consider not only the impact on the environment by the listed or specified activities, but

also alternatives thereto and especially the no-go option. The Minister of Environmental Affairs is also obliged to consider the cumulative impacts of the listed activities on the environment.

320.2 Although the road upgrades and improvements may have been completed or are nearly completed, it is the socio-economic impacts of the proposed recovery of the costs of such upgrades and improvements through e-tolling by SANRAL that have to be considered by the Minister of Environmental Affairs. In so doing the Minister of Environmental Affairs is the most appropriate authority to decide how these impacts should be weighed in comparison to all the other environmental impacts that result from the conduct of the listed activities by SANRAL. The Minister of Environmental Affairs will also in reconsideration of SANRAL's applications be afforded the opportunity to impose suitable conditions in mitigation of any significant negative impacts on the environment as may be appropriate.

321. Legal argument will be addressed to the Honourable Court in this regard at the hearing of the application in due course.

322. In the premises the Applicants respectfully request the above Honourable Court to review and set aside the environmental authorisations set out in paragraph 3 of Part B of the Notice of Motion and remit the matters to the Minister of

Environmental Affairs with directions for SANRAL to comply with the relevant EIA Regulations and for the Minister to afford the Applicants and other interested parties an opportunity to submit further representations to him and that he then considers those submissions before making a decision anew on the applications by SANRAL.

CONDONATION IN TERMS OF SECTION 9 OF PAJA

323. I am advised that section 7(1) of PAJA provides that any proceedings for judicial review in terms of section 6(1) must be instituted without reasonable delay and not later than 180 days after the date on which the person bringing the application 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.
324. I am advised further that section 9(1) and 9(2) of PAJA empower the Honourable Court on application to extend the 180 day limit where the interests of justice so require.
325. I am advised therefore that insofar as the relief sought in Part B of the Notice of Motion involves the reviewing and setting aside of administrative action taken by the First, Second, Fourth and/or Fifth Respondents, it is necessary for the Applicants to apply under section 9 of PAJA for an extension of the time limits.

326. I will deal with the position of each Applicant requiring condonation in turn.

OUTA

327. In the case of OUTA, the association came into being only on 12 March 2012 after the Minister of Finance in the budget speech had signalled definitively that tolling would be proceeded with on 22 February 2012.

328. The association had not been formed and was therefore not able to bring an application for the reviewing and setting aside of the impugned administrative action before that date (although I accept that any of the constituent members could have done so once the relevant facts came to their attention).

329. In addition, the individuals who have registered as supporters of OUTA as well as individual road users who make up the commuting public whose interests OUTA represents in this application, were in reality powerless to bring an application for the reviewing and setting aside of the impugned declarations and approvals by the Minister and would not have been able to do so to date but for the formation of OUTA.

330. Further in regard to the public, I reiterate what I have said above about SANRAL's failure to give proper notice. As a consequence, it is likely that large sections of the public were not aware of the fact that the proposed toll road network had been

declared toll roads. This is illustrated by the small number of responses to SANRAL's invitation to make representations.

331. More significantly, even members of the public who saw the notices when they were published in 2008 would have been entirely ignorant of the impact that such declaration would have on them until such time as the Minister first published the schedule of tariffs on or about 4 February 2011.
332. It was only after such publication of the tariffs, when the news of the high level of the tariffs was made known in the media to the general public that the public first became aware of the impact the toll roads would have on them.
333. The public could not fairly be expected to take action to set aside the declarations in February 2011.
334. This is because on 20 February 2011, in the face of the almost unprecedented public outcry, the Minister of Transport announced the suspension of the implementation of e-tolling on the proposed toll road network.
335. And on 8 March 2011, the Minister of Transport announced the formation of the GFIP Steering Committee that was to hold consultation with the public before reporting back to the Minister of Transport.

336. The public were informed in the statement by the Minister that the GFIP Steering Committee were due to finalise their report by the end of April 2011.
337. While the stated purpose of the committee was narrowed to a revision of the proposed tariffs, I (and I believe the public and civil society) held the view, reasonably it is submitted, that given the opportunity to properly consult with SANRAL and the Department of Transport, the decision to toll the proposed toll road network in its entirety might be suspended or set aside or an alternative method of funding the proposed roads might be adopted.
338. Certainly, the content of the representations which were made at the GFIP Steering Committee hearings by various stakeholders, representative organisations and interested parties, strongly opposed the notion of tolling of the proposed toll road network in itself, and not just the quantum of the tariffs.
339. It was in this same spirit, on the part of the public, that representative organisations and private stakeholders reconvened on 30 June 2011 at the last of the GFIP Steering Committee hearings only to be disappointed by the news that the Director General, Mr George Mahlalela, had held a press conference that morning announcing that the GFIP Steering Committee were ready to make their recommendations on the proposed tariff structure to the Minister of Transport without first attempting to properly consult and reach consensus that day.

340. The GFIP Steering Committee delayed in the production of its report and the making of its recommendation to the Minister of Transport.
341. After 30 June 2011, the public heard little about the tolling of the proposed toll road network or the toll tariffs until the beginning of August 2011 when it was reported in the media that Cabinet had approved revised toll tariffs and had agreed that the Minister of Transport should give effect to such approval.
342. Following the news of the approval of the tariffs and the amounts thereof, there was again a huge swell of public resistance with various organisations both political and from civil society, speaking out against the proposed toll road network once more.
343. On 23 October 2011, in what appeared to be a reaction to the further and growing opposition, the Minister of Transport issued a further statement to the effect that *"all processes related to the tolling of national roads should be halted"* and *"that consultative processes should be allowed to take place to offer concerned parties an opportunity to share their views on the toll road programme"*.
344. The statement said in particular in regard to GFIP that *"all these processes, including a consultative process initiated by the Gauteng provincial legislature, should be allowed to reach their logical conclusions to ensure that all parties concerned and their respective views are brought on board"*.

345. I refer again to the copy of the statement dated 23 October 2011 hereto as **"FA40"**.
346. At about the same time there were media reports that created the impression that amid continuing unhappiness a task team had been formed to look into the issue of toll roads again and that task team would include finance minister, Mr Pravin Gordhan.
347. I attach a copy of a news report dated 24 October 2011 that typifies what was published in the media as **"FA64"**.
348. In Gauteng, further public hearings on GFIP and e-tolling were set to start for 11 November 2011.
349. On 6 November 2011, because of how the earlier statement from the Ministry of Transport had been received, a qualifying statement was made by the Ministry of Transport that clarified that the halting of the implementation of tolling that was called for on 23 October 2011 only related to "*future road tolling projects*" and that GFIP Phase 1 would be implemented.
350. I refer again to the clarifying statement dated 6 November 2011 hereto as **"FA41"**.
351. Notwithstanding the clarification by the National Department of Transport, on 12 November 2011 Gauteng MEC for Roads and Transport, Ismail Vadi, was

reported to have expressed disapproval of the fact that SANRAL had proceeded with registrations for e-tolling before the hearings in the Gauteng Provincial Legislature had been concluded.

352. I attach a copy of the news report in the Saturday Star dated 12 November 2011 hereto as "**FA65**".

353. By January 2012, it appeared that, amid continuing political and civil opposition to the tolling of the roads in question, SANRAL and the Minister of Transport were again reconsidering its implementation.

354. On or about 13 January 2012, the board of SANRAL reported that it had met with the Minister of Transport in Pretoria on 12 January 2012 and that:

"With regards to E-tolling in Gauteng, the Board is currently seized with this very serious matter and will address the current stakeholder concerns and issues raised in the petition submitted to the Minister. The Board is committed to meeting all its obligations to the stakeholders, and is exploring different modalities. The Board will present their findings to the Minister, following which the Minister will present a report to Cabinet. Therefore, e-tolling in Gauteng will not commence during February 2012."

Once again, therefore, the implementation for tolling was postponed.

355. I refer again to the SANRAL Board statement dated 13 January 2012 attached hereto as "**FA42**".

356. It was during this time that the Second Applicant and other organisations within the motor industry believed that the changing of the board of SANRAL, coupled with the louder and ever more insistent pressure against e-tolling within civil society and politically from COSATU, might bring about the final shelving of e-tolling of the proposed toll road network.
357. Consultations by the Board with stakeholders did take place and SAVRALA, amongst other organisations, was invited to make representations to the SANRAL board in the beginning of February 2012, as I have already mentioned above.
358. Unfortunately, however, the hearings brought no relief.
359. On or about 7 February 2012 the Minister of Transport affirmed that the "*user pay*" principle would remain in place and that "*different modalities*" were being explored to make the implementation of the user pay principle not so burdensome for motorists.
360. The public and the Applicants were not informed further of the implication of this statement by the Minister of Transport and with tolling officially still subject to suspension, waited once again for the final word on whether the tolling of the proposed toll road network would be implemented, when it would be implemented and what the cost thereof would be.

361. The answer finally was given on 22 February 2012 from the Minister of Finance, who announced in the Budget Speech that the tolling of the proposed toll road network would be implemented on 30 April 2012 and that further discounted tariff structures would apply.
362. The Budget Speech, coupled with several harsh statements made in the ensuing weeks by various members of the National Executive concerning the fact that e-tolling would be implemented and those who were non-compliant would be punished, has finally made it clear that there will be no further re-consideration of e-tolling by SANRAL and the Minister of Transport and that unless halted by a legal challenge, the system will be implemented on 30 April 2012.
363. I submit given the above facts, the delay in bringing the present application by OUTA on behalf of individual members of the public affected by e-tolling and in the public interest should be condoned.
364. There are compelling further reasons why condonation should be granted in the interests of justice.
365. The subject matter of the present application is of unprecedented public controversy and public interest in South African and in Gauteng in particular.
366. A state agency, by its own failure to properly publicise and engage with the public on the largest and most far reaching toll project in the country's history, has placed

hundreds of thousands of citizens in the position where they are forced to pay for the only viable commuting road arteries around and between Johannesburg and Pretoria.

367. There are, moreover, very serious question marks over the funding model employed by SANRAL, and in particular over the apparently gross expense of operating the toll road scheme.
368. It is not in the interests of justice that the issue be effectively avoided by the closing of the door to the Applicants based on their failure to comply with statutory time limits.
369. It is submitted that further reason for condonation is to be found in the structure of section 27 itself which deals separately with the act of declaring a road a toll road on the one hand and the publication of tariffs and the implementation of tolling on the other.
370. Although the declarations under section 27(1)(a) of the Act were made in 2008, they were incomplete without the publication of tariffs, which were only first made in February 2011, and whose finalisation is still awaited.

SAVRALA

371. I turn now to set out the circumstances favouring one of the other organizations which founded OUTA, SAVRALA. It was informed of the fact that the various sections of road making up the proposed toll road network had been declared toll roads in about May 2009.
372. This was on account of the fact that SAVRALA was in contact with an attorney, Alta Swanepoel, from whom SAVRALA had received advice and with whom SAVRALA had consulted in conjunction with the Department of Transport regarding AARTO.
373. In about May 2009, Swanepoel approached the then general manager of SAVRALA, Val van den Bergh, and informed her that she should meet with Alex van Niekerk of SANRAL in order to become informed of the planned implementation of e-tolling on the proposed toll road network.
374. Because Van Niekerk was very busy at that stage, it took several weeks in order for a meeting to be set up with him but a meeting was eventually held in or about mid-2009.
375. The meeting, which was attended by Van den Bergh and me, was informal and Van den Bergh and I were informed briefly about the nature of the open road tolling system that had been planned and how it would work.

376. Van Niekerk had also informed them of the fact that the estimated cost of use of the toll roads would be about 50 cents per kilometre.
377. Arising from Van Niekerk's description of the open road tolling system, (which made it clear that the liability to pay toll would attach to the vehicle driven on the toll road as opposed to the individual driving the vehicle), were a series of immediate concerns which were expressed by Van den Bergh and I regarding the administrative difficulty that would be experienced by SAVRALA's members in collecting payment from clients.
378. Van Niekerk took note of the issues raised and undertook to appoint a service provider and set up workshops with SAVRALA members in order to find a workable solution.
379. In this regard I attach an activity report for August 2009 that I received from Van den Bergh on 15 September 2009 as "**FA66**".
380. I also attach the confirmatory affidavits of Van den Bergh hereto as "**FA67**".
381. Primarily because of Van den Bergh and Van Niekerk's full programmes, there were no further interactions of real significance until a meeting between the National Executive Committee of SAVRALA and Van Niekerk and technical representatives of SANRAL on 25 May 2010.

382. At the meeting, the National Executive Members of SAVRALA were provided with a briefing by Van Niekerk on further details of the system that SANRAL intended to implement.
383. This was the first meeting that provided SAVRALA with the kind of technical data that SAVRALA required in order to report back to SANRAL with a proper list of issues and concerns that could be addressed going forward.
384. I attach a copy of an email received from Van den Bergh, dated 7 June 2010, as "**FA68**" in regard to the above.
385. I pause to state at this point that the nature of the interactions between SAVRALA and SANRAL at this point were positive and co-operative. SAVRALA and the members of SAVRALA, had met with SANRAL and continued to do so with a view to complying with their legal obligations and with a view to identifying what technical and administrative resources and systems would have to be put in place in order to do so and, at the same time, operate their businesses successfully within Gauteng.
386. Apart from several e-mails exchanged between Van den Bergh and Alex van Niekerk during the course of the latter part of 2010 following up on the above meeting, there was no again no substantial interaction between SAVRALA and SANRAL and no concrete engagement between them with a view to the working implementation of open road tolling.

387. After the publication of the tariffs in February 2011 and the dramatic events that followed it, SAVRALA continued to engage with SANRAL and the Department of Transport, but this time on two levels.
388. On the one level, with a view to compliance with what might become a lawfully implemented tolling scheme, SAVRALA continued to attend and engage with representatives of SANRAL on a technical and business level.
389. There were various business meetings which were held between either members of SAVRALA or members of SAVRALA's national executive committee, or both, on the one hand, and representatives of SANRAL and ETC JV, on the other, with a view to getting the members of SAVRALA ready for the implementation of e-tolling.
390. The first of these meetings subsequent to the events of February 2011 was held on 16 March 2011.
391. I attach a copy of the notes of the business meeting dated 16 March 2011 hereto as "**FA69**" that were prepared by Toll Plan (Pty) Ltd, that provide record of the representatives of SANRAL, ETC JV and SAVRALA, *inter alia*, and provide the Honourable Court with an idea of the detailed nature of the interactions that took place.

392. Follow up meetings similar in nature took place on a periodic basis throughout the course of 2011. They were either business meetings between SAVRALA and SANRAL/ETC JV in particular or key account holders meetings between SANRAL/ETC JV, on the one hand, and SAVRALA and other members of the motor vehicle industry or corporate fleet owners, on the other.
393. Corcoran attended many of these meetings on behalf of SAVRALA which were held, *inter alia*, on:
- 393.1 8 April 2011;
- 393.2 23 May 2011;
- 393.3 15 June 2011;
- 393.4 29 June 2011; and
- 393.5 1 September 2011.
394. The aforesaid meetings covered a range of topics from e-tolling and the technical detail on the implementation thereof, to how organisations or businesses such as SAVRALA and its members were to administer and implement e-tolling and the interface they would have with ETC JV in such process, to the content of the

agreements that would regulate the relationship between the members of SAVRALA as key account holders and ETC JV/SANRAL.

395. As I have mentioned, the meetings were held in a frank, open, co-operative and constructive spirit.
396. This did not mean, however, that SAVRALA and its members were in agreement with the implementation of e-tolling or the terms on which SANRAL/ETC JV were prepared to engage the members of SAVRALA as key account holders.
397. There were, in particular, concerns raised during the course of the meetings which soon became sticking points for SAVRALA and its members which were not being adequately dealt with and were simultaneously exposing the limits and problems of the e-tolling system that SANRAL/ETC JV intended implementing.
398. These concerns grew and were added to by concerns about the initial decision to toll the proposed toll road network, the expense of e-tolling and the impossibility of enforcement thereof that I and other members of SAVRALA and its executive, as well as other members of the motor trade industry, had become aware of during the course of the public consultation process that had taken place during the same period.
399. I attach as “**FA70**” and “**FA71**” two letters written by Corcoran on 28 September 2011 and 6 October 2011 that provide example of the position

taken by SAVRALA at that time and the problems that the members of SAVRALA had identified and the SANRAL/ETC JV had failed to address.

400. The second of the two levels on which SAVRALA engaged with SANRAL and the Department of Transport included the making of representations by letter and by means of oral and written representations at stakeholder meetings in order to work towards the abandonment of the tolling of the proposed toll road network as the funding mechanism for GFIP.
401. On 17 February 2011, Thulani Nzima, the then vice-president of SAVRALA, sent a letter to the Minister of Transport objecting to the implementation of toll roads without proper, thorough investigation as to the impact this would have on the economy and to the manner in which the announced toll fees and discount structures had been presented to the public as "*fait accompli*" without engagement with the industry and the public at large.
402. The letter requested a meeting with the Minister in which the content of the letter could be further discussed.
403. I attach the letter dated 17 February 2011 hereto as "**FA72**".
404. This letter was followed up by the sending of a letter to George Mahlalela, Director-General of the Department of Transport, on 15 March 2011, attached

hereto as "**FA73**", in which Corcoran, on behalf of SAVRALA, requested that SAVRALA be allowed to participate in the GFIP Steering Committee.

405. SAVRALA, or its representatives, then attended and made representations at the GFIP Steering Committee hearings between 31 March and 30 June 2011, the hearings at the Gauteng legislature on 11 November 2011 and by invitation to the new SANRAL board on 1 February 2012 in which SAVRALA made representations to the effect that e-tolling should not be implemented, was too expensive and placed an undue burden on the public as a collection mechanism, and was impossible to implement.
406. The representations also included representations that were specific to the members themselves concerning the inability of the e-tolling system to adequately deal with the problem of cloned number plates or the ability of the members of SAVRALA to synchronise its operations with that of SANRAL/ETC JV in order to be in a position to collect toll from its customers.
407. I attach a copy of the powerpoint presentation prepared for and submitted to the new SANRAL board on 1 February 2012 hereto as "**FA74**" that provides detail of the content of the representations made to SANRAL as well as simultaneously an example of the kind of representations which were made to the government authorities the previous year.

408. As I have related above, SAVRALA was placed on its guard on 22 February 2012 when the Minister of Finance informed the public that the tolling of the proposed toll road network would proceed on 30 April 2012.
409. I respectfully submit that SAVRALA has not been supine, but at all times has sincerely and in good faith interacted with SANRAL with a view to compliance by its members with their lawful obligations.
410. The present challenge by SAVRALA has been born out of the learning of the members of the NEC of SAVRALA over time of the technically limited and unduly burdensome nature of e-tolling on SAVRALA's members as well as the of the legal and policy reasons why e-tolling is unlawful and should not be implemented.
411. Without the tariffs having been published, but with the knowledge that tolling would in all likelihood be implemented on 30 April 2012, SAVRALA consulted with its attorney and legal counsel on 28 February 2012 with a view to determining whether there were grounds for the bringing of the present application.
412. I pray on behalf of SAVRALA that for the same reasons set out in relation to the interests of justice above, the time period for the filing of this application be extended to the date on which it is filed.

QASA

413. The fact that the proposed toll road network would be tolled only came to the attention of QASA following on the public outcry in February 2011.
414. On 23 February 2011, Seirlis addressed a letter to the Minister of Women, Children and People with disabilities bringing the plight of QASA members to her attention, asking her to advise on what process to follow in laying a complaint, and requesting her support.
415. The above Minister's private secretary acknowledged the request on the same day.
416. I attach the emails to and from the Minister of Women, Children and People with Disability hereto as "**FA75**".
417. Despite not receiving further reply from the Minister, Seirlis was, and until recently remained, confident that she would intervene on behalf of people with disabilities and movement impairment given her portfolio.
418. In view of this confidence, and in view of the successive suspensions of the implementation of tolling, Seirlis did not take further action until media reports of what had been stated in the Budget Speech.
419. At this stage Seirlis also began to receive emails from QASA members requesting QASA's assistance.

420. Seirlis learnt of SAVRALA's plans to bring an application after the insert on Carte Blanche and through Wayne Duvenage, who is currently president of SAVRALA, made contact with the Applicants' attorneys.
421. Seirlis travelled up from Durban to Gauteng on Tuesday 20 March 2012 and consulted with the Applicants' legal representatives and counsel.
422. Seirlis explains that in view of the manner in which people with disabilities and mobility impairment are constrained to move from one place to the next in Gauteng and in particular to rely on other private road users, exemption from paying toll is of no use and moreover there is no alternative way to assist them other than to oppose the tolling *per se*.
423. For this reason, Seirlis requested that QASA be admitted as a co-applicant in the application.
424. On 22 March 2012 at a meeting of the South African Disability Alliance, Seirlis brought QASA's plans to join in the application to the attention of the Alliance who gave its unanimous support to QASA.
425. I respectfully pray that the Honourable Court similarly grant condonation to the Third Applicant

425.1 for the reasons set out above in relation to the public and the interests of justice;

425.2 because the position of people with disabilities and mobility impairment, namely quadraplegics and paraplegics, who are of the most vulnerable members of society, have clearly been ignored by SANRAL and the Minister of Transport;

425.3 because quadraplegics and paraplegics do not have any other effective remedy other than the setting aside of the plans to toll the proposed toll road network.

426. The Applicants similarly request the Honourable Court to grant them condonation for their failure to bring this review application of the environmental authorisations granted under the NEMA within in the periods prescribed by PAJA.

427. The Applicants repeat their grounds for condonation in respect of the administrative actions by the First and Second Respondents under the Act also in respect of the administrative actions by the Fourth and/or Fifth Respondents under the NEMA. In addition the Applicants submit that the need to apply for the review and setting aside of the environmental authorisations arose only after the Applicants became aware that SANRAL intends to recoup a substantial portion of the costs for the proposed road upgrades and improvements of the GFIP through e-tolling.

428. The Respondents should not be allowed to rely on their own failures to comply with the statutory requirements under the NEMA and the EIA Regulations to bar the Applicants from enforcing their substantial and procedural rights hereby. The Applicants cannot reasonably be expected to bring applications for the review of the administrative actions by the Fourth and/or Fifth Respondents if they were not fully apprised of the impacts that such administrative action would have on them. However, the Applicants respectfully submit that once they became aware of the impacts of the environmental authorisations they acted forthwith to protect their interests.
429. The Applicants respectfully submit that it would be unreasonable and unfair to allow the Respondents to present the above Honourable Court with a *fait accompli* and argue that SANRAL should be allowed to retain the benefits it obtained through its unlawful conduct described herein above.

INTERIM RELIEF: IN GENERAL

430. Thus far I have addressed the basis for the relief sought in Part B of the notice of motion. Against that background, I turn now to address the interim relief sought in Part A.

A prima facie right

431. I am advised and I respectfully submit that on the basis of the foregoing, the Applicants have demonstrated a clear, alternatively, a *prima facie* right:

431.1 to the review and setting aside of the declarations of the sections of national road making up the proposed toll roads;

431.2 to the review and setting aside of the approval of the Minister given in terms of section 27(1)(a) read with 27(4) of the Act that the aforesaid sections of road be declared toll roads;

431.3 to the review and setting aside of the environmental authorisations obtained by SANRAL authorising the expansion and upgrading of the proposed toll road network with a view to such roads being tolled and establishing e-toll gantries for that purpose;

431.4 in the alternative to subparagraph 1 hereof, interdictory relief preventing SANRAL from applying the e-toll terms and conditions to e-road users in term of section 114 of the Consumer Protection Act.

Reasonable apprehension of harm

432. The prejudice to the Applicants or those they represent in this application is clear in the event that e-tolling were to commence on 30 April 2012.

433. The Applicants, their members, and the public will suffer harm in that they will be forced to pay toll in excessive amounts in order to make use of the proposed toll road network in terms of an invalid tolling scheme.
434. Some users will have to pay up to R500.00 per month, without reasonable alternatives.
435. The members of SAVRALA will, in addition, suffer prejudice peculiar to their industry in that they, as owners of the motor vehicles in their respective fleets, will be compelled to take on the huge administrative burden of collecting toll from their customers and paying it over to SANRAL.
436. SAVRALA's members would have to incur substantial costs to put in place software and systems to enable it to administer toll collection.
437. The cost of compliance for SAVRALA's members with the obligation to collect toll, is difficult to quantify. Compliance would involve at least the establishment of new departments within the business of the respective members, the deployment of personnel to such divisions, and the cost of settling disputes between SAVRALA's members and its clients, on the one hand, and SAVRALA's members and SANRAL, on the other, relating to the toll collection mechanism.

438. Some of the larger members of SAVRALA, including Avis and Europcar, expect to incur new basic costs in excess of R1 million per annum for the administration of e-toll.
439. That SAVRALA's members will incur costs and reduction in profits is inevitable should the tolling of the proposed toll road network go ahead.
440. SANCU submits that it is inevitable that SANRAL's unfair terms and conditions will be enforced with full rigour should tolling be implemented.
441. The consumer will bear the brunt of draconian terms they will have no option but to agree to if tolling goes ahead.

Balance of convenience

442. I am advised and I respectfully submit that the balance of convenience favours the Applicants.
443. Should the interim relief not be granted, the Applicants will suffer the prejudice referred to above.
444. I am advised and I submit that it is not possible to weigh against any prejudice that will be suffered by SANRAL, the prejudice that will be suffered by such persons as Ms Hilda Maporama and her husband and the many thousands of persons in their

position who are unable to afford a further R500.00 per month and have no viable alternatives to use of the toll road system.

445. The same applies to the disabled person or person with mobility impairment who only receives a State grant of R1 200 per month and yet will be compelled to part with a portion thereof because they are dependent on private motor vehicles and need to use the proposed toll road network.
446. The individuals used as examples above are part of an entire society of Gauteng road users who collectively will suffer the same prejudice if the interdict is refused and e-tolling is implemented.
447. However I am advised and I respectfully submit that in a matter such as the present, the dominant consideration in the balance of convenience enquiry is this. If interim relief is refused and tolling commences, it is highly unlikely that a review court will be persuaded to halt the process even if the grounds of review are upheld. Tolling will be a *fait accompli*.
448. The corollary is not true. Should tolling be interdicted pending the final determination of relief in due course, then the review court will be able to exercise its unfettered discretion regarding appropriate relief if the application is successful.
449. The remedy of an interim interdict is therefore necessary to preserve the *status quo* failing which the fair determination of the application in due course, or any

proper decision sent back to the administration for reconsideration, will be effectively negated.

450. In any event it is not clear that SANRAL will suffer great financial prejudice should e-tolling be interdicted.

451. There are three reasons for this:

451.1 The first is that apparently the South African Government has guaranteed in relation to GFIP that should SANRAL not be able to comply with one month of its payment obligations, the Government will assume the whole debt on SANRAL's behalf. These were the express words of Lungiza Fuzile, Director General of the National Treasury, in the debate of the Appropriation Bill before Parliament last week in terms of which R5.75 billion was appropriated out of the national revenue fund for the requirements of the Department of Transport for GFIP. In this regard I attach a copy of a summary of the debate of such Appropriation Bill as "**FA76**" downloaded by the Applicants legal representatives from the Parliamentary Monitoring Group database. The summary is attached in order to prevent further prolixity. Should the allegation be disputed, the transcript of the debate will be obtained and produced.

451.2 The second reason why, even on a simplistic balance of harm or prejudice analysis SANRAL would not suffer greater harm than the Applicants, is

because there are alternative funding mechanisms that are available to SANRAL which may be used in order to fund GFIP in the interim.

452. The increase of a ring-fenced portion of the fuel tax levy is one such example.

453. Thirdly, it is anticipated that SANRAL will contend that any postponement of the toll scheme will result in enormous financial prejudice, as it did in a similar balance of prejudice enquiry in the *HMKL* case that I have referred to above. In that case, the deponent to SANRAL's affidavit stated that should the proposed toll scheme not proceed on a certain date the prejudice to SANRAL would be so enormous that its position would be irrecoverable. As it turns out, these statements were later contradicted by the postponement of the scheme on several occasions for indefinite periods without any calamity of the nature described in the affidavit materialising. As stated above, the papers in the *HMKL* case will be produced for the Honourable Court at the hearing hereof.

Lack of alternative remedy

454. It is clear from what I have stated that there is no alternative remedy available to the Applicants other than approaching the Honourable Court for interim relief.

INTERIM RELIEF: THE CONSUMER PROTECTION ACT

455. In addition to what is set out above, the Applicants seek interim relief under the Consumer Protection Act for the reasons that follow.

456. I attach a copy of the e-toll terms and conditions hereto as "**FA77**".

457. These terms and conditions will apply to all e-road users, whether registered as such and making use of an e-tag or unregistered and without an e-tag. They make provision for a draconian e-toll enforcement regime that is both unduly burdensome and highly prejudicial to the e-road user.

458. The particular provisions that illustrate this include the following:

"1.17 'red-listed' relates to the status of an e-tag and/or a VLN which is flagged by the TCH for various reasons including, the fact that the related e-toll account does not have sufficient funds to settle toll transactions, misuse of an e-tag and/or an e-tag having been reported stolen or damaged;...

1.23 'VLN' means a Motor Vehicle Licence Plate number;...

1.25 'PVC' is the Violations Processing Centre, a division of the Agency, that manages e-road violators and the collection of all outstanding toll charges;...

20. If the user's e-toll account goes into default due to non-payment, the user's account at the TCH will be suspended and the user will be allocated a VPC account and the user will be referred to VPC for further action.

21. *Once referred to the VPC, the user will only be able to settle outstanding charges by means of a payment into the user's VPC account through any of the available payment methods contemplated in 7.2.1 and where such payment is actually received by the VPC.*

...

23. *Fees charged shall be deemed to be correct, unless the user is able to demonstrate that they are incorrect.*

...

28. *The user hereby acknowledges and accepts that registration with the TCH, the allocation to the user of an e-toll account and/or the user's possession of an e-tag will not in itself necessarily result in valid passage by the user and/or the designated motor vehicle on an e-road and in this regard, the red-listing of the user's e-tag may result in the user and/or the designated motor vehicle being prevented from using or continuing to use an e-road and/or from being granted passage on an e-road which makes use of a boom down lane.*

29. *If at any time, the user is in breach of any of these terms and conditions -*

29.1 *the agency will be entitled, without notice to the user, to suspend the e-toll account and red-list the user's e-tag(s); and*

29.2 *the user will not have any claim against the Agency whether to reinstate the e-toll account or the e-tag(s) or any other relief for any loss suffered."*

459. I am advised and I respectfully submit that the e-toll terms and conditions attempt to impose on e-road users a contractual form of the "pay-now-argue-later" rule that applies in the case of tax collection.
460. I am advised and I respectfully submit that SANRAL is a supplier and the e-road user is a consumer subject to the reach of the Consumer Protection Act 68 of 2008 ("the CPA").
461. Section 48 of the CPA prohibits a supplier, in this case SANRAL, from offering to supply, supplying or entering into an agreement to supply any goods or services "on terms that are unfair, unreasonable or unjust".
462. Section 48(2) of the Act provides that a term or condition is unfair, unreasonable or unjust if:
- "(a) it is excessively one-sided in favour of any person other than the consumer or other person to whom goods or services are to be supplied;*
- (b) the terms of the transaction or agreement are so adverse to the consumer as to be inequitable."*
463. I am advised and I respectfully submit that section 44 of the CPA Regulations published as Government Notice R293 in Government Gazette 34180 of 1 April

2011 stipulate that the following terms are presumed not to be fair and reasonable:

"(x) *[Terms or conditions] excluding or hindering the consumer's right to take legal action or exercise any other legal remedy...*

(y) *[Terms or conditions] restricting the evidence available to the consumer or imposing on him or her a burden of proof which, according to the applicable law, should lie with the supplier."*

464. I am advised and respectfully submit that the above conditions of the agreement clearly fall foul of the terms of the CPA and regulations I have referred to.
465. The e-toll terms and conditions in fact place an e-road user in an entirely unfair situation. If an e-road user disagrees with the amount that he has been charged by SANRAL (either because he did not make use of the e-road at all or because he disagrees that the amount of toll that he has been charged is in excess of his usage), there is by virtue of the above terms of the agreement no recourse open to such user except to make payment of the amount of toll SANRAL alleges to be owing in order to freely continue using the proposed toll road network.
466. The e-road user will then be limited, after having made payment, to approaching Courts for relief and will be required to discharge the unfair onus of "demonstrating" that the charges levied by SANRAL are incorrect.

467. Clauses 28 read with 29 of the agreement make matters worse in that should SANRAL determine that an e-road user is liable for toll (when in fact it may not be the case), SANRAL is entitled without notice to the e-road user to red-list such user's account or VLN and prevent such user from continuing to make use of the e-road.
468. To add insult to injury, by virtue of section 29, the e-road user will not have any claim against SANRAL in such a situation whether to reinstate the e-toll account or the e-tags (and here impliedly the ability as a red-listed VLN user to be unlisted) or claim "any other relief for any loss suffered".
469. I am advised and I respectfully submit what makes the above provisions even more unconscionable is the fact that the parties entering into the agreement are in an unequal relationship with SANRAL being the power holder and the gatekeeper of the arterial network that the prospective e-road user has no realistic option but to use.
470. The e-road user is therefore coerced into entering into an agreement that is highly prejudicial to the e-road user and has no option but to accept the terms imposed which include the waiving of rights and the assumptions of obligations that section 48(c) and section 51(1)(b) of the CPA were designed to protect against.
471. I am advised and I respectfully submit that the above "pay now argue later" mechanism that has been written into the agreements constitutes the operative

terms in the agreement relating to payment and the remedies of the parties in the case of non-payment and disputes about payment.

472. I am advised and I respectfully submit that these provisions cannot reasonably be severed from the agreement without paralysing the agreement as a whole.
473. I am advised and I respectfully submit therefore that, in relation to the terms mentioned above, the appropriate remedy is an order declaring the agreement void and/or unenforceable, coupled with orders interdicting SANRAL from requiring e-road users to enter into agreements with it on the same or similar unequal terms.
474. The above provisions are not the only provisions of the e-toll terms and conditions that are offensive.
475. Clause 32 of the e-toll terms and conditions that ought to limit SANRAL's liability "for any loss or damage, injury or harm or other relief arising from the use of the e-tag, except to the extent that the agency, its agents, representatives or employees were grossly negligent" are also in direct conflict with sections 48(c)(iii) and 51(1)(b) of the CPA, read with sections 61(1) and 61(2) of the CPA.
476. The effect of clause 32 is to insulate SANRAL from *inter alia* any monetary loss that may arise from a faulty e-tag, such as the incorrect deduction of toll fees,

when sections 61(1) and 61(2) impose strict liability upon SANRAL in such an instance.

477. I am advised and I respectfully submit that clauses 14 and 25 that provide for the free viewing of user charges on the e-toll website but require payment for tax invoices and statements to be printed at customer outlets are also unfair in that many road users have no access to internet and all e-road users should be entitled to receive documentary breakdowns of the charges levied against them without having to pay for such charges.
478. Stated otherwise, the above clauses of the terms and conditions are unfair in that they do not cater for all road users - including those without internet access or ability - and compel payment of an unspecified charge on such consumers.
479. A further draconian provision contained in the e-toll terms and conditions that should be declared invalid is clause 33:

"The user hereby irrevocably authorises the agency or its duly authorised agent, to obtain from any institution where the user may have an account, or from any credit bureau, any information concerning the user. This clause constitutes consent and an instruction to each such institution to disclose such information to the agency or its agent."

480. I am advised and I respectfully submit that this clause is manifestly unfair to the e-road user who is essentially compelled to waive his rights of privacy and confidentiality in favour of SANRAL.
481. I am advised and I respectfully submit that the clause is certainly over broad in that it provides no limitation of the extent of the information that SANRAL may obtain, namely, "any information concerning the user".
482. SANRAL's response to the Third Applicant's complaint concerning this clause is essentially to the effect that the e-road user can trust SANRAL since SAN
483. RAL would not use the clause to gain access to any more information than "is required".
484. I am advised and I respectfully submit that this sort of answer from SANRAL is entirely unacceptable and that no road user should be compelled to enter into an agreement containing such a term. I am advised and I respectfully submit that this clause is manifestly unfair to the e-road user who is essentially compelled to waive his rights of privacy and confidentiality in favour of SANRAL.
485. I am advised and I respectfully submit that the clause is certainly over broad in that it provides no limitation of the extent of the information that SANRAL may obtain, namely, "any information concerning the user".

486. SANRAL's response to the Third Applicant's complaint concerning this clause is essentially to the effect that the e-road user can trust SANRAL since SANRAL would not use the clause to gain access to any more information than "is required".
487. I am advised and I respectfully submit that this sort of answer from SANRAL is entirely unacceptable and that no road user should be compelled to enter into an agreement containing such a term.
488. Finally, in relation to SANRAL's terms and conditions, I am advised and I respectfully submit that clauses 7.2.2, 7.3.3, 9 and 12 alone and read with the clauses quoted in paragraph 460 above also constitute unfair and unduly burdensome terms and conditions that the e-road user should not be compelled to accept. Counsel for the Applicants will address the Honourable Court in regard to the latter at the hearing of the application.
489. When the "*e-Toll Terms and Conditions*" were brought to SANCU's attention, and at a stage that the implementation of tolling was still suspended, Dr Cliff Johnston addressed a letter on behalf of SANCU to SANRAL raising with the latter what SANCU identified as terms in conflict with the CPA.
490. I attach a copy of the letter dated 30 January 2012 hereto as "**FA78**".

491. SANRAL replied on 9 February 2012 in a letter attached as “**FA79**” expressing its disagreement with SANCU and claiming that the e-Toll Terms and Conditions were not in conflict with the CPA.
492. Johnston replied to SANRAL’s letter on 21 February 2012, and informed that SANCU would, in view of SANRAL’s stance, lay a complaint with the National Consumer Commission.
493. I attach a copy of the second SANCU letter as “**FA80**”.
494. On 28 February 2012, SANCU transmitted its complaint to the National Consumer Commission in the prescribed form, a copy of which I attach hereto as “**FA81**”.
495. I am informed by Johnston that the initial transmission of the complaint failed, and it had to be resent in early March 2012. Confirmation of receipt has been received of the resending of the complaint.
496. SANCU herein approaches the Honourable Court for interim relief in terms of section 4 and/or 114 of the CPA *alternatively* in terms of the common law, pending the final determination of the complaint that is still to be investigated by the Sixth Respondent pursuant to section 72 of the CPA, before the National Consumer Commission determines what of the further processes set out in sections 72 and following of the CPA should be followed.

497. The order sought is an interim order preserving the *status quo* pending the proper resolution of the complaint.

INTERIM RELIEF: URGENCY

498. I am advised and I respectfully submit that the relief sought in Part A is urgent and a departure from the usual forms and time periods is justified.

499. It was announced in the budget speech on 22 February 2012, and confirmed by SANRAL and the Department of Transport subsequently thereto, that tolling will commence on 30 April 2012. It appears unlikely that there will be further postponements. Implementation is therefore imminent.

500. In order to preserve the rights of the parties, and prevent the Applicants and the hundreds of thousands of members of the public from suffering the cost and inconvenience of the implementation of e-tolling, this matter must be heard before 30 April 2012.

501. I am advised and I respectfully submit that the Applicants have not created their own urgency.

502. Between 28 February 2012 and the launching hereof, SAVRALA, the further Applicants and the further members and supporters of OUTA, held a series

consultations with their attorneys of record and counsel in order to prepare the present application.

503. The large volume of documentation that had to be perused by the Applicant's legal representatives, the complex factual history and legal setting, the gravity of the matter for the Applicants as well as the public at large, and the need to consult with a variety of stakeholders, has naturally slowed the preparation of the application.
504. On or about Thursday 15 March 2012, once substantial progress had been made in the preparation of the application, the Applicants were placed in possession of the HMKL record which the Applicants were advised would have to be properly perused and considered before the application could be launched.
505. I am advised and I respectfully submit that in view of the above, 23 March 2012 is the soonest an application of this size and importance could reasonably be brought.
506. I respectfully draw it to the attention of the Honourable Court that in launching the matter on 23 March 2012, but setting the matter down for 24 April 2012, subject to the directions of the Honourable Deputy Judge President, the Applicants have been mindful to provide SANRAL and the Minister of Transport with sufficient time to answer the application.

CONFIRMATORY AFFIDAVITS

507. I respectfully refer the Honourable Court to the confirmatory affidavits of

507.1 Marc Corcoran, attached hereto as “**FA81**”;

507.2 Aristides Seirlis, attached hereto as “**FA82**”; and

507.3 Dr Cliff Johnston, attached hereto as “**FA83**”.

508. In the urgent circumstances, it will not be possible for the Applicants to file several of the above affidavits simultaneously with the filing of the application. The Applicants are advised of the premium of not delaying the launching the application, notwithstanding that certain deponents, for instance Corcoran who is abroad, are not in Gauteng.

509. Any confirmatory affidavits that are not filed with this affidavit will be filed as soon as possible and before the hearing of the matter. The Applicants pray that the Honourable Court condone the subsequent filing of such confirmatory affidavits.

PRAYER

510. For the reasons set out above, the Applicants:

510.1 pray for the relief set out in Part A of the Notice of Motion;

510.2 pending supplementation of these papers in accordance with Rule 53(4),
pray for the relief set out in Part B of the Notice of Motion.

I hereby certify that the deponent has acknowledged that he:

- (a) knows and understands the contents of this affidavit;
- (b) has no objection to taking the oath;
- (c) considers the oath to be binding on his conscience.

THUS signed and sworn to before me, at _____ on
_____ 2011, the Regulations contained in Government Notice No. R1258 of
21 July 1972 (as amended), having been fully complied with.

COMMISSIONER OF OATHS