IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

CASE NO: 90/2013

In the matter between :

OPPOSITION TO URBAN TOLLING ALLIANCE & OTHERS **APPELLANTS**

and

THE SOUTH AFRICAN NATIONAL ROADS AGENCY LIMITED & OTHERS **RESPONDENTS**

FILING SHEET FOR FIRST RESPONDENT'S PRACTICE NOTE WITH HEADS OF ARGUMENT

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Case number: 90/2013

In the matter between:

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

and

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

SANRAL'S PRACTICE NOTE

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1. **Nature of the appeal**

This is an appeal against the whole of the judgment and order, including the order on costs, of Vorster AJ sitting in the North Gauteng High Court in NGHC Case No 17141/2012 on 13 December 2012.

2. **Jurisdiction**

The High Court granted the appellants leave to appeal on 25 January 2013. This Court has jurisdiction in terms of section 20 of the Supreme Court Act, 59 of 1959. Time periods stipulated by this Court have been adhered to.

3. **Issues on appeal**

3.1. The appeal lies against the dismissal of the appellants' application to review and set aside the declaration of certain roads in Gauteng as toll roads and related relief aimed at declaring the decisions to toll the roads as having been unlawfully taken.

3.2. The review application was brought in terms of the Promotion of Administrative Justice Act, 3 of 2000 (*PAJA*) and on grounds of illegality under the Constitution.

3.3. The first issue is whether the appellants' substantial delay in launching their review application ought to have been condoned.

3.4. If the delay should be condoned, whether there is any merit in the grounds of review pursued by the appellants.

3.5. Whether the levying and collection of toll pursuant to the impugned toll declarations would constitute a violation of section 25 of the Constitution.

3.6. Whether, even if the toll declarations and determined to be invalid or inconsistent with the right to property in section 25 of the Constitution, this court should exercise its remedial discretion either to not set aside the impugned decisions or to suspend any declaration of invalidity in relation to the property challenge.

3.7. Whether the High Court's costs order should be confirmed.

4. Constitutional issues

4.1. Whether the levying and collection of tolls pursuant to the impugned decisions constitutes an arbitrary deprivation of property.

4.2. Whether the court's remedial discretion should be employed to not set aside the impugned decisions or to suspend any declaration of invalidity granted by the court

5. Estimated duration

Two days. The matter has already been enrolled for two days on 25-26 September 2013.

6. **Portions of the record necessary to be read**

6.1. For purposes of SANRAL's arguments, it is requested that, in addition to the Judgment of the Court *a quo* (which is to be found at volume 34, pages 5232 - 5249), this Court have regard to the following affidavits filed by the parties:

6.1.1. The Notice of Motion and founding affidavit - Volume 1: Pages 1 – 11 and 19 – 150

6.1.2. The first answering affidavit of SANRAL – Volumes 6 and 7: Pages 467 – 763

6.1.3. The answering affidavit of the Department of Transport – Volume 10: Pages 1067 – 1101

6.1.4. The founding affidavit of National Treasury – Volume 10: Pages 1216 – 1236

6.1.5. The first replying affidavits – Volume 11: Pages 1244 – 1418 and Volume 12: Pages 1475 – 1498

6.1.6. Amended Notice of Motion and supplementary founding affidavit - Volume 12: Pages 1520 – 1613 and Volume 13: Pages 1614 – 1629

6.1.7. The second answering affidavit of SANRAL – Volume 14: Pages 1725 – 1950

6.1.8. The second answering affidavit of the Department of Transport – Volume 15: Pages 2070 – 2143

6.1.9. The answering affidavit of National Treasury – Volume 16: Pages 2144 – 2195

6.1.10. The second replying affidavit – Volume 16: Pages 2203 – 2374

6.1.11. The third replying affidavit – Volume 18: Pages 2593 – 2614

6.1.12. The third answering affidavit of SANRAL – Volume 18: Pages 2650 – 2702 as well as annexures "A" (at Volume 19: Pages 2703 – 2727), "B" (at Volume 20: Pages 2915 – 2950), and "C" at Volume 21: Pages 3137 – 3163

6.1.13. Supporting affidavit of Minister Radebe Volume 21:Pages 3185 – 3192

6.1.14. The fourth replying affidavit – Volume 21: Pages 3193 – 3250

6.2. Those portions of the record referred to in the parties' heads of argument.

7. Summary of argument

7.1. The decision to fund the GFIP through tolling was a complex, polycentric decision of the executive.

7.2. The Constitutional Court has found that courts owe deference to the executive in their approach to reviews of polycentric decisions.

7.3. The grounds of review are without merit.

7.3.1. The public participation procedure followed by SANRAL complied with the SANRAL Act and also with the requirements of section 4(1)(d) of PAJA.

7.3.2. The Transport Minister properly considered the costs of toll collection before he approved the toll declarations.

7.3.3. E-tolling of the GFIP is not impossible.

7.4. The costs order falls squarely within the class of exceptional cases identified in *Biowatch* and this court's jurisprudence for a departure from the ordinary costs rule in constitutional litigation.

8. **Authorities to which particular reference will be made**

8.1. A list of authorities is annexed to SANRAL's written submissions.

8.2. The authorities marked with an asterisk are those to which particular reference will be made in argument.

9. Core bundle

9.1. Paragraph 9 of the appellants' practice note refers to the compilation of a core bundle which the appellants undertook to deliver to the Registrar.

9.2. We understand from the appellants' attorneys that as at the date of filing this practice note, the core bundle has not yet been prepared.

9.3. In order to avoid unnecessary duplication of documents before the court, we shall consider the appellants' core bundle as soon as it is available and deliver our own supplementary core bundle in the event that there are any relevant documents omitted from it.

10. Chronology

SANRAL does not take issue with the appellants' chronology which appears as annexure B to their heads of argument, except to the extent that it omits the events set out in annexure to SANRAL's heads of argument.

11. **Compliance with the Rules**

11.1. Rules 8(8) does not apply.

11.2. Rule 8(9) has been complied with. The relevant correspondence reflecting this is to be found at Volume 34: Pages 5725 – 5291

12. Attachments:

Accompanying the heads of argument are the following attachments:

12.1. A – The Table of Authorities;

12.2. B – A glossary of defined terms used in the heads of argument;

12.3. C – The supplementary chronology of events;

12.4. D – Certificate in terms of Rule 10A(b).

David Unterhalter SC

Bruce Leech SC

Lwandile Sisilana

Kate Hofmeyr

Counsel for SANRAL

Chambers
Sandton
9 July 2013

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SANRAL'S HEADS OF ARGUMENT

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A. INTRODUCTION

1. The appellants, OUTA et al, appeal against the whole of the judgment and order of the Court *a quo*, in terms of which their application to review and set aside certain administrative decisions and related relief was dismissed with costs.

2. In effect,what is argued on behalf of OUTA et al is that they—and those they represent—want to retain the benefit of the significant infrastructural upgrades to the Gauteng roads undertaken by SANRAL pursuant to the declarations of tolling, but don't want to have to pay directly for their use of those upgrades.

2.1. Over the course of nearly four years, one of the largest construction projects of its type, saw SANRAL and its appointed contractors—in a very public way—complete the GFIP.

2.2. OUTA et al, and the interests that they represent, stood by and watched as this construction work was undertaken; at the time, the significant role players amongst the appellants knew that these upgrades were to be funded through the user-pay principle.

2.3. Now that the time has come to pay, however, they balk. This appeal is the continuation of a legal campaign to avoid having to pay tolls for the use of and the benefit derived from the Gauteng Freeway Improvement Project ('the GFIP").

3. The relief which the appellants now seek[1] differs quite substantially from the relief which was first sought in the application *a quo,*[2] as also from the amended relief *a quo.*[3]

3.1. Most obviously, the appellants have abandoned the pretence that they are entitled to set aside the environmental authorisations granted by the Transport Minister under NEMA or any relief associated with those environmental authorisations, being the relief sought in prayers 3 and 7 of the amended Notice of Motion.

3.2. In addition, in the heads of argument submitted on their behalf, the appellants desist from any argument that the promulgation of the SANRAL Act offends against the Constitution—thereby obviating the need for an order under prayer 5 of the amended Notice of Motion.

3.3. Finally, the OUTA CC Judgment made it clear that SANRAL's proposal to undertake the GFIP and to fund it through tolling—a proposal that was approved by the Transport Minister—is a policy decision which lies outside the purview of the courts on review.[4] This materially alters the relief that the appellants are entitled to claim.

4. Instead, the appellants belabour an argument that the declaration of the Gauteng roads as toll roads was procedurally unfair vis-à-vis the people of Gauteng.

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1 In the form of an Order attached to the Heads of Argument submitted on behalf of the appellants.
2 Notice of Motion, Part B, at Record vol 1 pp 5—9.
3 Amended Notice of Motion, at Record vol 13 pp 1618—1625.
4 Indeed, as is apparent from the affidavits of Alli, this was a decision which was the culmination of years of thought and planning, not only on the part of SANRAL but the Government of the Republic of South Africa generally and the Department of Transport in particular, as well as the Provincial Government.

4.1. In support of this the appellants make much of the fact that the SANRAL Act must be interpreted in the light of the Constitution, on the basis that this means that the activities undertaken by the Transport Minister and SANRAL under the Act must be consistent with PAJA.

4.2. There can be no disagreement with this approach as a proposition of law, but as we show below, it is an argument that leads nowhere: SANRAL's conduct under—and its interpretation of—the SANRAL Act is consistent with the provisions of both PAJA and the Constitution.

4.3. The Court *a quo* would have none of it. Vorster AJ, with respect, rightly rejected the appellants' claims that the decision to pay for the much needed upgrade of the Gauteng roads was taken unfairly and without due notice being given to members of the public: the appellants' arguments rested on the '*erroneous assumption that each and every user of the proposed roads had a right to be informed of the scheme and the proposed tariffs that could be levied in due course.*'[5]

4.4. We submit that this Court should come to the same conclusion.

5. The appellants also pursued the review before Vorster AJ on the basis that the tolling of the GFIP amounted to an unlawful deprivation of rights in property and that it therefore fell foul of section 25 of the Constitution.

5.1. The appellants resorted to this argument in the expectation that it would relieve them of responsibility for having delayed unreasonably in bringing the review

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5 OUTA NG Judgment at vol 34 p 5246 lines 10—19.

application and overcome the lack of merit of their condonation application.

5.2. The argument is presented on the basis that the tolling of the GFIP was arbitrary and unlawful because it was otherwise procedurally unfair or because it was taken in conflict with the SANRAL Act. Hence, the argument relies on the same claims of procedural irregularity of the toll declarations. These criticisms lack merit and so the property challenge is stillborn.

5.3. We understand, from discussions with our colleagues representing National Treasury, that they will deal directly in their heads of argument with the section 25 property challenge.

5.4. In these heads of argument we limit our submissions to the underlying criticisms which found the property challenge; we do not address the section 25 arguments directly.

6. In addition to these two complaints—of procedural unfairness and the section 25 property complaint—the appellants advance four grounds on which the Court *a quo*'s decision should be reversed.

6.1. The one ground—legality—is new. It has not previously formed part of the case.

6.2. Three grounds, though never formally abandoned in the Court *a quo*, were nevertheless not argued, nor pressed. Vorster AJ did not deal with them. These are (i) unreasonableness, (ii) the alleged failure ,of the Minister of Transport to consider the costs of toll collection, and (iii) the alleged

incorrectness of the 2006 estimate of the costs of toll collection.

6.3. The only grounds argued, and the grounds on which the Court *a quo* made findings, are the property challenge and the procedural unfairness ground. That, indeed, is how Vorster AJ correctly understood the position.[6] He understood himself to be being asked to determine the case on two grounds only.

6.4. Now it is said that Vorster AJ must be reversed on grounds that the appellants did not press before him.

7. Nonetheless, in these heads of argument, we deal with all of the review grounds now pursued by OUTA et al in their heads of argument before this Court. Finally, we make submissions on costs.

8. We do not deal with the issues pertaining to the unreasonable delays on the part of the appellants in bringing the review, the resultant prejudice that will flow if any if the relief sought is granted, or the question of condonation. These issues—along with the section 25 property challenge—will be dealt with by our learned friends on behalf of National Treasury.

9. Our learned friends on behalf of the Transport Minister will deal with the review grounds insofar as they relate directly to the Minister whom they represent.

10. Before we address each of the review grounds, we set out a summary of the material background facts and circumstances:

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6 OUTA NG Judgment vol 34 pp 5240—5241 paras 6-7.

10.1. We submit that a consideration of the background facts and circumstances can leave the Court in no doubt that the decision to implement the GFIP and to finance it through the user-pays principle of tolling was the product of a reasoned and rational decision-making process over the course of many years.

10.2. The appellants adopt a different approach: they accept the rationality of the process in most respects—notably the fundamental underlying decision to upgrade the Gauteng roads—but seek to parse out for criticism the decision to fund these upgrades through tolling.

10.3. In their review application and in this appeal, OUTA et al lose sight of the fact that these were not discrete decisions, but *part of an overarching decision to implement the GFIP on the basis that it would be funded through tolling*. This is quintessentially a situation where the perceived bad parts of the decision cannot be separated out from its whole.

B. THE MATERIAL BACKGROUND FACTS

The Position of SANRAL as an Organ of State

11. SANRAL derives its powers from the SANRAL Act, with its main function and responsibility being all strategic planning, design, construction, operation, management, control, maintenance, and rehabilitation of national roads and for the financing of those activities.[7] Importantly, it is obliged to exercise its powers and

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[7] Section 25(1) of the SANRAL Act.

perform its responsibilities 'within the framework of government policy'.

12. The financing options that are available to SANRAL are set out in section 34(1) of the SANRAL Act and, for purposes of this application, include levies raised on the sale of fuel (subsection (1)(b)), loans granted to or raised by *SANRAL* (ss (1)(c)), toll (ss (1)(g)), and moneys appropriated by Parliament (ss (1)(k)).

13. It is common cause between all of the parties that the Gauteng Roads fall within the remit of SANRAL. It is also common cause that the development and improvement to these Roads, undertaken by SANRAL under the auspices of the GFIP, was critically necessary to alleviate congestion and to facilitate growth in Gauteng and economic growth nationally. The only question is how these improvements were to be funded.

14. As the Constitutional Court characterised the dispute, at paragraph 5 of the OUTA CC Judgment:

> *The debate between the parties to this dispute is not whether it is prudent to undertake the GFIP. They accept that the roads in Gauteng needed extensive upgrades. They have observed the large scale road works and now enjoy the benefits of the improved roads made possible by the GFIP. [OUTA et al] accept that someone has to pay for the improved roads and that it is the Government that must decide how to finance the GFIP. Their differences lie somewhere else. The Government has made a policy decision that the expenditure related to the GFIP will be funded by tolling the roads on a "user pay" principle. [OUTA et al] say they are neutral on alternative financing mechanisms, but in essence contend that the project should be funded through a fuel levy.*

15. There are a number of caveats to the exercise by SANRAL of its powers:

15.1. In exercising its main responsibilities and functions SANRAL does not do so by taking decisions in isolation, but necessarily does so within the overall approach to roads throughout South Africa and the national road network in particular.

15.2. SANRAL cannot embark on a project without being able to fund it; the initiation of one project must necessarily comport with other projects and initiatives; and the funding of all of SANRAL's activities is the responsibility of SANRAL, not National Treasury.

15.3. It must perform its functions within the framework of government policy. It is contrary to government policy to earmark revenue raised through a levy on fuel for any particular purpose. Government policy dictates that the fuel levy is used to fund general government expenditure. As a result, at the time that SANRAL was contemplating the GFIP, it did so on the premise that it was not open to SANRAL for it to obtain funding for GFIP through a ring-fenced fuel levy.

16. It is common cause that SANRAL elected to raise funds through borrowing, these loans in turn being guaranteed by Government and repayable over the term of the loan from income generated through tolling.[8] These loans were concluded and GFIP commenced only after the declaration of the Gauteng Roads as toll roads.

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[8] SANRAL's decision to toll was also informed by a number of policy considerations including alleviating congestion, improving socio-economic wellbeing, and encouraging reliance on and thereby the development of public transport. SANRAL's first answering affidavit vol 6 pp 516—519 paras 27 to 37 and vol 7 pp 536—557 paras 61 to 81.3. The appellants blithely ignore these considerations in their attack both on the decision to toll GFIP and on the reasonableness of tolling as a mechanism.

17. Hence, GFIP was undertaken on the strength of a funding mechanism premised on the decisions to toll, which decisions are now challenged. These interlinked decisions—to implement GFIP, to fund it initially through loans, to exclude the fuel levy as a funding mechanism, to repay the loans on the basis of a user-pay principle, and to implement tolling as the chosen means of achieving "user pay"—are quintessentially policy decisions, beyond the remit of judicial review.

18. The appellants' appeal must be understood against the backdrop that initially it was this policy that they sought to challenge through the review application. This challenge cannot be sustained[9] and it is for this reason that they now seek refuge in procedural complaints. At the heart of their complaints, however, lies a dissatisfaction with tolling as the chosen funding mechanism.

19. The decisions which are challenged were informed by government's policy on expenditure financing and a series of inter-connected, logistical, spatial, developmental, economic and social considerations. This much was made clear by the Constitutional Court in the OUTA CC Judgment.[10]

20. We submit that, in the circumstances, the appeal should be approached on the bases that:

20.1. SANRAL is a specialist body with a specialised competence;

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9 As we show below, the Constitutional Court—in the OUTA CC Judgment—has already determined that the policy decision itself is not the province of the Courts. That said, the policy decision was in no way unreasonable; on the contrary, it was perfectly sound.

10 At paras [35] and at [65] to [68]. We would also refer to the *dicta* of the minority judgment of Froneman J at paragraphs [92] to [95]. See also *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) at [45] to [48].

20.2. The Court will view the administrative action that is subject to review in a holistic manner; and

20.3. The Court will be alive to the fact that there are many competing calls on the fiscus in South Africa, and that the development of roads and the modalities of their funding is but one of those.

21. We turn now to consider the factual background leading up to the declarations.[11]

Process prior to the declaration of toll roads

22. The starting point in the narrative of events giving rise to the GFIP, lies in a White Paper on National Transport Policy compiled during 1996.[12]

23. This policy document—which was itself the product of a process—recognised transport as one of Government's five main priority areas for socio-economic development.

24. The different transport needs within South Africa were disparate, including on the one hand unlocking previously isolated rural communities and alleviating poverty and access to resources for persons who were historically deprived and, on the other hand,

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11 Most of the facts are in the public domain, are not disputed and are common cause, or are not capable of being disputed by the appellants. Insofar as there remains any dispute of fact, however, any such dispute falls to be dealt with on the principles set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) and therefore on the strength of the allegations contained in SANRAL's answering affidavits.

12 The White Paper, which is to be found at Vol 22 pp 3279—3324, is discussed in SANRAL's second answering affidavit at vol 14 pp 1790—1794 para 39.

promoting economic growth and development by maintaining road infrastructure in existing urban and commercial centres.

25. This had to be achieved against the background of scarce economic resources and financial reserves. Available resources had to be allocated to where they were most needed, and alleviating poverty and improving access for rural and dispossessed communities was seen as a priority.

26. Within that context, tolling had an important role to play in providing for road development and infrastructure improvements, without thereby imposing further demands on National Treasury and without diverting resources away from those transport needs where tolling could not feasibly be implemented.

27. Tolling of roads wherever possible was seen as a viable and desirable means of increasing the economic resources available to meet transport infrastructural development. This would of necessity have to be carried on against the background of long-term planning and sound financial management and fiscal responsibility.

28. The implementation of tolling in areas where it could be sustained was both necessary and desirable. The studies relied on by SANRAL show that the cost of tolling in Gauteng would be borne by those households that can most afford it. In other words, from a socio-economic point of view, the tolling of the GFIP frees up other economic resources so that they may be diverted to impoverished areas which most need it.[13] This is, of course, important inasmuch as it reflects that the cost of tolling was something which SANRAL considered could, in principle, be borne by the people

[13] SANRAL's second answering affidavit at vol 14 pp 1930—1935 para 234.

who would use the Gauteng roads.[14] In addition to these considerations of distributional equality, the user pays principle was found to have other advantages: it provides direct incentives for users to weigh the costs of using a valuable public resource in a prudent way.

29. In January 1998, the Gauteng Government published a proposed toll road strategy for Gauteng, which recognised the lack of traditional funding for the development of Gauteng roads and which accepted in principle the use of tolling as a funding mechanism.[15] This policy document, which was generally published in April 1998, is referred to in the founding affidavit on the basis that tolling had its origins in this document.[16] Although this is not entirely correct (GFIP and the tolling thereof can trace its origins much earlier), the appellants acknowledged that the decision to implement tolling, which was taken in 2008, had its origins in processes that were underway more than ten years earlier.

30. In December 2001, the Gauteng Government published a further report, being a macro-economic analysis of the Gauteng toll road strategy.[17]

30.1. The document set out the enormous advantages to be derived from improvements to the Gauteng roads and considered those advantages as against the cost of the improvements that would be required.

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14 In their affidavits OUTA et al stress the circumstances of those people who, they contend, can least afford tolling and who have no transport alternatives open to them. it is unfortunately so that there are some people who will feel the effects of tolling more acutely than others, but this is inevitably so irrespective of which funding mechanism is chosen. This does not mean that the system itself is flawed, irrational or unreasonable. If the complete absence of deleterious effects was required, then no system could ever be implemented.

15 SANRAL's second answering affidavit at vol 14 pp 1794—1796 paras 42—45.

16 FA vol 1 page 51 para 86; SANRAL's AA vol 6 p 492 para 11.10.1.

17 SANRAL's second answering affidavit vol 14 pp 1801—1812 paras 51—57.

30.2. The costs were high and the availability of funding limited.

30.3. The use of tolls was considered as a means of funding these costs and detailed consideration was given to the question of whether or not the costs and disadvantages of tolling would be sufficiently offset through the advantages to be derived from the improvements to road infrastructure. The conclusion was that they would.

31. Importantly, the report considers the question that if the immediate benefits to be derived from the improvement to the Gauteng roads are realised, then the use of tolling as a means of repaying those costs would be warranted. SANRAL was well aware of this interplay.[18]

32. In 2003, the former MEC for Transport and Public Works introduced the Gauteng Toll Roads Bill (Notice 1880 of 2003 in the Provincial Gazette) to give effect to the policy.[19] However, this Bill was not passed into law. Instead, in 2005, SANRAL proposed to the Minister of Transport a toll road scheme to upgrade and expand the freeway network in Gauteng.[20]

33. Thus, in August 2005, SANRAL prepared what was termed a "Gauteng Freeway Improvement Proposal", which was a precursor to a formal submission to the Transport Minister and which covered many of the areas of debate traversed above.[21]

34. Ongoing development of the thinking behind GFIP was carried on by and on behalf of the Gauteng Government. In September 2005, a macro-economic analysis and

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18 SANRAL's second answering affidavit vol 14 p 1812 para 58.
19 FA vol 1 p 51 para 88; SANRAL's AA vol 6 p 493 para 11.10.2.
20 FA vol 1 p 52 para 91; SANRAL's AA vol 6 p 493 para 11.10.3.
21 SANRAL's second answering affidavit vol 14 pp 1813—1814 paras 60—61.

projections relating to road infrastructure was prepared, which highlighted the deleterious effects of the deterioration of the Gauteng roads and which stressed the need for improvements to be undertaken expeditiously.[22]

35. In August 2006, SANRAL appointed an independent consultant to conduct specialised toll and traffic research studies and modelling for the GFIP.[23]

36. In June 2006, the working group referred to above produced a draft report.[24] This proposal was refined and ultimately finds form in the so-called 2006 Proposal of September 2006 under the title "Gauteng Transportation Integration Process: Proposal for Gauteng Freeway Improvement Scheme" dated September 2006,[25] a large portion of which was devoted to considering the various funding options available to finance the upgrade of the freeway system.[26] The proposal not only considered five possible funding models but also analysed the advantages and disadvantages of each funding model.[27] Tolling was ultimately proposed as the most appropriate method of funding because:

36.1. It enables the mobilisation of substantial capital funds upfront, usually through debt equity, for the construction of infrastructure. This is in contrast to traditional tax-supported highway financing.[28]

36.2. A preliminary financial analysis of the scheme showed that it could be implemented as a state toll road which would provide excellent benefits to

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22 SANRAL's second answering affidavit vol 14 pp 1817—1818 para 63.
23 SANRAL's second answering affidavit vol 14 p 1828 para 73.
24 SANRAL's second answering affidavit vol 14 pp 1818—1821 paras 64—68.
25 SANRAL's AA vol 7 p 696 para 237.2.3; SANRAL's second answering affidavit vol 14 at p 1821 para 69. A copy of this report is annexure NA6 to the answering affidavit (vol 9 pp 974—1006).
26 SANRAL's AA vol 7 p 557 para 82.
27 SANRAL's AA vol 7 p 557 para 82.
28 SANRAL's AA vol 7 p 557 para 82.

road users and an acceptable tariff.[29]

37. In October 2006, the GFIP Proposal was tabled in a detailed and comprehensive presentation given to the AA.[30]

37.1. The proposal made it clear that GFIP would be funded through tolling and included indicative costing. There was no principled objection at that stage from the AA and there was no public outcry from its tens of thousands of members.

37.2. This is, of course, important, because it shows the extent to which SANRAL was prepared to go and did go towards consulting directing with members of the public through representative organisations. This was consultation which SANRAL was not required by the SANRAL Act to undertake.

37.3. It is also important insofar as it dispels the myth, put forward by OUTA et al, that no single person could previously have acted to resist tolling: representative associations were well aware of the impending tolling of the GFIP, but did nothing then to galvanise public opinion. In this regard, it cannot be that civic organisations are allowed to be supine and, at the last minute, institute proceedings which they could and should have instituted much earlier.

37.4. As we show below, SANRAL also consulted with other representative organisations.

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29 SANRAL's AA vol 7 p 557 para 82.

30 SANRAL's second answering affidavit vol 14 pp 1821—1828 paras 70—72.

38. From 2006 to mid-2007, SANRAL made several presentations to the Gauteng provincial government and metropolitan councils and portfolio committees.[31] As part of this process, the provincial and metropolitan council representatives participated in cluster meetings which focussed on traffic and toll studies that were then being conducted. These studies explored, inter alia, the most equitable toll strategy and the impact of tolling on diversion to and attraction from the supporting road network onto the freeway network.[32]

39. We set out in some detail these background facts because it demonstrates the extent of the policy debate that SANRAL was engaged in and how it engaged on these issues with the municipalities and the Gauteng Province. This type of policy debate is the domain of government and, for this reason, what SANRAL put before these entities differs materially from that which it would put before the members of the public.

40. We revert to this below in considering the argument advanced by the appellants concerning the extent of the detail that SANRAL, in its advertisements to the general public, was required to provide. Suffice it to say now that the appellants' argument—that SANRAL should have given to the public, under section 27(4)(a) of the SANRAL Act, the same level of detail as it was required to give to the Gauteng Premier and the municipalities under section 27(4)(b) of the SANRAL Act—is plainly an untenable interpretation of the Act.

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31 SANRAL's AA vol 6 p 518 para 35; SANRAL's second answering affidavit at vol 14 pp 1837—1838 para 92—93.

32 SANRAL's AA vol 6 p 518 para 36.

41. There was also a report made to the Department of Environment[33] and to the Gauteng Legislature Portfolio Committee.[34]

42. The reports made by SANRAL included a comprehensive 120 page presentation made to the Gauteng Government in April 2007. This report confirms that the adoption of the GFIP as a user-funded development was both rational and reasoned.[35] More importantly, as SANRAL's second answering affidavit shows, the question of costs was considered and it was shown that these costs were not disproportionate to international experience.

43. Whilst this process was underway, SANRAL reported back to the Transport Minister in December 2006 and March 2007[36] and, in May 2007, Alli presented a memorandum to the SANRAL Board recommending that GFIP be implemented and that it be funded through tolling.[37] A second memorandum was presented to the SANRAL Board in August 2007.[38]

44. The independent experts retained by SANRAL provided their draft traffic and toll feasibility study report.[39] The report considered the likely costs of tolling and maintenance as a percentage of total revenues and on certain collection assumptions. A second report was provided by these experts in July 2007, which again considered the detailed financial aspects of the proposed tolling of GFIP, including the cost of

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33 SANRAL's second answering affidavit at vol 14 p 1838 para 94.
34 SANRAL's second answering affidavit at vol 14 pp 1841—1843 paras 101—102.
35 SANRAL's second answering affidavit vol 14 pp 1829—1831 paras 75 to 81. A similar presentation was made to the Department of Transport: vol 14 pp 1831 para 82.
36 SANRAL second answering affidavit vol 14 pp 1828—1829 para 74.
37 SANRAL's second answering affidavit vol 14 pp 1831—1835 paras 84—86 and 1838—1839 para 95.
38 SANRAL's second answering affidavit vol 14 pp 1841 para 99.
39 SANRAL's second answering affidavit at vol 14 pp 1835—1837 paras 87—91.

tolling.[40]

45. In July 2007, the National Department of Transport submitted the GFIP toll road scheme as a proposal to national cabinet.[41] The proposal dealt with the various funding models and advocated a user-based toll scheme with the electronic recording of tolls.[42] The proposal also indicated that the anticipated toll that would be applicable if the scheme was adopted would be in the region of 50 cents per kilometre.[43] This estimated tariff was reported to the media in the same period.[44]

46. In July 2007, cabinet approved the implementation of the GFIP as a state implemented toll scheme[45] and in October 2007, the then Minister of Transport officially announced the launch of the GFIP.[46]

47. The launch of the GFIP by the Transport Minister on 8 October 2007 saw the Minister, SANRAL and the Director General: Transport all give speeches. At the launch, the general press (print, radio and TV) was present. In his address, the Director General: Transport indicated that the anticipated cost per kilometre would be 50c.[47]

48. Days later, SANRAL published its notice of intent to toll the relevant roads (excluding the R21)[48] in various Government Gazettes together with diagrams of the relevant

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40 SANRAL's second answering affidavit vol 14 pp 1839—1840 paras 96—97.
41 FA vol 1 p 52 para 92; SANRAL's AA vol 6 page 493 para 11.10.4
42 SANRAL's AA vol 7 p 571 para 93
43 SANRAL's AA vol 6 p 519 para 37 and vol 7 p 696 para 237.2.5. These allegations are not disputed.
44 SANRAL's AA vol 6 p 519 paras 38 and 39 read with Annexure NA2 (at vol 8 p 764—vol 9 p 966).
45 FA vol 1 p 52 para 93; SANRAL's AA vol 6 p 493 para 11.10.5
46 FA vol 1 p 52 para 94; SANRAL's AA vol 6 p 493 para 11.10.6
47 SANRAL's second answering affidavit vol 14 p 1843—1844 paras 104—107.
48 The R21 was originally a provincial road and therefore had to be declared a national road before it could be declared a toll road under section 27(1) of the SANRAL Act. This process took place during April 2008.

road sections.[49] These notices were published in English and Afrikaans.[50]

49. At or about the same time, the notices and diagrams were also published in various newspapers.[51] These notices invited comments from the general public by 14 November 2007 – approximately one month from the date of publication of the notices.[52] This was in accordance with the period stipulated in section 27(4)(a)(ii) of the SANRAL Act.[53]

50. Letters detailing the same information as the notices were also sent to various local and district municipalities affected by the proposed declaration.[54] The closing date for comments for public authorities was 14 December 2007.[55] This was in accordance with the period stipulated in section 27(4)(a)(ii) of the SANRAL Act.[56]

51. We pause to remark that the appellants base their appeal most fervently on a complaint that not enough was done by SANRAL to bring the proposed tolling of GFIP to the public's attention and that the toll declarations fall to be reviewed because of a lack of procedural fairness.

52. These statements are simply wrongheaded given the extent of SANRAL's engagement on the toll declaration process, which included:

52.1. SANRAL published notices in compliance with its statutory obligations under the SANRAL Act and in various newspapers with wide circulation in Gauteng;

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49 FA vol 1 p 52 para 95; SANRAL's AA vol 6 p 493 para 11.10.7
50 FA vol 1 p 54 para 97; SANRAL's AA vol 7 p 696 para 238
51 FA vol 1 p 56 to 57 paras 99 to 99.5; SANRAL's AA vol 6 p 494 para 11.10.8
52 FA vol 1 p 59 para 104; SANRAL's AA vol 6 p 494 para 11.10.9
53 FA vol 1 p 60 para 105; SANRAL's AA vol 7 p 699 para 244
54 FA vol 1 p 57—58 paras 100 to 11.6; SANRAL's AA vol 7 p 697 para 240
55 FA vol 1 p 59 para 104; SANRAL's AA vol 6 p 494 para 11.10.9
56 FA vol 1 p 60 para 105; SANRAL's AA vol 7 p 699 para 244

the notices were prominent advertisements;

52.2. SANRAL and the Department of Transport publicly launched the GFIP and explained its nature and import, as well as the fact that it was to be tolled;

52.3. An indicative cost of tolling was given;

52.4. SANRAL engaged directly with interested organisations and civic groups, including the AA and SAVRALA.

53. The issue harks back to the reasoning of Vorster AJ: the appellants' erroneous assumption that every member of the public who might use the Gauteng Roads had a right to be informed of the proposed tolling of the GFIP. SANRAL had an obligation to take reasonable measures to inform the public generally, which it plainly did.

54. In response to the Notices and the invitation extended in those notices for people to comment, SANRAL received 82 written representations from the public.[57] Not one of the appellants, or their members, submitted any representations during this period.[58] Comments were also received from the South African Bus Operators Association—again a representative association.[59]

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57 FA vol 1 p 60 para 107

58 SANRAL's AA vol 7 p 699 para 246.2. In their replying affidavit, the appellants did not deny that they never made any representations, but alleged that their failure to do so was because of the inadequacy of the notice (RA vol 11 p 1372 para 583). This explanation is singularly unsatisfactory in light of who the appellants are and the identity of the members they represent.

59 SANRAL's AA vol 6 p 523 para 49

55. SANRAL read and responded in writing to every one of these responses individually.[60]

56. No person who made representations to SANRAL provided SANRAL with any further comments after receiving SANRAL's response.[61]

57. In November 2007 an economic analysis of the proposed GFIP was completed for SANRAL by yet further independent experts.[62] The report specifically addressed the cost of tolling versus the benefits to be derived, including the costs of tolling, which were estimated to be as much as 17% of revenue collected. The report concluded that the benefits overwhelmingly outweighed the costs such that the project was an eminently worthwhile one.

58. Between November 2007 and February 2008, SANRAL applied for and was granted several environmental authorisations to commence with and continue the upgrade of the freeways for phase one of the GFIP. These upgrades included the construction of roads wider than four meters and the dredging, excavating, infilling, removing or moving of rock, soil or sand in a stream or wetland, the above-ground storage of a dangerous good, the construction of masts, and the construction of toll platforms on which toll gantries were eventually erected.[63]

59. On 15 January 2008, SANRAL applied to the Minister of Transport for approval of the declaration of the relevant roads (excluding the R21) as toll roads.[64] In accordance with section 27(4)(c) of the SANRAL Act, this application was accompanied by a

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60 FA vol 1 p 60 para 108; SANRAL's AA vol 7 p 700—701 paras 247 and 249.2
61 SANRAL's AA vol 7 p 701 para 249.3. These allegations are not disputed by the appellants.
62 SANRAL's second answering affidavit vol 14 p 1846—1851 paras 116—124.
63 FA vol 1 p 116 paras 282 to 283; AA vol 7 p 741 para 313 read with p 743 para 320.4
64 FA vol 1 p 61 para 111; SANRAL's AA vol 6 p 494 para 11.10.10

report prepared by SANRAL which was entitled the "Intent to Toll Report". In this report, SANRAL summarised the main issues which were raised in the comments received. The report also provided SANRAL's detailed responses to these issues. These are quoted verbatim in paragraph 51 of SANRAL's answering affidavit. The Minister was also provided with a record of the complete submissions as an annexure to the report.[65]

60. The Minister considered the application and granted approval for the declaration process on 11 February 2008.

61. In relation to the process described above, it is immediately apparent that the decision to implement GFIP and to fund it through tolling was not a hasty decision and it was not one that SANRAL undertook without due and proper consideration. It is also apparent that SANRAL drew on the resources and expertise of a wide range of people. As Alli says in SANRAL's second answering affidavit:

> *At the outset and as the record reveals, decisions of this nature are not one dimensional, but are multi-faceted and a myriad different factors are taken into account, including the availability of funding. A perusal of the record reflects that SANRAL did not act alone in coming to its decision to declare the GFIP roads as toll roads: it drew on the specialist knowledge of numerous independent experts, weighed all of the evidence in favour of tolling and against, and ultimately decided on a conspectus of all of the information before it that the immediate upgrading and improvement of the GFIP, to be funded through tolling, offered substantial benefits that justified the adoption of tolling for the GFIP. The Transport Minister agreed with the conclusions*

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65 SANRAL's AA vol 7 p 701 para 249.4. These allegations are not disputed by the appellants.

reached by SANRAL.[66]

62. On 28 March 2008, SANRAL declared the relevant roads (excluding the R21) as toll roads in accordance with section 27(1) of the SANRAL Act.[67]

63. On 28 July 2008, after following the same notice and comment procedure as had been adopted for the other declared roads, SANRAL declared sections 1 and 2 of national road R21 as a toll road.[68]

The GFIP commences

64. On 9 May 2008, SANRAL issued a media release to the effect that it had awarded seven contracts for the first phase of the GFIP.[69]

65. On 24 June 2008, work began on the GFIP and continued for the next two years in order to complete certain sections of the proposed new toll network for the FIFA 2010 World Cup.[70] After a three-month period of inactivity during the FIFA 2010 World Cup, the construction recommenced and continued until 2011.[71]

66. During this extended period of construction, the appellants, their members and their associate members did nothing. They literally stood by and watched over the years as construction work took place to effect substantial upgrades to the affected GFIP highways and the related infrastructure, including the construction of bridges,

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66 SANRAL's second answering affidavit at vol 14 p 1789 para 36.
67 FA vol 1 p 61 para 113; SANRAL's AA vol 6 p 494 para 11.10.11
68 FA vol 1 p 66 para 127; SANRAL's AA vol 7 p 703 para 254
69 FA vol 1 p 66 para 130; SANRAL's AA vol 6 p 495 para 11.10.14
70 FA vol 1 p 68 para 134; SANRAL's AA vol 6 p 495 para 11.10.15
71 FA vol 1 p 68 para 137; SANRAL's AA vol 6 p 495 para 11.10.16

flyovers, on- and off-ramps, and related services.[72]

67. The completion of the GFIP was the culmination of a lengthy and involved process that started more than a decade ago and which was driven by the need to upgrade and improve the Gauteng roads and related infrastructure. That said, the process would not have been possible at all, but for the promise of funding to be derived through tolling.[73]

Toll tariffs

68. On 4 February 2011, the Director-General for Transport in the national government published the toll tariffs for the proposed toll network in terms of section 27(3)(c) of the SANRAL Act.[74] At that stage, tolling was intended to commence on 23 June 2011.

69. In response to the public outcry which followed the publication of the toll tariffs, the Department of Transport suspended the application of the toll tariff and the Minister of Transport announced that a Steering Committee would be formed to address the public's e-tolling concerns.[75] The mandate of the Steering Committee was to review the amount of the toll tariffs. In the Minister's words, the Steering Committee was formed "to address on a consultative basis, the proposed tariff structure".[76] Revisiting the process of tolling itself was never part of the Steering Committee's mandate.[77]

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72 SANRAL's AA vol 6 p 477 para 9.11. In the replying affidavit, the appellants allege that they could not have brought a review application before the tariffs had been published, but do not deny that they stood back and watched whilst the GFIP construction was undertaken: RA vol 11 p 1263—1269 para 89—116

73 SANRAL's second answering affidavit vol 14 p 1858—1860 paras 141—147

74 FA vol 1 p 69 para 146; SANRAL's AA vol 6 p 496 para 11.10.17

75 FA vol 1 p 70 para 151; SANRAL's AA vol 6 p 496 para 11.10.19

76 FA vol 1 p 71 second paragraph

77 SANRAL's AA vol 7 p 705 para 257.2

70. That the Steering Committee's mandate was limited to this extent was clearly known to the appellants. They describe in detail how at each meeting of the Steering Committee, it was made clear at the outset that the "user pays" principle had been accepted and that tolling of the proposed freeway network was a given.[78]

71. On 10 August 2011, cabinet approved the revised toll tariffs for phase 1 of the GFIP.[79]

72. On 27 October 2011, SANRAL issued a statement indicating that e-toll registration would commence from 7 November 2011.[80]

73. On 6 November 2011, the Department of Transport confirmed that the tolling of phase one of the GFIP was proceeding.[81]

74. At a hearing at the Gauteng Provincial Legislature on 11 November 2011, the announcement was made that the tolling of the proposed roads and the so-called user-pays principle were in place.[82]

75. On 7 February 2012, the Minister of Transport again confirmed that the user-pay principle would not be abandoned.[83]

76. On 22 February 2012, the Minister of Finance confirmed in his budget speech that the toll system would be implemented but indicated that there would be reductions in the

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78 FA vol 1 p 72 para 156; see further page 74 para 163
79 FA vol 1 p 74 para 166; SANRAL's AA vol 6 p 497 para 11.10.23
80 FA vol 1 p 75 para 172; SANRAL's AA vol 6 p 498 para 11.10.26
81 FA vol 1 p 75 para 173
82 FA vol 1 p 76 para 176; SANRAL's AA vol 6 p 498 para 11.10.27
83 FA vol 1 p 78 para 185

amount of the toll payable.[84]

77. Citing the budget speech as the trigger for their application, the appellants launched an urgent application on 23 March 2012 in which they sought an order immediately interdicting tolling pending the outcome of their review application. Ultimately they have proved to be unsuccessful in both the interdict application as also in the review application.

C. PROCEDURAL FAIRNESS

78. The appellants' primary attack on the toll declarations—and the Transport Minister's approval of them—lies in complaints of procedural unfairness related to the notice that SANRAL was required to give the public of the proposed declarations.

79. The challenge cannot be that notice was not given: as we have shown above, notice very plainly was given to the public. The complaint is that the notice that was given was inadequate, first because it did not comply with the requirements of section 27(4) of the SANRAL Act and, secondly, because the extent of the notice given was inadequate when regard is had to the requirements of the Constitution and PAJA.

80. We deal with each of these complaints in turn, starting with the proper interpretation of section 27(4).

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[84] FA vol 1 p 78 para 188; SANRAL's AA vol 6 p 498 para 11.10.28

What does section 27(4) require?

81. The appellants' first attack on SANRAL's toll road declarations and the Transport Minister's approval of them lies in an interpretation of the provisions of section 27(4) of the SANRAL Act.

82. The appellants contend that SANRAL ought, in terms of section 27(4) of the SANRAL Act, to have given the public notice that included (a) the underlying proposal (i.e. the road project and its anticipated costs), (b) the extent to which such costs are proposed to be funded through tolling and (c) the anticipated toll tariff.[85] The notices' failure to include this information is said to have led to a lack of meaningful consultation with the public, in breach of section 27(4)(a) of the SANRAL Act, thereby rendering the toll road declarations and their approvals reviewable.

83. To bolster this argument, the appellants say that section 27(4)(b) provides that the Premier and an affected municipality be given notice and an opportunity to comment.[86] From this it is concluded that the Premier and the affected municipality can only comment meaningfully if they receive a compendious notice.[87] The Transport Minister must also receive proposals, under section 27(4)(c), which are the proposals given to the Premier and the Municipality.

84. According to OUTA et al, if this is what the Premier and the affected municipality will receive and what must, in turn, be furnished to the Transport Minister, then there is no reason why members of the public should not get the same information. They must all get the same notice.

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85 Appellants' heads para 2.31.
86 Appellants; heads para 2.23.
87 Appellants' heads para 2.24.

85. We submit that this argument is not sustainable in the light of the clear wording of the SANRAL Act.

85.1. The language and structure of section 27(4) of the SANRAL Act draws a distinction between what the Premier, the municipality and the public must be informed of, on the one hand, and the information the Transport Minister must be furnished with, on the other.

85.2. Section 27(4)(c) provides that, as a condition for his approval of a toll road declaration, the Transport Minister must be furnished with SANRAL's "proposals" underlying the toll declaration that is sought, as well as a report on the comments and representations received. There is no similar provision in relation to the Premier, the municipality or members of the public. The Premier, municipality and members of the public are required to comment on "the proposed declaration".

85.3. There is a material linguistic distinction between, on the one hand, being given an opportunity to comment on "the proposed declaration" of a toll road and, on the other, being furnished with SANRAL's proposals for the proposed toll declaration in order to determine whether to approve the toll declarations.

85.4. Under the scheme of section 27(4), it is the Minister who receives SANRAL's "proposals". The public, the Premier and the municipality are only notified of the proposed toll declaration and afforded an opportunity to comment on it. It follows from this that members of the public, the Premier and the municipality concerned would not be entitled to the information which is placed before the Minister because only section 27(4)(c) places an obligation on SANRAL to

forward its proposals to the Minister. *Expressio unius est exclusio alterius.*[88]

85.5. More importantly, however, section 27(4)(a) spells out in plain and unambiguous language the information that must be given to members of the public. There are three things which, in terms of section 27(4)(a), a notice must do:

85.5.1. First, it must give notice, generally, of the proposed declaration. The first object of the notice under section 27(4)(a) is therefore to inform the public of the fact that a declaration is proposed.

85.5.2. Secondly, the notice must in terms of section 27(4)(a)(i) "*give an indication of the approximate position of the toll plaza contemplated for the proposed toll road*". This plainly alerts members of the public who might be affected by the locations of the toll plaza.

85.5.3. Thirdly, the notice in terms of section 27(4)(a)(ii) must invite "*interested persons to comment and make representations on the proposed declaration and the position of the toll plaza*". This wording could not be clearer.

85.6. The object of a section 27(4)(a) notice is thus limited to (i) informing the public that a road is proposed to be declared a toll road, (ii) indicating the proposed location of toll plazas and (iii) allowing members of the public an opportunity to comment on (i) and (ii).

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88 *Poynton v Cran* 1910 AD 205 at 222.

85.7. Linguistically, the interpretation contended for by the appellants leads to an absurdity:

85.7.1. The proposals that are to be put before the Transport Minister must include the results of the consultative processes undertaken in terms of sub-sections 27(4)(a) and (b).

85.7.2. If the information that must be made available to the public is coextensive with the proposal that must be put before the Transport Minister, then the public must be given the responses that the public are yet to give in relation to the proposals.

85.7.3. At best for the appellants this is impossible of fulfilment; at worst, it results in a gyre of never-ending proposal, comment and proposal.

85.8. Once this absurdity is revealed, the appellants' argument becomes untenable.

85.9. Furthermore, the logic of OUTA et al's argument is that the vast reams of information which must be placed before the Transport Minister so as to enable him properly to act as a check and balance on the exercise by SANRAL of its powers, must also be contained in the notice to the public. But that level of detail could not plausibly be published and made available to members of the public. The extent of the information in fact placed before the Transport Minister belies any such suggestion.

85.10. On a purposive approach or even on what has recently been described by this Court as a common-sense approach to interpretation,[89] therefore, the arguments advanced by the appellants must be rejected.

86. It is therefore clear that the person who, under the SANRAL Act, is to be furnished with the proposals is the Transport Minister, and not the Premier, the affected municipality, or members of the public. On the strength of the information contained in the proposals, the Transport Minister may approve the toll declarations. The Premier, the municipality and members of the public do not have approval or veto powers in relation to toll road declaration..

87. We conclude that the appellants' argument on the meaning of section 27(4) should be rejected.

What does meaningful consultation require?

88. The appellants say that the phrase "*notice of the proposed declaration*" in section 27(4)(a) must be construed so as to conduce to a meaningful consultation process with members of the public. What is meaningful, it is said, will vary with context. So, for example, a notice will contain less if what is being proposed is to raise toll for maintenance of an existing road, but considerably more if what is proposed is (as in this case) a large-scale reconstruction of roads.[90]

89. It is not clear why, if we are correct in our interpretation of section 27(4), that should mean that the consultation called for in section 27(4)(a) of the SANRAL Act is

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89 *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at [17] to [26].

90 Appellants' heads para 2.18.2.

meaningless. That is, it is not clear how, in commenting on the positioning of a toll plaza, a member of the public would be disadvantaged by not having in her possession the proposals underlying the declaration of a toll road, the underlying costs or the proportion of those costs which will be defrayed by tolls.[91]

90. Nor need a member of the public know what the toll tariff will be in order to comment on the declaration of tolls roads. It does not help to say, as the appellants contend, that the decision to levy tolls (which is made under section 27(1)(b)) is inextricably linked with the declaration of tolls, so that the notice as to the proposed declaration must include the toll tariff.[92]

90.1. First, the decisions are not inextricable: indeed, they are different judicial acts. As the Constitutional Court pointed out at [41] of the OUTA CC Judgment, the levying of tolls is a separate juristic act performed by the Minister and not, as with the declaration of toll roads, by SANRAL with the Minister's approval.

90.1.1. This is a distinction that is borne out by the plain meaning of section 27 of the SANRAL Act.

90.1.2. The powers are exercised by different organs of state: SANRAL declares a road as a toll road, albeit with Ministerial approval and after consulting *inter alia* other organs of state and the public. The Transport Minister determines the toll that is payable, on the recommendation of SANRAL, but without having to consult with

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91 Appellants' heads para 2.31.
92 Appellants' heads paras 216 and 2.17.

other organs of state.[93]

90.1.3. The time periods for the exercise of these powers differ: the determination of the tolls that are payable presupposes that the road has already been declared a toll road.

90.1.4. There is no requirement—whether express or implied—in section 27(4), which links the approval to be given by the Minister to the disclosure by SANRAL of the tolls that the Transport Minister will himself determine under section 27(3). If the legislature had intended that the amount of toll be disclosed, it could very easily have said as much.

90.1.5. On the plain meaning of section 27 of the SANRAL Act, read in context, therefore, there is no room for the argument advanced on behalf of the appellants.

90.2. Secondly, the tariffs can only be finally determined once the costs are known. This can only be achieved after the project has been given the go ahead, the scope of the work finally determined, the tenders have been issued and awarded, and the cost of financing or funding established. Plainly, as we set out above in the section describing SANRAL's role as an organ of state, this can only happen after it has secured a funding mechanism—in this instance tolling.

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93 Although not expressly called for in the SANRAL Act, the determiantion of the tariffs would, in terms of the Constitution and PAJA, also be required to follow a public participation process, as is in fact occurring at present in relation to the GFIP.

90.3. Thirdly, if there is a conditionality between the indicative tariff and the proposed toll declaration, then the toll declarations may be undone at a very late stage if, when the tariffs are finally determined and made known through the process envisaged in section 27(3) of the SANRAL Act, the final tariffs differ substantially from the indicative tariffs. This could also never have been intended by the Legislature as it would potentially leave SANRAL without funding for infrastructure development that it has already committed to and costs that it has already incurred. It could also leave National Treasury exposed to unforeseen expenses.

90.4. Finally, OUTA et al's argument on this aspect is premised on the contention that there is no public participation process required before the Minister determines the toll tariffs.[94] But this is incorrect. As OUTA et al themselves submit, the SANRAL Act must be read together with PAJA and section 33 of the Constitution. The Minister's decision to impose toll tariffs is a separate administrative act which gives rise to its own public participation requirements. Prior to that determination being made by the Minister, therefore, administrative justice requires that the public be given an opportunity to comment on the proposed tariffs.

91. Any other reading of the SANRAL Act would lead to absurdities. The more natural and, we submit, sensible reading of the requirement of the SANRAL Act is therefore that the process of determining the tariffs—with public involvement and comment—follows at a much later stage and is in any event not linked to the process of declaring the roads as toll roads.

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94 Appellants' heads para 2.29

92. At all events, since members of the public have a right to comment on the Minister's tariff determination, it follows that OUTA et al's contention—that if members of the public cannot comment on the proposed declaration of tolls they cannot comment on the toll tariff—is not correct.

93. There is another difficulty for OUTA et al. Their interpretation, which ignores the plain meaning of the SANRAL Act, is in truth nothing less than a reading-in: that is, reading into the SANRAL Act requirements it does not contain.[95] But no reading-in is possible in the absence of an attack on the constitutionality of the SANRAL Act. Reading-in is a remedial measure following upon a finding of unconstitutionality.[96]

94. There has been no challenge to the constitutionality of the SANRAL Act and a reading-in, under any guise, is accordingly impermissible. The text of section 27(4) of the SANRAL Act is clear: it does not require the furnishing of proposals, policies, costs and toll-tariffs to members of the public.

Is the SANRAL Act inconsistent with PAJA?

95. OUTA et al next contend that, should their interpretations of the SANRAL Act be rejected, then the Act is procedurally unfair for being inconsistent with PAJA.[97]

96. Section 4(1)(d) of PAJA gives an administrator—in this instance SANRAL—an option, where the administrator is empowered by any empowering provision to follow a procedure which is fair but different, to follow that procedure. Section 27(4) of the

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95 Appellants' heads paras 2.7-2.15.

96 *National Coalition for Gay & Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) at [24]

97 Appellants' heads para 2.35.

SANRAL Act was a "fair but different" procedure contemplated in PAJA.

97. OUTA et al's counter to this is that SANRAL could follow that option only if it was a fair procedure and that, on their interpretation, section 27(4) is an unfair procedure.[98] Therefore, it is concluded, SANRAL was obliged to follow the procedure set out in sections 4(2) (hold a public enquiry) or 4(3) (follow a notice and comment procedure) under PAJA.[99]

98. In their enthusiasm to criticise section 27(4)(a) of the SANRAL Act, however, OUTA et al have ignored the provisions of PAJA and, more importantly, the indicative guidelines contained in items 17 and 18 of the PAJA Regulations.

99. OUTA et al contends that the 30-day period provided for in section 27(4)(a) of the SANRAL Act, within which members of the public were asked to comment on the notices, was insufficient.[100] PAJA does not assist the appellants in this regard: the PAJA Regulations too require no more than 30 days.

100. Furthermore, the SANRAL Act itself contains its own remedy for any period of publication which is deemed insufficient by the public. Section 56 of the SANRAL Act provides that where a notice issued by SANRAL specifies a time period within which a person must do something, that person may apply to SANRAL for an extension of the time period. The reference to 30 days in section 27(4)(a)(ii) of the SANRAL Act must therefore be read subject to the general power which SANRAL has to extend the period prescribed in a notice about a proposed toll declaration if it receives an application for an extension of the period.

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98 Appellants' heads paras 2.37 and 2.38.
99 Appellants' heads para 2.61.
100 Appellants' heads para 2.51.

101. OUTA et al also complain that the manner of publication of the notices—in the Gazettes and in newspapers circulating in the province, including English and Afrikaans medium newspapers—was inadequate. Once again, however, the method of publication comported with the requirements of the PAJA Regulations. Item 18(1) of the PAJA Regulations regard publication in newspapers and the Government Gazette as sufficient.

102. To succeed in this argument, OUTA et al have to show, by reference to facts, that this case demanded something more than what the Legislature regarded as sufficient in section 27(4)(a)(ii), read with section 56, of the SANRAL Act. There are no such facts.

103. There is no allegation, for example, that any of the appellants, or anyone for that matter, attempted to provide comments after the lapse of 30 days and was refused, nor, for that matter, that an application for an extension of time was made by any member of the public under section 56 of the SANRAL Act.

103.1. SANRAL has in any event said that it would have considered any late responses, had they been received.[101]

103.2. No one tried to submit comments and was denied this opportunity after the 30-day period. No one complains that, because of the inadequate notice, they were ignorant of the toll road declaration process. This omission from OUTA et al's founding papers is significant. There is no averment in the founding or supplementary founding affidavit that OUTA et al's members were, as a matter of fact, ignorant of the proposed toll declarations.

[101] Record vol 7 page 699 para 244 of SANRAL's first answering affidavit. This is, in any event somehing which is already catered for in the PAJA regulations.

103.3. In the circumstances, there is no warrant for saying that the 30-day notice period was insufficient and therefore unfair.

104. OUTA et al also embark on a campaign for the illiterate and sight impaired members of the public whom, they claim, were compromised in their ability to comment on the proposed toll declarations because the publicity was limited to advertisements on the inner pages of newspapers. As we have shown above and deal with again below, this argument belies what actually happened around the time of the declarations. As a matter of fact, there was extensive publicity and media coverage of this flagship project.

105. SANRAL's conduct was therefore reasonable and fair in the light of the circumstances.

106. PAJA does not require that every person has a right to have knowledge of the proposed administrative action, only that SANRAL should have taken reasonable steps to bring it to the attention of the public. This is what SANRAL did.

107. OUTA et al allege that SANRAL concealed the true magnitude of the GFIP.[102] Indeed, it is said, the notices were "*positively misleading*".[103] This proposition is simply incorrect when regard is had to the facts pertaining to the process in fact followed by SANRAL.

108. In addition to the public notifications and the media coverage and publicity, SANRAL engaged actively with representative groups and with those persons who in fact responded to the invitations for comment.

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102 Appellants' heads para 2.45.
103 Appellants' heads para 2.44.

108.1. SAVRALA, a constituent member of OUTA, participated in the process and had actual knowledge of the process whilst it was underway and before the notices were published. On its own version, SAVRALA acknowledges that, as at May 2009, it had actual knowledge of the declaration of the roads as toll roads.[104] SAVRALA acknowledges further that it "*was informed about the nature of the open-road tolling system and how it would work*"[105] and was also informed "*of the fact that the estimated cost of use of the toll roads would be about 50c per kilometre*".[106]

108.2. SAVRALA's case on its knowledge of the declarations has changed during the course of the litigation as realisation has dawned that its earlier claims as to its knowledge were false. In the founding affidavit SAVRALA claimed it first knew of the declarations in May 2009. When challenged on this in SANRAL's answering affidavit, SAVRALA came back in reply and said "*Val van den Bergh of SAVRALA came to know about SANRAL's intention to develop and toll the proposed network in about mid 2008.*"[107] In fact, however, Val van den Bergh of SAVRALA attended a question and answer session on 7 July 2007, when not only the upgrade of the roads was discussed, but also the likely tariff of 50c/km.[108]

108.3. The AA (one of the supporters of OUTA) has been aware of the process from the very outset, but did nothing.[109] The AA was invited to an extensive and detailed presentation of the proposed tolling plans and improvement to the

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104 Record vol 1 para 371 p128 of the founding affidavit.
105 Record vol 1 para 375 p128 of the founding affidavit.
106 Record vol 1 para 376 p129 of the founding affidavit.
107 Record vol 11 para 163.4.1 p 1279.
108 Record vol 9 p 1017.
109 SANRAL's Answering affidavit page 812 para 11.11.2

GFIP.[110] The AA recorded its objection to the notice of intention to toll, in a letter dated 14 November 2007. This objection dispels the myth put forward by the appellants that the people the appellants purport to represent did not know about the toll declarations.[111]

108.4. It is significant that neither of these representative organisations, who are now so active in their opposition to the tolling including, in the case of SAVRALA, as a direct litigant, did anything then to galvanise public opinion or even to foster a debate around the question.

108.5. The appellants themselves acknowledge that they and their members "*were aware that upgrades were being effected to the Gauteng freeway network as they witnessed them.*"[112] It follows that all reasonable members of the motoring public, from 2008 onwards, would have observed the construction of the upgrades and were placed on inquiry as to how this was taking place and that it had a link to the extensive public debate that had taken place concerning the tolling of the GFIP. Still, nothing was done to encourage debate on the question.

109. The appellants' complaints about the lack of opportunity for public consultation must also be seen against the background of what consultation reasonably should entail. That is, the type of consultation and the purposes that could be achieved through that consultation must be the yardstick against which a failure to consult must be measured.

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110 SANRAL's Second answering affidavit pp 2833—2840 paras 70—72.
111 SANRAL's Second answering affidavit p 2858 para 114.
112 Record vol 11 para 163.6.1 p 1279.

110. We submit that there are four types of representations that a member of the public might meaningfully make in relation to the notices. She might (a) accept the idea of tolling the identified roads; (b) she might reject it outright; (c) she might accept it with *caveats* as to what, in her view, would be acceptable to pay for it; (d) she might reject it, subject to further information as to what it would cost her.

110.1. There is nothing in the notices, as they were issued, which precluded or discouraged such responses.

110.2. Indeed, just such responses were given by members of the public. For example, Mr S Aiyer says his letter of 13 November 2007:

> *I understand that upgrading of the infrastructure is required and is expensive and thus the road users are liable for this. But I urge you to look at my case and look at the contribution I make in the form of levy's [sic] in my high fuel cost and request that I be considered for a concession.*[113]

110.3. Nothing in this letter betrays any kind of disabling ignorance induced by the alleged lack of particularity in the notice. In fact, Mr Aiyer proposes that he be afforded a concession because he is already paying a fuel levy. It is unclear how the inclusion of proposals and costs and toll tariffs would have altered Mr Aiyer's response, namely that paying tolls would be too expensive for him.

110.4. SANRAL wrote back to Mr Aiyer, saying that:

> *We appreciate your response and note your request to be considered for a discount. Your presentation will be included in the submission to the Minister of Transport for consideration.*

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113 Record vol 29 p 4455.

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It is the current practice to discount the posted tariff for various types of road users. The practice may be adhered to on this network as well.

We advise you to contact SANRAL again closer to the implementation of the tolling towards the end 2010, should the route be declared a toll road by the Minister of Transport.[114]

110.5. This was the sort of response expected of an organ of state like SANRAL.

110.6. Sun Valley Ratepayers Association, taking a more assertive position, wrote to SANRAL on 16 October 2007, saying that "*the proposed N1 road network is absurd and flawed in many respects.*"[115] They then went on to list their complaints, the first of which was environmental, relating to wetlands. The letter went on to contend that tolling would not be the most effective way of paying for the upgrade.[116]

110.7. To this SANRAL wrote a long and considered reply (four pages), dealing with each of the concerns raised by the Sun Valley Ratepayers Association.[117] Again, it can hardly be said that this engagement was meaningless.

110.8. Another example is that of Wilgers Landgoed Ingelyf, which wrote to SANRAL on 13 November 2007, complaining that the notice did not say that there would be any upgrades for a section of the N4.[118] To which SANRAL replied, in a lengthy letter, saying that the notice does include the N4 and that

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114 Record vol 29 p 4456.
115 Record vol 29 p 4458.
116 Record vol 29 p 4458.
117 Record vol 29 pp 4455-4462.
118 Record vol 29 p 4469.

it is proposed to upgrade the N4 in phases.[119]

110.9. These examples could be multiplied: they are all contained in volume 29 of the Record. They disclose one thing: the comments from members of the public were well-informed and engaging. SANRAL's answers to these comments were equally detailed and informative.

111. In view of this level of engagement between SANRAL and members of the public, it is astonishing that OUTA et al could speak of the notices as "*positively misleading*" and of the process followed as being meaningless. We conclude therefore that:

111.1. The notices were not sterile. If they were, they could not have elicited the comments they did.

111.2. The consultation process was meaningful, as is demonstrated by the letters between SANRAL and members of the public.

111.3. The process was fair and in compliance with PAJA. SANRAL was accordingly entitled to follow the section 27(4) process.

112. It follows that the notification process followed by SANRAL was not only authorised by the SANRAL Act, but it was also in conformity with PAJA and hence with the Constitution. It could hardly be said, therefore, that the publication process was inadequate to the point of being unlawful. Therefore we submit that this ground has no basis.

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119 Record vol 29 p 4476.

113. The appellants' complaints to the contrary therefore cannot sustain their appeal.

Legality

114. Having failed to show that the process was unfair, the appellants seek a declarator to the effect that SANRAL and the Minister acted outside the law.[120] This is on the basis, exposed above as baseless, that SANRAL did not follow the provisions of section 27(4) of the SANRAL Act as interpreted by the appellants, and on the basis that, if they are wrong in their interpretation, SANRAL should have but failed to follow section 4 of PAJA. We have submitted that they are wrong on both points. Accordingly, nothing more need be said of this ground.

115. In any event, OUTA et al's reliance on the principle of legality adds nothing to their case. Either they are right on their interpretation of section 27(4), PAJA and the Constitution, or they are not. If they are correct, then the impugned decisions are liable to be reviewed and set aside as procedurally unfair. If they are incorrect, then there is no basis for an order declaring that SANRAL failed to comply with section 27(), section 4 of PAJA or the Constitution.

116. In any event, resting this aspect of the case on the principle of legality does not enable OUTA et al to avoid the requirement under PAJA to avoid an unreasonable delay in applying to set aside invalid administrative decisions. As this Court has recently held in *Beweging vir Christelik-Volkseie Onderwys*, because declaratory relief is discretionary, the applicant for a declarator based on the principle of legality must

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120 Appellants' heads paras 3.4-3.6.

launch its application within a reasonable time.[121]

D. FAILURE TO CONSIDER COSTS OF TOLL COLLECTION

117. OUTA et al contend that the Minister was obliged to consider the costs of toll collection when he approved the toll declarations in terms of section 27(1)(a)(i) of the SANRAL Act.[122] We do not dispute that the Minister was required to consider the costs of toll collection as one of a myriad of considerations which impacted on the question whether to approve the toll declarations. The dispute between the parties is therefore not about whether he was obliged to consider the toll collection costs but rather whether he did, in fact, do so[123] and if so, whether there is something about the information that he considered at the time of making the decision that could vitiate the decision.[124] We address each of these issues below.

118. It is important, we submit, that the decisions and the decision-making process be assessed not with reference to what is now known, but rather in the light of what was known—and what could not be known with any certainty—as at the time that the decisions were taken.

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121 *Beweging vir Christelik-Volkseie Onderwys v Minister of Education* [2012] 2 All SA 462 (SCA) [34]
122 Appellants' heads para 4.2
123 Appellants' heads para 4.8
124 Appellants' heads para 4.16

Whether the Minister considered toll collection costs

119. The first dispute can be easily dealt with.

119.1. The then Transport Minister, Mr Radebe, has deposed to an affidavit in these proceedings in which he states unequivocally that he "*considered the cost of toll collection as one factor amongst a myriad of considerations which had to be weighed and balanced in the final decision to approve the toll declarations*".[125]

119.2. He goes on to state that "*after considering and weighing all the [relevant] elements, [he] was of the view that the cost of tolling of the Gauteng roads was acceptable having regard to the benefits to be derived from the improvements to be effected to the Gauteng roads and related infrastructure and the advantages to be derived through tolling as a funding mechanism*".[126]

120. In particular, the then Transport Minister confirms that attached to the application for his approval of the toll declarations was a September 2006 proposal which referred to the annual estimated operations and maintenance costs of R 200 million (excluding VAT). The Minister explains that he understood that the figure was based on the then available cost estimates and figures in 2006 and that he regarded the figure as not "wholly out of keeping with the costs of tolling on other projects".[127]

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125 Record vol 21 para 15 p 3189
126 Record vol 21 para 16 p 3190
127 Record vol 21 para 14 to 14.4 p 3189

121. OUTA et al contend that Mr Radebe's affidavit "*should not be accorded any probative value*" because it was filed close to the date of the hearing in the High Court.[128]

122. However, OUTA et al did not seek leave to file an affidavit in answer to Mr Radebe's affidavit and have accordingly not placed anything of what he states under oath in dispute. This is not surprising because the essence of Mr Redebe's affidavit is to explain what he took into account when he gave approval for the toll declarations. That information is peculiarly within his knowledge and thus not liable to be disputed by anyone else.

123. OUTA et al's attempts therefore to diminish the weight of Mr Radebe's evidence has nothing to do with its credibility or its veracity, neither of which are disputed. They simply claim that because it was filed late in the day it should be accorded less weight.

124. This, on its own, is not a basis for reducing the weight of Mr Radebe's evidence. In any event, however, when that evidence is considered in context, it is clear that it is not new. Mr Radebe's evidence is simply an elucidation of the evidence which had previously (and timeously) been placed before the court in the answering affidavits filed on behalf of the Transport Minister and SANRAL. Those answering affidavits made it clear that the cost of toll collection was considered by the Minister before he approved the toll declarations.

125. Paragraph 2 of the Transport Minister's first answering affidavit, set out a brief factual background which explained how the Minister decided to approve the toll declarations. In the course of describing the factual background, the deponent referred in detail to the 2006 Proposal. This section of the affidavit concluded with the

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128 Appellants' heads para 4.10

statement that the decision to adopt e-tolling as the revenue mechanism for GFIP was "*a product of a consideration of various models of funding the freeway improvement, and the adoption of one of the available options which were justified for the reasons set out in [the Proposal]*".[129]

126. This contention is baseless. In its supplementary answering affidavit, SANRAL states that prior to seeking the Minister's approval, it was required to and did commission specialist studies on various aspects of the GFIP. These included financial and toll modelling, as well as studies from economists and social scientists.[130] For example, a Toll Feasibility Study (dated May 2007)[131] was undertaken. The Toll Feasibility Study, under the heading "Toll Operating and Maintenance Costs", reflects on Tables 11-6 and 11-7 the toll operating costs (excluding routine road maintenance costs) as a total of R447 million *per annum*.[132] The initial construction costs are shown separately on Table 11-5 on page 5044 of volume 32 of the record as R11 783 billion.[133] The Toll Feasibility Study was placed before the Minister when he approved the GFIP.[134]

127. Another study, undertaken by Barry Standish of the University of Cape Town, referred to in the papers as the Interim Economic Impact Report,[135] was also presented to the Minister before he took his decision to approve tolling.[136] The Interim Economic Impact Report reflects on Table 2, under the heading "Costs of the proposed scheme", the following line items: the capital costs of the toll system infrastructure (upgrade cots); the capital costs of the operations and customer service centres; the toll system

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129 Transport Minister's first answering affidavit Vol 10 page 1074 para 10
130 Record vol 14 para 215 p 1917 of SANRAL's supplementary answering affidavit.
131 Record vol 32 p 4978 *et seq*.
132 Record vol 14 para 215.3 p 1918 of SANRAL's supplementary answering affidavit. Record vol 32 p 5045.
133 Record vol 14 para 215.2 p 1918 of SANRAL's supplementary answering affidavit.
134 Record vol 14 para 215.8 pp 1920-1921 of SANRAL's supplementary answering affidavit.
135 Record vol 31 p 4842 *et seq*.
136 Record vol 14 para 215.9 p 1921 of SANRAL's supplementary answering affidavit.

maintenance costs; and toll system related costs which, in turn, include: the costs of the tags; the toll system costs; the Violations Processing Centre (VPC); and the ORT system operating costs.[137] These, as a mere reading of the items will indicate, are operating costs.

128. That is precisely Mr Radebe's evidence. All that he did in November 2012 was to provide further details about precisely what aspects of the 2006 Proposal he considered pertinent to the issue of toll collection costs.

129. We accordingly submit that there is no basis on which to ignore the uncontested evidence of the then Minister that he took toll collection costs into account when he decided to approve the toll declarations.

Whether reliance could be placed on the toll collection estimates in the 2006 Proposal

130. OUTA et al contend that any reliance placed by the Transport Minister on the toll collection costs referred to in the 2006 Proposal was "irrational and arbitrary".[138] They make this claim for three reasons.

130.1. First, they contend that the R200 million annual figure in the 2006 Proposal was an estimate and therefore had not yet been confirmed by "specialist studies".[139]

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137 Record vol 31 p 4874.
138 Appellants' heads para 4.16
139 Appellants' heads paras 4.13 and 4.15

130.2. Secondly, they complain that the figure was "unacceptably vague" because it did not clearly delineate which proportion of the R200 million was for operations as compared with maintenance.[140]

130.3. Thirdly, they contend that the figure was "patently wrong".[141]

131. The first two complaints can easily be met.

131.1. The mere fact that the 2006 figure was envisaged to be the subject of future specialist studies cannot make reliance on the figure irrational or arbitrary. The 2006 Proposal did not reflect the R200 million figure as something that it was not. It clearly indicated that it was an estimate.

131.2. There is also nothing unacceptably vague about the figure. The figure is an estimate of the total annual maintenance and operating costs. The fact that the precise proportion of the R200 million which would be allocated to maintenance, as compared with operations was not disclosed in the 2006 Proposal does not render the figure vague. It simply means that the figure was an aggregate of two components and the Minister therefore knew when he approved the toll declarations that the estimated toll collection costs, taken together with maintenance costs, would be in the region of R200 million per year.

132. OUTA et al do not come close to showing that, at the time, the figure was wrong, let alone "patently" so. A mere showing of factual error at the time that the decision was taken is not, without more, a basis for reviewing the decision.

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140 Appellants' heads para 4.13

141 Appellants' heads paras 5.1 to 5.6.5

133. As SANRAL set out in its supplementary answering affidavit in the review, the calculations presented by OUTA et al to show that the 2006 figure was "patently wrong", compare the wrong items.

134. Simply put, OUTA et al's error is this.

134.1. They base their calculations on figures known after the decision was taken, which is an impermissible consideration of *ex poste facto* calculation. What matters for purposes of the review is whether there was a reviewable error made at the time that the decision was taken, and on the basis of the information available at that time.

134.2. OUTA et al purport to do a comparison between the costs of toll collection as a percentage of the total capital expenditure for the GFIP based on the figures in the 2006 Proposal, on the one hand, and the costs of toll collection as a percentage of the total capital expenditure for the GFIP based on SANRAL's current estimates, on the other.

134.3. Having performed this calculation they claim that on the basis of the 2006 Proposal, the figure was 24%, whereas based on SANRAL's current figures the percentage is 89%. [142]

134.4. The disparity between these two percentages is, they contend, considerable.

134.5. However, the error in their calculation is that OUTA et al compare two different phases of capital expenditure when they calculate the percentages.

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142 Appellants' heads para 5.3

When OUTA et al calculated the percentage based on the 2006 Proposal, they worked off the estimated capital expenditure cost for the first and future phases of the GFIP.[143] However, when they calculated the percentage based on SANRAL's current estimates, they worked off the estimated capital expenditure cost for only the first phase of the GFIP.[144]

134.6. As a result, toll collection costs as a proportion of the capital expenditure costs of only the first phase of the GFIP is far higher than toll collection costs as a proportion of all the phases of the GFIP.

134.7. As SANRAL set out in its supplementary answering affidavit in the review, if the correct calculation were done for the 2006 Proposal—in other words, if the figure for toll collection costs in the 2006 Proposal were calculated as a percentage of the estimated cost of only the first phase of the GFIP in 2006—then the correct figure is 91%.[145]

134.8. 91% is so close to the 89% current figure that reliance could confidently be placed by the Minister on the figures contained in the 2006 Proposal. The difference between the figures was immaterial, but in any event the figure must be considered in the light of all the cost based information before the Transport Minister referred to in paragraphs 119—127 above.

135. In the light of what is set out above, we submit that there is no basis to impugn the Minister's decision to approve the toll declarations on the basis of the toll collection costs.

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143 Record Vol 18 para 21 p 2657
144 Record Vol 18 para 21 p 2657
145 Record Vol 18 para 21 p 2657

E. UNREASONABLENESS: THE ALLEGED PRACTICAL IMPOSSIBILITY OF ENFORCEMENT

136. OUTA et al contend that the system of electronic tolling is impossible to implement.[146] They accordingly submit that the decision to approve the toll declarations was unreasonable because enforcement would be unduly burdensome and wholly impractical.[147]

137. OUTA et al have not come close to establishing on the papers that enforcement is impossible. Impossibility as a ground of review, in any event, cannot be predicated upon the unwillingness of those subject to the law to obey it.

138. Their case on this aspect of the review requires this Court to take into account the levels of public antagonism to e-tolling[148] and then to conclude that because of the likely extent of civil disobedience which this antagonism will produce,[149] enforcement will be impossible. There are three problems with this reasoning: one at the level of law, one at the level of fact, and one at the level of principle.

139. At the level of law, our courts have repeatedly affirmed that it is not—and can never be—an element of reasonableness that a decision must be capable of perfect implementation before it can lawfully be taken. Indeed, the Constitutional Court has held that the validity of a law or conduct cannot be determined on the basis of the

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146 Appellants' heads para 6.17
147 Appellants' heads para 6.1
148 Appellants' heads para 6.3
149 Appellants' heads para 6.3

circumstances for abuse.[150]

140. At the level of fact, it is important to emphasise that the prospect of default was but one consideration that had to be weighed by SANRAL and the Minister, as against the other considerable benefits arising from the GFIP and the adoption of a user-pays funding model.

141. At the level of principle, it cannot be that the Legislature, Government, or organs of state should be precluded from implementing a system because of a threat that the system will be unpopular or that some members of the public may not adhere to its requirements.

142. In any event, OUTA et al's case for "sky-rocketing" delinquency[151] is based on unsubstantiated speculation and conjecture. It fails to take into account the detailed system of incentives which SANRAL intends to utilise to encourage users to subscribe to the e-tag system. In terms of this incentive scheme, an e-tag user will obtain a significant discount per kilometre as compared with non-e-tagged users.[152]

143. SANRAL has also confirmed that it intends to manage toll collection by methods which include:[153]

143.1. Rolling up of multiple offences;

143.2. Automation of back-office process as far as possible;

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150 *Head of Department, Mpumalanga Department of Education v Hoerskool Ermelo* 2010 (2) SA 415 (CC) para 72

151 Appellants' heads para 6.4

152 Record vol 14 para 169.6 p 1869

153 These are set out in record vol 18 para 49.2.1 pp 2678-2679 of SANRAL's further affidavit.

143.3. Debt collection processes prior to any court action, with the aim of reducing the need for court action;

143.4. Deterrent strategies with multiple incentives and ultimately punitive steps;

143.5. High accessibility to various account payment channels;

143.6. On road enforcement;

143.7. Dedicated courts;

143.8. Rolling of up offences of persons who have multiple vehicles;

143.9. Dedicated call centres, contract centres, and mobile compliance operations.[154]

144. OUTA et al do not engage with these proposed strategies other than to speculate that they will be ineffective.

145. Their argument on this aspect of the case is also undermined by the position they adopt in relation to the court's remedial discretion. Although our learned friends for the National Treasury deal with the remedial discretion in their heads of argument, it is important to highlight here that OUTA et al find themselves in an uncomfortable position at the intersection of their arguments on unenforceability and remedial discretion.

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154 Record vol 18 para 49.2.3 p 2679

146. OUTA et al claim that if this court finds that the impugned decisions are invalid, it should not exercise its remedial discretion to keep them in place because the civil construction costs for the GFIP will not be wasted. They claim that "the expenditure relating to the erection of gantries and in connection with the e-toll administration systems can still be effectively utilised after a new procedure has been followed and lawful decisions have been taken".[155]

147. But they cannot maintain this position and also argue that e-tolling is unenforceable. The logical terminus of their argument on unenforceability is that no system of e-tolling could ever be rationally implemented because enforcement is impossible. For as long as that is the case, they cannot claim that the expenditure on the e-tolling infrastructure will not be wasted if the decisions are set aside.

148. Finally, the record contains numerous examples of e-tolling systems around the world which operate notwithstanding delinquency rates in the order of 7%. OUTA et al have failed to explain what it is that is peculiar about the South African environment which means that it, unlike all the other jurisdictions considered in the expert reports, will not be able to enforce a system of e-tolling.

F. COSTS

149. The appellants appeal against the High Court's costs order. They say that even if their application was properly dismissed, they should not pay costs. This is on the alleged basis that this is litigation in the public interest and therefore covered by the Constitutional Court's decision in *Biowatch* at [18] and [24].

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155 Appellants' heads para 10.5.2

150. In *Biowatch*, the Constitutional Court reaffirmed the general approach to costs in constitutional litigation.

150.1. The general rule is that an unsuccessful litigant ought not to be ordered to pay costs to the state. That rule is, however, subject to certain exceptions. Where an unsuccessful litigant's conduct has been "vexatious, frivolous, professionally unbecoming or in any other similar way abusive of the processes of the court", it should not be immunized from an adverse costs order.[156]

150.2. This court has further developed the exception to the general principle to include cases where the proceedings are "manifestly inappropriate". According to this Court, an application may be manifestly inappropriate if an applicant had delayed unreasonably before launching it and ought to have known that its prospects of having the delay condoned were slight.[157]

151. We submit that the High Court's costs order against OUTA et al was justified on two grounds which bring it within the *Biowatch* exceptions.

151.1. The first is that certain of the accusations made against SANRAL, which are traced through OUTA et al's heads in this Court and which occupied a substantial part of their argument before the High Court, have no grounding in the papers and are accordingly vexatious. They accordingly deserve the censure of this Court.

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156 *Biowatch Trust v Registrar, Genetic Resources and Others* 2009 (6) SA 232 (CC) paras 18 and 24

157 *Beweging vir Christelik-Volkseie Onderwys v Minister of Education* [2012] 2 All SA 462 (SCA) 68

151.2. The second is OUTA et al's unreasonable delay in bringing this application has never been adequately explained. Its own members were involved in the toll declaration process from the start and yet waited more than four years to bring this application. They ought, therefore, to have known that the prospects of having the delay condoned were slight.

152. This court has recently held that "whatever place mere suspicion of malfeasance or moral turpitude might have in other discourse it has no place in the courts – neither in the evidence nor in the atmosphere in which cases are conducted. It is unfair if not improper to impute malfeasance or moral turpitude by innuendo and suggestion. A litigant who alleges such conduct must do so openly and forthrightly so as to allow the person accused a fair opportunity to respond. It is also prejudicial to the judicial process if cases are adjudicated with innuendo and suggestion hovering in the air without the allegations being clearly articulated. Confidence in the process is built on transparency and that calls for the grounds upon which cases are argued and decided to be openly ventilated".[158]

153. This caution has not been heeded by OUTA et al in this case. Laced through the heads of argument filed on behalf of OUTA are accusations that:

153.1. the notice of the toll declarations published by SANRAL were "clearly calculated to reveal virtually nothing of the tolling proposal and the real intended project";[159] and

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158 *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* [2013] 2 All SA 501 (SCA) para 4

159 Appellants' heads para 2.44

153.2. SANRAL "depressed the amounts in schedule SAA4 in a transparent attempt to render the scheme economically viable".[160]

154. These are serious accusations to make against an organ of state. These and many more were made during the hearing before the High Court.[161]

155. We respectfully submit that it is not appropriate for a litigant to pursue litigation on the back of these sorts of accusations when no case has been laid in the papers for such conclusions about SANRAL's conduct and, more importantly, when SANRAL has not been given an opportunity pertinently to answer the accusations. Such conduct deserved the censure of the High Court through an appropriate costs order.

156. Although we do not address the delay and condonation issues in these heads of argument, we do wish to highlight that OUTA et al ought to have been alive to the fact before they launched this application that their substantial delay was unlikely to the condoned by the court. That factor alone entails that the application was inappropriate.

157. A costs order against OUTA et al in the circumstances was warranted.

G. PRAYER

158. In the light of what is set out above, SANRAL seeks an order dismissing the appeal with costs, including the costs of three counsel.

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160 Appallents' heads para 5.6.5

161 OUTA NG Judgment Vol 34 para 13 pp 5247 to 5248

DN UNTERHALTER SC

BE LEECH SC

L SISILANA

KS HOFMEYR

Counsel for SANRAL

Chambers
Sandton
9 July 2013

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number: 90/2013

In the matter between:

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

and

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

SANRAL'S LIST OF AUTHORITIES

CASE LAW

1. *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* [2013] 2 All SA 501 (SCA)

2. *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC)

3. *Beweging vir Christelik-Volkseie Onderwys v Minister of Education* [2012] 2 All SA 462 (SCA)

4. * *Biowatch Trust v Registrar, Genetic Resources and Others* 2009 (6) SA 232 (CC)

5. *Head of Department, Mpumalanga Department of Education v Hoerskool Ermelo* 2010 (2) SA 415 (CC)

6. *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA)

7. *National Coalition for Gay & Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC)

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

9. *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A)

10. *Poynton v Cran* 1910 AD 205

LEGISLATION

11. The Constitution of the Republic of South Africa, 1996

12. The Promotion of Administrative Justice Act, 3 of 2000

13. Regulations on Fair Administrative Procedures GNR 1022 of 31 July 2002

14. The South African National Roads Agency Limited and National Roads Act, 7 of 1998

ADDENDUM TO SANRAL'S HEADS OF ARGUMENT: GLOSSARY OF DEFINED TERMS

AA	The Automobile Association of South Africa.
Biowatch	*Biowatch Trust v Registrar, Genetic Resources* 2009 (6) SA 232 (CC)
Constitution	The Constitution of the Republic of South Africa, 1996.
Director General	The Director General, Department of Water and Environmental Affairs: The fifth respondent *a quo*.
Environment Minister	The Minister, Department of Water and Environmental Affairs: The fourth respondent *a quo*.
Gauteng Roads	Certain National Roads in Gauteng, which form part of the GFIP and which had, with the Transport Minister's approval, been declared as toll roads by SANRAL under section 27(1)(a)(i) read with section 27(4) of the SANRAL Act.
GFIP	Gauteng Freeway Improvement Project, comprising the overall project to upgrade certain National Roads in Gauteng, the funding for which was to be derived from tolling.
National Treasury	The department of State envisaged by section 216(1) of the Constitution and established by Chapter 2 of the PFMA.
NEMA	National Environmental Management Act, 107 of 1998.
OUTA	Opposition to Urban Tolling Alliance: The first appellant in this appeal.
OUTA CC Judgment	The judgment of the Constitutional Court, reported as *National Treasury v Opposition to Urban Tolling Alliance* 2012 (6) SA 223 (CC).
OUTA et al	The first to fourth apps in the appeal and respondents *a quo*, being *OUTA*, *SAVRALA*, *QASA*, and *SANCU* respectively.

OUTA NG Judgment	The unreported judgment handed down in the North Gauteng High Court by Vorster AJ, *a quo*, against which the apps now appeal at Record Vol 34 pp 5232—5249.
PAJA	The Promotion of Administrative Justice Act, 3 of 2000.
PAJA Regulations	Regulations on Fair Administrative Procedures GNR 1022 of 31 July 2002.
PFMA	The Public Finance Management Act, 1 of 1999.
QASA	Quadpara Association of South Africa: The third appellant; the third applicant *a quo*.
SANCU	South African National Consumer Union: The fourth applicant *a quo*; the fourth appellant in this appeal.
SANRAL	The South African National Roads Agency Ltd, established in terms of section 2 of the SANRAL Act.
SANRAL Act	The South African National Roads Agency Limited and National Roads Act, 7 of 1998.
SAVRALA	South African Vehicle Renting and Leasing Association: The second applicant *a quo*; the second appellant in this appeal.
Transport Minister	The Minister, Department of Transport: The second respondent *a quo* and in this appeal.

ANNEXURE A – SANRAL's Supplementary Chronology

December 2001	The Gauteng Government published a macro-economic analysis of the Gauteng toll road strategy.	SANRAL's second answering affidavit vol 14 pp 1801—1812 paras 51—57
September 2005	A macro-economic analysis and projections relating to road infrastructure was prepared, which highlighted the deleterious effects of the deterioration of the Gauteng roads and which stressed the need for improvements to be undertaken expeditiously.	SANRAL's second answering affidavit vol 14 pp 1817—1818 para 63
August 2006	SANRAL appointed an independent consultant to conduct specialised toll and traffic research studies and modelling for the GFIP.	SANRAL's second answering affidavit vol 14 p 1828 para 73
October 2006	The 2006 Proposal was tabled in a detailed and comprehensive presentation given to the AA.	SANRAL's second answering affidavit vol 14 pp 1821—1828 paras 70—72
May 2007	The independent experts retained by SANRAL provided their draft traffic and toll feasibility study report	SANRAL's second answering affidavit at vol 14 pp 1835—1837 paras 87—91
November 2007	An economic analysis of the proposed GFIP was completed for SANRAL by a further set of independent experts. The report specifically addressed the cost of tolling versus the benefits to be derived, including the costs of tolling, which were estimated to be as much as 17% of revenue collected. The report concluded that the benefits overwhelmingly outweighed the costs such that the project was an eminently worthwhile one.	SANRAL's second answering affidavit vol 14 p 1846—1851 paras 116—124
24 June 2008	Construction work began on the GFIP and continued for the next two years in order to complete certain sections of the proposed new toll network for the FIFA 2010 World Cup.	FA vol 1 p 68 para 134; SANRAL's AA vol 6 p 495 para 11.10.15

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

SCA Case No: 90/2013

In the matter between :

OPPOSITION TO URBAN TOLLING ALLIANCE First Appellant

(*and three others*)

and

SOUTH AFRICAN NATIONAL ROADS AGENCY LIMITED First Respondent

(*and six others*)

CERTIFICATE IN TERMS OF RULE 10A(b)

I, the undersigned, confirm that to the best of my knowledge Rules 10 and 10A(a) have been complied with in respect of the heads of argument and practice note submitted on behalf of the first respondent, SANRAL, save that:

1 Our heads of argument exceed the 60pp limit imposed by the Court, by a little more than a page; and

2 The summary of the argument contained in the practice note is 125 words.

BE LEECH SC
Counsel for First Respondent
Johannesburg
8 July 2013