IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

SCA Case No. 90/2013

NGHC Case No. 17141/2012

In the matter between:

OPPOSITION TO URBAN TOLLING ALLIANCE AND THREE OTHERS	First Appellant

and

THE SOUTH AFRICAN NATIONAL ROADS AGENCY LTD AND SIX OTHERS	First Respondent

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1.

Introduction

1.1 At the heart of this matter is the Government and SANRAL's highly controversial intention to exact toll from users of Gauteng's freeways.

1.2 The first phase of the Gauteng Freeway Improvement Project ("GFIP") was completed at a cost of approximately R21 billion.

1.3 SANRAL seeks to recover this massive amount and fund its project entirely by means of electronic tolling.

1.4 The scheme will be South Africa's first major urban toll road scheme and is set to have a daily impact on millions[1] of captive[2] urban commuters in Gauteng who will have to pay for the use of the GFIP over and above their contributions to South Africa's roads through taxes, the fuel levy and vehicle licence fees.

1.5 SANRAL's intention to do so has galvanised opposition from civil society in a manner that is unprecedented in the post-1994 era.

1.6 It is the Government's and SANRAL's intransigence to the genuine concerns of civil society in this regard that led to the launch of the present proceedings.

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[1] *Sanral Answer* para 153 Vol 7 p 649 ln 4-6 & *Sanral Supplementary Answer* para 169.2 Vol 14 ln 14-19.

[2] **NA6** Vol 9 p 976 ln 25 & p 998.2 ln 26-29; Addendum B - Interim Social Impact Report in Sanral Record Vol 31 p 4835 ln 5-18.

1.7 The application consisted of two parts with the first part being directed at interim interdictory relief pending adjudication of the second main review part.

1.8 A temporary interdict was granted by the North Gauteng High Court (Pretoria) but was later set aside on a direct appeal to the Constitutional Court. This judgment has been reported[3] and is hereinafter referred to as "*OUTA CC*".

1.9 After *OUTA CC*, the Appellants introduced an additional constitutional challenge on the basis of Section 25 of the Constitution and amended their Notice of Motion accordingly.[4]

1.10 The main application (Part B) was eventually heard on 26-28 November 2012 by Vorster AJ.

1.11 At the hearing, the Appellants also sought declaratory relief on the basis of this court's decision in *Kouga Municipality v Bellingan and others ("Kouga")*.[5]

1.12 In the judgment handed down on 13 December 2012, the application was dismissed with costs.

1.13 The Appellants now appeal to this Honourable Court with the leave of the court *a quo* against the whole of the judgment and order, including the costs order.

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3 *National Treasury and others v Opposition to Urban Tolling Alliance and others* 2012 (6) SA 223 (CC).

4 *Amended Notice of Motion* Vol 13 p 1623 ln 11-14.

5 2012 (2) SA 95 (SCA).

1.14 For the sake of convenience, the Appellants will be referred to as "the Applicants", the First Respondent as "SANRAL" and the Second Respondent as "the Minister".

2.

Lack of Procedural Fairness

2.1 The impugned toll road declarations and approvals by the Minister that such declarations be made are identified in the Applicants' Notice of Motion.[6] They will hereafter be referred to as the "toll declarations" and the "Minister's approvals" respectively.

2.2 Both the approvals by the Minister of the proposed toll road declarations in terms of Section 27 and the resultant decision by SANRAL in terms of Section 27 to declare the GFIP a toll road, constitute administrative action.

2.3 Section 33 of the Constitution guarantees procedurally fair administrative action.

2.4 The Promotion of Administrative Justice Act 3 of 2000 ("PAJA") was enacted to give effect thereto.[7]

2.5 Procedural fairness

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[6] *Amended Notice of Motion* Vol 13 p 1618 ln 12 - p 1621 ln 2. See toll declarations at **A1**-**A7** Vol 1 p 12-18 and Minister's approvals at Transport Minister's Record Vol 27 p 4340-4351 (N1, N3, N4 & N12) and Transport Minister's Record Vol 25 p 4048 (R21).

[7] See Long Title of PAJA; See also *OUTA CC* para 49.

"is concerned with giving people an opportunity to participate in the decisions that will affect them, and – crucially – a chance of influencing the outcome of those decisions. Such participation is a safeguard that not only signals respect for the dignity and worth of the participants, but is also likely to improve the quality and rationality of administrative decision-making and to enhance its legitimacy."[8]

2.6 The directly relevant parts of Section 27 of the SANRAL Act provide:

"(1) Subject to the provisions of this section the Agency –

(a) with the Minister's approval

(i) may declare any specified national road or any specified portion thereof ... to be a toll road ...;

(3) The amount of toll that may be levied under ss(1) ... –

(a) is determined by the Minister on the recommendation of the Agency;

(4) The Minister will not give approval for the declaration of a toll road under ss(1)(a) unless –

(a) the Agency, in the prescribed manner, <u>has given notice</u>, generally, <u>of the proposed declaration</u>, and in the notice –

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[8] *Mobile Telephone Networks (Pty) Ltd v SMI Trading CC* 2012 (6) SA 638 (SCA) para 21 ("*Mobile Telephone Networks*").

(i) has given an indication of the approximate position of a toll plaza contemplated for the proposed toll road;

(ii) has invited interested persons to comment and make representations on the proposed declaration and the position of the toll plaza and has directed them to furnish their written comments and representations to the Agency not later than the date mentioned in the notice. However a period of at least 30 days must be allowed for that purpose;....

(b) the Agency in writing –

(i) has requested the Premier ... to comment on the proposed declaration;

(ii) has given every municipality ... the same opportunity to so comment;

(c) the Agency, in applying for the Minister's approval for the declaration, has forwarded its proposals in that regard to the Minister together with a report on the comments and representations that have been received....;

(d) the Minister is satisfied that the Agency has considered those comments and representations." (emphasis added)

2.7 It is submitted that as a legislative provision designed to safeguard the rights of the public in general, and road-users who will be affected by the tolling of a

road in particular, Section 27 is to be interpreted in a manner that is informed by the right to procedurally fair administrative action guaranteed by Section 33 of the Constitution.

2.8 In this regard, it has been held by the Constitutional Court in *Zondi v MEC for Traditional and Local Government Affairs* 2005 (3) SA 589 (CC) at para 101:

> "All decision-makers who are entrusted with the authority to make administrative decisions by any statute are therefore required to do so in a manner that is consistent with PAJA. The effect of this is that statutes that authorise administrative action must now be read together with PAJA unless, upon a proper construction, the provisions of the statute in question are inconsistent with PAJA."

2.9 In the earlier case of *Minister of Home Affairs v Eisenberg & Associates: In re Eisenberg & Associates v Minister of Home Affairs and others* 2003 (5) SA 281 (CC), the Constitutional Court at para 59 held that:

> "In each case it is a question of construction whether a statute making provision for administrative action requires special procedures to be followed before the action is taken. In addition whether or not such provisions are made, the administrative action must ordinarily be carried out consistently with PAJA."

2.10 It is, therefore, submitted that Sections 27(1), 27(3) and 27(4) of the SANRAL Act should be read in a manner that is consistent with – and informed by – Sections 3 and 4 of PAJA.

2.11 The section is, of course, also to be interpreted in accordance with the constitutional imperative contained in Section 39(2) of the Constitution.

2.12 Our courts have, in addition, emphasised that an interpretation must be favoured which will result in the elicited comments and representations being meaningful.[9]

2.13 In *Public Carriers Association and others v Toll Road Concessionaries (Pty) Limited and others* 1990 (1) SA 925 (A) at 950D-F, it was held:

> "The purpose thereof is obviously to inform the public.... This purpose would be stultified, if not defeated, if all that is made public is the upper limit of the tolls and not the actual amount thereof. How can representations be made, or be adequately made, when it is not known what actual amount they should address?"

2.14 The section is, accordingly, to be interpreted in a manner so as to give due meaning and effect to the purpose of such notice and to the purpose of the envisaged comments/representations.

2.15 The purpose of the notice is to elicit meaningful comments/representations which are then to be properly considered before the approval by the Minister is granted.

2.16 The declaration of a toll road necessarily means that toll will be levied. This appears from the express wording of Section 27(3).

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[9] *Joseph and others v City of Johannesburg* 2010 (3) BCLR 2012 (CC) para 42 ("*Joseph*").

2.17 The declaration of a toll road and the resultant levying of toll are, therefore, inextricably linked.[10]

2.18 It is further to be understood that, depending on the underlying motivation for a declaration of a toll road, vastly different consequences can follow:

2.18.1 If SANRAL's motivation is, for example, merely to finance (fund) the maintenance of an existing road, the interested public will expect a nominal toll. This will then be addressed in the elicited comments and representation

2.18.2 If, on the other hand, SANRAL's motivation is, for example, to finance a large-scale reconstruction of a road, including adding of additional lanes, the interested public will expect a very high toll. Any comment or representation made in such a case will be based on this and will address aspects such as the need, desirability, affordability and practicability of the proposal and a host of other considerations and implications resulting therefrom.

2.19 It must, accordingly, be clear that, depending on the underlying motivation (i.e. the actual tolling proposal), vastly different consequences to the public and interested parties come into play, involving vastly different considerations.

2.20 Section 27(4) requires that notice be given of the "proposed declaration" and it is in respect of the "proposed declaration" that comments and representations are to be invited.

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[10] See Section 27(1)(b) of the SANRAL Act.

2.21 The question that arises is whether, as a matter of proper interpretation in accordance with those principles set out above:

2.21.1 The notice is required merely to indicate an intention to declare without informing the reader of anything more, i.e. a sterile notice without content, as is contended for by SANRAL, or whether

2.21.2 The notice is required to provide sufficient information about the underlying proposal so as to enable the public to understand what project is intended to be funded through tolling and at what tariff, as is contended for by Applicants.

2.22 What falls to be interpreted in this regard is the expression in Section 27: "the proposed declaration".

2.23 What is significant in this regard is that in terms of Section 27(4)(b) the Premier and every affected municipality are also to be given the opportunity of commenting on "the proposed declaration".

The Premier, representing provincial government, and the affected municipalities, as part of local government, are respectively responsible under the Constitution for provincial planning and municipal planning with all its multiple implications.

2.24 It stands to reason that the Premier and affected municipalities can only meaningfully comment if they are properly informed of the particular tolling

proposal and not merely of a sterile notice of intention to declare a particular section of road a toll road.

2.25 It is to be noted that the expression "the proposed declaration" appears in Section 27(4)(a), Section 27(4)(ii) and Section 27(4)(b)(i). It is also necessarily incorporated into Section 27(4)(b)(ii).

2.26 It is compellingly logical to assume that the legislature intended the Premier and the affected municipalities to be properly informed of the proposed road project intended to be funded through tolling so that these spheres of government will be able to properly perform their planning functions and to carry out their planning responsibilities. It is only from this perspective that these spheres of government will be able to meaningfully comment on the "proposed declaration".

2.27 Significantly further, and in terms of Section 27(4)(c), it is required that the Agency, in applying for the Minister's approval for the declaration, "has forwarded <u>its proposals in that regard</u> to the Minister together with the report on the comments and representations that have been received".

What is important to note in this regard is:

2.27.1 Firstly, that SANRAL is to provide the Minister with <u>its proposals in that regard</u>, i.e. in regard to the application for the approval for the declaration. The expression "its proposals in that regard", therefore, clearly suggests that what is to be contained in the proposals is not the mere sterile notice

of intention without any content, but rather its underlying project/funding proposals;

2.27.2 Secondly, that SANRAL's "proposals in that regard" are to be presented to the Minister <u>together</u> with a report on the comments/representations received.

It follows that "proposed declaration" and SANRAL's "proposals in that regard" must, in essence, have the same meaning. If this were not so, the linking of the "proposals" and the report on the comments/representations in Section 27(4)(c) would not make sense.

2.28 It is important to note further that from the perspective of anyone invited to comment or make representations, the mere declaration of the road as a toll road is quite meaningless.

2.29 It is further to be noted that in terms of the section, the public and interested parties have only one opportunity to comment and to make representations, in the words of Cora Hoexter (quoted in *Mobile Telephone Networks* above)

> "to participate in the decisions that will affect them and – crucially – a chance of influencing the outcome of those decisions."

No such opportunity is provided prior to the determination of the amount of the toll under Section 27(3).

2.30 The opportunity to comment and to make representations provided for in Section 27(4) must, therefore, logically relate to both the proposed toll road declaration as well as the proposed tariff determination under Section 27(3), or at least the indicative rate of toll.

2.31 It is, accordingly, submitted that Section 27(4) is to be interpreted that the notice inviting comments and representations is to provide sufficient information about:

2.31.1 The underlying proposal, i.e. the road project and the anticipated costs thereof;

2.31.2 The extent to which such costs are proposed to be funded through tolling; and

2.31.3 The anticipated tolling tariff,

so as to enable the comments and representations to be meaningful and to satisfy the requirements of procedural fairness.

2.32 If this were not so, it will be difficult to understand what the legislature sought to achieve through the notice procedure.

2.33 SANRAL's argument, however, is that the notice under Section 27(4) does not have to provide any information of the kind set out above, but need only to identify the particular section of road intended to be declared a toll road. In other words, SANRAL contends for an interpretation that the notice can be a

completely sterile notice containing no information of the kind set out above. On this argument, the notice will not enable the public or interested parties to make meaningful comments and representations regarding the pith and marrow of the matter and regarding the real bite of any toll road declaration, i.e. the toll to be levied.

2.34 It is submitted that such an argument cannot bear scrutiny:

2.34.1 It will serve no practical or rational purpose;

2.34.2 It will render the purported public participation process quite meaningless;

2.34.3 It will enable SANRAL to mislead the public and other interested parties;

2.34.4 It will result in the process being mere window-dressing; and

2.34.5 It will result in a procedurally unfair process.

2.35 If, however, it should be found that Section 27 is not reasonably capable of the interpretation contended for by Applicants and that the notice does not have to provide any information about the project, the anticipated costs of the project, the extent to which tolling will be used to fund the project costs and of the anticipated tolling tariff, then the prescribed procedure will be manifestly unfair and will manifestly not satisfy the constitutional requirement of procedural fairness.

2.36 Section 4(1) of PAJA provides:

"In cases where an administrative action materially and adversely affects the rights of the public, an administrator, in order to give effect to the right to procedurally fair administrative action, must decide whether –

(a) to hold a public enquiry in terms of ss(2);

(b) to follow a notice and comment procedure in terms of ss(3);

(c) to follow the procedures in both ss(2) and (3);

(d) where the administrator is empowered by any empowering provision to follow a procedure which is fair but different, to follow that procedure; or

(e) to follow another appropriate procedure which gives effect to s(3)." (emphasis added)

2.37 The option to follow the procedure "empowered by any empowering provision" is in terms of Section 4(1)(d) only available if it is "fair".

2.38 On SANRAL's interpretation of Section 27(4) of the SANRAL Act, the procedure under Section 27(4) will be anything but fair in that, on SANRAL's interpretation, the public and interested parties will not have a clue of the actual underlying tolling proposal, the essential features thereof, including the envisaged road project, the costs of such project, the extent to which it is intended to be funded through tolling, the anticipated tolling tariff and, in general, of the manner and extent of the impact that the proposed administrative action would have on them.

2.39 On the facts of this case, it appears that:

2.39.1 SANRAL, as early as August 2005, made its proposal to the Minister that Gauteng's freeways be dramatically upgraded and expanded and that this be funded by means of electronic tolling.[11]

2.39.2 During September 2006, SANRAL and the Department of Transport produced a tolling proposal entitled "A Proposal for a Gauteng Improvement Scheme" in which the essential features of the scheme were again set out.[12]

2.39.3 By October 2006, SANRAL's proposal was laid before Cabinet for the first time.[13]

2.39.4 On 29 May 2007, the SANRAL Board resolved that SANRAL implement the GFIP and commence toll declaration procedures in terms of the SANRAL Act.[14]

2.39.5 Cabinet approved the proposed project in late July 2007.[15]

2.40 The project as already approved by July 2007 aforesaid[16], entailed:

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[11] See *Applicants' Supplementary Founding* para 66-67.2 Vol 12 p 1548 ln 1 - p 1550 ln 10 read with SANRAL Record Vol 22 p 3325-3343 and **SA13** Vol 13 p 1685-1700.
[12] **NA6** Vol 9 p 998.1 ln 18 - p 1001 ln 17.
[13] **NA7** Vol 9 p 1008 ln 7-14.
[14] Sanral Record Vol 22 p 3388 ln 1-30 & p 3405 ln 1 - p 3410 ln 10.
[15] *Sanral Answer* Vol 6 p 519 ln 1-8. See also **NA7** Vol 9 p 1011 ln 6-12 and Section 39 of the SANRAL Act.
[16] See *Sanral Answer* Vol 6 p 519 ln 1-8 read with **NA7** Vol 9 p 1009 ln 25 - p 1013 ln 26.

2.40.1 A massive upgrading during Phase 1 of the project of 185 kilometres of the Gauteng main arterial network, i.e. the GFIP. The project entailed the addition of a number of lanes to the existing freeways, new flyovers, bridges and related works;

2.40.2 An estimated expenditure on Phase 1 of approximately R15 billion;

2.40.3 That the project would be funded entirely through tolling;

2.40.4 That the manner of tolling would be "open tolling", i.e. that the owners of motor vehicles would be tolled by means of electronic monitoring;

2.40.5 That the anticipated/indicative standard tariff would be approximately 50c per kilometre; and

2.40.6 That "collection" of the toll would be enforced primarily through e-tag registration by owners of motor vehicles.

2.41 SANRAL itself emphasised the importance of a proper public participation process in emphasising in its proposal in 2006 that:

> "Consultation at all levels will be an important cross-cutting element in all of the above processes, both within and outside government. <u>The most critical will be public consultation which will be particularly necessary in the following areas:</u>
>
> - <u>The principle of tolling</u>

- <u>The planned initial Construction Works</u>

- <u>The nature and price of the planned toll scheme.</u>"[17] (emphasis added)

2.42 It is against the aforegoing background that the notices published by SANRAL in purported compliance with Section 27(4) are to be viewed[18]:

2.42.1 Firstly, the notices relating to the N1, N2, N3, N4 and N12 were fragmented into a number of separate notices each relating only to a small section of the particular road.[19]

2.42.2 Secondly, the notices were only published in the Government Gazette and in a single edition of newspapers such as the *Sunday Times*, *Beeld*, *The Star*, *Mail & Guardian* and *Pretoria News*[20] (the notice in respect of the R21 was however not published in the *Sunday Times*);

2.42.3 Thirdly, all of the notices were situated well within the inner pages of such newspapers and none of the newspapers signalled on the front page that it contained such notice or notices[21];

2.42.4 Fourthly, there was no television or radio broadcast in this regard[22];

2.42.5 Fifthly, no roadside signboards were put up alongside the affected routes[23];

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[17] **NA6** Vol 9 p 1006 ln 27-34.

[18] The text of a notice is typed into the Founding Affidavit: *Applicants' Founding* para 98 Vol 1 p 54 ln 12 - p 56 ln 10. Examples of notices as published in the Government Gazette are at **FA13**-**FA18** Vol 2 p 210-235.

[19] See **FA13**-**FA18** Vol 2 p 210-235.

[20] *Applicants' Founding* para 56 & 120 ln 14-57 ln 10 & p 64 ln 9 - p 65 ln 3 read with **FA19**-**FA23** Vol 3 p 236-257 and **FA28**-**FA30** Vol 4 p 278-285. See **FA19**-**FA23** Vol 3 p 236-257.

[21] *Idem*. See also *Applicants' Founding* para 203.8-203.10 Vol 1 p 87 ln 10 - p 88 ln 4.

[22] *Applicants' Founding* para 203.8-203.10 Vol 1 p 87 ln 10 - p 88 ln 4.

2.42.6 Sixthly, a period of only 30 (thirty) days was allowed for comments and representations[24];

2.42.7 Seventhly, in each case the notice identified a section of "the existing road".[25]

2.43 It will be seen that the notice in each case:

2.43.1 Related only to a fragmented section of a particular road (except in respect of the R21);

2.43.2 Represented that the "existing road" would be tolled – this representation conveyed that there would not be major change/addition of lanes and a dramatic expansion;

2.43.3 Only identified the particular section or stretch of road intended to be tolled with no indication whatever of the grand scale upgrade, i.e. the GFIP;

2.43.4 Made no mention of the total attendant costs of the GFIP or even of Phase 1, i.e. the R15 billion;

2.43.5 Made no mention of the proposal that the total GFIP costs be funded entirely through tolling;

2.43.6 Gave no indication of the anticipated tolling tariff of 50c per kilometre;

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[23] *Applicants' Founding* para 203.9 Vol 1 p 87 ln 14-18 & p 83 ln 14 - p 85 ln 16.

[24] *Applicants' Founding* para 205-205.7 Vol 1 p 89 ln 19 - p 91 ln 14; See also **FA24** Vol 4 p 266 ln 13-20.

[25] See eg. **FA13** Vol 3 p 212 ln 15.

2.43.7 Failed to inform the reader that collection would be enforced through e-tag registration by owners of vehicles.

2.44 Because of the fragmentation of the notices aforesaid, only the most astute of readers would have been able to piece the puzzle together.

Because of the misrepresentation in each case that the intention was to declare a section of the "existing road" a toll road – only the clairvoyant would have known that it related not to the existing road but to the total GFIP involving massive changes and additions to the existing road.

The same can be said of SANRAL's failure to disclose its intention to recover all of the attendant capital expenditure through tolling and what such costs and the estimated toll tariffs would be.

The notice, accordingly, failed to contain the essential information relating to the tolling proposal and failed to provide even the bare bones of the intended project. In fact, the notice was clearly calculated to reveal virtually nothing of the tolling proposal and the real intended project. Even worse, the notice was positively misleading in that it only referred to the "existing road".

2.45 The reader of the notice could not – and would not – have known that the proposed toll road declaration had, as its aim, the funding through tolling of the massive GFIP and attendant costs. Had this not been concealed, the readers of the notice would have known that the amount of the toll that would be levied and collected through e-tolling was going to be enormous.

2.46 The extremely limited and completely insignificant public response at the time fully demonstrates the point. The public and interested parties were misled by the notice and had no clue as to what was really underfoot. In total there were only 30 (thirty) responses to the first batch of notices relating to the N1, N3, N4 and N12[26] and in total only 2 (two) responses to the notice relating to the R21.[27]

An analysis of the responses demonstrates that almost all of those who responded had no insight whatsoever into SANRAL's plans.[28] A number clearly did not appreciate that the intended toll road declaration related to much more than merely funding the costs of maintenance of the existing road.[29] Several positively decried the absence of information and communication to the public.[30]

Even the comments of apparently the most astute and well-informed, such as Hawke and McClaren, show that the public were in the dark about SANRAL's plans. Hawke was under the impression that there are no planned upgrades for the R21[31], and McClaren, who recalled an article on the "GFIS" a year prior to the notice, complained about the lack of consultation with those affected,

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[26] See a list at Transport Minister's Record Vol 29 p 4453; *Applicants' Founding* para 107 Vol 1 p 60 ln 5-7 read with **FA24** Vol 4 p 270 ln 13-15. The responses are in the Transport Minister's Record Addendum A Vol 29 at pp 4455 (Aiyer), 4458 (Dicks), 4464 (Du Toit), 4469 (Ehlers), 4479-4482 (Engelbrecht), 4487 (Hulsman), 4492 (Janse v Rensberg), 4496 (V Jivan), 4497 (S Jivan), 4498 (M Jivan), 4499 (T Jivan), 4504-4520 (Johnston), 4528 (Knott), 4530-1 (Kok), 4540-4 (Limerick), 4549 (Mc Claren), 4555 (Ntuli), 4558 (Pauw), 4563-4 (Rossouw), 4570-1 (Schutte), 4577 (Stolk), 4581-6 (Van Rooyen), 4593-5 (Viljoen), 4600-1 (Woodhouse), 4608-4610 (Hesse) & 4611-3 (SABOA).

[27] The two responses are in the Sanral Record Vol 25 p 4012 (Lombard) & 4027-8 (Hawke).

[28] *Applicants' Founding* para 202-202.8 Vol 1 p 82 ln 5-p 85 ln 16.

[29] See responses of Ehlers, Hulsman, Schutte and Woodhouse above.

[30] See responses of Rossouw and Van Rooyen above.

[31] See Hawke's response at Vol 25 p 4027 ln 7-8.

questioned what the cost of tolling would be and said he would like to see more communication with the public about SANRAL's plans.[32]

Not a single response showed any insight into the indicative rate of 50 cents per kilometre.[33]

This must be contrasted with the massive public outcry in February 2011 when the true facts became known. This must also be contrasted with the broad-based opposition by the wide range of civil and political organisations, also only after the facts became known.[34]

2.47 SANRAL contends that the notice did not have to reflect the amount of toll to be levied, the intended project, the costs of the project, and not even an estimate of the tolling tariffs, because, so SANRAL argues, the tariff determination is a distinct and separate administrative act.

2.48 It is submitted that this argument is devoid of merit:

2.48.1 As pointed out earlier in the Heads, the tariff determination is a distinct and separate administrative act, but the tariff determination is not, in terms of the section, preceded by any separate prior notice to the public and by any public participation process. It follows that the only opportunity in terms of Section 27 that interested parties and the public have is in respect of the notice in terms of Section 27(4). It follows that, on a proper interpretation

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[32] Vol 28 p 4549 ln 16-20; Vol 4550 ln 23-25 & ln 32-33.
[33] *Applicants' Founding* para 148 Vol 1 p 70 ln 3-7.
[34] **AA3** Vol 10 p 1174 ln 10 - p 1181 ln 25 read with *Applicants' Supplementary Reply* para 94-106 p 2227 ln 9 - p 2230 ln 4.

of Section 27, the proposal should reflect the indicated or anticipated tariff, failing which the interested and affected public will have no opportunity whatever to make any representations on the amount of the toll. This clearly cannot be correct, and would result in an absurd conclusion.

2.48.2 As demonstrated earlier, any decision to declare a toll road as such is necessarily fully linked to the funding by means of tolling, of the costs to be incurred in regard to the maintenance, construction or upgrade of the road.

2.48.3 In the absence of an indication of a total cost to be funded through the method of tolling, and of the anticipated tolling tariff, the affected interested parties would not be able to make meaningful representations. In the result, by the time that such information becomes known, tolling will be a *fait accompli*. This is exactly what happened in the present case.

2.49 In an attempt to overcome this failure, SANRAL contends that during the two years prior to the notices published in terms of Section 27(4), there was extensive media coverage about the GFIP, its attendant costs and even about the anticipated toll tariff.

2.49.1 This argument is a tortuous one which is predicated on the contention that the public in general would have kept a scrapbook of sporadic newspaper articles, or are possessed of elephantine memories to recall sporadic articles over the previous two year period.

2.49.2 SANRAL then seeks to strengthen the argument by relying on a collage of bits and pieces of newspaper articles which, when all condensed, reflect a telescoped but unrealistic and skewed picture.

2.49.3 It is submitted that this can never be regarded as a substitute for procedural fairness in terms of Section 27 or under PAJA. An argument similar to SANRAL's bits and pieces argument aforesaid was raised in the matter of *Kouga Municipality v Bellingan* 2012 (2) SA 95 (SCA) para 10, but roundly rejected by this Honourable Court.

2.49.4 The postulate that members of the public should have been able to recall, to collate, and to make the necessary connection, with the published notice, is fanciful, and far-fetched.

2.49.5 In any event, the content of the responses themselves, referred to and analysed above conclusively refutes this.

2.50 The notice could not – and did not – perform the function of informing the interested road-using public of the tolling proposal and the underlying project. It similarly could not – and did not – serve the purpose of eliciting meaningful comments/representations from the road-using public and interested parties.

2.51 The time allowed within which the public was to respond was the prescribed minimum of 30 (thirty) days. It is submitted that this was hopelessly insufficient and inappropriate in view of the magnitude of the scheme, the

consequences and the large number of people that would be impacted thereby.[35]

2.52 In this regard, it has been held in the context of consultation procedures with a view to tolling, that two essential prerequisites are that:

2.52.1 Sufficient information must be provided in notices initiating consultation; and

2.52.2 Sufficient time must be given in which to respond.[36]

2.53 The time given should not be viewed abstractly and in isolation but in conjunction with – and in the light of – the inadequate content of the notices and the inadequate publication of the notices.

2.54 Thus, where the content of the notice in each case did not even contain the bare bones of the proposal and the actual project, it would have been incumbent upon – and necessary for – the reader of the notice to make extensive enquiries so as to extract from SANRAL the essentials of the underlying project, the tolling proposal and the relevant information relating thereto, thereafter to study and consider all of the implications and perhaps to obtain expert or other advice thereon. Only then would such an interested and affected party have been able to make meaningful representations.

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[35] *Applicants' Founding* Vol 1 p 89 ln 19 - p 91 ln 15.
[36] *S v Smit* 2008 (1) SA 135 (T) at 153B-J and 173A.

2.55 In addition – and as a result of the limited publication – word first had to get around before the affected public would even have been aware of the notices. Only after eventually finding out about the notices, and after enquiries as set out above, as a consequence, would a response have been possible.

2.56 Considered from the perspective of all those who are sight-impaired or illiterate, the position is even worse:

2.56.1 The manner of publication did not cater for them at all;

2.56.2 This was not only discriminatory, but also grossly unfair;

2.56.3 They would only have found out about the notice if, by chance, they were told by someone.

2.57 It is submitted that it is further important to note that a very large percentage of the road-using public would not have seen the notices, which in each case appeared in the inner pages of single newspaper editions. Their only chance to have found out about what was underfoot would have been through the slow process of word-of-mouth.

2.58 Under all of the circumstances above, the 30-day period provided was woefully – and self-evidently – completely inadequate.

2.59 The 30-day period was, in the result, unfair.

2.60 SANRAL is, accordingly, and in terms of Section 4(1)(d) of PAJA precluded from relying on the fact that Section 27(4) provides for a period of at least 30 days.

2.61 In terms of Section 4 of PAJA, SANRAL was accordingly obliged to follow either Sections 4(2) or 4(3) of PAJA or both.

2.62 It is, therefore, no answer to say 30 days is all that Section 27(4) requires.[37]

2.63 In *Joseph supra* the Constitutional Court pointed out that it has consistently held that fairness needs to be determined in the light of the circumstances of a particular case.[38]

2.64 The Constitutional Court also held in *Minister of Public Works and others v Kyalami Ridge Environmental Association* 2001 (3) SA 115 (CC) para 102 that:

> "Procedural fairness depends in each case upon the balancing of various relevant factors including the nature of the decision, the rights affected by it, the circumstances in which it is made, and the consequences resulting from it."

2.65 Viewed in the light of what is contained in paragraphs 2.39 to 2.41 above, the procedure was objectively clearly unfair.

2.66 In the result:

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[37] Cf. *Sanral Answer* para 294.1-3 Vol 7 p 720 ln 6-20.
[38] *Joseph* para 56.

2.66.1 SANRAL failed to comply with the mandatory provisions of Section 27 of the SANRAL Act;

2.66.2 SANRAL failed to comply with the provisions of Section 4 of PAJA;

2.66.3 The procedure followed by SANRAL was manifestly and self-evidently not fair and completely failed to achieve the underlying purpose so eloquently articulated by Cora Hoexter quoted earlier in the Heads.

2.67 The impugned administrative action was, accordingly, unlawful.

2.68 The extent of the non-compliance with Section 27 of the SANRAL Act, with Section 4 of PAJA and with the requirement of procedural fairness and the extent to which SANRAL deviated from its own Planning Memorandum referred to in paragraph 2.41 above, is so dramatic that it demonstrates a cavalier disregard of the law.[39]

2.69 The Minister, in turn, when faced with such a dramatic failure on the part of SANRAL to comply with section 27(4), was obliged to refer SANRAL's applications back to it.

2.70 The Minister failed to do so, and in so doing failed in his statutory responsibility to act as a safety net on behalf of the public.

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[39] *Applicants' Supplementary Founding* para 108-109 Vol 12 p 1564 ln 1-21. See also Vol 12 p 1545 ln 14ff.

3.

Legality

3.1 Both the approval by the Minister of the proposed toll road declaration and the resultant toll road declarations by SANRAL constituted the exercise of public power.

3.2 It is by now settled law that the exercise of all public power is subject to constitutional control.[40]

3.3 In *Judicial Service Commission v Cape Bar Council* 2013 (1) SA 170 (SCA) 179 at para 21, it was expressed in the following terms:

> "... It has by now become axiomatic that the doctrine or principle of legality is an aspect of the rule of law itself which governs the exercise of all public power, as opposed to the narrow realm of administrative action only. The fundamental idea expressed by the doctrine is that the exercise of public power is only legitimate when lawful. See *Fedsure Life Assurance Limited and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) para 56. By way of example, it was held in *Fedsure*, on the basis of the legality principle, that a body exercising public power has to act within the powers lawfully conferred upon it...."

3.4 SANRAL's failure to comply with:

3.4.1 The mandatory provisions of Section 27(4) of the SANRAL Act;

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[40] *OUTA CC* para 64.

3.4.2 The mandatory provisions of Section 4 of PAJA; and

3.4.3 The constitutional requirement of procedural fairness (Section 33 of the Constitution),

results in the conclusion that the purported exercise of public power by the Minister and SANRAL was outside the law and consequently lacked legality.

3.5 The extent of the non-compliance with the law leads to the inevitable conclusion that the purported approval by the Minister and the resultant purported toll road declarations are void. In this regard, it was held in *OUTA CC* at para 34:

> "The exercise of all public power is subject to constitutional control. In an appropriate case an interdict may be granted against it. For instance, if the review court in due course were to find that SANRAL acted outside the law then it is entitled to grant effective interdictory relief. That would be so because the decision of SANRAL would in effect be contrary to the law and thus void."

3.6 Applicants are consequently entitled to a declarator to this effect.

3.7 It is SANRAL's avowed intention to proceed with the implementation and the enforcement of tolling. It is, accordingly, clear that SANRAL will resort to coercive measures in the form of civil fines and the institution of criminal

prosecution in terms of the SANRAL Act to enforce the GFIP tolling scheme.[41] But the relevant purported decisions in this regard, as pointed out above, are unlawful and invalid.

3.8 The Applicants and the public are accordingly faced with the real and immediate threat of coercive measures to implement the invalid and void exercise of public power.

3.9 The Applicants and the public have no alternative satisfactory remedy available other than an interdict to prevent SANRAL from resorting to such coercive measures.

4.

The failure to consider the costs of toll collection

4.1 A key feature of the power to be exercised by the Minister in granting approval was to carefully consider the cost of tolling to be borne by the public.[42]

4.2 One of the factors that will necessarily be relevant to a decision to collect revenue from a particular source is the costs involved in collecting that

[41] See *inter alia Sanral Supplementary Answer* Vol 14 p 1871 ln 3 - p 1873 ln 9. See also Section 27(5) of the SANRAL Act.

[42] *Public Carriers* at 949H-I: "It is clear from the provisions of s 9(4)(a) that the Legislature intended the determination of the amount of a toll ultimately to be a matter of ministerial responsibility. The reason for this probably lies in the fact that a toll is a form of tax and that therefore the Minister, and not some lesser official, should be the final arbiter of the amount thereof." (emphasis added.); See also Section 217 of the Constitution and Sections 38(1)(c), 45(b)(c), 51(1)(b) and 57(b)(c) of the Public Finance Management Act 1 of 1999.

revenue. In the case of e-tolling, those costs involve setting up and operating an infrastructure to collect tolls. This added cost represents a material and fundamental difference between tolling and direct funding.

4.3 The Applicants pertinently alleged in both their founding and supplementary founding affidavits that the Minister did not have before him, and did not consider, the costs of toll collection when granting approval for the toll declarations.[43]

4.4 The January 2008 application[44] and the economic feasibility report referred only to the capital cost of the tolling infrastructure. The economic report annexed to the January 2008 application was further positively misleading in that it created the impression that the toll <u>infrastructure</u> cost was the <u>only</u> cost difference between tolling and direct funding.[45]

4.5 The Applicants added further that SANRAL had materially omitted to place the costs of toll operations before the Minister in the January 2008 application. SANRAL specifically drew the Minister's attention to the capital and other costs, but left out the critical toll collection cost information.[46]

4.6 SANRAL initially sought to answer these allegations by alleging generally that the Minister was not "*placed under any incorrect apprehension concerning the costs of toll collection*"[47] and later, in its supplementary answering affidavit, by

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[43] *Applicants Founding* paras 218-221 Vol 1 p 94 ln 14 - p 95 ln 11; *Applicants Supplementary Founding* paras 151-158.2 Vol 12 p 1582 ln 1 - p 1586 ln 10.
[44] The application by SANRAL for approvals in respect of the N1, N3, N4 and N12 in January 2008.
[45] *Applicants' Supplementary Founding* para 153 Vol 12 p 1582 ln 11 - p 1583 ln 9.
[46] *Applicants Supplementary Founding* paras 154-154.4 Vol 12 p 1583 ln 10 - p 1584 ln 16.
[47] *Sanral Answer* para 302.3 Vol 7 p 727 ln 4-7.

pointing out that the costs of toll collection were before the Minister in the Addenda to the January 2008 application.[48]

4.7 But <u>the Minister</u> failed to deal pertinently with these allegations at all, either in the Minister's answering affidavit or supplementary answering affidavit.[49]

4.8 In the result, it was not properly disputed by the Minister that he had failed to consider the costs of toll collection.[50]

4.9 After Applicants' Heads had been filed in which the above point was made, the Minister, a mere four days before the hearing, filed yet a further affidavit. In this affidavit, the Minister, for the first time, alleged that he did consider the costs of toll collection.[51]

4.10 This belated affidavit was a contrived attempt to relieve the pinch of the shoe and should not be accorded any probative value.

4.11 Further and in any event, the belated affidavit on analysis:

4.11.1 Confirms that the Minister had failed to properly consider the cost of toll collection;

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[48] *Sanral Supplementary Answer* para 215.8-215.9 Vol 15 p 1920 ln 29 - p 1921 ln 16. We submit that the Honourable Court should take a dim view of SANRAL's version in regard to what was before the Minister given its continually changing version (summarised at *Applicants Supplementary Reply* para 180-184 Vol 16 p 2248 ln 10 - p2249 ln 16) and given that initially Sanral admitted that the costs before the Minister were the capital costs of collection and that this was not a "*startling omission*" (*Sanral Answer* para 303.2 Vol 7 p 727 ln 17 - p 728 ln 4).

[49] See *Applicants Supplementary Reply* paras 185 - 194 Vol 16 p 2250 ln 1 - p 2252 ln 16 and references to the pleadings contained therein. There was in fact no answer from the Minister at all, but only by the incumbent Director General who was not employed by the department at the relevant time: See *Applicants Supplementary Reply* paras 189 - 191 Vol 16 p 2251 ln 8-16.

[50] *Wightman t/a JW Construction v Headfour (Pty) Ltd* 2008 (3) SA 371 (SCA) para 13.

[51] *Affidavit of Radebe* deposed to on 20 November 2012 Vol 21 p 3185 & 3192 ln 1-4.

4.11.2 Demonstrates that if the Minister did consider the cost of collection at all, what he considered was so disproportionate to the true cost of toll collection that his approval is invalid for being based on materially incorrect information.

4.12 It is clear from this affidavit that he did not consider the cost of toll collection set out at page 62 of the January 2008 application, but that he allegedly considered the cost estimates from two years before, in the 2006 proposal.[52]

4.13 But the cost estimate in the 2006 proposal of R 200 million per year was only an estimate and an unacceptably vague one at that.[53]

4.14 Not only was it bereft of any empirical foundation, it was a figure meant to encompass "operations and maintenance" with no indication of the proportion in which the two were divided. The 2006 report further did not even indicate whether the "maintenance" referred to related to the toll system, or to "routine road maintenance".[54]

4.15 Even worse, the 2006 proposal made it clear that the figures were mere estimates, not the confirmed product of "specialist studies".[55]

4.16 In the premises, the Minister's consideration and reliance on the costs estimate in the 2006 proposal (if he considered the costs of toll operation at all) was irrational and arbitrary.[56]

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[52] *Affidavit of Radebe* para 14-15 Vol 21 p 3189 ln 6-18. But tellingly, the 2006 Proposal, a working document used to promote tolling, did not form part of the Minister's Rule 53 Record.

[53] **NA6** Vol 9 p 1001 ln 1-2.

[54] As opposed to "periodic maintenance". **NA6** Vol 9 p 1001 ln 8-13.

[55] **NA6** Vol 9 p 1001 ln 14-17. See *Applicants Supplementary Founding* paras 133-35 Vol 12 p 1575 ln 5 - p 1576 ln 10.

5.

The 2006 estimate of the costs of toll collection was patently wrong

5.1 Even if the Minister did consider the estimated costs of toll collection in the 2006 proposal, the Minister's decision would still be unlawful and invalid because such estimate was patently wrong.[57]

5.2 The actual cost of toll collection, being precisely the added cost to be borne by the public, dramatically exceeds the said estimate. The extent of the disparity appears fully from the following:

5.2.1 In terms of the 2006 figures, the cost of toll collection (inclusive of unspecified maintenance) was estimated at R 200m per year[58], which translates to 24%[59] of the capital amount to be repaid, ie. the capital expenditure relating to the GFIP. This is calculated by expressing the costs of toll collection over a period of 30 years (R6 billion) as a percentage of the capital expenditure in regard to the GFIP (R25 billion)[60]. In other words, according to the 2006 proposal, the cost of tolling would equal to be 24% of the capital cost of the project;

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[56] Within the meaning of 6(2)(f)(ii) and 6(2)(e)(vi) of PAJA read with *Democratic Alliance v President of the Republic of South Africa and others* 2013 (1) SA 248 (CC) (*"Simelane*") para 36-39 & 44. Alternatively, the Minister failed to take into account relevant considerations, and took into account irrelevant ones - Sections 6(2)(e)(iii).

[57] *Chairpersons' Association v Minister of Arts and Culture* 2007 (5) SA 236 (SCA) para 47-48. *Supplementary Founding Affidavit* paras 159-163. The Applicants made this case on the basis of the costs as disclosed in the January 2008 application in the affidavit in absence of any word up to that time from the Minister.

[58] At its highest given the figure is supposed to incorporate an undefined portion for "maintenance".

[59] The proportion is more important, given that the 2006 Proposal was expressed in different rand values to the rand values used by SANRAL in its version.

[60] Because the repayment period for the Initial Construction Works cost of R6 300 million is not given in the 2006 Proposal, it is only possible to provide the ratio of toll collection cost over total capital cost for the 2006 Proposal with reference to the "final Scheme", namely R 25 billion over 30 years - **NA6** Vol 9 p 999 ln 32-33 Vol 9 p 999 p 999 ln 31 & p 1001 ln 1-2.

5.2.2 SANRAL's version is that the toll collection costs figure will be R 765m per year, which translates to 89% of the capital expenditure. This is calculated by again expressing the cost of toll collection over 24 years[61] (R18 364 billion)[62], as a percentage of the capital expenditure of R20 629 billion[63]. In other words, according to SANRAL, the cost of tolling will be equal to 89% of the capital cost of the project ;

5.2.3 On the Applicant's version, the figure is R1,286 billion per year, which translates to 149% of the capital expenditure. This is calculated by again expressing the cost of toll collection over 24 years[64] (R30 880 billion)[65] as a percentage of the total capital expenditure (R20 629 billion)[66]. According to the Applicants, the cost of tolling will be equal to 149% of the capital cost of the project.

5.3 Accordingly, and even if credence were to be given to the Minister's latest version, the position will be that he considered that the costs of toll collection would (at most) amount to 24% of the total GFIP expenditure.

However, the real percentage is, even on SANRAL's version, 89% and on Applicants' version, as high as 149%.

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[61] **SAA4** Vol 15 p 1956 ln 3.
[62] **SAA4** Vol 15 p 1956 ln 7 read with *Applicants' Supplementary Reply* para 198 Vol 16 p 2253 ln 11-12.
[63] **SAA4** Vol 15 p 1956 ln 7.
[64] **SAA4** Vol 15 p 1956 ln 3.
[65] *Applicants' Reply to New Matter* para 34-39 Vol 21 p 3203 ln 17 - p 3205 ln 6. The figure of R 28.2 billion was in 2009 Rand and therefore correctly had to be adjusted upwards to 2011 Rands. See *Applicants' Supplementary Reply* paras 258 - 292 Vol 16 p 2264 ln 14 - p 2274 ln 10 for R 28.2 billion figure.
[66] **SAA4** Vol 15 p 1956 ln 7.

5.4 For the sake of completeness, the ratio in 2008, which the Minister did not have regard to, was either 28.5% or 36%, depending on whether an 11 or 14 year period of collection would apply.[67]

5.5 The extent of the disparity between what the Minister (allegedly) considered and the actual position explains SANRAL's lack of candour and transparency in the proceedings in this regard.

5.6 To the extent that there is a dispute between SANRAL and the Applicants relating to the cost of toll collection, SANRAL's version should be rejected:

5.6.1 To date SANRAL has refused to disclose its full toll model despite repeated requests[68];

5.6.2 In the Part A proceedings, SANRAL was invited to disclose the true cost of tolling and the ETC Contract (which would reflect such costs). SANRAL refused, and put forward a version that was demonstrably incorrect[69], and which is contradicted by several later versions on costs;

5.6.3 SANRAL's version of the costs has undergone repeated and contradictory mutations[70];

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[67] *Applicants' Supplementary Founding* para 159 Vol 12 p 1586 ln 11 - p 1587 ln 2 read with Transport Minister's record Vol 27 p 4299 ln 20-27 & Vol 32 p 5045 ln 26-27 & p 4300 ln 8-12.

[68] *Supplementary Founding Affidavit* par 128 Vol 21 p 1573 ln 4-16. **SAA4** is not a toll model. The toll model contains the very information that would enable the Court (and the public) to know the true detail of the project and expected projected revenues.

[69] Compare *Applicants' Founding* para 225-241 Vol 1 p 96 ln 225 - p 99 ln 13 with *Sanral Answer* para 305.1 Vol 7 ln 4-14 and *Applicants' Reply* para 15-26 Vol 11 p 1248 ln 12 - p 1250 ln 20.

[70] *Applicants' Supplementary Reply* para 216-257 Vol 16 p 2257 ln 5 - p 2267 ln 13; **RA6**-**RA12** p 2381-2394; *Affidavit on New Matter* par 10-39.2 Vol 21 p 3196 ln 6 - p 3205 ln 6; Cf. *Sanral Further Affidavit* para 17 - 47.13.2.3 Vol 18 p 2656 ln 1- p 2676 ln 4.

5.6.4 The Applicants' version is taken from and supported by the terms of the ETC Contract. SANRAL's version is based on a tortuous explanation, based only on SANRAL's say so, of what the costs will be[71] and SANRAL's version is contradicted by the ETC Contract[72];

5.6.5 SANRAL depressed the amounts in schedule **SAA4** in a transparent attempt to render the scheme economically viable. However, the financial model produced shows the planned tolling to be not viable.[73]

6.

Unreasonableness: The practical impossibility of enforcement

6.1 The Minister's approvals and the toll declarations were arbitrary and unreasonable because enforcement will be both unduly burdensome and wholly impracticable.[74]

6.2 Non-compliance is an inherent, and internationally recognised, feature of open road tolling.[75]

6.3 The international benchmark for developed countries[76] is 7% non-compliance in running schemes (steady state). Given the controversy surrounding the e-

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71 *Affidavit on New Matter* para 40-84 Vol 21 p 3205 ln 9 - p 3223 ln 17; *Applicants' Supplementary Reply* para 258-294 Vol 16 p 2264 ln 15 - p 2275 ln 2; *Applicants' Further Supplementary Reply* par 75-82 Vol 18 p 2600 ln 11 - p 2602 ln 9.

72 *Idem*.

73 *Applicants' Further Supplementary Reply* para 81-91 Vol 18 p 2602 ln 10 – p 2606 ln 10 read with **SRA4** Vol 18 p 2625-2634. The most likely reason, given SANRAL's conduct in regard to costs, is that SANRAL has depressed the amounts on the schedule of costs in order to create the impression that the cost of the toll scheme and revenues to be garnered are less than they actually are.

74 It was therefore not open to SANRAL to choose, and the Minister to approve it: *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and others* 2004 (4) SA 490 (CC) para 44 & 48;

75 **FA33** Vol 4 p 302 ln 1; See *Sanral Supplementary Answer* para 169.4 Vol 14 p 1869 ln 10-11.

toll scheme, and the active opposition by the likes of COSATU and others, it is entirely realistic to expect that the non-compliance rate in the case of GFIP will be substantially higher.[77]

6.4 Based on SANRAL's own figures of the number of users of the GFIP network[78], a 7%-10% delinquency will translate to between 230 000 and 250 000 defaulters per month.

6.5 It stands to reason that if SANRAL does not immediately and effectively bring such persons to heel, the delinquency rate will sky-rocket. If it escalates to only 20%, the number of defaulters will swell to between 460 000 and 500 000 per month.

6.6 It is self-evident that the courts are not equipped to deal with such volumes.

6.7 The choice of funding the GFIP network through tolling necessarily should have implied a proper consideration of whether enforcement of open road tolling would be possible.

6.8 It clearly is not. The enforcement of open road tolling will be unworkable because of the sheer volumes of traffic on the GFIP network[79] and the obvious inability of the courts to cope with the volume of case.

6.9 The founding affidavit alleged that the decision to declare the GFIP network as a toll road was unreasonable (within the meaning of section 6(2)(h) of PAJA) because enforcement of the system would be virtually impossible.[80]

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[76] There is only reference in the papers to developed countries such as Britain, Sweden and the countries listed in the table at **AA3** Vol 10 p 1203.

[77] *Applicants' Supplementary Reply* par 309 Vol 16 p 2278 ln 1-3. See also **AA3** Vol 10 p 1135 ln 38-41.

[78] *Applicants' Supplementary Reply* para 295-315 Vol 16 p 2275-p2279 ln 10.

[79] *Applicants' Supplementary Reply idem*.

6.10 SANRAL's vague response to the effect that the same processes followed with traffic fines would be applied and no problems were anticipated conclusively demonstrates that SANRAL nor the Minister had not given any serious consideration to the extent of the problem.[81]

6.11 The Applicants demonstrated in reply that the problem of enforcement was even worse than it had surmised earlier on limited information.[82]

6.12 SANRAL's second answer, while more comprehensive and setting out a structured plan for enforcement[83], on close scrutiny still did not provide a plausible solution.

6.13 Using SANRAL's own numbers once again the Applicants' were able to demonstrate in reply that e-tolling is irrational because it is practically unworkable or at least totally unreasonable within the meaning of section 6(2)(h) of PAJA.[84]

6.14 SANRAL's third bite at the cherry constituted a repetition of its Supplementary Answer, save for the introduction of new matter in the form of a comparison with the number of infringement notices processed by the Metropolitan Municipality of Johannesburg.[85]

6.15 But this too, also did SANRAL more harm than good since, as the Applicants demonstrated in the affidavit dealing with new matter

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[80] *Applicants' Founding* para 250-275 Vol 1 p 102 ln 1 - p 107 ln 15.
[81] *Sanral Answer* para 309.6 Vol 7 p 734 ln 14-21. See generally *idem* para 301-310 Vol 7 p 732-735.
[82] *Applicants Reply* para 27-38 Vol 11 p 1251 ln 1 - p 1253 ln 6.
[83] *Sanral Supplementary Answer* para 169.8 Vol 14 p 1871 ln 3 - p 1873 ln 30. See generally *idem* para 169-172 Vol 14 p 1868 ln 4 – p 1878 ln 8.
[84] *Applicants' Supplementary Reply* para 295-315 p 2275 ln 3 - p 2297 ln 10.
[85] *Sanral Further Affidavit* para 49.2.2 Vol 18 p 2679 ln 6 to ln 13.

6.15.1 the processing of notices is not comparable to recovery of toll from non-compliant users;

6.15.2 the success rate in the recovery of fines in South Africa in 2011/2012 is as low as 8.83%.[86]

6.16 There is no prospect of SANRAL effectively collecting toll. The volumes are simply too great.

6.17 Had the Minister and SANRAL applied their minds to the actual figures, as opposed to the general notion that enforcement mechanisms would have to be put in place, they would have come to the only reasonable conclusion open to them, that tolling was either impossible to implement, or so unduly burdensome and expensive to enforce that it was not open to them to choose it.

7.

<u>The infringement of Section 25 of the Constitution</u>

7.1 The Applicants seek orders

7.1.1 declaring that the levying and collecting of toll pursuant to the toll declarations "*would constitute an unjustifiable limitation of the right to*

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[86] *Applicants' Affidavit on New Matter* para 103-117 Vol 21 p 3229 ln 1 - p 3232 ln 4.

property as envisaged in section 25(1) of the Constitution and would be invalid";[87]

7.1.2 interdicting and restraining SANRAL from levying and collecting toll pursuant to the toll declarations and any tariffs that may be published in terms of 27(3) of the SANRAL Act.[88]

7.2 Section 25(1) of the Constitution provides that:

> "No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."

7.3 The exacting of payment of money by individuals constitutes a deprivation of property within the meaning of section 25(1) of the Constitution.[89]

7.4 Such exacting of payment is only permissible if, firstly, it is "in terms of law of general application"[90], and secondly if such law does not "permit arbitrary deprivation of property".

7.5 The power of SANRAL to levy and collect toll is found in section 27(1)(b) of the SANRAL Act. In terms of Section 27(1)(b), SANRAL

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[87] *Amended Notice of Motion* para 4 **SA1** p 1623 ln 11-15. See *National Coalition for Gay and Lesbian Equality and another v Minister of Justice and others* 1999 (1) SA 6 (CC) para 114 and to the same effect *Occupiers of 51 Olivia Road, Berea township v City of Johannesburg and others* 2008 (3) SA 208 (CC) para 10.

[88] *Amended Notice of Motion* para 6 **SA1** p 1623 ln 18 – p 1624 ln 3.

[89] *Mkontwana v Nelson Mandela Metropolitan Municipality and others* 2005 (2) BCLR 150 (CC) para 32.

[90] Section 25(1) of the Constitution; Van der Walt *Constitutional Property Law,* Juta, 2011 at 252. The Applicants rely on the "first part" of section 25(1) as in *Offit Enterprises (Pty) Ltd and another v Coega Development Corporation (Pty) Ltd* 2011 (1) SA 293 (CC) para 30 and *Mobile Telephone Networks* above para 19-24.

"*for the driving or use of any vehicle on a toll road, may levy and collect a toll the amount of which has been determined and made known in terms of subsection (3)*".

7.6 In terms of Section 27(1)(b), SANRAL may only levy and collect toll for use of a portion of national road:

7.6.1 if such portion of national road is a toll road; and only

7.6.2 in an amount determined by the Transport Minister and published in the *Government Gazette*.[91]

7.7 The requirement that the road on which SANRAL levies and collects toll be "*a toll road*" necessarily implies that the road in question must have been lawfully declared a toll road.

7.8 The declaration of the toll road must be substantively valid, that is it must have been effected in compliance with the provisions of section 27 of the SANRAL Act.[92] It is not sufficient that the declaration is substantively invalid but merely presumed to be valid because it has not been set aside.[93]

7.9 The unlawfulness of the toll declarations has been fully demonstrated above. It follows that the levying and collecting of toll will constitute arbitrary deprivation of property.[94]

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[91] Section 27(1)(b) read with 27(1)(a) and 27(3) of the SANRAL Act.

[92] *Mobile Telephone Networks* para 35.

[93] *Oudekraal Estates (Pty) Ltd v City of Cape Town and others* 2004 (6) SA 222 (SCA) para 32-37; *S v Smit* 2008 (1) SA 135 (T) at 174-181.

[94] The micro-analysis referred to in *Mobile Telephone Networks* para 35.

7.10 In *Mobile Telephone Networks* the position was put thus:

> "For deprivation not to be arbitrary, it must be both substantively and procedurally fair"[95]

> "I accordingly conclude that the invocation of the power ... by section 22 would constitute administrative action. That being so, it attracts the fundamental rights ... to administrative action that is lawful, reasonable and procedurally fair. That, in turn, has two effects: first, on the macro-level, because s22 can only validly be exercised in accordance with administrative-justice rights, it insulates the ECA against constitutional invalidity by serving as a hedge against arbitrary deprivation; and secondly, when a particular deprivation is challenged, the requirements of administrative justice determine whether it was, on the micro-level, arbitrary or not."[96]

7.11 The conclusion is accordingly that if the administrative action is unlawful, the deprivation in terms thereof becomes arbitrary.

7.12 It is submitted that in the context where the toll declarations are unlawful, it is no defence for SANRAL to allege that the deprivation in question is insignificant.

7.13 In any event, the deprivation in the present instance <u>is significant</u>[97]:

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[95] *Mobile Telephone Networks* para 22.

[96] *Mobile Telephone Networks* para 35.

[97] Cf. *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and another* 2002 (4) SA 768 (CC) para 100(e): "*Generally speaking, where the property in question is ownership of land or a corporeal movable, a more compelling purpose will have to be established in order for the depriving law to constitute sufficient reason for the deprivation than in the case when the property is something different and the property right is something less extensive.*"

7.13.1 For persons such as Hilda Maphorama and her husband, the levying and collection of e-toll will force them to pay 10% of their income to SANRAL[98] and for persons such as Tshidi Leatswe, a significant portion of their disposable income will have to be paid to SANRAL[99].

7.13.2 For the members of QASA, whose sole source of income is the R1 200.00 disability pension, which is all they have to live on, the payment of any amount to SANRAL as a consequence of e-tolling will also constitute a significant deprivation.[100]

7.14 In the premises, we submit that a proper case has been made out for an order declaring that the levying and collection of e-toll by SANRAL pursuant to the toll declarations will be unconstitutional.

7.15 It is submitted that since:

7.15.1 the applicants and road users in Gauteng have a clear right not to be arbitrarily deprived of property in terms of section 25(1); and

7.15.2 it is Treasury and SANRAL's avowed intention to proceed urgently with e-tolling at the first available opportunity

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[98] *Applicants' Founding* para 42.1 Vol 1 p 39 ln 15 – p 40 ln 2.

[99] *Applicants' Founding* para 42.4 Vol 1 p 41 ln 1-7.

[100] *Applicants' Founding* para 50-55 Vol 1 p 43 ln 10 p 45 ln 3. The members of QASA cannot be exempt from e-tolls since they are forced to rely on third persons to transport them by private car. *Applicants' Founding* para 422 Vol 1 p 138 ln 6-10.

a proper case has been made out for an order interdicting SANRAL from levying and collecting toll on the GFIP network pursuant to the impugned toll declarations.[101]

7.16 It is important to note that:

7.16.1 The challenge under section 25 of the Constitution is not brought under section 6 of PAJA. The 180 day requirement under Section 27 is accordingly not applicable. Even if condonation were not to be granted, it will have no impact on the section 25 challenge;

7.16.2 The principle in administrative law that the Court retains an overriding discretion not to set aside administrative action even if unlawful finds no application to a party seeking relief for the infringement of fundamental human rights in the Bill of Rights.

8.

<u>The Applicants' standing</u>

8.1 The standing of the individual Applicants is comprehensively addressed in the Founding Affidavit.[102]

8.2 The First Applicant ("OUTA") is a voluntary association specifically established for the purpose of opposing electronic tolling of the GFIP.

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[101] *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 19.

[102] *Applicants' Founding* para 30-58.2 Vol 1 p 36 ln 4 - p 45 ln 18 read with *Confirmatory Affidavit of Johnston* para 9-11 Vol 5 p 450 ln 6 - 456 ln 10.

8.3 In this regard, OUTA acts in the interest of its members, a large number of businesses and a large number of identified individuals.

8.4 OUTA, accordingly, brought the application in the interest of its members in terms of Section 38(e) of the Constitution and in the public interest in terms of Section 38(d) of the Constitution.

8.5 The Second Applicant ("SAVRALA") is a voluntary association representing 22 member companies which conduct business in the vehicle rental and leasing industry.

8.6 SAVRALA brought the application in its own interest in terms of Section 38(a) of the Constitution, in the interest of its members in terms of Section 38(e) of the Constitution and acting in the public interest in terms of Section 38(d) of the Constitution.

8.7 The Third Applicant ("QASA") is a voluntary association that protects and promotes the rights and interests of people with disabilities and suffering from mobility impairment.

8.8 QASA brought the application in its own interest in terms of Section 38(a) of the Constitution and in the interest of its members in terms of Section 38(e) of the Constitution.

8.9 The Fourth Applicant ("SANCU") is a voluntary organisation protecting and promoting the rights of millions of consumers in South Africa.

8.10 SANCU brought the application on behalf of its members and in the public interest in terms of Sections 38(d) and 38(e) of the Constitution.

9.

Condonation

9.1 The Applicants' failure to have initiated review proceedings timeously (in terms of Section 7 of PAJA) can be condoned. In terms of Section 9 of PAJA the period of 180 days may be extended "where the interests of justice so require".[103]

9.2 The extent of the delay is not 4 (four) years as SANRAL and Treasury would have it, but very much less. In terms of Section 7 of PAJA the 180 day period only commences on the date of actual knowledge or deemed knowledge of the administrative action and the reasons for it.[104]

9.3 The Minister's approvals were not in the public domain at all.

9.4 The batch of notices under Section 27 relating to the N1, N2, N3, N4 and N12 was published on 12 October 2007. The notice relating to the R21 was only published on 18 April 2008.

9.5 The extent to which these notices were inadequate, defective and positively misleading has been fully dealt with above.

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[103] Section 9(1)(b) of PAJA.
[104] Section 7(1)(b) of PAJA.

9.6 The actual toll road declarations on 28 March 2008 and 28 July 2008 respectively, were published in the Government Gazette only and were not in the public domain at all.

9.7 The media release by SANRAL on 8 May 2008 announcing the awarding of contracts for the upgrading of the GFIP, made no mention of tolling whatsoever.[105]

9.8 The commencement of civil construction on 24 June 2008 conveyed – and would have conveyed – nothing about tolling. This activity would have been linked to the hosting of the then upcoming Soccer World Cup in 2010.

9.9 It is not properly disputed on the papers that there was no general notification of the public in this regard by SANRAL and that there were no notice boards along the roads and no newspaper, radio or television advertisements in this regard.

9.10 The erection of the gantries would have been a new development in the South African public's experience. On the papers, the construction of the first of these began in October 2009 and the first gantry was completed in June 2010.[106] One gantry would, however, have had no significance. Only once all the gantries over the GFIP network (or the bulk of them) had been erected,

[105] **FA32** Vol 4 p 289-290.

[106] Treasury says the gantries were constructed "between 2010 and 2011": *Treasury Answering Affidavit* para 37 Vol 16 p 2163 ln 11-12. *Sanral Supplementary Answer* para 33.6.3 Vol 14 p 1773 ln 1-2. Cf. *Applicants' Founding* para 144 & 283 Vol 1 p 69 ln 10-13 & p 116 ln 14-20. **FA6** Vol 2 p 175 ln 4-14.

would it have had some significance.[107] This, on the papers, was roughly at the end of 2010.

9.11 It is accepted that the erection of the gantries could reasonably have led to enquiries being made and resulting in the public becoming aware of the earlier administrative action.

9.12 It was only then that the 180 day period would have commenced.

9.13 The 180 day period expired in approximately mid-2011.

9.14 The review was launched on 23 March 2012[108], some 9 (nine) months later.

9.15 It is for this period (ie the 9 month delay) that an explanation had to be provided, and was.[109]

9.16 This explanation, fully borne out by the facts, is that there was from February 2011 onwards, every indication that SANRAL and Government would reconsider and that from February 2011 when the tariff determination was made known to the public, and upon discovery by the public of the real bite of the tolling and the full facts in this regard (resulting in the massive public outcry), there were many mixed signals sent out by Government.[110]

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[107] *Treasury Answering Affidavit* idem; *Applicants' Founding* para 283 Vol 1 p 116 ln 14-20.
[108] *Notice of Motion* Vol 1 p 11 ln 16.
[109] *Applicants' Founding* para 330-368 Vol 1 p 118 ln 17- p 368 ln 9; *Replying Affidavit* para 89-115 Vol 11 p 1263 ln 16 - p 1269 ln 4. See also in relation to SAVRALA and QASA *Applicants' Founding* para 371-412 & 413 - 425.3 Vol 1 p 128 ln 2 - p 139 ln 9 and *Answer in Treasury Intervention* para 35-40 Vol 12 p 1482 ln 7 - p 1483 ln 5.
[110] *Applicants' Founding idem*; *Applicants' Reply idem*; *Applicants' Answer to Treasury Intervention idem*.

9.17 The explanation given is that it was under the circumstances not unreasonable to have waited for the final word after such reconsideration before embarking on what would be very costly litigation.[111]

9.18 By the time that the public realised what really was in store for them, i.e. when the tariffs were determined and made known in February 2011, the civil construction works relating to the GFIP and relating to the erection of the gantries had already been completed and was a *fait accompli*.

9.19 All expectations that Government and SANRAL would come to their senses were, however, finally dashed when first the Minister of Transport and later the Minister of Finance made their respective announcements in the course of February 2012.

9.20 The next approximately 4 to 6 weeks were taken up by necessary consultations, research and investigation of the facts, establishing of the First Applicant, collection of funds and the drafting of the application papers.[112]

9.21 The review was launched on 23 March 2012.

9.22 The decision affected an entire province and the public in general. There was no single person, community or entity which was so uniquely or discretely affected by the decision that he/it could have been expected to take the decision on review. The costs would further simply have been prohibitive to such an individual or entity.

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[111] *Applicants' Reply idem.*
[112] *Applicants' Reply idem.*

9.23 The present litigation constitutes hugely important public interest litigation where the Applicants, in the public interest, seek to vindicate constitutional rights to lawful and procedurally fair administrative action and to the lawful and valid exercise of public power.

9.24 It has been demonstrated earlier that SANRAL, completely disregarded the requirements of Section 27 of the SANRAL Act, of Section 4 of PAJA and of the constitutional requirement of procedural fairness.

9.25 The administrative actions in *casu* were clearly unlawful and the purported exercise of public power lacked legality.

9.26 On the facts, and if condonation were not granted, the public (including the poor marginalised and indigent) will be compelled to pay over time the enormous sum of between R71 billion and R110 billion resulting from manifestly unlawful decisions and resulting from a flagrant disregard of the law.

9.27 The tariff determination in regard to the GFIP will be dependent upon the substantive validity and legality of the toll road declarations. Any tariff determination will, accordingly, similarly be unlawful and lacking in legality.

9.28 SANRAL will, in the result, not be able to enforce payment as affected members of the public, when faced with coercive measures, will be able to

raise a collateral challenge to the legality/validity of the toll road declarations and the resultant tariff determinations.[113]

9.29 Under the circumstances detailed above, where SANRAL and Government will not be able to enforce payment, the entire scheme is clearly doomed to failure. This conclusion is fully dispositive of the Respondents' arguments relating to prejudice.

9.30 Even if viewed solely as unlawful administrative action, denying condonation will result in the unlawful act or decision continuing to exist as a fact and in those circumstances the courts should be slow to refuse condonation. The importance of finality lies in administrative convenience, rather than principle, and its importance is accordingly relatively low on the scale as compared to the protection of rights. Finality is good, but justice is better.[114]

9.31 In addition to the decisions being unlawful and void, SANRAL and Government are hell-bent on pursuing a tolling scheme:

9.31.1 Which is prohibitively expensive;

9.31.2 Which, based on SANRAL's own figures, is not viable;

9.31.3 Under which the payment of the toll cannot, in law, be enforced;

9.31.4 Which the courts are not equipped to deal with; and

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[113] *Kouga* para 12-14 & 18.

[114] *Oudekraal Estates (Pty) Ltd v City of Cape Town and others* 2010 (1) SA 333 (SCA) para 80-82.

9.31.5 In terms of which, the costs of collection by far exceed the total costs of the GFIP.

9.32 These considerations weigh strongly in favour of granting condonation.

9.33 In *Camps Bay Ratepayers' and Residents Association v Harrison* [2010] 2 All SA 519 (SCA), the SCA listed the factors typically to be considered:

> "Relevant factors include the nature of the relief sought, the extent and cause of the delay, its effect on the administration of justice and other litigants, the importance of the issue to be raised in the intended proceedings and the prospects of success."[115]

9.34 The delay by the Applicants (approximately 9 months) has had no effect on the administration of justice.

9.35 The issues at stake in the review are, on any view, of massive public importance. This factor weighs strongly in favour of the grant of condonation.

9.36 The Applicants' prospects of success have been dealt with above. It is submitted that Applicants' case is unanswerable.

9.37 It cannot be overemphasised that the real reason why the public were kept in the dark, and why a review challenge was not brought long ago, is because of the complete failure by SANRAL to follow a proper public participation process.

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[115] *Camps Bay Ratepayers* para 54.

9.38 The prejudice relied upon by SANRAL relating to the expenditure incurred, is not prejudice that resulted from the period of delay aforesaid, but from SANRAL's own conduct and failure to comply with the law. SANRAL had incurred its debt and Treasury had already guaranteed it by May 2010[116], before the first gantry was completed.

9.39 It is submitted that on a conspectus of all of the considerations, it is in the interest of justice that extension of the 180 day period be granted to Applicants under Section 9 of PAJA and that their failure to have initiated review proceedings before 23 March 2012, be condoned.

10.

Remedial discretion

10.1 It is submitted that this is not an appropriate case for the exercise of the discretion to refuse remedial relief.

10.2 The same considerations set out in the preceding paragraph also come into play under this heading.

10.3 Of vital importance in this regard are the legal consequences flowing from the conclusion of unlawfulness:

[116] *Treasury Answer* para 38 Vol 16 p 2163 ln 13-15; *SANRAL Supplementary Answer* para 33.6.3 Vol 14 p 1773 ln 1-2.

10.3.1 Any attempt by SANRAL to use the coercive measures available to it under the SANRAL Act will be successfully met by the defensive/collateral challenge relating to the unlawfulness of the toll road declarations.

10.3.2 The determination of a toll tariff is, in turn, dependent upon the substantive validity of the toll road declarations.

10.3.3 The implementation of the tolling scheme will thus not be possible.

10.3.4 Attempts at enforcement by SANRAL will result in a multiplicity of law suits.

10.4 SANRAL's contentions about the resultant fiscal *Armageddon* and massive wasted expenditure, constitute clear hyperbole:

10.5 The expenditure relating to the civil construction of the GFIP is not wasted.

10.5.1 The road network is being put to good and productive use.

10.5.2 The expenditure relating to the erection of the gantries and in connection with the e-toll administration systems can still be effectively utilised after a new proper procedure has been followed and lawful decisions have been taken.

10.5.3 There can be no good reason why, upon a proper reconsideration following upon lawful administrative action, the total cost cannot be funded in part by other funding means and only in part through tolling so as to

render the toll affordable. If this means that existing executive and/or existing policy decisions are to be revisited, so be it. It will be the unavoidable consequence of unlawful conduct. Why, after all, should the public have to pay the penalty for SANRAL's bungling and the Minister's and SANRAL's unlawful conduct?

10.5.4 Unlawfulness is not trumped by the doctrine of separation of powers. Government and SANRAL cannot violate the Constitution and then seek to shelter behind the doctrine of separation of powers.

11.

Relief sought

11.1 Applicants are, in the premises aforesaid, entitled to an order setting the impugned decisions aside.

11.2 In the alternative, Applicants are at least entitled to a declaratory order to the effect that:

11.2.1 The impugned decisions were unlawful;

11.2.2 The purported exercise of powers by the Minister and by SANRAL in this regard lacked legality; and

11.2.3 The purported approval and resultant toll road declarations are void.

11.3 It is asserted by SANRAL on the papers - and a matter of public record – that SANRAL intends to implement tolling as soon as possible and to use the coercive measures available to it under the Act in this regard.

11.4 A conclusion that the purported exercise of public power by the Minister and by SANRAL lacked legality and is void, entitles Applicants to an interdict to prevent the implementation of such illegal scheme.[117]

11.5 In addition, SANRAL's avowed intention constitutes an imminent threat of arbitrary deprivation of property in conflict with Section 25 of the Bill of Rights in the Constitution. Applicants are entitled to an interdict to prevent such conduct.

11.6 In the alternative and/or cumulatively to the aforegoing:

11.6.1 The present proceedings, although in form a direct challenge, are in substance really (or at least also) a defensive challenge to the impugned decisions and to SANRAL's threat to implement the scheme and to use coercive measures to enforce such implementation.[118]

11.6.2 The following dictum in the *Kouga* judgment aforesaid is particularly apposite to the present proceedings:

> "... It would be inexplicable to a layman were the applicants to fail in civil proceedings, the avowed purpose of which was to avoid their prosecution

[117] *OUTA CC* para 64.
[118] *Kouga* para 12-19.

under the by-law, but succeed in defending criminal proceedings on the same facts."[119]

11.7 In *Kouga* aforesaid the question was left open whether a collateral challenge by way of a declaratory order may be brought by a person who is merely liable to prosecution and who has not yet been charged.[120]

11.8 It is submitted that there are compelling policy considerations why the collateral challenge principle applied in *Kouga* should be extended to a situation such as the present where members of the public have not actually been charged yet, but stand to be criminally charged and prosecuted in their droves.

11.9 As pointed out earlier in the Heads, it is realistic to anticipate that the number of "defaulters" will run into the hundreds of thousands and that this figure will keep on escalating.

11.10 It is, accordingly, realistic to anticipate that criminal prosecutions will be initiated by SANRAL against literally hundreds of thousands of the road-using public.

11.11 It is further highly probable that the bulk of the "defaulters" who will be criminally prosecuted and have civil fines imposed, will come from precisely that category of the public that can least afford the toll, i.e. the poor marginalised and disabled.

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[119] *Kouga* para 16.
[120] *Kouga* para 20.

11.12 It further stands to reason that the aforegoing will result in a multiplicity of law suits on an unprecedented scale.

11.13 There can be no good reason why that should be permitted to happen, where this Honourable Court can simply grasp the nettle now and avoid all of such undesirable consequences.

11.14 The extension of the *Kouga* principle aforesaid must be particularly indicated under the present circumstances where the Applicants seek to vindicate constitutional rights in the public interest.

11.15 It is accordingly submitted that also on this basis, will the Applicants be entitled to a declaratory order to the effect as set out above and to an order interdicting SANRAL from using coercive measures under the SANRAL Act to enforce the payment of toll.

11.16 To the extent that this Honourable Court retains a discretion whether or not to grant the relief aforesaid, all of the considerations detailed in the preceding two paragraphs find equal application here.

12.

<u>The appeal on costs</u>

12.1 The High Court fundamentally misdirected itself on the question of costs in that it failed in the context of genuine constitutional litigation to apply, or even

consider applying, the general rule laid down in *Biowatch Trust v Registrar, Genetic Resources and others* 2009 (6) SA 232 (CC) ("*Biowatch*").[121]

12.2 It is submitted that the SCA is therefore at large to intervene and overturn what is a manifestly inappropriate costs order.[122]

12.3 It is submitted that the costs order of the High Court should be overturned and the general rule in *Biowatch* applied for the following reasons:

12.3.1 the matter constitutes genuine constitutional litigation[123] in which the Applicants seek to vindicate the constitutional rights to the lawful exercise of public power, to just administrative action, and to property;

12.3.2 the matter is a classic case of one in which the focus is not only on the "*interest of the particular litigants involved [or their members], but also on the rights of all those in similar situations*"[124];

12.3.3 the litigation has been primarily funded by money donated to OUTA by the public as a result of public fundraising drives[125];

12.3.4 in no sense could this litigation be described as frivolous or vexatious.

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[121] *Biowatch* para 21-23, 25, 30 & 57. The High Court only gave attention to a contrived application by SANRAL for punitive costs. The application was contrived as it accused the Applicants of arguing that SANRAL was guilty of deliberately not informing the public of its plans to toll when the basis for this had been set out in the papers. See Judgment para 13-14 Vol 34 p 5247 ln 12 to 5249 ln 13 and compare *Supplementary Founding Affidavit* para 108-109 Vol 12 p 1564 ln 1-21.

[122] *Biowatch* para 29-30.

[123] *OUTA CC* para 22.

[124] *Biowatch* para 21.

[125] *Applicants' Further Supplementary Reply* para 97-113 Vol 18 p 2611 ln 2- p 2614 ln 3.

12.4 Accordingly, even if the application had been correctly dismissed by the court *a quo*, the Applicants should not have been ordered to pay the Respondents' costs.

13.

The order sought

The order sought is formulated in Annexure A to the Heads.

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14 June 2013
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