

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

Case No: 17141/12

In the matter between:

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

and

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

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**FILING SHEET: APPLICANTS' REPLYING AFFIDAVIT**

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Herewith presented for service and filing:

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**APPLICANTS' REPLYING AFFIDAVIT**

Signed at SANDTON on this the \_\_\_\_ day of APRIL 2012

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TO:  
**The Registrar of the above Honourable**  
**Court, Pretoria**

AND TO:  
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Received a copy hereof on this  
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For: First Respondent's Attorneys

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AND TO:

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Received a copy hereof on this  
the \_\_\_ day of APRIL 2012

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For: Attorneys for National Treasury

AND TO:

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Received a copy hereof on this  
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For: Attorneys for the Road Freight  
Association

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<b>SOUTH AFRICAN NATIONAL CONSUMER UNION</b>	Fourth Applicant

and

<b>THE SOUTH AFRICAN NATIONAL ROADS AGENCY LTD</b>	First Respondent
<b>THE MINISTER, DEPARTMENT OF TRANSPORT REPUBLIC OF SOUTH AFRICA</b>	Second Respondent
<b>THE MEC, DEPARTMENT OF ROADS AND TRANSPORT, GAUTENG</b>	Third Respondent
<b>THE MINISTER, DEPARTMENT OF WATER AND ENVIRONMENTAL AFFAIRS</b>	Fourth Respondent
<b>THE DIRECTOR GENERAL: DEPARTMENT OF WATER AND ENVIRONMENTAL AFFAIRS</b>	Fifth Respondent
<b>NATIONAL CONSUMER COMMISSION</b>	Sixth Respondent

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APPLICANTS' REPLYING AFFIDAVIT

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I, the undersigned,

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**LEOPOLD JEAN JOSEPH POWEN**

do hereby make oath and state that:

1. I am a major male and general manager of the Second Applicant currently residing at 17a Mervin Road, Glenhazel.
2. I depose to this replying affidavit on behalf of the First to Fourth Applicants.
3. 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.
4. Where I rely on information conveyed to me by others, I believe such information to be correct and have no reason to believe otherwise.
5. 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.

**PURPOSE OF THE REPLYING AFFIDAVIT**

7. I have read the answering affidavit of SANRAL and the combined affidavit of the Minister of Transport and MEC for the Department of Roads and Transport in Gauteng and I reply thereto herein.
8. It is necessary for me to qualify that in doing so, I shall deal with such answering affidavits only insofar as is strictly necessary for the purposes of the application for interim interdictory relief in terms of Part A of the Notice of Motion.
9. The reason for this is because the Applicants have been placed under considerable pressure by the above respondents who delayed in filing their affidavits:
  - 9.1 the application was launched on 23 March 2012;
  - 9.2 the Notice of Motion allowed the respondents 17 days, that is, until 9 April 2012 to file their answering affidavits in the application for interim relief;
  - 9.3 the Applicants deliberately sought to allow the respondents as long as possible to file such affidavits in view of the importance of the matter;
  - 9.4 when it was realised that 9 April 2012 was Easter Monday, the Applicants notified the respondents that they could file instead on 10 April 2012, that is, 18 days after the application was launched;

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- 9.5 neither SANRAL nor the Minister of Transport and the MEC filed by Tuesday 10 April 2012, however;
- 9.6 instead, the Second and Third Respondents filed approximately 35 page answering affidavit at about 17h10 on Thursday, 12 April 2012, that is, 20 days after the launch of the application;
- 9.7 SANRAL, for its part, filed its answering affidavit at about 12h20 on Friday 13 April 2012, that is, 21 days or three full weeks after the launching of the application. SANRAL's answering affidavit is 311 pages in length and includes 743 pages of annexures.
10. On Friday 13 April 2012, the parties met with the Deputy Judge President of the Honourable Court with a view to obtaining directions for the hearing of the matter.
11. Despite being encouraged by the Deputy Judge President to come to some interim arrangement, SANRAL, the Minister of Transport and the MEC insisted that the matter proceed on 24 April 2012 and not be stood down to a later date (with the undertaking not to commence tolling on 30 April), despite the risk that the Applicants might not be able to reply to the voluminous affidavit delivered by the First Respondent and despite that the Minister of Finance's intention to intervene in the application.

12. In the circumstances, the Applicants' legal representatives recorded that the Applicants were prejudiced by the late filing of the answering affidavits. I record that the Applicants reserve their rights to supplement this replying affidavit should there be a need to do so in due course.
13. I will deal first with the answering affidavit of SANRAL, and thereafter with the answering affidavit of the Minister of Transport and the MEC.

**THE FAILURE OF SANRAL TO DEAL WITH THE MATERIAL ALLEGATIONS OF THE APPLICANTS' FOUNDING THE REVIEW**

14. I am advised that before dealing systematically with the answering affidavit of SANRAL, it is important that I draw to the attention of the Honourable Court that SANRAL has failed to deal with the material allegations founding the review.

***It is not disputed that the cost of collection alone will exceed the cost of the upgrade***

15. Firstly, SANRAL failed to dispute the material allegations that show that the respective declarations of the proposed toll road network should be set aside because of the inordinate expense of tolling such network.
16. The material allegations in this regard are set out in the Founding Affidavit from paragraph 206 (p.199) to paragraph 249 (p.209).

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17. Working from the figures made available to the public in the Steering Committee report, the Applicants draw the conclusion at paragraphs 238 (p.207) to paragraph 241 (p.207) that the road using public 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*".
18. The Applicants earlier (at paragraph 231 p.205 to paragraph 237 p.206) specifically allege and provide reasons why the cost of tolling is in all probability even more expensive than this, given the obvious efforts by SANRAL to hide this cost from the public, and the Applicants invited SANRAL to take the Honourable Court into its confidence and disclose its contract with ETC JV and the true cost of tolling.
19. The above material allegations made by the Applicants are met with nothing but avoidance on the part of SANRAL (See Answering Affidavit paragraph 296 p.1042 to paragraph 308 p.1051).
20. SANRAL still refuses to disclose the true cost of tolling to the Honourable Court.
21. SANRAL refuses to provide the Honourable Court with the contract between itself and ETC JV that would reflect the true cost of tolling.
22. This is despite the fact that the true costs are known to SANRAL, whose Chief Executive Officer, Nazir Alli ("Alli" or "the deponent") states at paragraph 302 (p.1045-1046) as follows:

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*"The real costs [of tolling] only became known once the tender processes were concluded and the toll costs determined".*

23. At paragraph 305.1 (p.1048) of the answering affidavit, SANRAL admits that *"the figures contained in these paragraphs [of the founding affidavit] are correct"* but qualifies that they are *"based on a public non-compliance in excess of 60%"*. This allegation is, however, entirely without foundation since the figures used by the Applicants are taken from the Steering Committee report wherein no mention is made whatsoever of a presumed 60% rate of non-compliance.
24. In the result, the Applicants' allegation that it will cost the public more to pay for the administration of tolling than the cost of the road upgrades stands as an uncontroverted fact.
25. I am advised and I respectfully submit that the Applicants case in this regard is consequently raised to the level of a clear right, or at least a strong *prima facie* right, to review.
26. It is noteworthy that the Applicants are supported by the Minister of Finance in their views on the inordinately expensive cost recovery mechanism. I refer in this regard to the Applicants' answer to the Minister's affidavit and the interview held with John Robbie on Radio 702 on Thursday 23 February 2012, where the Minister of Finance referred to the expensive e-tolling system and acknowledged it as a *"mistake"*.

***The logistical impossibility of the implementation of e-tolling is likewise not controverted***

27. Secondly, the Applicants' material allegations founding the conclusion that the choice of tolling is so unreasonable that no reasonable administrator would have chosen it on the basis of the logistical impossibility of its enforcement are also not controverted.
28. In fact, from the content of SANRAL's answering affidavit it is made apparent that the situation is even worse than what the Applicants were able to deduce from the information available to them.
29. The material allegations by the Applicant in this regard are contained at paragraph 250 (p.210) to paragraph 275 (p.215).
30. In the answering affidavit, SANRAL responds by denying the reliability of the information contained in the article FA54 by contesting that such information cannot be used on the basis that it is an article unconfirmed by confirmatory affidavits.
31. SANRAL also disputes, on the basis of the SANRAL Act, that there is a need for SANRAL to post invoices (paragraph 309.4 p.1052).
32. SANRAL finally states that, in relation to the issuing of summonses and legal notices *"the current process for conducting these activities exists throughout the*

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- country in relation to road traffic users" and that such procedures will be applied to the e-tolling system with "no anticipated logistical difficulties that will cause the system to become impractical" (paragraph 309.6 p.1053).*
33. SANRAL's serves, however, simply to emphasise the logical difficulties of operating the system.
34. This is because at paragraph 153 of the answering affidavit (and notwithstanding the denial of the correctness of the figures quoted by the CEO of ETC JV) the deponent for SANRAL himself says that there will be *"approximately one million vehicles who utilise the proposed toll road network each day"*.
35. When this figure is put together with the statement by Alli in his letter to Business Unity South Africa, (FA33), that the expected levels of non-compliance will be 7% following the international benchmark it emerges that within seven days of the implementation of e-tolling there will be 70 000 non-compliant defaulters from whom toll collection will have to be made each day.
36. Thus, on SANRAL's own version, SANRAL will be required to serve 70 000 summonses per day for a total of approximately 2.1 million summonses per month and institute proceedings against the same number of persons using the ordinary civil and criminal collection procedures available in terms of the Criminal Procedure Act and the rules of the Magistrate's Court.

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37. Consequently, the practical impossibility of the implementation of e-tolling on the proposed toll road network as claimed by the Applicants also stands as an uncontroverted fact.
38. The system is, as the Applicants claim, by virtue of logistical impossibility so unreasonable a funding mechanism that the Applicants have established a clear right, or at least a strong *prima facie* right, to review the decision.

***The failure of SANRAL to place before the Minister of Transport, and the failure of the Minister of Transport to consider, the inordinately expensive cost of e-tolling also stands uncontroverted***

39. Thirdly, SANRAL is not able to dispute the material allegations founding the Applicants claim that the approval of the Minister of Transport given to SANRAL to declare the proposed toll *road network* toll roads was vitiated by the failure of SANRAL to place material information before him in relation to the inordinate cost of tolling.

***The Applicants' case that SANRAL failed to properly inform the public and allow for public participation in terms of section 27 of the Act is established***

40. Fourthly, the material factual allegations of the Applicants concerning the failure by SANRAL to give proper notice of its intent to toll the proposed toll road network are also not denied.

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41. I am advised and I submit that given

41.1 SANRAL's admission of the material facts founding this ground of review; coupled with

41.2 SANRAL's interpretation of section 27 that is (I am advised) manifestly in conflict with the purpose of the section, the principles of administrative law and the section 33 right to just administrative action by which section 27 of the Act must be informed;

the Applicants have established a further clear right, or at least a strong *prima facie* right to review on this ground as well.

***It is admitted that the environmental authorisations were obtained without proper consideration of the socio-economic impact of e-tolling***

42. Fifthly, SANRAL failed to contradict the material allegations underlying the Applicants' case for a review and setting aside of the environmental authorisations attached to the Notice of Motion.

43. The Honourable Court will notice that SANRAL's answer to the material allegations (Answering Affidavit paragraph 313 p.1060 to paragraph 334 p.1069) admits that in the case of each of the applications for environmental authorisation for the upgrades to be effected to the road network, that

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SANRAL did not inform the Fourth and/or Fifth Respondents that certain of the upgrades were to be effected for the purpose of establishing a toll road network. More importantly though, SANRAL failed to inform the Fourth and/or Fifth Respondents of its intention to recoup through e-tolling the costs associated with the road upgrades and improvements constituting the GFIP.

44. SANRAL's concessions are made in the face of the duty of applicants for an environmental authorisation to disclose all material facts relevant to the application and the duty of the Fourth and/or Fifth Respondents to investigate the socio-economic impact of the relevant activity for which environmental authorisation is sought.
45. SANRAL's claim that the Applicants had a duty to exhaust the internal remedies before approaching the Honourable Court is also without merit as shall be dealt with in legal argument.
46. I am advised and I respectfully submit that in regard to this ground for review too, the Applicant has succeeded in establishing a clear right, or at least a strong *prima facie* right to review the environmental authorisations referred to in the Notice of Motion.

***Neither SANRAL nor the Minister of Transport place before the Honourable Court any evidence to show why e-tolling cannot be postponed, as it has on four prior occasions, pending the determination of the review***

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47. Finally, I draw it to the attention of the Honourable Court that while SANRAL and the Minister of Transport have insisted that e-tolling must proceed on 30 April 2012 pending the determination of the review, neither have provided the Honourable Court in their answering affidavits with any basis for distinguishing this alleged deadline from the previous alleged deadlines in April 2011, July 2011, November 2011 and February 2012, all of which were postponed either for several months or indefinitely at the will of SANRAL and the Minister of Transport.
48. I now turn to address the allegations made by SANRAL in its answering affidavit. Consistent with what I have stated at the outset, I shall only deal with those allegations requiring a specific response. Those allegations that are not specifically dealt with by me are denied insofar as they are inconsistent with what I have stated in the founding affidavit and elsewhere in this affidavit.
49. Moreover, the legal arguments made by the deponent for SANRAL in the answering affidavit will be dealt with at the hearing of the application.

## AD PARAGRAPH 2

50. I deny that the facts contained in the answering affidavit are true and correct.

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**AD PARAGRAPH 4**

51. I deny that SANRAL was given insufficient time to answer to the application for the purposes of Part A. I respectfully refer the Honourable Court to what I state below in this regard.

**AD PARAGRAPH 9.1**

52. It is correct that the present application was launched by the Applicants on Friday, 23 March 2012.

53. The application was launched as a matter of urgency in circumstances where the Minister of Finance had finally indicated in the Budget Speech on 22 February 2012 that the tolling of the proposed toll road network would proceed and that tolling would commence on 30 April 2012.

54. The Applicants launched their application four weeks after this date.

55. The application was set down for the motion court week of 24 April 2012 in order to allow the Respondents as much time as was reasonably possible in which to deal with a very important application in the public interest.

56. In the circumstances:

56.1 the Applicants prepared the urgent application over a period of thirty days;

56.2 SANRAL prepared its answering affidavit over a period of twenty one days; and

56.3 the First and Second Respondents prepared their answering affidavit over a period of twenty days.

#### AD PARAGRAPH 9.2

57. The allegation that SANRAL was unable to deal with the application sufficiently for the purposes of Part A in a period of twenty one days, is denied.

58. In the time taken by SANRAL, SANRAL produced an answering affidavit running to 311 pages in length with annexures running in excess of 700 pages.

59. 21 days was more than sufficient time for SANRAL to deal with the key allegations found in the application for the review and the interim interdict pending such a review.

60. SANRAL's inability to deal with the material allegations of the Applicants founding the case for review does not relate in any way to the time period allowed to them for the preparation of their answering affidavit.

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**AD PARAGRAPHS 9.3 TO 9.4**

61. I admit the content hereof.

**AD PARAGRAPH 9.5**

62. Should tolling commence at 0h00 on the evening of Monday, 30 April 2012, the Honourable Court will have five clear days from Tuesday, 24 April 2012 in which to decide the application and grant an order. Should the hearing of the application run over to Wednesday or Thursday, that time may be reduced to four or three days respectively.

63. The Deputy Judge President in a letter directed to the parties on Thursday, 12 April 2012 prior to the meeting with counsel on Friday, 13 April 2012 invited the parties come to an interim arrangement which would allow the "*responsible*" handling of the matter.

64. SANRAL and the Minister of Transport were unwilling to defer e-tolling pending an early review,

**AD PARAGRAPHS 9.6 TO 9.6.5**

65. I deny that 30 April 2012 is an "*arbitrary deadline*" for the purposes of urgency.

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66. The matter is, on the contrary, clearly urgent for the reason that the tolling of the proposed toll road network is scheduled to commence on that date.
67. It is precisely the tolling of the proposed toll road network that the application is aimed at preventing, reviewing and setting aside.
68. SANRAL argue herein on the basis of a disembodied interpretation of section 27 of the Act that the levying and collection of toll is irrelevant to the setting aside of the declaration of the roads upon which toll is to be levied and collected as toll roads.
69. This is a matter for legal argument which will be dealt with at the hearing of the application.
70. The Applicants could not, reasonably speaking, have waited until the publication of the new tariffs and commencement date for tolling after the Minister of Finance had given, what in the context of the ongoing e-toll saga, was the final word from the Government that e-tolling would in fact commence, especially given the 14 day period stipulated in section 27(3) of the Act.

#### **AD PARAGRAPHS 9.6.6 TO 9.6.8**

71. For the reasons that are clearly set out in the founding affidavit, it is not possible to assist the members of QASA by granting them exemption.

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72. The vast majority of the members of QASA are transported by means of the private transport provided to them by friends, acquaintances, and other third parties who drive them from A to B and whom the QASA members reimburse from the R1 200.00 disability grant that they rely on to live.
73. As stated in the founding affidavit, QASA members are unable to use public transport as it is inaccessible to them, and in any event is geographically inadequate in reach.
74. In the circumstances, exempting QASA members will be of no assistance.
75. As regards the individuals who have deposed to affidavits at "FA5" to "FA8" of the founding affidavit, it is denied that SANRAL's offer that they may apply for exemption constitutes a tender that is either effective or sincere.
76. Such individuals are in the same position as thousands of Gauteng commuters who make use of the proposed toll road network on a daily basis. SANRAL will not, and cannot without suffering the risk of under-subscription to the toll scheme, grant exemption to persons in the position of the above individuals.

**AD PARAGRAPHS 9.6.9 TO 9.6.10**

77. This is a matter for legal argument.

**AD PARAGRAPH 9.6.11**

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78. The prejudice to be suffered by the Applicants and the road users of the proposed toll road network is not limited to financial prejudice.
79. The Applicants and those represented by them will suffer irreparable prejudice should e-tolling commence in that it will be determinative of the pending review.
80. It cannot reasonably be expected of a review Court in due course to stop e-tolling once it has commenced.
81. The constitutional rights to just administrative action will be irreparably harmed should e-tolling commence. The infringement of these rights will not only be irreparable, but their effects ongoing since the Applicants and the road using public will be forced to pay toll indefinitely in terms of an unlawful tolling scheme.
82. The above is prejudice that cannot ever be compensated or reversed.
83. The Applicants and those represented by them have a right not to be forced to pay toll in terms of an unlawful e-tolling scheme.
84. In the case of members of QASA and individuals who like the individuals referred to above are not able to afford paying for tolls, the prejudice that they will suffer will extend beyond money out of their pockets.

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85. The road using public will also suffer the inconvenience and expense of having to register for e-tolling and fit an e-tag. Many of the same category of users will no doubt suffer the waste of time and effort of querying or challenging incorrect toll charges or other administrative processes inherent in a scheme of this complexity.
86. Further, and in any event, I am advised that financial prejudice may constitute a basis for urgency.

#### AD PARAGRAPHS 9.7 AND 9.9

87. I am advised that SANRAL's argument herein that the application for the relief sought in Part A is "*in effect ... a review application*" and that they should have been allowed forty five working days is without merit.
88. I repeat that twenty one days is and was clearly sufficient time for SANRAL to deal with the core of the application for interim relief that has been brought against it. I note that SANRAL uses calendar days in some instances and court days in others.

#### AD PARAGRAPHS 9.10 TO 9.16

89. In the circumstances and on the facts that I have set out in the Applicants' founding affidavit, it could not reasonably be expected of the Applicants to have

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launched an application to review and set aside the tolling of GFIP prior to 22 February 2012.

90. If they had done so, SANRAL and the Minister of Transport might well have legitimately complained that it had not yet been finally determined that the tolling of the proposed toll road network would proceed.
91. With the exception of SAVRALA, which was aware of the intent to toll the proposed toll road network and had some insight into the financial implications of tolling GFIP, the Applicants as well as the public at large who the Applicants represent were not aware of SANRAL and the Minister of Transport's intentions to toll the proposed toll road network in 2008 and ignorant of the impact that this would have on them until the publication of the toll tariffs on 4 February 2011.
92. Since that time, and in the face of the public outcry the tolling of the proposed toll road network has been the subject of the review and re-consideration, as I have detailed in the founding affidavit.
93. The Minister of Transport withdrew the section 27(3) publication of tariffs and determination that tolling would commence on 23 June 2011, and the Steering Committee public hearings were then conducted during the course of April, May and into June 2011.
94. While it is true that the Steering Committee were given the mandate of reconsidering the quantum of the tariffs to be charged, the widespread and

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reasonably held belief in the circumstances that obtained at the time was that tolling in its entirety might be reconsidered and discontinued.

95. It is for this reason that many of the representations made by the private stakeholders at the Steering Committee hearings addressed not only or even primarily the quantum of tolls to be paid but argued for tolling to be discontinued in itself and for GFIP to be funded by an alternative means.
96. Similarly, the announcements in August 2011 that the Steering Committees recommended revision of the proposed tariffs had been accepted by Cabinet was again met by such a scale of public outcry and resistance that there were further statements made by the Minister of Transport concerning the discontinuing of toll processes.
97. A further public hearing was set to be held in the Gauteng Legislature on 11 November 2011.
98. The public sentiment at the time was such that the Minister of Transport had to issue a clarifying statement on 7 November 2011 clarifying that tolling for Phase 1 of GFIP would continue and that his earlier statement in October 2011 applied only to future toll road projects.
99. Notwithstanding this, and notwithstanding SANRAL's announcement on or about 7 November 2011 that tolling would commence in February 2012, in

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January 2012 the Minister of Transport announced again that the e-tolling of the proposed toll road network would not commence in February 2012.

100. The public were informed that various meetings were being held within Government and between the Minister of Transport and SANRAL concerning the tolling of the proposed toll road network.
101. There had also been the appointment of a new Board to SANRAL before whom and private stakeholders were invited to make representations at hearings for this purpose at the CSIR in Pretoria on 1 February 2012.
102. The private stakeholders, which included SAVRALA and organisations such as SANCU, at this stage preserved the reasonable belief that not only the proposed toll tariffs but the tolling of GFIP as a funding mechanism to the tolling of the proposed toll road network as a funding mechanism for GFIP was being reconsidered.
103. This belief was fuelled by the fact that the opposition in the public domain remained widespread and vociferous.
104. It was fuelled further by the fact that the powerful political pressure of COSATU was being brought to bear on Government to stop with the plans to toll the proposed toll road network and the threat of protect action being carried in March 2012.

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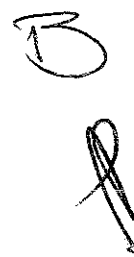
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105. It was in this context, that the Minister of Transport was compelled to issue another clarifying statement on or about 7 February 2012 that the user pay principle "*remained in place*" but that various "*modalities*" were being explored in order to emulate the effect of its implementation.
106. Nevertheless, public opposition continued and COSATU become increasingly militant and outspoken against e-tolling.
107. Widespread uncertainty about tolling remained and the Applicants watched and waited together with the public until the final word of Government was given in the budget speech by the Minister of Finance on 22 February 2012.
108. Further SAVRALA did not initially oppose e-tolling and SAVRALA members sought to constructively and in good faith prepare themselves in conjunction with SANRAL for the implementation of e-tolling through attending periodic technical meetings and information sessions and engaging with SANRAL on contractual matters.
109. It was because of the continued inability of SANRAL to cater for the very real difficulties that would be experienced by SAVRALA's members on account of the manner in which toll would be charged and collected in the system, and because of the fact that SAVRALA's representatives learnt during the course of the public hearings and investigations of Marc Corcoran pursuant thereto of the defects and irregularities in the manner in which the proposed toll road network

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had come to be declared as toll roads and in regard to the logistical impossibility and extravagantly expensive nature of the system itself, that SAVRALA made the decision to mount a court challenge.

110. For the above reasons, I deny that the Applicants have been supine or that the urgency in this instance is self-created.
111. The thirty days taken by the Applicants to launch the application was reasonable and the application could not reasonably have been launched sooner given the nature of the application.
112. The preparation of the application required that SAVRALA, the further Applicants and various supporters of what eventually became OUTA hold a series of consultations with the Applicants' attorneys of record and counsel.
113. The Applicants' legal representatives were required to peruse a large volume of documentation, learn a complex factual history and explore the constitutional and legal setting in which the planned implementation of tolling had been conceived and was planned to be carried out.
114. The coming into possession of the HMKL record on about 15 March 2012 delayed the launch of the application in that the Applicants and their legal representatives could not do otherwise than carefully scrutinise the contents of the record in order to ascertain whether there was further material that should



be included in the application and brought to the attention of the Honourable Court.

115. The task was such that 23 March 2012 was the earliest date upon which it could be completed.

116. The Applicants made every effort to ensure that the respondents had as long as possible within the circumstances to deal with the application. If the application.

#### **AD PARAGRAPHS 9.17 TO 9.19**

117. The Applicants do not rely on the establishment of OUTA as a justification for the Applicants not having brought the application earlier.

#### **AD PARAGRAPH 9.20**

118. I am advised that the fact that this application is brought in the public interest, as well as the fact that the tolling of GFIP is a matter of national interest, are both material considerations in both the determination of urgency and the determination of whether condonation should be granted to the Applicants in terms of section 7 of PAJA.

119. I am advised and I respectfully submit that the magnitude and importance of the present application makes it one that should appropriately be decided on the merits.

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**AD PARAGRAPHS 9.21 TO 9.22**

120. SANCU seeks an interim interdict pending proceedings before the National Consumer Commission alone.
121. SANCU also opposes the tolling of the proposed toll road network for the reasons set out in the founding affidavit. It was not necessary for it to institute separate proceedings.

**AD PARAGRAPH 9.23**

122. I deny that the Applicants have created their own urgency and I respectfully refer the Honourable Court to what I have stated above.

**AD PARAGRAPHS 9.24 TO 9.25**

123. I deny that the Applicants have sought to abuse the process of the Honourable Court in order to place SANRAL in a difficult position and I take exception to this suggestion.
124. On the contrary, the Applicants and their legal representatives made enormous efforts to ensure that the application could be brought as long as possible before 30 April 2012 precisely in order to afford the Respondents an adequate opportunity in which to answer to the application for the relief sought in Part A.
125. I deny that SANRAL was prejudiced in the preparation of its answering affidavit.



126. I submit that in truth SANRAL is seeking to bolster its case on urgency and to cry prejudice in order to avoid the Honourable Court deciding the application on its merits.

#### AD PARAGRAPH 10

127. The allegations under the heading "*Nature of the Relief Sought Under Part A*" are a matter for legal argument.

128. I will therefore deal only with certain of the factual allegations made through the course of paragraph 10 insofar as it is strictly necessary to do so.

#### AD PARAGRAPH 10.4

129. It is denied that it "*will be months and perhaps even years*" before the review application for the relief sought in Part B will be heard.

130. In the meeting held with the Honourable Deputy Judge President on 13 April 2012, the Deputy Judge President indicated that a review application could be accommodated in May/June 2012.

131. The parties were invited by the Deputy Judge President to approach him depending on the outcome of Part A, for directions concerning the further expedited conduct of the matter.

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**AD PARAGRAPH 10.5**

132. If SANRAL is successful in the review application then the collection of toll will simply have been delayed. No revenue is "forever" lost.
133. In addition, such monies could be raised by the use of alternative means such as the raising of the fuel levy by the appropriate amount in the interim.
134. The implementation of tolling, after all, has been postponed in the past for lengthy periods.
135. There are no facts advanced in either the answering affidavits filed by the respondents or in the intervening application of the Minister of Finance that distinguish the previous instances where e-tolling was postponed from the present situation.
136. I point out that in the HMKL application SANRAL similarly claimed that the interim relief that was sought in that application should not be granted precisely because the planned date for the implementation of tolling could not be set back without SANRAL suffering severe prejudice.
137. SANRAL made the same claim several months later, in respect of a different commencement date after interdictory relief had been granted, in an application for leave to execute pending an application for leave to appeal.

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138. As in the present application, SANRAL alleged that the economic consequences for SANRAL would be “severe” and certainly outweigh the prejudice to be suffered by the Applicants in that matter.
139. As it turned out, although the deponent for SANRAL made the allegation on oath in the answering affidavit in the main application that SANRAL had to commence with tolling in April 2011, the day before the answering affidavit was deposed to, SANRAL had informed the public through its project manager, Alex van Niekerk that the implementation of the toll system would be postponed or extended beyond April 2011 by three months to June 2011.
140. In the application for leave to execute a similar claim was made. In that application, the deponent for SANRAL alleged that the date for the commencement for tolling was 23 June 2011 and that should SANRAL not be able to erect and ensure the operation of the gantries by that date, SANRAL would suffer a loss of revenue in the amount of R10 million per month with the result that it would be irreparably prejudiced in that its ability to repay the loan finance used to fund GFIP would be affected.
141. However it had been reported shortly before the affidavit was deposed to that the toll road project would not be complete until about November 2011 and that SANRAL would not be levying and collecting toll on the toll road network until such work was complete.

142. I attach the relevant excerpts from the affidavits filed of record in that matter as "RA1". The full papers will be available at the hearing of the matter should the court wish to peruse same.
143. In addition to the above, it is a matter of public knowledge that not only was the planned commencement of tolling for 23 June 2011 postponed by SANRAL (or the Minister of Transport) to November 2011, but the commencement of tolling announced in November 2011 to begin in February 2012 was again postponed by the Minister of Transport and/or SANRAL for a further two to three months.
144. I reiterate that none of the respondents place information before the Honourable Court why a further postponement would have different consequences to any to any of the previous ones.
145. There is no reason therefore, beyond the say-so of the respondents and the Minister of Finance that the commencement of tolling cannot be postponed again.

#### AD PARAGRAPH 10.6

146. Despite invitation SANRAL has declined to produce its contract with ETC. Consequently, I deny that SANRAL would be "*in breach of its contracts with ETC (Proprietary) Limited*" should the interim interdict be granted.

#### AD PARAGRAPH 10.7

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147. It is common cause that the South African Government has guaranteed SANRAL's debt.
148. There is no evidence that the Government will not be able to honour its guarantee should an interim interdict be granted.

#### **AD PARAGRAPHS 10.8 TO 10.9**

149. I reiterate there is no evidence before the Court that the Government is unable to meet its guarantee of the debts of SANRAL.
150. SANRAL's debt will in any event be recouped either by e-tolling (if it is allowed) or by an alternate funding mechanism
151. The Government is able to increase the fuel levy should it need to do so. Neither SANRAL, nor the Minister of Transport, nor the Minister of Finance have alleged that it would not be possible to raise the fuel levy.
152. For the above reasons, I deny that the granting of interim relief would result in the down-grading of the credit rating of either SANRAL or the South African Government.

#### **AD PARAGRAPH 11**

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153. The facts forming the foundation for SANRAL's arguments on condonation are contained elsewhere in this affidavit, SANRAL's answering affidavit and the Applicants' founding affidavit.
154. The balance of SANRAL's contentions in relation to condonation constitute legal argument which will be addressed by the Applicants.
155. As with the previous section, I will therefore only deal with the factual allegations in paragraph 11 of the answering affidavit and only insofar as I have not already done so elsewhere in this affidavit.

#### **AD PARAGRAPHS 11.1 TO 11.2**

156. The allegations contained herein are admitted.

#### **AD PARAGRAPH 11.3**

157. The allegations contained herein are denied. Whereas SAVRALA came to learn of SANRAL's plans to develop and toll the proposed toll road network in June 2008, QASA and SANCU, and the other members of OUTA learnt of what is referred to in paragraphs 11.3.1 to 11.3.3 of SANRAL's answer in or about February 2011.
158. In regard to the impugned environmental authorisations referred to in paragraphs 11.3.4 to 11.3.8, the Applicants learnt of the existence of such

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authorisations and the fact that they were liable to be reviewed and set aside when they were drawn to their attention during the course of the preparation of the case after 22 February 2012.

**AD PARAGRAPH 11.4**

159. I admit the content hereof

**AD PARAGRAPH 11.5**

160. While I admit that an applicant seeking to review and set aside administrative action in terms of PAJA outside of the 180 day period requires condonation, I deny the balance of the allegations contained herein.

**AD PARAGRAPHS 11.6 TO 11.9**

161. The allegations contained herein constitute argument, are denied, and will be dealt with at the hearing of the application.

**AD PARAGRAPH 11.10**

162. While the Applicants do not dispute the facts enumerated in this paragraph, they deny that they knew or ought to reasonably have known of the existence of many of the facts at the time of their occurrence.

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163. In particular:

**163.1 Ad paragraph 11.10.1**

163.1.1 SAVRALA came to know about this through the research conducted by Marc Corcoran during 2011;

163.1.2 the balance of the Applicants learnt such facts during the preparation of the application;

**163.2 Ad paragraph 11.10.2:**

163.2.1 SAVRALA and the other Applicants became aware of this during the course of the preparation of the application after 22 February 2012;

**163.3 Ad paragraph 11.10.3-4**

163.3.1 SAVRALA came to know about this through the research conducted by Marc Corcoran during 2011;

163.3.2 the balance of the Applicants learnt such facts during the preparation of the application;

**163.4 Ad paragraphs 11.10.5 to 11.10.13:**

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163.4.1 While Val van den Bergh of SAVRALA came to know about SANRAL's intentions to develop and toll the proposed network in about mid-2008, SAVRALA learnt about the facts contained herein during or about the time of the publication of the Steering Committee report on 30 June 2011 and the balance of the Applicants came to know about the facts contained herein during the time of the preparation of the application;

**163.5 Ad paragraph 11.10.14:**

163.5.1 The Applicants learnt of the media release referred to herein during the preparation for the application;

**163.6 Ad paragraphs 11.10.15 to 11.10.16:**

163.6.1 The Applicants and/or their members were aware that upgrades were being effected to the Gauteng freeway network as they witnessed them, as is set out in the founding affidavit;

**163.7 Ad paragraphs 11.10.17 to 11.10.28:**

163.7.1 The Applicants can fairly be said to have learnt of the facts mentioned herein at or about the time that they occurred, save the SANRAL media releases which were specified in the

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founding affidavit to have only been discovered during the preparation of the application.

**AD PARAGRAPHS 11.11 TO 11.11.2**

164. I learnt that SANRAL planned to toll the proposed toll road network in or about mid-2009 when I attended the informal meeting with Alex van Niekerk and Val van den Bergh which I have referred to in the founding affidavit.

165. Save as aforesaid the allegations contained herein constitute argument and are denied.

**AD PARAGRAPHS 11.11.3 TO 11.13**

166. The allegations contained herein are denied.

167. I refer to what I have said above about the time at which the various facts came to the knowledge of the representatives of the Applicants or their representatives.

**AD PARAGRAPHS 11.14**

168. The reasons for why the present application has been brought after 22 February 2012 is set out elsewhere in this affidavit and in the founding affidavit and I respectfully refer the Honourable Court thereto.

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

**AD PARAGRAPH 11.15**

170. The dates on or about which the Applicants learnt the material facts founding the Applicants case for review are set out above.

171. Save as aforesaid, I deny the allegations contained herein.

**AD PARAGRAPH 11.16**

172. Once again, the reasons why the application was brought when it was has already been dealt with and I respectfully refer the Honourable Court to what I have stated above and in my founding affidavit in this regard.

**AD PARAGRAPHS 11.17 TO 11.19**

173. The contractual obligations referred to in general terms by SANRAL herein together with the repayment commitments of SANRAL are not specified.

174. No detail is provided as to the precise terms of such obligations, what amounts are owing, when such amounts become owing, and the instruments in terms of which such amounts or obligations arise.

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175. Neither the Applicants nor the Honourable Court are fairly in a position to assess whether there is any substance to SANRAL's allegations that it will in fact default on its obligations, requiring the Government to honour repayment guarantees.
176. Details of SANRAL's financial state are not before the Court. The Honourable Court and the applicants have no ability to assess the validity of the claim that SANRAL cannot pay the debt.
177. Further, while it is accepted that the upgrades of the freeway network within Gauteng was effected in anticipation of recouping the costs thereof in the long term by means of tolling, it is clear from the papers filed of record and the attachments thereto that tolling or not, SANRAL would have effected large-scale upgrades of the Gauteng freeway network.
178. While SANRAL may have believed that it would repay the initial capital loans by means of tolling, it has only itself to blame for not properly considering whether tolling was a reasonable choice open to it and also for not considering whether there were not other reasonable alternative methods of funding.
179. SANRAL also can only blame itself if it failed to adhere to the principles of good governance, accountability, openness and transparency as required by the Constitution and if its conduct is held by this Honourable Court not to have been lawful, reasonable and procedurally fair.

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180. Save as aforesaid, the balance of the allegations herein will be dealt with in argument.

**AD PARAGRAPH 11.20**

181. It is admitted that SANRAL retrenchments and job losses may conceivably follow the reviewing and setting aside of open road tolling on the proposed toll road network.

182. As with the other allegations contained herein, SANRAL's allegations in this regard are general and provide no specific detail upon which the Applicants or the Honourable Court can assess the extent of such job losses.

183. The Applicants nevertheless contend that whatever losses are suffered, these will be outweighed by the financial and other prejudice that will be suffered by hundreds of thousands of road users in Gauteng for as long as the toll system operates.

**AD PARAGRAPH 11.21-11.22**

184. The conduct of the Applicants has already been explained and I refer to what I have stated above.

185. The balance of the content hereof constitutes argument that will be dealt with at the hearing of the application.

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**AD PARAGRAPH 11.23-11.36**

186. SANRAL began with e-tag registrations in about November 2011. Their doing so was viewed as premature.
187. The MEC publicly stated that they ought not to have done so pending the hearings that were to be conducted in the Gauteng legislature.
188. The prominent signage and other advertising referred to concerning registration for e-tolling only emerged during 2011.
189. The balance of the allegations contained herein either constitutes argument or matter which I have already dealt with.

**AD PARAGRAPH 12**

190. I am advised that the legal arguments contained herein will be addressed by the Applicants' counsel during argument and I shall therefore not deal with these arguments herein, save to deny the correctness thereof.
191. I am advised that section 24C(2)(d) of NEMA, read with the regulations promulgated in Government Notice R386 in *Government Gazette* 28753 of 21 April 2006 ("GN R386"), designates the Fourth Respondent as the competent authority to grant the environmental authorizations concerned.


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Regulation 60(2) of the EIA Regulations promulgated in Government Notice R385 in *Government Gazette* 28753 of 21 April 2006 ("GN R385") provides that no appeal lies against decisions taken by the Fourth Respondent in their capacity as the competent authority for the activity to which the decision relates.

192. I point out that the deponent failed to allege and prove that the Fifth Respondent was duly authorized to grant the environmental authorizations. I am advised that in the absence of authority the administrative actions of the Fifth Respondent in granting the environmental authorizations are void, alternatively voidable.
193. I am further advised that even if the Fifth Respondent acted under authority delegated to her in terms of section 42 of NEMA, the Applicants would still not have been able to avail themselves of the appeal provisions in section 43 of NEMA, read with Chapter 7 of the EIA Regulations promulgated in GN R385, as the Applicants did not participate in the basic assessment process that resulted in the granting of the environmental authorizations, nor were they registered as interested and affected parties in that process.
194. In the premises the Applicants respectfully submit that the deponent's contentions regarding the Applicants' alleged failure to exhaust internal remedies or their alleged failure to seek and obtain exemption in terms of

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section 7(2)(c) of PAJA, are without merit. Legal argument will be addressed to the Honourable Court in this regard.

#### AD PARAGRAPH 13

195. I state at paragraph 496 (p.286) of the founding affidavit that

*“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”*

196. I am advised that section 4(2) empowers the court to make appropriate orders protecting the rights of consumers and that SANCU falls within the categories of persons that may approach a court in terms of section 4(1).

197. I am advised and I respectfully submit further that the Honourable Court has inherent power to protect the legal rights of SANCU, its members and consumers and may be approached on an urgent basis for interim relief pending the outcome of a statutory process such as a section 72 complaint.

198. I am advised and I respectfully submit that, significantly, the CPA does not expressly exclude the jurisdiction of the Honourable Court in coming to the assistance of SANCU and the consumer.

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199. SANCU will do what it can in order that the complaint be expedited before the National Consumer Commission.
200. I am advised and I respectfully submit that SANCU is, however, entitled to seek protection on behalf of its members and consumers in the interim.
201. It is noted that SANRAL is revising its *E-toll Terms and Conditions* and says it will bring same to the hearing of the application. It published new *E-toll Terms and Conditions* on 19 April 2012. Until SANCU has perused these and is satisfied that they comply with the CPA, SANCU will persist with the present application.

**AD PARAGRAPH 15**

202. I note the allegations contained herein

**AD PARAGRAPH 16**

203. I deny that the application "*lacks substantive merit*".
204. As I have drawn to the attention of the Honourable Court at the outset, and shall deal with in this replying affidavit in due course, it is the First Respondent who singularly fails to deal with the material allegations of the Applicants grounds for review.

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205. I am advised and I respectfully submit that (subject to considerations of balance of convenience) it is only necessary for the Applicants to establish a *prima facie* right on one of such grounds (as opposed to two or more of them) in order for it to be entitled to interim relief pending the finalisation of an application for review.
206. I am advised and I respectfully submit that it is clear from the affidavits filed of record that the Applicant has established not only a *prima facie* right open to some doubt, but a clear right in relation to:
- 206.1 the failure of SANRAL and/or the Minister to comply with section 27(1) read with section 27(4) of the Act;
- 206.2 the failure of SANRAL to inform the Minister of Transport, and the failure of the Minister of Transport to take into account, material information on the inordinate cost of open road tolling;
- 206.3 the manifestly unreasonable cost of tolling the proposed toll road network, which allegations the Respondent wholly failed to engage and deal with;
- 206.4 the allegations by the Applicants that the practical implementation of tolling would be practically impossible;

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206.5 the failure of the Fourth and/or Fifth Respondents to conduct a proper socio-economic impact study of the proposed road upgrades for the purposes of establishing a toll road network.

#### AD PARAGRAPHS 17-18

207. I deny that "*the role of the first respondent in South Africa*" and "*the challenges which it faces*" as described in SANRAL's answering affidavit have any impact on the relief sought as alleged herein.

#### AD PARAGRAPHS 19-22

208. I note the quotation by SANRAL herein of paragraph 29 of the founding affidavit and how the deponent states he intends to deal with such allegations in answer.

209. I will deal with the deponent's allegation in paragraph 20.2 concerning the effect of the withdrawal of the e-toll terms and conditions later in this affidavit and for the present purposes deny this allegation specifically.

#### AD PARAGRAPH 23

210. It is clear from SANRAL's own papers that the upgrading of the Gauteng freeways was not for the purpose of ensuring "*economic prosperity of the Gauteng Province*" only but was important for the country as a whole.

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211. In annexure "NA6", the Gauteng Province is referred to as the "*compact economic powerhouse of South Africa*" (p.1329), "*the economic hub of South Africa*" (p.1384) and it is stated that:

*"The strategic intention of a Gauteng Freeway Improvement Scheme would be to reduce congestion, promote and prioritise public transport and enable freight to move efficiently around the province. These three objectives are critical for the province and the country to achieve its priorities."* (emphasis added) (p.1391)

212. SANRAL's memorandum to Cabinet of July 2007 ("NA7") it is further stated by SANRAL that:

*"The state of the freeway system in Gauteng is a concern not only for Gauteng, but for South Africa as a whole. Contributing 38% of the country's Gross Domestic Product (GDP), Gauteng is the economic hub of South Africa."* (emphasis added) (p.1411)

213. The Applicants agree that the upgrading of the Gauteng freeway network, that is, the proposed toll roads, was important for Gauteng and for the country and is likewise in support of all future urban and other route construction and improvements as and when these become necessary to meet transportation needs in South Africa.

214. What the Applicants oppose is:

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- 214.1 the unlawful and unconstitutional manner in which SANRAL has sought to implement e-tolling as a funding mechanism for the upgrades of the proposed toll road network;
- 214.2 the unlawful and unconstitutional manner in which SANRAL has sought to implement tolling heedless of the environmental and socio-economic impact of the implementation of such tolling;
- 214.3 the choice of tolling as a funding mechanism for the upgrades of the proposed toll road network for the reasons set out in the founding affidavit and in this affidavit.
215. I have already stated in the Applicants' founding affidavit that SANRAL and the Minister of Transport enjoy a discretion in which to select an appropriate method of funding for a project such as GFIP, but I have also stated that the Applicants assert that such discretion must be lawfully exercised.
216. If either the choice or the manner of implementation of such choice of funding mechanism is unlawful as it is in this case, then the Honourable Court is entitled to intervene at the instance of the Applicants in accordance with the Constitution.
217. Further legal argument will be addressed in this regard to the above Honourable Court at the hearing of the application.

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**AD PARAGRAPH 27**

218. I reiterate the Applicants' concern that the decision to toll the proposed toll road network was a decision *"taken hastily or without due consideration for other possible funding mechanisms"*.
219. SANRAL, the Minister of Transport and the MEC have failed to show in their answering papers anything but a most superficial consideration of alternative methods for funding.
220. The document attached as "AA1" to the Minister's answering affidavit and "NA6" to SANRAL's answering affidavit (hereafter "the 2006 Proposal") is plainly a document that deliberately motivates and justifies tolling.
221. Noteworthy is that in this document the exorbitant cost of open road tolling is neither mentioned nor considered.
222. According to paragraph 7 of the document, the other modes of funding were only considered in *"overview of some of the available funding options"*.
223. In contrast, as is clear from the DRT response attached to the founding affidavit ("FA12") and from SANRAL's answering affidavit, the idea of tolling the proposed toll road network dates back to the late 1990s and had crystallised as the choice method of funding the freeway upgrades by 2006 when the *"Gauteng*



*Transport Network Integration Process: Proposed for a Gauteng Freeway Improvement Scheme*" document was published.

224. Also by contrast, in comparison to the passing reference to the four other possible methods of funding "*in overview*", it is plain from the proposal that by that stage a financial analysis of funding the upgrades by means of tolling had already been conducted:

*"It is thus proposed that improvements the (sic) Gauteng freeway network be financed as a State Toll Road. A preliminary financial analysis of the scheme showed that it could be viable to implement as a State Toll Road, which will provide excellent benefits for road users as an acceptable tariff." (Emphasis added) (p.1399-1400)*

225. Indeed, it is clear from the document that after only a passing glance at the other methods of funding in overview versus a financial analysis of the scheme as a toll road scheme, tolling of the proposed toll road network was formally proposed.
226. There is no evidence in this document that the other methods of funding were properly analysed.
227. There is no allegation that between the time this document was produced and the declaration of the proposed toll road network as toll roads that a proper analysis of other methods of funding were conducted.

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228. SANRAL and the Minister of Transport are unable to demonstrate to the Honourable Court that due consideration was given to other possible methods of funding.

#### AD PARAGRAPH 32

229. I deny that the 2006 Proposal "*concluded that the Gauteng Freeway Improvement Scheme should be further explored*".

230. The Honourable Court will note that the last page of the 2006 Proposal (p.1410):

230.1 presents the "*Freeway Improvement Toll Scheme*" as a scheme that will be implemented after the "*granting of approval for scheme go-ahead by political principles*";

230.2 states that the "*next step will be the incorporation of the scheme in the various planning processes of the various spheres of government, to enable planned integration*"; and

230.3 states further that "*the success and timely delivery of this proposed scheme depends on the commitment of all three spheres of government*".

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231. The Applicants do not dispute that the report was presented to "*political decision makers*" for acceptance after mid-2006. As much is recorded in the Cabinet memorandum referred to below.
232. It is clear that no time was spent between the 2006 Proposal and the presentation to Cabinet duly considering whether there were suitable or better funding alternatives.

### AD PARAGRAPH 33

233. The deponent does not specify who "*prescribed*" that the Gauteng Freeway Improvement Scheme would have as two of its "*fundamental principles*" the "*utilisation of the user pay principle as a financing tool*" and "*its implementation as a State toll scheme*".
234. But whether this was "*prescribed*" by the 2006 Proposal itself or by political principles thereafter, I do not deny that it was prescribed.
235. The closed minded approach and manifestly unjustified fixed adherence of SANRAL and the Minister of Transport subsequent to 2006 to such principles is one of the grounds for the bringing of the current application by the Applicants.

### AD PARAGRAPH 34

236. The Applicants deny that the studies referred to herein were properly done.

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237. SANRAL certainly provides the Honourable Court with no detail in this regard in the paragraph under reply.

#### AD PARAGRAPHS 35-36

238. SANRAL provides no detail concerning the alleged meetings and the content of the studies referred to herein and I accordingly cannot meaningfully respond thereto.

#### AD PARAGRAPHS 38-39

239. The deponent does not provide the Court with any detail on or transcripts of the radio or television broadcasts referred to herein and his allegation to the effect that the public were informed by these media about the fact that the proposed toll road network would be tolled and the estimated tariff of 50 cents per kilometre is denied.

240. Certainly, it is clear from the unprecedented public outcry in February 2011 and the number of stakeholders and interested groups that came forward after February 2011 in response to the publications of the tariffs, that the public were not adequately informed of tolling or of the tariffs until several years after the declaration of the proposed toll road network as toll roads.

241. I note the summary of printed media publications attached as "NA2" to SANRAL's answering affidavit.

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242. I draw it to the attention of the Honourable Court that a number of the articles listed therein refer to toll projects in other areas of the country, including the Western Cape and N4 in Mpumalanga.

243. Further, I draw it to the attention of the Honourable Court that:

243.1 in July 2007, namely, the month in which SANRAL allegedly approved GFIP as a State Toll Road Scheme, there were only four publications in which the payment of possible toll tariffs were referred to in passing in a single sentence, namely, the Star and Daily Sun on 3 July 2007 and Engineering News and the Mail and Guardian on 13 July 2007;

243.2 in August 2007, there were three articles in the printed media, namely, the Star dated 23 August 2007 in an article entitled "*Cabinet still to decide on tolling of Gauteng roads*", the Sunday Times Metro dated 26 August 2007 and Sunday Times dated 28 August 2007 where there is passing reference to "*charging motorists a possible 50c a kilometre for using them*";

243.3 in September 2007, the month before the publication of the notice of intent to toll, there was a publication in the printed media (according to SANRAL) in only one instance where a possible toll tariff of 50 cents is referred to, namely, the RekordSentraal/Central dated 7 September 2007;

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- 243.4 in October 2007, namely, the month in which the Minister announced GFIP on 8 October 2007 and the notice of intent to toll was published on or about 12 October 2007, there were three articles published on 9 October 2007, namely, in the Pretoria News and the Star, that referred to the indicated tariff of 30 to 50 cents per kilometre in one sentence and six articles where the possible tariff of 50 cents was referred to after 12 October 2007, only one of which was one with wide circulation, namely, the Sunday Independent, dated 28 October 2007. The others include The Auto Dealer dated 15 October 2007 and the Fourways Review, North Eastern Tribune and Midrand Reporter and Northcliff Melville Times dated 19 October 2007;
- 243.5 in November 2007, the month in which the closing date for public comment on the notice of intent to toll expired on 14 November 2007 and in December 2007, January 2008, February 2008 and March 2008, there were no articles published dealing with the proposed tariff that Gauteng road users might be liable to be charged.
244. I pause to state that it is difficult to comment on the above publications given that the information about the page on which the respective articles appeared, the nature and extent of the readership and the location of the passing references to the indicated toll rate are not provided and/or cannot be evaluated. They were obviously insufficient to inform the public of SANRAL's

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- plans to toll the proposed toll road network and of the impact that such plans would have on them.
245. The clearest indication of this fact is to be found in the answering affidavit of SANRAL itself by contrasting the private stakeholder response to the notice of intent to toll dated 12 October 2007, namely, one association, SABOA, with the whole host of private and political stakeholders that later appeared and made representations before the Steering Committee in March/April 2011, namely BUSA, Road Freight Association, SAVRALA, RMI, SATSA, Afriforum/Solidarity, Johannesburg Chamber of Business, South African Local Government Association, The Automobile Association, The South African Road Federation, Democratic Alliance, the South African Communist Party, the Freedom Front Plus, ANC Youth League, COSATU, National Taxi Alliance, Mamelodi Commuter Forum and South African Commuters Organisation (p.1549-1560).
246. Further illustration is provided by the massive public outcry in February 2011 when the public became informed of the intent to toll and the impact it would have on them and by the very fact that the tolling of the proposed toll road network intended to start on 23 June 2011 was postponed as a result.
247. The Honourable Court will note also, in relation to the notice of intent to toll the R21, that between 18 April 2008, the date the notice of intent to toll was published, and 18 May 2008, the date on which the public opportunity to

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comment expired, there were similarly no articles published dealing with the amount that people could expect to pay for the tolls.

248. In the circumstances, I deny that the public were either generally or adequately informed of the implications that the tolling of the proposed toll road network would have for them.

249. The allegations by SANRAL to the contrary in the paragraph under reply are denied.

#### **AD PARAGRAPH 47**

250. I deny that there was publication of the notice of intent to toll the R21 in the Sunday Times on 20 April 2008.

#### **AD PARAGRAPH 49**

251. I deny that the representations received from the public following the notice of intent to toll published on 12 October 2007 were duly considered or were accommodated in any way as is required by section 27 of the Act.

252. SANRAL had clearly made up its mind to proceed with the tolling of the proposed toll road network heedless of the response of the public in much the same manner as they did in the face of public outcry in February 2011 and the months following.

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253. SANRAL have done nothing to properly address the lack of public transport alternatives and the absence of viable secondary roads which were raised in many of the 53 representations made by the public as well as were stated as conditions for the successful implementation of tolling in the Interim Social Impact Report that SANRAL included in the HMKL record.

**AD PARAGRAPH 50**

254. I admit the allegations contained herein to the extent that the deponent's summary of the public representations made is consistent with the content of such representations.

**AD PARAGRAPH 51**

255. I admit that SANRAL made written responses to the representations received from the public and public authorities.

256. The representations and the responses are contained in the HMKL record at Addendum A.

257. I deny, however, as set out in the founding affidavit, that SANRAL meaningfully engaged with the objections raised, particularly as regards the lack of adequate public transport and the absence of viable alternative routes.

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258. The e-tolling of the proposed toll road network in the absence of viable public transport and viable alternative routes is what makes the e-tolling of the proposed toll road network particularly invasive of the rights of Gauteng road users and commuters.
259. I admit that the lengthy quote contained herein is taken from the report (the same document is referred to in the founding affidavit by me as the application) to the Minister of Transport, but I deny the adequacy of the content thereof.
260. I specifically deny the economic justifications offered on the strength of the economic impact study conducted by Barry Standish of the University of Cape Town's Graduate School of Business School.
261. I shall have more to say concerning this economic study later and I respectfully refer the Honourable Court thereto.

#### **AD PARAGRAPH 52**

262. I admit that the Minister of Transport gave approval for SANRAL to declare the various sections of the proposed toll road network as toll roads.
263. For the reasons set out in the founding affidavit and in this affidavit, I deny that the Minister of Transport should have done so and respectfully submit that his approval is liable to be reviewed and set aside.

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**AD PARAGRAPH 53**

264. I note that the deponent specifically alleges herein that GFIP was proceeded with *"on the basis that the costs thereof would ultimately be funded by tolling of the sections of the road in question"*.

265. I respectfully submit that SANRAL and the Minister of Transport only have themselves to blame for proceeding on the basis of unlawful and reviewable toll road declarations and environmental authorisations.

**AD PARAGRAPH 54**

266. I repeat that this media release was discovered on the SANRAL website recently in the course of preparation for the present application.

**AD PARAGRAPHS 55-57**

267. The suspension of the commencement of tolling on the proposed toll road network which was scheduled to begin on 23 June 2011 was one example of at least three separate suspensions of the commencement of tolling.

268. The other instances in which the commencement of the tolling of the roads was postponed have been referred to above and I respectfully refer the Honourable Court thereto.

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**AD PARAGRAPH 59**

269. The deponent omits reference to the last day of the Steering Committee hearings at which participants were promised an opportunity to engage the committee in discussion with a view to reaching consensus on 30 June 2011.

270. I have already dealt in the founding affidavit with what in fact transpired on this day and I respectfully refer the Honourable Court thereto.

**AD PARAGRAPH 61**

271. I deny:

271.1 that the founding affidavit "*reveals a lack of appreciation of the complexity of the process*" culminating "*in the decision to commence tolling on the proposed toll road network on 30 April 2012*". I pause to draw it to the attention of the Honourable Court that consistent with the position of the Applicants, the deponent evidently views the process in its entirety as a single process;

271.2 that there is a "*lack of merit*" in the material allegations. To the contrary, as I have said at the outset and deal with further later on herein, it is the Respondents who fail in their answering affidavit to deal with the material allegations by the Applicants that establish the grounds for review.

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**AD PARAGRAPHS 62-63**

272. I note the reference to the 2006 Proposal which I have already referred to herein and which is attached as annexure "NA6" and the lengthy quote of the executive summary.
273. I refer to the first paragraph of the executive summary which acknowledges "*the marginalisation and under use of public transport within the province*" and the "*suboptimal public transport systems; and the spill over effects of a failing rail system that has suffered years of underinvestment and poor service quality*".
274. Apart from the minor modal upgrades I have referred to in the founding affidavit, nothing has been done to materially improve the public transport offering to the citizens of Johannesburg and Pretoria.
275. Significantly, SANRAL does not allege in its answering affidavit that adequate improvements have been made.

**AD PARAGRAPHAD PARAGRAPHS 64-72**

276. The content of the 2006 Proposal speaks for itself.
277. The Applicants will, however, not dispute the allegations contained herein insofar as they are consistent with that report for the purposes of Part A.

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**AD PARAGRAPH 72**

278. I respectfully draw the Honourable Court's attention to the last paragraph on page 1388 in the section dealing with the "*insufficiency of public funds*" where it is stated that:

*"Problems relating to inadequate funding for road infrastructure can be traced back to 1988 when the dedicated fuel levy was abolished. Budgets for road projects were reduced significantly immediately thereafter. Hardly any significant new road construction projects have been launched since then, whilst funding for maintenance has been lowered."*

279. I respectfully draw the Honourable Court's attention further to the passing mention of the use of public funds emanating from the fiscus to fund the proposed toll road network in the portion entitled "*shadow tolling*" (p.1398-1399), where it is not said that the fiscus would be unable to fund the project, but only stated that "*extensive lobbying will need to be made at National Treasury to get commitment of public funds for repayment of the private investment over a concession period of typically 30 years*".

280. On this note, I pause to mention that in April 2011, the Minister of Transport launched a R22 billion road project for the upgrade of roads in other provinces to be funded by the fiscus. In this regard, I attach an information document

Handwritten signature and initials, possibly 'R B', located at the bottom right of the page.

from the South African Government information website on S'hamba Sonke as "RA2".

281. As regards funding from the fiscus by means of shadow tolling (or the other methods of funding mentioned in overview in the 2006 Proposal) it is clear that these were given no further thought since the 2006 Proposal was evidently placed before Cabinet in October 2006.

282. In this regard I respectfully refer the Honourable Court to paragraph 3.3 of "NA7" (p.1412) which states:

*"A working group convened by the Department of Transport (DOT) developed a proposal for the improvement of the freeway system in Gauteng, which was presented to Cabinet in October 2006. Cabinet noted the proposal and instructed that the outstanding feasibility studies and impact studies should be completed prior to final approval. The South African National Roads Agency Limited (SANRAL) has since completed the studies, and their findings have been incorporated."*

283. It is plain that SANRAL and the Department of Transport moved from the 2006 Proposal to the first proposal to Cabinet in October 2006 and thereafter to the second proposal to Cabinet in July 2007 without there being any comprehensive consideration of alternative methods to funding instead of tolling.

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284. Certainly, in the papers filed of record, neither SANRAL nor the Minister of Transport or the MEC provide any evidence beyond the most superficial of treatment in the 2006 Proposal of the serious consideration of alternative methods.
285. This is especially significant given the distinct lack of proper alternatives before the Minister of Transport in the HMKL record which I have dealt with in the founding affidavit.

#### AD PARAGRAPH 74

286. I note the allegation by the deponent that the 2006 Proposal "*reflects that introducing tolling was part of the strategic planning from the outset*".
287. I respectfully submit that this further supports the Applicants' contention that there was not at any stage any serious or adequate consideration given to alternative methods of funding the GFIP.
288. As regards the "*strategic intention*" referred to herein that the upgrading of the roads and the tolling of GFIP would "*reduce congestion*", "*prioritise public transport*" and "*ensure that freight moves efficiently around the province*" there is nothing in the papers filed of record or indeed in the HMKL record that substantiates that tolling the proposed toll road network would in fact achieve these aims.

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289. Save as aforesaid, I respectfully state that the content of the 2006 Proposal speaks for itself.

#### **AD PARAGRAPH 75**

290. This paragraph is evidently out of place.

291. It nevertheless highlights that the tolling of the proposed toll road network is not the only means of funding available to SANRAL.

292. Indeed, it is significant that an allocation of R5.8 billion has been made from the fiscus in the beginning of this year and that the Minister of Finance in his interview with John Robbie (contained in the Applicants answering affidavit to the intervention application of National Treasury) referred to above makes reference to higher revenues and surplus funds being available for distribution.

#### **AD PARAGRAPHS 76-79**

293. I respectfully state that the contents of the 2006 Proposal speak for themselves and that the Applicants deny the content hereof insofar as it does not accurately reflect what is contained in the 2006 Proposal.

294. The introduction of modal upgrades with the Bus Rapid Transport system (BRT) as well as the introduction of the Gautrain have not scratched the surface of the

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problem of a lack of adequate public transport in the greater Pretoria and Johannesburg areas.

295. This is evident to anyone who lives within the economic heartland of Gauteng.

#### **AD PARAGRAPH 81**

296. SANRAL attempted to introduce high occupancy vehicle lanes (HOV) about a year ago without success and there are currently no HOV lanes on the proposed toll road network.

#### **AD PARAGRAPH 82**

297. I have already dealt with the superficial nature of the treatment of alternative methods of funding in the 2006 Proposal and SANRAL's unwarranted and fixed adherence to the introduction of tolling as a funding mechanism.

298. Save as aforesaid, the content of the 2006 Proposal speaks for itself and the Applicants deny the allegations of the deponent herein.

#### **AD PARAGRAPHS 83-89**

299. The further summary of, and further extensive quotes from, the 2006 Proposal is noted.

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300. For the purposes of Part A, the Applicants will not dispute that what is contained in the paragraphs under reply is consistent with the 2006 Proposal.

301. The Applicants do not, however, admit the correctness of the contents of the 2006 Proposal.

#### AD PARAGRAPH 90

302. As I have pointed out above, it is clear that the memorandum to Cabinet attached as "NA7" is the second of two submissions by SANRAL and/or the Minister of Transport to Cabinet.

303. The first was in October 2006, the month following the drawing up of the 2006 Proposal.

304. I reiterate that it is clear that SANRAL and the Department of Transport moved directly from the 2006 Proposal to the proposal of a toll road scheme to Cabinet in October 2006 and again in July 2007 without proper consideration to alternative methods of funding GFIP.

305. Also, nowhere in these documents or in the HMKL record before the Minister was there any disclosure of the actual or anticipated exorbitant cost of e-tolling. Neither Cabinet, nor the Minister of Transport therefore had any idea of the extent to which the public's money would be wasted on paying not for the road upgrades but for the collection of toll.

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306. I am advised and I respectfully submit that this material omission undermined the validity of the decision to implement tolling from the outset.
307. I respectfully draw it to the attention of the Honourable Court that the deponent states that "*the next significant event in the GFIP process was the presentation to Cabinet*".
308. Significantly, there is, in other words, nothing of importance that happens as far as the deponent is concerned between the publication of the 2006 Proposal and the presentation to Cabinet in July 2007.
309. I note the attachment of the memorandum to Cabinet and slide presentation at "NA7" and "NA8" respectively.

#### AD PARAGRAPHS 91-95

310. I respectfully state that the content of the Cabinet memorandum speaks for itself.
311. The allegation that the "*Cabinet memorandum reflects consideration of the various funding models*" is untrue.
312. There was no discussion of alternative funding models in the Cabinet memorandum and therefore no evidence of the consideration of alternative funding models by Cabinet.

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313. Save as aforesaid, the Applicants will not dispute the allegations contained herein insofar as they are consistent with what is contained in the Cabinet memorandum.
314. The Applicants do not, however, admit the correctness of the contents of the Cabinet memorandum.

#### AD PARAGRAPH 96

315. I deny that the content of the 2006 Proposal and the Cabinet memorandum substantiates the deponent's claim that "*SANRAL and the government considered all of the relevant information and debated the issues at stake*".
316. As I have demonstrated, the above documents in fact serve as an indication to the contrary and as evidence of SANRAL's unwarranted fixation on tolling GFIP.
317. They simultaneously, and together with the HMKL record before the Minister, further serve as evidence of the fact that the exorbitant cost of tolling was not duly and properly considered and that the discretion of the Minister was in fact fettered by an absence of material information.

#### AD PARAGRAPH 97

318. I admit that Cabinet were informed of the anticipated tariff of 50 cents per kilometre and the possible discounted tariff of 30 cents per kilometre.

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**AD PARAGRAPHS 98-100**

319. The Applicants admit this meeting between SANRAL and certain civil society stakeholders as well as Val van den Bergh's presence at such meeting.
320. I have since the receipt of SANRAL's answering affidavit verified with Val van den Bergh that she did attend the meeting, notwithstanding that at the time the application was prepared she could only remember the start of the interaction with SANRAL with the assistance of Alta Swanepoel.
321. Van den Bergh informs me further that there were no further meetings held before mid-2009 essentially because Van Niekerk was very busy and unavailable to meet and because the road upgrades were far from complete.
322. I have no reason to disbelieve Van den Bergh, and moreover I recall her reporting the fact that she and Van Niekerk were not able to meet with each other at the time.
323. Several of the concerns raised at the meeting, including the "*challenges with rental companies*" acknowledged by SANRAL's Alex van Niekerk and the problem of illegal number plates raised at the meeting have still not been adequately addressed.

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**AD PARAGRAPH 101**

324. I admit that there were meetings held periodically between SANRAL and so-called "*key account holders*", including SAVRALA and/or its members, during the course of 2010 and 2011.
325. I have referred to these already in the founding affidavit.
326. I am further aware of only isolated presentations by SANRAL at "*public forums*", several of which I attended.

**AD PARAGRAPHS 102-103**

327. I note the attachment of the slide presentation at "NA10" together with the summary in the affidavit of such presentation.
328. It is evident from the content of paragraphs 103.8 and 103.8.1 that this presentation was given by the deponent subsequent to the highly controversial publication of the toll tariffs on 4 February 2011.
329. Apart from providing general information on GFIP and the need for the upgrading of the Gauteng freeway network, the presentation is self-evidently a justification for the tolling of the proposed toll road network.

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330. The Applicants deny specifically that the presentation provides any evidence to undermine the grounds for review that have been set out in the founding affidavit.
331. In the urgent circumstances, and because the Applicants are not in possession of the respective reports referred to in the presentation, the Applicants are unable to deal with the correctness of the representation in respect of such reports.
332. As regards the Graduate School of Business of the University of Cape Town Economic Impact Study ("the economic impact study"), this is contained as an addendum to the application to the Minister of Transport in January 2008, i.e. the HMKL record. The Applicants are in possession of this study as well as the updated study produced in 2010.
333. The Applicants deny that the economic impact study is at all reliable.
334. The economic impact study was commissioned by SANRAL and conducted on information provided by SANRAL for the purposes of determining the economic impact of a tolling scheme that SANRAL was intent upon implementing.
335. There has been no independent review of this economic impact study (and none is alleged to have performed).

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336. Moreover, the content of the economic impact study itself defies analysis and evaluation given that the source information underlying the economic impact study is missing from the study.

#### AD PARAGRAPHS 104-105

337. SANRAL provides no indication in the affidavit when this presentation was prepared.
338. SANRAL also does not say if the presentation was ever made.
339. It is not denied that the Gauteng government has plans to address the public transport deficiency within the province.
340. The point is, however, nothing significant or adequate has been done yet to alleviate the problem of a lack of viable public transport alternatives within the area of the proposed toll road network.
341. SANRAL has proceeded with the implementation of GFIP and the tolling of the proposed toll road network without public transport having been addressed with the result that hundreds of thousands of urban commuters have no choice but to make use of the proposed toll roads.

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**AD PARAGRAPH 106**

342. I note the attachment of the Steering Committee report as "NA12".
343. I repeat that, as indicated in the founding affidavit, the Steering Committee was not composed of representatives both of the Department of Transport and SANRAL, on the one hand, and private stakeholders and independent organisations and/or professional bodies, on the other, as had initially been announced it would.
344. The Steering Committee was ultimately composed only of representatives of SANRAL and the Department of Transport and National Treasury and the report is palpably a *post-hoc* justification for an originally unlawful decision to toll and implement tolling on the proposed toll road network.
345. In the extremely short time periods in which the Applicants are required to prepare this replying affidavit, the Applicants will not deal with the content of this Steering Committee report except insofar as it is strictly necessary for the purposes of the determination of Part A.
346. Therefore, anything not dealt with by the Applicants herein that is contained in the report and/or quoted in the answering affidavit by SANRAL is and should be deemed to be denied by the Applicants.

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**AD PARAGRAPHS 107-110**

347. I admit that the portions quoted herein are contained in the Steering Committee report.

**AD PARAGRAPH 111**

348. Pages 13 to 16 referred to herein are a mere rehash of the text of the studies attached to the respective social impact and economic impact studies attached to the HMKL record which I have already dealt with for the purposes of Part A.

**AD PARAGRAPH 114**

349. I repeat that the Applicants are unable in the context of the present time constraints to deal with all of the content of the Steering Committee report.

350. I nevertheless point out that it is ironic that the GFIP Steering Committee in the section in which it seeks to justify tolling states that "*toll fees promote economic efficiency as well as improving accountability and transparency*".

351. This is because:

351.1 the economic impact study by the University of Cape Town's School of Business reports that the funding of GFIP through the use of the fuel levy would be the most economically efficient method of funding;

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- 351.2 the uncontested allegation before the Honourable Court is that the tolling of GFIP is set to cost more in the administration of the tolling than the upgrades themselves;
- 351.3 the continued lack of disclosure by SANRAL of the true cost of the administration of the tolling by ETC JV and the level of secrecy surrounding the content of the contract directly contradicts the principles of "*accountability and transparency*".
352. As regards the allegation that the user pays principle is justifiable on the basis that the user pays for the benefit received:
- 352.1 it is undeniable that not only road users of the proposed toll road network but citizens of Gauteng as well as of the country as a whole are set to benefit from the upgrading of GFIP. The importance of the upgrade not only for Gauteng but for the country as a whole was one of the very rationales for the prioritisation of this project if regard is had to the 2006 Proposal and the Cabinet memorandum;
- 352.2 it is also clear that not all the users will pay for the use of the proposed toll road network in that several large categories of users will apparently be exempted, namely, public transport and mini bus taxis;
- 352.3 it is also not a given that the road upgrades confer the benefits on its users that SANRAL say or assume it does in its answering affidavit.

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The Minister of Transport has publicly and formally acknowledged that the alleged benefits will not be forthcoming. In this regard I refer the Honourable Court to what I have stated below about doubts expressed by the Minister of Transport on record of the benefits that GFIP was meant to confer.

353. I have dealt elsewhere with the inconsistencies and the unsatisfactory way in which the Steering Committee deals with the question of whether the fuel levy could be utilised. I also return later herein to deal with further aspects of the argument for SANRAL on the use of the levy.

#### AD PARAGRAPHS 115-118

354. I admit that the content hereof is taken from the report.
355. I deny that the *"tolling system will promote the usage of the public transport system as a mode of choice"*.
356. There is no adequate public transport system available to the vast majority of users of the proposed toll road network.
357. Notwithstanding that SANRAL seeks to deny this in its answering affidavit, I respectfully submit that this is clear to anyone living and working in Gauteng.
358. SANRAL, as well as the GFIP Steering committee, also provides no evidence to support the above assumption.

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**AD PARAGRAPHS 118-123**

359. It is noteworthy that almost all the stakeholders that made representations before the Steering Committee were opposed to tolling as appears from the report itself.
360. This is also confirmed by Marc Corcoran who attended each day of the public hearings.
361. I respectfully refer the Honourable Court to Corcoran's confirmatory affidavit which is attached hereto as "RA3".

**AD PARAGRAPH 124-125**

362. I note the extensive quotes from the Steering Committee report contained herein.
363. I have already dealt elsewhere in this affidavit and in the founding affidavit with the fuel levy, user pay principle and tolling to the extent that it is necessary for the purposes of the application for the relief sought in Part A of the notice of motion.
364. I reiterate that Applicants do not admit the correctness of the Steering Committee report.

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**AD PARAGRAPH 126**

365. I deny the conclusion reached by the deponent follows what precedes it in the answering affidavit.
366. The Steering Committee did not meaningfully engage with the stakeholders that appeared before it, nor did they keep to their promise that the final day of hearing on 30 June 2011 would be a discussion between all interested stakeholders with a view to reaching consensus.
367. Save as aforesaid, I deny the allegations contained herein.

**AD PARAGRAPH 127**

368. I deny that there were on-going presentations.
369. I admit that on 12 September 2011 Alex van Niekerk delivered the report attached as "NA13" to the answering affidavit.

**AD PARAGRAPHS 128-136**

370. I am advised that it is not necessary for me to deal with the context of this further extensive quote by the deponent that unnecessarily burdens the papers.

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371. I deny that comparisons to the fuel price and/or the price of tolling in countries such as America and Canada are necessarily useful as justifications for tolling in Gauteng.
372. As I have stated in the founding affidavit, this application concerns whether the e-tolling of the proposed toll road network in Gauteng is lawful, justifiable and constitutional.
373. It does not concern whether e-tolling may be justifiable in other countries and in other circumstances.
374. I deny specifically the conclusions reached by Van Niekerk in his presentation as summarised in paragraph 134.
375. I emphasise that:
- 375.1 in regard to "*efficiency*", electronic tolling is decidedly not efficient. It is disgracefully expensive (the true cost of which is hidden by SANRAL from the Honourable Court) and its implementation entails a massive and unnecessary administrative burden that is borne not only by the collection agency but also *inter alia* by the courts and the postal system. It is also manifestly less efficient than other methods of funding, such as the fuel levy or funding from the fiscus;

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- 375.2 as regards "*equity*", while electronic tolling is ostensibly equitable in that "*the user of the road pays for the use thereof*", such equity is only superficial. Not only road users but the greater population in Gauteng as well as in South Africa will benefit from the upgrade of the road. Not all the users of the road will pay for the use thereof in any event, with the large scale exemptions that apparently will be given to public transport and mini bus transport operators. The tolling of the proposed toll road network is further inequitable on account of the fact that the users that will end up being liable to pay toll will be paying not only for the road upgrades but the inordinate cost of collection which is in excess of the cost of the upgrades themselves;
- 375.3 in regard to "*revenue adequacy*", it is untrue that tolling will be any more adequate or reliable as a revenue stream than income derived from the fiscus or from the fuel levy, especially given the level of public resistance and logistical impossibility of properly collecting toll.
- 375.4 In regard to the fuel levy, both the amount of fuel consumed by South Africa and the revenues derived from the fuel levy are consistently increasing year on year. I respectfully refer the Honourable Court to what I have to say later about the continued increase of funds derived by the fiscus from this revenue source;

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375.5 as to "*environmental sustainability*", SANRAL provides no evidence to support its claim that e-tolling will necessarily be more friendly on the environment than funding the proposed toll road network by some other means. In regard to this, I attach "RA4" an article hereto as dealing with the usefulness of the fuel levy as a means to discourage overuse of motor vehicles and of fuel. The Applicants will, for the purposes of Part A hereof, not dispute the conclusions by Van Niekerk on this score as are listed on p.957 of the answering affidavit;

375.6 as to "*feasibility*", the Applicants dispute for the reason set out in the founding affidavit that e-tolling is feasible. To the contrary, it is apparently practically impossible to implement, does not cater for the difficulties experienced by entities such as SAVRALA and other large fleet owners whose cars are driven by third persons and involves a cumbersome administrative process. The feasibility of tolling is also at risk as a result of a lack of buy in from the public and the logistical difficulties SANRAL will face in collecting toll from non-compliant road users.

#### AD PARAGRAPH 137

376. I note the attachment of the letter by SANRAL to SANCU on 9 February 2012.

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377. I deny that this single letter to SANCU establishes that "*interaction with the public and various bodies continued during this period*" and the period referred to is not clarified.
378. I am advised that it is not necessary for me to deal with the content of the letter written by SANRAL for the purposes of Part A and that, to the extent necessary, legal argument will be addressed to the Honourable Court in this regard.
379. The Applicants specifically deny the correctness of the assertions by SANRAL in the letter.

**AD PARAGRAPH 138**

380. I deny the conclusions reached by the deponent herein.
381. Importantly, SANRAL has failed to address the material allegations forming the grounds for the review application as I have dealt with elsewhere in this affidavit.
382. The deponent fails to mention the great cost to society as a whole that will occur as a result of e-tolling as movers of consumable goods and business up the costs of such goods to offset the cost of tolling.

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## AD PARAGRAPH 142

383. SANRAL does not provide any evidence that tolling the proposed toll road network will be of benefit.
384. As regards the alleged "*myriad material benefits*" that will "*flow to the public through the GFIP*", the deponent does not specify precisely what these benefits are.
385. The deponent presumably refers primarily to decreased congestion and saved travel time and the benefits associated therewith.
386. However, the Minister of Transport himself has expressed doubt that these benefits will, in fact, materialise.
387. In this regard, I refer to the Minister's reply dated 31 October 2011 which I attach hereto as "**RA5**" in which it was stated:

*"The economic feasibility study conducted in 2007, before the commencement of the Gauteng Freeway Improvement Project (GFIP), argued that road user benefits would fall within the following categories:*

- *Travel time savings - road users would experience substantial travel time savings as a result of the improved freeway network and interchanges. These travel time savings would result in social benefits (more time at*

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*home or leisure), as well as improved productivity resulting in economic benefits.*

- *Reduced vehicle operating costs - stop-go travelling results in increased vehicle operating costs, inclusive of the cost of fuel, tyres and vehicle mechanical parts.*
- *Improved road safety - the upgraded freeway network would improve road safety by means of additional capacity, installation of safety features such as freeway lighting. The installation of ITS (CCTV cameras, electronic signs), together with the provision of incident manager vehicles (light and heavy towing vehicles, traffic police and medical assistance), would enable the South African National Roads Agency Limited (SANRAL) to detect incidents, and respond in an effective way.*

*As can be seen, the key assumption of the 2007 feasibility study was that the GFIP Project would reduce congestion. In my considered view, and in retrospect, the original feasibility study did not sufficiently weigh up international evidence suggesting that freeway expansion often does not in the medium term resolve congestion challenges, and often induces greater demand. It also fails to consider alternative solutions to congestion - improved public transport provision, moving more freight onto rail and a curb on urban sprawl. The projected benefits to road users may, therefore, unfortunately not be forthcoming."*

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**AD PARAGRAPHS 143-148**

388. I deny the allegations contained herein.

389. While the deponent for SANRAL does his best in the answering affidavit to show that the Applicants do not necessarily represent the views of the public concerning the tolling of GFIP, it is significant that the deponent and SANRAL are unable to positively refer the Honourable Court to persons who are groups within the public that have come out in favour of e-tolling and support its implementation.

390. There are a number of public petitions against e-tolling the proposed toll road network. These include:

390.1 Toll Free GP led by the Democratic Alliance, supported by approximately 76 800 petitioners;

390.2 A petition led by the Automobile Association, supported by 52 100 petitioners;

390.3 A petition led by Freedom Front Plus, supported by 100 005 petitioners.

391. COSATU, an organization with approximately 2 million members, is vehemently opposed to e-tolling.

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392. There are no movements or petitions in favour of e-tolling.

#### **AD PARAGRAPH 149**

393. As at 21 April 2012, the list of supporters on the OUTA website has grown to:

393.1 356 businesses; and

393.2 6546 individuals, with 3000 registrations in the last two days alone.

#### **AD PARAGRAPH 150**

394. The allegation contained herein is arrogant and shows no sensitivity to the financial position of the individual members of OUTA whose affidavits are attached to the founding affidavit.

395. SANRAL has, in fact, in addition to riding roughshod over the rights of the public similarly shown a lack of sensitivity to many Gauteng road users who, already burdened with taxes and the high cost of living, are little able to afford the additional expense of tolling.

#### **AD PARAGRAPH 151**

396. I admit that SAVRALA represents 22 member companies that conduct business in the vehicle rental and leasing industry.

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397. I do not understand how the deponent can allege that the members of SAVRALA will not suffer material financial and administrative prejudice.
398. I have already explained in the founding affidavit that the implementation of e-tolling will require SAVRALA members to establish departments or business sections dealing solely with the administration of e-tolling.
399. I have already also made clear the difficulties that will be faced by rental companies in particular in billing and obtaining payment from customers who drive on the proposed toll road network with cars owned and managed by SAVRALA members of which, in Gauteng, there are approximately 220 000.
400. I have also set out in the founding affidavit how SAVRALA and its members have endeavoured to constructively engage with SANRAL with a view to the implementation of e-tolling but that such constructive dialogue has been thwarted by the inability of SANRAL to deal with and accommodate the real business concerns of SAVRALA members.
401. I do not deny that there are several SAVRALA members who continue to engage with SANRAL in order to prepare for the implementation of e-tolling should it go ahead.
402. It is in fact the case that the majority of SAVRALA members have expressed to SANRAL their intention to continue to attend technical meetings for the same

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purpose but have been effectively turned away by SANRAL on account of their unwillingness to sign the letter of intent, a draft of which I attached as "RA6".

403. The letter was sent by SANRAL to SAVRALA members with the obvious purpose of coaxing SAVRALA's members and diluting SAVRALA's opposition to e-tolling.
404. The sanction for not signing the letter has been that SAVRALA members have effectively been prevented by SANRAL from preparing for the implementation of e-tolling albeit on a without prejudice basis.
405. Many of SAVRALA members wish to prepare as far as possible notwithstanding the present challenge in order to be compliant should the tolling of the proposed toll road network be found to be lawful.

#### AD PARAGRAPH 152

406. SANRAL admits that the members of QASA are in an "*untenable position*".
407. I deny that their situation can be ameliorated by the offering of possible exemption. The giving of exemption to QASA members is of no use to them since the vast majority are driven from place to place by friends, acquaintances and other third parties who QASA members reimburse from the R1 200.00 monthly disability grant they receive from government.

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408. In the circumstances, it is not the QASA members who require exemption but the persons who transport them.

#### AD PARAGRAPHS 154 & 158

409. I deny that there is support for the implementation of e-tolling from the public in general and that the assertion herein that "*the majority of motorists will obey the law and travel on the proposed toll road network each day and pay the required tolls*" is true.

410. To date, with only two weeks to go before SANRAL intends implementing e-tolling, it is a well-known fact that SANRAL's e-toll kiosks remain largely deserted with a large section of the public refusing to register.

411. In this regard I attach as "RA7" hereto a report which is to that effect in the Business Day newspaper dated 15 April 2012.

412. Further, also with less than ten days to go, there have been only approximately 320 000 e-tag registrations out of the four million vehicles owned in Gauteng of which, according to SANRAL, one million vehicles will utilise the proposed toll road network each day.

413. I pause to state that according to information available to SAVRALA, whose members manage corporate and individual fleets, two thirds of the number of e-

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toll registrations are made up by the major banks and corporate entities, not private individuals.

414. This is a registration percentage of less than 33% which is only half of what was predicted by Yacoubi, the CEO of ETC JV in the article attached to the founding affidavit as "FA54".

415. The failure of SANRAL to secure the buy in from the public at large raises questions as to whether SANRAL's financial model will not fail as a result of a lack of support.

416. I deal with SANRAL's denial of the authority of the Applicants later in this affidavit

#### **AD PARAGRAPHS 155-157**

417. I am not sure of the purpose of the allegations contained herein.

418. I note the attachment of "NA15" which I point out is only a summary of the market survey conducted in 2009.

419. For the purposes of Part A, the Applicants deny the validity and relevance of this study.

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420. The Applicants are, in any event, unable to meaningfully respond to the content thereof given that only a summary.
421. Further, I respectfully draw it to the Honourable Court's attention that the updated economic impact study by the University of Cape Town's Graduate School of Business expresses reservations on the reliability of this survey, especially as regards income data on account of the fact that of the 27 300 respondents allegedly interviewed, only approximately 5 000 were prepared to reveal their income and because individuals in telephonic surveys tend to overstate their income.
422. In this regard, I attach hereto, as "RA8", the relevant pages of the economic report to this effect.
423. To avoid prolixity, the full report is not attached hereto but will be available at the hearing hereof in the event that the Honourable Court wishes to peruse same.

**RESPONSE TO FIRST RESPONDENT'S ANSWER TO THE AFFIDAVITS OF  
MAPHOROMA, TABAKIN, OSRIN AND LEATSWE**

424. SANRAL fails to substantively address the complaints of the deponents Maphoroma, Leatswe, Tabakin and Osrin.

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425. The thrust of SANRAL's answer is to the effect that while it concedes that the imposition of e-tolling would inevitably involve additional cost to Maphoroma, Leatswe Osrin, and Tabakin (whose description of their already over-stretched and parlous financial circumstances are nowhere challenged by SANRAL) that the four deponents, in seeking to explain the economic hardship *currently* experienced by each in advance of the imposition of e-tolling, and in joining the public outcry against the proposed e-tolling, have failed to take account of what SANRAL describes as a "*myriad of financial benefits*" that users of the proposed toll road system will enjoy.
426. It is accordingly suggested by SANRAL that the extent of the public outcry against the proposed introduction of e-tolling witnessed over recent months, would not have occurred, were the public and the aforementioned four deponents to properly appreciate the enormous benefit of e-tolling to Gauteng civil society as is alleged by SANRAL in its papers.
427. But SANRAL has failed in its papers to substantiate its claim the "*myriad benefits*" that will accrue to persons such as Maphoroma, her fellow deponents and persons similarly placed to them, and the very benefits that SANRAL claims will accrue have been acknowledged by the Minister of Transport as benefits that will "*not be forthcoming*".
428. All's assertions demonstrate the extent to which SANRAL has adopted a position profoundly dislocated from the "*reality on the ground*".



429. In order to avoid the *bona fide* concerns of a public whose outcry is echoed by Maphoroma, Leatswe, Osrin, and Tabakin, SANRAL hides behind the following three essentially fallacious propositions:

429.1 that Maphoroma, her fellow deponents and persons similarly placed to them do not in truth represent the general public or if they do, then that they fail to represent a sufficiently significant segment of the public to warrant having its views taken into account in an evaluation of the impact of e- tolling on residents of Gauteng;

429.2 that Maphoroma, her fellow deponents and persons similarly placed to them (and by implication other users of the tolled roads) have an election as to whether to use the tolled roads or not. Tabakin and Osrin appear to SANRAL to have ignored the fact that neither is in fact "*obliged*" to use the proposed toll network

429.3 that Maphoroma, her fellow deponents and persons similarly placed to them who find themselves in circumstances where they are not in position to take advantage of the "*myriad of benefits*" allegedly offered by urban tolling, are presumably free to travel to wherever they work on a daily basis by making use of public transport rather than by using their private vehicles.

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430. None of the three aforementioned propositions is substantiated by any evidence put up by SANRAL in its papers. All of them are in fact untrue, according to the very individuals whose plight is placed before the Court in this application.
431. It is obvious to anyone alive to the plight of fellow residents in the current economic climate that a substantial segment of the Gauteng public driving motor vehicles operate and live under the constraints imposed by relatively parlous financial circumstances.
432. I pause to state in this regard that I am informed by Gary Ronald, head of Public Affairs of the Automobile Association of South Africa, that according to the AA's records, at least 30% of the vehicles on Gauteng's roads (in excess of some million vehicles) are operated by persons living in lower income brackets whose monthly salaries are lower than R7,000).
433. The affidavit of Gary Ronald will be obtained after his return to Gauteng and will be handed up at the hearing of the matter.
434. To suggest accordingly therefore that Maphoroma's complaint or that of Leatswe or Osrin and Tabakin fail to reflect the circumstances of tens of thousands of Gauteng motorists is to deny the obvious.
435. The validity of SANRAL's argument hinges further on the allegation that Maphoroma and her fellow deponents appear to have ignored the fact that none of them are in fact obliged to make use of the proposed toll road network. In

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other words that they could, if they elected to do so, avail themselves at any time of an alternative existing network of secondary roads.

436. But this is not the position of Maphoroma because she has no viable alternative but to use, at the very least, sections of the tolled roads leading from Leondale Gardens so as to drop her two children at a bus stop in Ghandi Square Johannesburg from whence they take a bus to school in Auckland Park and whereafter Maphoroma proceeds by motor car to her place of employment in Norwood.
437. A further indication that SANRAL has failed to carefully consider the contents of Maphoroma's affidavit, is disclosed by its erroneous reference *inter alia* to "a daughter" of the deponent whom it alleges Maphoroma "drops off at school". No such reference is made.
438. The fact is that an absence of safe regular, reliable (and in her case given the distance) affordable public transport from Leondale Gardens, in the case of her children to their school and for Maphoroma to her place of work in Norwood means that Maphoroma is required to use her vehicle daily.
439. SANRAL accordingly fails to take account of the fact that thousands of Gauteng residents such as Maphoroma and Leatswe are further constrained by the shortage of affordable housing in Johannesburg's northern suburbs to find homes well outside of Johannesburg and its environs and accordingly, in the

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absence of viable public transport, have no alternative but to access their places of employment by way of the use of their private motor vehicles.

440. Rather than to squarely confront the challenges faced by the likes of Hilda Maphoroma, SANRAL enjoins her to take comfort in an opportunity to enjoy more “*quality time*” with her family”. This is cold comfort for the Gauteng mother who explains that she departs her home in Leondale Gardens for work in Norwood at 05h00 am each morning and leaves her place of employment after 06h00pm in the evening, a drive *in toto* of some 54 kilometers undertaken each day for *on average*, 25 days of each month (rather than the 22 days alluded to by SANRAL in its calculation of her monthly toll costs a further detail which appears to have escaped the attentions of SANRAL).
441. It is self-evident that the only possible alternative to the use of tolled highways by Maphoroma and Leatswe, at least in theory, would be for them to make use of secondary or “supporting” roads or otherwise to abandon their vehicles and to use public transport. I deal first with the latter option.
442. It is common cause, and a major premise underpinning the argument advanced by SANRAL for the introduction of urban tolling, is that its introduction will, *inter alia* serve to reduce congestion on key highways.

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443. This however presupposes the availability to current users of Gauteng's motorways of a viable and reliable integrated public transport infrastructure as an alternative to the more expensive option of running a motor vehicle.
444. The fact is, that in the scheme of things, safe regular and reliable public transport options are simply not available whether to Maphoroma or to Leatswe or to a substantial proportion of Gauteng's citizens who are similarly placed to them.
445. This significant factor was never coherently addressed by the respondents at any time during the process of the introduction of urban tolling. Save for an announcement by the Minister of Transport in the press that the matter would receive the attention of Government, this requirement has not been adequately addressed notwithstanding that the presence of this alternative public transport option may properly be regarded as a *sine qua non* for the introduction of urban tolling, given that members of the public are about to be deprived of the hitherto free use of and unimpeded access to the roads of their province and require alternative options.
446. Neither has it been demonstrated that Maphoroma and others might reasonably expect at any time in the immediate future to enjoy the benefits of the alternative of reliable affordable and safe public transport.

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447. In the face of such obvious constraints SANRAL nonetheless asserts that alternatives to the use of tolled roads do exist for current users of private vehicles.
448. In respect of both Osrin's and Tabakin's affidavits, the suggestion is made that "*neither is obliged to use the toll routes to ply their trade*".
449. No evidence or reasoning is provided by SANRAL to substantiate this bald assertion which implies without any explanation, that safe accessible and usable alternative secondary or supporting roads are available to those who elect for whatever reason not to use the proposed toll road network.
450. Once again, this is contradicted by the experience of the very persons whose affidavits are before the Honourable Court.
451. SANRAL seeks to defend its position herein *inter alia* by asserting that in addition to underestimating the benefits of urban tolling, Maphoroma, her husband and Leatswe might have failed to accurately calculate the cost of using tolled roads. For reasons set out in below, this too is disputed.
452. In any event, even were the respective cost to any of them be halved from say R500.00 to R250.00 a month or from R1, 000 to half of that amount, Maphoroma, her husband and thousands of similarly placed individuals (whether as cashiers, receptionists or clerks in businesses) representing a

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stratum of relatively low income earners would nonetheless feel the pinch acutely.

453. The fact is that for those of our citizens struggling to make ends meet, payment of *any* additional amount in the face of the challenge of the current economic climate, and whether R200; or R300, or R400 a month more than is currently paid out by them, represents a substantial percentage of income and amounts to a significant expense which simply cannot as be traded off against the benefit of increased "*family time*" promised by SANRAL to Maphoroma and Leatswe.
454. For the reasons I have set out above, SANRAL's offer that Maphoroma and persons similarly placed to her should apply for relief by way of exemption from e-tolls is a disingenuous and somewhat cynical attempt to deflect the obvious challenge presented by the authenticity of their respective affidavits.

#### AD PARAGRAPH 159.1

455. I deny the allegations contained herein.
456. Both Osrin and Tabakin describe with sufficient particularity the respective areas in Gauteng which each is required to visit. In the case of Osrin this is to be found at paragraph 5 of his affidavit where he explains that he is called upon to travel widely in Gauteng. In his circumstances the description suffices given

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that the route followed by him will obviously vary extensively dependent upon the location to which he is called.

457. In the case of Tabakin reference to paragraph 16 of his affidavit and the schedule Annexed thereto marked "B" sets out with sufficient particularity the routes taken by him.

#### AD PARAGRAPH 159.2

458. I similarly deny the allegations contained herein.

459. The substance thereof is comprised primarily of speculation on the part of SANRAL as to what VAT deductions Osrin and Tabakin might be entitled to claim were they to run their respective enterprises as registered companies. Neither of them do so. In fact Osrin specifically describes himself as a sole proprietor.

#### AD PARAGRAPH 161

460. The contents of paragraph 161.1 are denied for the reasons set out above.

461. The suggestion that "*neither is obliged*" to use the toll routes "*to ply their trade*" flies in the face of the allegations set out in their respective affidavits and is

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