IN THE SUPREME COURT OF APPEAL

SCA case number: 90/2013
NGHC Case number: 17141/12

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 LTD	First respondent
MINISTER OF TRANSPORT OF THE REPUBLIC OF SOUTH AFRICA	Second respondent
MEMBER OF THE EXECUTIVE COUNCIL: ROADS AND TRANSPORT, GAUTENG	Third respondent
MINISTER OF WATER AND ENVIRONMENTAL AFFAIRS	Fourth respondent
DIRECTOR-GENERAL, DEPARTMENT OF WATER AND ENVIRONMENTAL AFFAIRS	Fifth respondent
NATIONAL CONSUMER COMMISSION	Sixth respondent
NATIONAL TREASURY	Seventh respondent

FILING SHEET

Document presented for filing: **Seventh Respondent's Practice Note and Heads of Argument**

DATED at PRETORIA on this the 09th day of July 2013.

STATE ATTORNEY
SEVENTH RESPONDENT'S ATTORNEY
SALU Building
255 Thabo Sehume (Andries) Street,
cnr Francis Baard(Schoeman) Street
Private Bag X91, PRETORIA, 0001
Docex: 298, PTA
Ref: 7260/2012/Z32
Ref to: Mr L Moyse
Tel: (012) 309 - 1575
Fax: (012) 309 – 1649/50
C/o STATE ATTORNEY
11TH Fedsure Building
49 Maitland Street
BLOEMFONTEIN
Tel: (051) 400 4300
Refer to: Mr A Seale

TO: **The Registrar of the**
above Honourable Court
BLOEMFONTEIN

AND TO: **APPELLANTS' ATTORNEYS**
CLIFFE DECKER HOFMEYR INC
1 Protea Place, Sandown
SANDTON
Ref: P J Conradie/R Thompson/01933299
C/O WEBBERS
Webbers Building
96 Charles Street
BLOEMFONTEIN
Ref: A C Conradie

AND TO: **FIRST RESPONDENT'S ATTORNEYS**
WEBBER WENTZEL
c/o SYMINGTON & DE KOCK ATTORNEYS
169B Nelson Mandela Drive
BLOEMFONTEIN
Ref: Lazyja Venter

AND TO: **SECOND AND THIRD RESPONDENTS' ATTORNEYS**
STATE STTORNEY
SALU Building
255 Thabo Sehume (Andries) Street,
cnr Francis Baard(Schoeman) Street
Private Bag X91, PRETORIA, 0001
Docex: 298, PTA
Ref: 7260/2012/Z32
Ref to: Mr P Seleka
Tel: (012) 309 - 1500
Fax: (012) 309 – 1649/50
C/o STATE ATTORNEY
11TH Fedsure Building
49 Maitland Street
BLOEMFONTEIN
Tel: (051) 400 4300
Refer to: Mr A Seale

IN THE SUPREME COURT OF APPEAL

SCA case number: 90/2013
NGHC Case number: 17141/12

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 LTD	First respondent
MINISTER OF TRANSPORT OF THE REPUBLIC OF SOUTH AFRICA	Second respondent
MEMBER OF THE EXECUTIVE COUNCIL: ROADS AND TRANSPORT, GAUTENG	Third respondent
MINISTER OF WATER AND ENVIRONMENTAL AFFAIRS	Fourth respondent
DIRECTOR-GENERAL, DEPARTMENT OF WATER AND ENVIRONMENTAL AFFAIRS	Fifth respondent
NATIONAL CONSUMER COMMISSION	Sixth respondent
NATIONAL TREASURY	Seventh respondent

TREASURY'S PRACTICE NOTE

Nature of the appeal and the issues in summary

1. The appeal is against the judgment and order of Vorster AJ, in the North Gauteng High

Court, dismissing the review application brought by the appellants. The appeal is with leave of the court *a quo*.

2. The appellants had sought an order for the review and setting aside of various declarations made by the second respondent in terms of section 27(1)(a)(i) of the South African National Roads Agency Limited and National Roads Act, 7 of 1998. Some five years before he had declared certain roads in Gauteng continuous toll roads and had established electronic toll points.

3. The application was instituted on a purportedly urgent basis in March 2012. The relief was in two parts. Part A was a temporary interdict against the implementation of the impugned decisions, pending the outcome of Part B, the review. Part A was granted by the North Gauteng High Court (by Prinsloo J) in April, but was then set aside by the Constitutional Court in August. Part B – the subject of this appeal – was dismissed with costs. Treasury contends that the judgment of the Constitutional Court in respect of Part B has significant implications for this Court's determination of Part B.

4. The appellants challenge the declarations on several grounds, including procedural fairness, legality, unreasonableness and breach of their rights under section 25 of the Constitution. Treasury was not cited as a party when the review application was brought, but sought leave to intervene, which was granted. Its interest pertains to the far-reaching consequences for public finance, aptly described by the Constitutional Court as "dire". In particular, Treasury objects to the excessive delay by the appellants in bringing the application in the first place, and the unique budgetary implications brought about by the delay. It submits that the excessive and inadequately explained delay, related to the radical relief sought, is fatal to the appeal. The scope of Treasury's

submissions are these:

(a) the inordinate delay in instituting the review proceedings, and whether condonation should be granted under section 9(1) of PAJA;

(b) the prejudicial consequences of the relief sought;

(c) the proper approach to a court's exercise of its remedial discretion under the Constitution and PAJA, were the review grounds to be upheld (contrary to the respondents' joint position); and

(d) the (belated and tactical) claim by the appellants that the impugned decisions are in conflict with section 25 of the Constitution. (The claim is tactical, because it was only made - this in the supplementary founding affidavit – in an attempt to outflank the reliance on delay and related prejudice. The premise is that delay and consequential prejudice may not be raised against a section 25 attack).

The basis for jurisdiction

5. The appeal is with leave of the court *a quo*, granted on 25 January 2013.

Constitutional issues

6. The review aside, the constitutional issue remaining on appeal is the claim by the appellants that the toll declarations constitute an infringement of their rights in terms of section 25(1) of the Constitution.

Duration of argument

7. The appeal has been set down for two days. Given what Treasury submits are the

confined decisive issues, in particular the primacy of the delay-prejudice issue and the fact that the appellants themselves treat failure in the review as dispositive of their section 25 claim (although the latter is framed as ostensibly in the alternative), it is our view that one day should suffice.

Language of the record

8. The entire record is in English.

Portions of the record necessary for determination of the appeal

9. The record is particularly voluminous. Our view is that the material facts necessary for determination of this appeal are confined to the references already set out in our heads of argument. More broadly stated, in our view only the following volumes matter:

(a) Vol 1;

(b) Vol 3;

(c) Vol 4

(d) Vol 6;

(e) Vol 9;

(f) Vol 11;

(g) Vol 12;

(h) Vol 13;

(i) Vol 15

(j) Vol 16;

(k) Vol 21; and

(l) Vol 34

Core bundle

10. There is no core bundle prepared by the appellants for the consideration of the other parties.

Compliance with Rule 8(8) and 8(9)

11. Rule 8(8) is not applicable

12. In regard to Rule 8(9), the records reflects the agreement between the parties to limit the extent of the original record. The rule has accordingly been complied with.

Compliance with Rule 10 and 10A

13. We certify that, to the best of our knowledge, all the requirements of these Rules have been complied with.

J.J. GAUNTLETT SC

T.N. NGCUKAITOBI

F.B. PELSER

Counsel for Treasury

Chambers
Cape Town and Johannesburg

8 July 2013

IN THE SUPREME COURT OF APPEAL

SCA case number: 90/2013
NGHC Case number: 17141/12

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 LTD	First respondent
MINISTER OF TRANSPORT OF THE REPUBLIC OF SOUTH AFRICA	Second respondent
MEMBER OF THE EXECUTIVE COUNCIL: ROADS AND TRANSPORT, GAUTENG	Third respondent
MINISTER OF WATER AND ENVIRONMENTAL AFFAIRS	Fourth respondent
DIRECTOR-GENERAL, DEPARTMENT OF WATER AND ENVIRONMENTAL AFFAIRS	Fifth respondent
NATIONAL CONSUMER COMMISSION	Sixth respondent
NATIONAL TREASURY	Seventh respondent

TREASURY'S HEADS OF ARGUMENT

INDEX

A. Introduction

1. These heads of argument are filed on behalf of the seventh respondent, National Treasury ("Treasury"). Treasury opposes the appeal to this Court against the High Court's dismissal of a review application seeking to impugn Government's decisions to implement the Gauteng Freeway Improvement Project ("GFIP").

2. At the outset we briefly set out the scope of Treasury's submissions, explain the pertinent features of the GFIP, and refer to the procedural background.

(1) The scope of Treasury's submissions

3. Treasury supports the bases on which the other respondents oppose the review application and defend the High Court's dismissal of the application, although Treasury is not itself a decision-maker or participant to any of the impugned decisions. Treasury's participation in the proceedings was necessitated by the far-reaching consequences of the relief sought, and the "dire" (the Constitutional Court's word)[1] consequences for public finance and the South African economy should the relief be granted – especially after the excessive delay in launching the review, and the consequent budgetary decisions made by Government in reliance on the finality of the impugned decisions.

4. Treasury's submissions focus on three related grounds of opposition:

   (a) the inordinate delay in instituting the review proceedings, and whether condonation should be granted under section 9(1) of PAJA;

[1] *National Treasury v Opposition To Urban Tolling Alliance* 2012 (6) SA 223 (CC) at para 69.

(b) the prejudicial consequences of the relief sought; and

(c) the proper approach to a court's exercise of its remedial discretion under the Constitution and PAJA, were the review grounds to be upheld (contrary to the respondents' joint position).

5. We also deal with one surviving issue, impermissibly sought to be introduced in the appellants' supplementary founding affidavit. In an attempt to shift their weight to new grounds of attack, the appellants manufactured numerous eleventh-hour arguments and grounds of challenge – all but one of which now abandoned.

6. For example, on the eve of the hearing before the High Court the appellants introduced an argument that the excessive and fatal delay in bringing the application could somehow be cured by suddenly presenting their application as a class action. The appellants strenuously argued that the application should be entertained (despite the expiry of the 180-day period) *qua* "class action". But this Court's judgments in *Children's Resource Centre Trust v Pioneer Food (Pty) Ltd*[2] and *Mukkaddam v Pioneer Food (Pty) Ltd*[3] demonstrated that the appellants' attempt was untenable. The appellants have now correctly abandoned the "class action" construct in their attempt to salvage their case.

7. Another example of an unmeritorious attempt to circumvent the fatal delay in instituting the proceedings (and to recast their case after the Constitutional Court identified conceptual inconsistencies in it) was a constitutional challenge to section 27

[2] 2013 (2) SA 213 (SCA).
[3] 2013 (2) SA 213 (SCA).

of the SANRAL Act.[4] Also this artifice has now been abandoned by the appellants – correctly, we submit, for the reasons set out in short below. As will be seen, the appellants' concession that the challenge against the SANRAL Act is misconceived disposes also of the only relic of the appellants' recast case.

8. The only surviving attempt to smuggle in (via Rule 53(4)) new review grounds – despite these patently not arising from the records of decision – is the appellants' unabandoned section 25 challenge. The appellants continue to maintain that a user-charge authorised by an Act of Parliament violates the constitutional right to property. This despite the Act's constitutionality being conceded. This contention (in support of which the appellants can, unsurprisingly, provide no authority) contradicts Constitutional Court caselaw. It has indeed already been rejected expressly by persuasive international and foreign judgments.

9. In short, nowhere in the world has a court accepted that governmental imposition of a charge for the use of infrastructure like that provided by the GFIP is unconstitutional. The appellants were pertinently challenged in argument, both before the Constitutional Court and the High Court, to find just one. They still have not done so (or for that matter, addressed the respondents' arguments).

This is not the issue though

(2) The GFIP

10. As we shall show below, infrastructural developments of the GFIP's scope are seldom reviewed and set aside by courts – especially where some (and often even very short) delays have occurred between making the impugned decision and challenging it. The

[4] South African National Roads Agency Ltd and National Roads Act 7 of 1998 ("the SANRAL Act").

relevant facts demonstrate that the GFIP is a governmental project which inherently falls within a category requiring courts to exercise their remedial discretion with reservation.

11. To demonstrate this, in what follows we deal with the most important facts relating to the context in which the impugned decisions were made, the extent of the GFIP, and the completed status of the project.

(a) Context of impugned decisions

12. The impugned decisions were made pursuant to Cabinet's July 2007 approval of the GFIP,[5] which followed extensive investigation and a report on the issue.[6] The decisions give effect to the national Executive and Treasury's policy not to use fuel-levy funding for road infrastructure projects – a policy which is not and cannot be attacked on review before a court.[7] This is the proper constitutional context in which the impugned decisions should be viewed, because

> "[t]he courts of this country do not determine what kind of funding should be used for infrastructural funding of roads and who should bear the brunt of that cost. The remedy in that regard lies in the political process."[8]

13. It is a matter of public record that the appellants' appeal is funded by a political party.[9]

---

[5] For an overview by the High Court of the common-cause facts, see Vol 34 pp 5236-5238 paras 4-5.
[6] Vol 1 p 52 para93; Vol 6 p 519 para 37; Vol 16 p 2145 para 5. The importance of this context was noted by Froneman J (at para 93 of the Constitutional Court's judgment).
[7] Froneman J at para 93 of the Constitutional Court's judgment.
[8] *Ibid.*
[9] E.g. ITWeb of 13 June 2013 quotes "OUTA chairperson Wayne Duvenage [as] say[ing] over R1.35 million has been raised from the public, in addition to the R1 million contribution the Democratic Alliance (DA) made on Friday" (http://www.itweb.co.za/index.php?option=com_content&view=article&id=64820). This is indeed confirmed in Mr Duvenage's own statement posted on OUTA's website (http://www.outa.co.za/site/outa-on-a-high/). The leader of the DA also confirmed the donation in her own press statement, in which she acknowledged

They indeed continue in their heads of argument before this Court to invoke the "highly controversial" nature of the "intention to exact toll from the users of Gauteng's freeways".[10] It is expressly stated that it is the appellants' perception of "Government's and SANRAL's intransigence to the genuine concerns of civil society" which "led to the launch of the present proceedings".[11] Thus already in the first paragraph of the appellants' heads of argument it is clear that the appellants have not heeded the Constitutional Court's warning of the misconceived nature of the present proceedings.

14. The project was officially announced by the Minister of Transport on 8 October 2007.[12] On the evidence before Court, the appellants were aware, or ought to have reasonably been aware, of the impugned decisions already in 2008.[13] As we shall show in section B below, not only our own Constitutional Court, but also courts in comparable constitutional jurisdictions require people who are discontent with choices made by organs of State to "have their block and tackle in order" and to "proceed with the greatest possible urgency". Otherwise, extensive governmental infrastructural developments are rendered unreviewable – however "controversial".

(b) Extent of GFIP and far-reaching consequences of relief

15. The GFIP is a major Government investment programme, and generates substantial benefits for its users.[14] It forms part of the transport integration plan for Gauteng,[15]

---

the failed political opposition to e-tolling (http://www.da.org.za/newsroom.htm?action=view-news-item&id=12406). ITWeb of 7 June 2013 quotes Mr Duvenage as saying "it [the appeal] is a political matter. 'It's being fought in Parliament, it's being fought by the DA and every other political party opposing the ANC" (http://www. itweb. co.za/? id =64745:DA-foots-e-toll-legal-fees).

[10] Para 1 of the appellants' heads of argument.

[11] Para 1.6 of the appellants' heads of argument.

[12] Vol 1 p 52 para 94; Vol 6 p 519 para 37; Vol 9 pp 967-972.

[13] Vol 1 p 52 paras 93-94; Vol 10 para 28 ; Vol 16 p 2165 para 44.2.

[14] Vol 16 p 2150 para 18.

[15] Vol 16 p 2150 para 18.

involving not only the construction and maintenance of complex road infrastructure[16] but also other modes of transport in an overarching programme to serve the transport needs in Gauteng and to alleviate road congestion.[17]

16. Accordingly any decision which sets aside tolling (which is the Cabinet-approved financing scheme for the project) has implications for the rest of the Gauteng transport infrastructure. But because the capital outlay associated with the GFIP is immense, a restructuring of the project's funding mechanism (which is a necessary corollary of the appellants' express challenge to the user-pay principle, given effect to by the impugned tolling declarations) also has considerable implications for Government's nation-wide developmental programmes, and the sovereign debt status of the country as a whole.

17. Financial planning has been done in reliance on the finality of the belatedly-impugned decisions, and the project implemented and the infrastructure completed. Were the decisions now to be set aside, far-reaching consequences for the South African economy are at clear risk.

(c) State of completion

18. Although the GFIP is a continuous project (aimed at periodical maintenance of the road infrastructure for the next twenty years),[18] the public finance investment necessitated by it is now largely completed.[19] A significant part of the project relates to the mechanism to recover tolls without impeding traffic flow (the inevitable consequence of using

---

[16] Vol 16 p 2151 para 19.
[17] Vol 16 p 2151 para 20.
[18] Vol 16 p 2150 para 18.
[19] Vol 16 pp 2152-2153 para 24.3.

conventional toll plazas to collect tolls). This in turn required gantries to be constructed, sophisticated electronic technology deployed and associated capital investment applied to the GFIP. These once-off, but considerable, costs have already been incurred, and will be wholly wasted if the tolling decisions are set aside.

19. On the basis of well-known authority of this Court, to which we refer below, the completed status of the GFIP itself constitutes a basis for refusing to set aside the impugned decisions.

(3) The implications of the failure of the Part A proceedings for Part B relief and the current appeal

20. As final introductory observation, it is necessary to note the implications of the failure of the Part A proceedings.

21. In a direct appeal it allowed to it, the Constitutional Court unanimously set aside the interim interdict granted by Prinsloo J pursuant to the Part A proceedings. Moseneke DCJ held, applying the lower threshold applicable to interim interdicts, that after hearing "full argument on the merits o[f] the grounds of review" he was "unable to say without more that they bear any prospects of success."[20]

22. While the Constitutional Court understandably warned itself against anticipating the review court's decision in the Part B proceedings,[21] the position remains that the Part B relief sought can only be granted on the much higher test applicable to final relief.

---

[20] At paras 48 and 52.
[21] *Ibid.*

23. On a proper application of the Constitutional Court's established caselaw (*inter alia* on the doctrine of separation of powers;[22] the correct review standard applicable to the impugned decisions; and courts' remedial discretion), and in the light of the Constitutional Court's judgment in the Part A proceedings[23] (applying these principles in the context of this matter,[24] but, as mentioned, on a test more favourable to the current appellants), the appellants should have appreciated that ultimate success in the Part B proceedings was, from the outset, highly improbable.

24. Nevertheless the appellants have persisted in the Part B proceedings. For this reason, amongst others, the High Court was asked (in reliance on this Court's judgment in *Beweging vir Christelik-Volkseie Onderwys v Minister of Education*,[25] applying the Constitutional Court's judgment in *Biowatch*)[26] to make a costs order against the applicants (the current appellants), which it did. For reasons set out below, we submit that the review application is without merit and was correctly dismissed by the High Court.

25. Significantly the appellants, who attack the High Court's judgment, do not analyse the High Court's judgment in their heads of argument. Because the application was dismissed on bases which do not constitute the main focus of Treasury's participation

---

[22] See e.g. *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC).
[23] See paras 67-69 of the Constitutional Court's judgment. At para 67 the Constitutional Court observed that the impugned decisions

> "result from a National Executive decision about the ordering of public resources, over which the Executive Government disposes and for which it, and it alone, has the public responsibility. Thus, the duty of determining how public resources are to be drawn upon and re-ordered lies in the heartland of the Executive Government function and domain. What is more, absent any proof of unlawfulness or fraud or corruption, the power and the prerogative to formulate and implement policy on how to finance public projects reside in the exclusive domain of the National Executive subject to budgetary appropriations by Parliament."

[24] At para 63 of the Constitutional Court's judgment.
[25] [2012] 2 All SA 462 (SCA).
[26] *Biowatch Trust v Registrar, Genetic Resources* 2009 (6) SA 232 (CC).

in the proceedings, we too do not analyse the High Court's judgment in what follows. We submit that the orders *a quo* are clearly sustainable also on the bases set out below, even were this Court to uphold any of the review grounds against the impugned decisions.

B. Delay in instituting review application

(1) The proper approach when dealing with delays

26. In *Beweging vir Christelik-Volkseie Onderwys v Minister of Education*[27] this Court dealt with the approach to be adopted in approaching an application for condonation under section 7(1) of PAJA.[28] It held that "there is no need to deal with the merits first" when considering a condonation application,[29] upholding the North Gauteng High Court's judgment which dismissed the main application "without the merits even being considered".[30]

27. Following this approach, the first question for consideration in this appeal is whether condonation should have been granted (a question which the High Court did not consider).[31] In doing so, the purpose and function of the delay rule must be kept in mind,[32] and the trite two-stage inquiry must be conducted.

---

[27] [2012] 2 All SA 462 (SCA).
[28] Promotion of Administrative Justice Act 3 of 2000.
[29] *Beweging vir Christelik-Volkseie Onderwys v Minister of Education supra* at para 44.
[30] *Id* at para 66.
[31] As para 3 of the judgment records, the High Court dealt with the merits first – rejecting the application on the merits (Vol 34 p 5236 para 3; see too Vol 34 5247 para 13).
[32] *Cf Beweging vir Christelik-Volkseie Onderwys v Minister of Education supra* at para 45.

28. Following this Court's established approach, the first question is whether the review application was launched more than 180 days after internal remedies had been exhausted or the applicant had been informed of, had knowledge of, or ought to have had knowledge of the administrative action sought to be challenged.[33] The second question is whether it is in the interests of justice that the failure to bring the application within 180 days should be condoned.[34] Condonation is only granted if the explanation for the delay is acceptable.[35]

29. In *Camps Bay Ratepayers' and Residents' Association v Harrison*[36] the proper approach to condonation under section 9(1) of PAJA was summarised thus:

> "Section 9(2) however allows the extension of these time frames where 'the interests of justice so require'.
> And the question whether the interests of justice require the grant of such extension depends on the facts and circumstances of each case: the party seeking it must furnish a full and reasonable explanation for the delay which covers the entire duration thereof and relevant factors include the nature of the relief sought, the extent and cause of the delay, its effect on the administration of justice and other litigants, the importance of the issue to be raised in the intended proceedings and the prospects of success."

30. The approach adopted in *Harrison* is an application of the Constitutional Court's application of the interests of justice criterion (expressly adopted in section 9(2) of PAJA) which also applies to condonation for the late lodging of an application for leave to appeal.[37] In *Van Wyk v Unitas Hospital* the Constitutional Court applied this test to a

---

[33] *Beweging vir Christelik-Volkseie Onderwys supra* at para 46.
[34] *Ibid.*
[35] *Id* at para 47.
[36] *Camps Bay Ratepayers' and Residents' Association v Harrison* [2010] 2 All SA 519 (SCA) para 54, confirmed by the Constitutional Court on appeal in *Camps Bay Ratepayers' and Residents' Association v Harrison* 2011 (4) SA 42 (CC). See too *Price Waterhouse Coopers Inc v Van Vollenhoven NO* [2010] 2 All SA 256 (SCA).
[37] *Cf Brummer v Gorfil Brothers Investments (Pty) Ltd* 2000 (2) SA 837 (CC) at para 3.

delay of eleven months.[38] The Constitutional Court held that

> "An applicant for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of delay. And, what is more, the explanation given must be reasonable."[39]

31. The Constitutional Court held that an important governing principle was that "[a]n inordinate delay induces a reasonable belief that the order [or, in this case, administrative action] had become unassailable."[40] The Court held that a party was entitled to have closure. The same applies, we submit,[41] to administrative action. As the Constitutional Court accepted, "[t]o grant condonation after such an inordinate delay and in the absence of a reasonable explanation, would undermine the principle of finality and cannot be in the interests of justice."[42] Despite the important constitutional questions raised, the Court refused to grant condonation, as it did in a previous case concerning a nine-month period (regardless of the nature and importance of the issues raised).[43]

32. As regards the contended prospects of success, the Constitutional Court held that this aspect "pale[s] into insignificance where, as here, there is an inordinate delay coupled with the absence of a reasonable explanation for the delay."[44] The application for condonation was accordingly dismissed without "giv[ing] much weight to the prospects of success".[45] The condonation application accordingly turned on the duration of the

---

[38] 2008 (2) SA 472 (CC) at paras 20-22.
[39] *Id* at para 22.
[40] *Id* at para 31.
[41] See in this regard the English caselaw referred to below.
[42] *Ibid.*
[43] *Id* at para 32.
[44] *Id* at para 33.
[45] *Id* at para 34.

delay and the absence of a reasonable explanation.[46]

33. When the delay rule as it is applied in the context of administrative review is considered, it is apparent that these considerations apply equally – if not with even more force – in the current context. This is apparent from this Court's articulation of the purpose of the delay rule.

(2) The purpose and function of the delay rule

34. In *Gqwetha v Transkei Development Corporation Ltd*,[47] Nugent JA summarised the established purpose and function of the delay rule as follows:

> "It is important for the efficient functioning of public bodies (I include the first respondent) that a challenge to the validity of their decisions by proceedings for judicial review should be initiated without undue delay. The rationale for that longstanding rule – reiterated most recently by Brand JA in *Associated Institutions Pension Fund and Others v Van Zyl and Others* 2005 (2) SA 302 (SCA) at 321 – is twofold: First, the failure to bring a review within a reasonable time may cause prejudice to the respondent. Secondly, and in my view more importantly, there is a public interest element in the finality of administrative decisions and the exercise of administrative functions. As pointed out by Miller JA in *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) at 41E-F (my translation):
>
> > "It is desirable and important that finality should be arrived at within a reasonable time in relation to judicial and administrative decisions or acts. It can be contrary to the administration of justice and the public interest to allow such decisions or acts to be set aside after an unreasonably long period of time has elapsed – *interest reipublicae ut sit finis litium*. …
> >
> > Considerations of this kind undoubtedly constitute part of the underlying reasons for the existence of this rule."

---

[46] *Ibid.*
[47] 2006 (2) SA 603 (SCA) at paras 22-23.

> Underlying that latter aspect of the rationale is the inherent potential for prejudice, both to the efficient functioning of the public body and to those who rely upon its decisions, if the validity of its decisions remains uncertain. It is for that reason in particular that proof of actual prejudice to the respondent is not a precondition for refusing to entertain review proceedings by reason of undue delay, although the extent to which prejudice has been shown is a relevant consideration that might even be decisive where the delay has been relatively slight (*Wolgroeiers Afslaers*, above, at 42C)."

35. This summary encapsulates the relevant considerations, and is clearly consistent with the Constitutional Court's approach in *Van Wyk*, to which we referred above.

36. The Constitutional Court has in numerous other cases emphasised the importance of finality.[48] Finality, it has held, serves the interests of justice – which, as mentioned, is the criterion governing the granting of condonation under PAJA. Moreover, as Cameron J observed in an oral exchange with the current appellants' counsel in the Part A hearing, it is incumbent upon civil society – where it seeks to challenge administrative decisions such as those in issue here – to do so with all deliberate speed.[49] This requirement, we shall show below, applies throughout the democratic world. The facts demonstrate that the appellants grossly failed to comply with it.

(3) <u>The factual background: failure to proceed "without unreasonable delay"</u>

37. As the Constitutional Court observed in its judgment setting aside Prinsloo J's interim interdict, the appellants only sought to set these aside the decisions some four years

[48] See e.g. *Brummer v Gorfil Brothers Investments (Pty) Ltd* 2000 (2) SA 837 (CC) at para 51; *Road Accident Fund v Mdeyide* 2011 (2) SA 26 (CC) at para 79; *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC) at para 11; *Barkhuizen v Napier* 2007 (5) SA 323 (CC) at para 48.

[49] This, of course, has always been the law (*Associated Institutions Pension Fund v Van Zyl* 2005 (2) SA 302 (SCA) at paras 50-52).

after the impugned decisions were taken.[50] The appellants' own papers demonstrate that the relevant chronology starts in July 2008,[51] when the Minister of Transport publicly announced the GFIP.[52] In short, the appellants had known, or should reasonably have been aware, of the impugned decisions since 2008.[53]

38. The notices of SANRAL's intention to take the impugned decisions were published in the Government Gazettes of 12 October 2007[54] and in five popular newspapers,[55] and notified per letter to the municipalities involved.[56] On 28 March 2008 the N1, N3, N4 and N12 were declared toll roads.[57] This process was repeated some four months later in respect of the R21,[58] which was declared a toll road on 28 July 2008.[59]

39. On 9 May 2008 SANRAL published a media release informing the public that it had awarded seven contracts pursuant to the first phase of the GFIP.[60] SANRAL held a meeting with SAVRALA and the Automobile Association on 7 July 2008 to discuss the implementation of the GFIP, estimated toll tariffs, and e-tolling's implications for vehicle rental agencies.[61] Work commenced on 24 June 2008, and continued conspicuously for the next two years.[62] The highly-visible gantries were erected, on the appellants' own version, "in the period following the World Cup [i.e. July 2010] and into 2011."[63]

---

[50] Para 7 of the Constitutional Court's judgment.
[51] Vol 1 p 52 para 95.
[52] See too Treasury's chronology at Vol 16 pp 2166-2167 paras 46.1-46.11.
[53] Vol 16 p 2165 para 44.2.
[54] Vol 1 pp 53-54 paras 96.1-96.6.
[55] Vol 1 pp 56-57 paras 99.1-99.5.
[56] Vol 1 pp 57-58 paras 100.1-100.6.
[57] Vol 1 p 61 para 113.
[58] Vol 1 p 61 para 114. See further Vol 1 pp 64-65 paras 118-124.
[59] Vol 1 p 66 para 127.
[60] Vol 1 p 66 para 130.
[61] Vol 16 p 2167 paras 47-48.
[62] Vol 1 p 68 para 136.
[63] Vol 1 p 69 para 144.

40. On 4 February 2011 the toll tariffs were published.[64] They received immediate, mass-media attention; they were immediately very unpopular.[65] It is the public reaction (and Government's corresponding resolve to deal with political dissent in the political arena) which led to political initiatives to address the concerns regarding e-tolling.[66] As a consequence the implementation of e-tolling has from time to time been suspended in an ultimately unsuccessful attempt to reach a political solution.

(4) The pleaded basis for condonation

41. The appellants' case for condonation does not satisfy the requirements set by this Court and the Constitutional Court. Firstly, the appellants' pleaded basis for condonation does not provide an explanation for the full period between taking the impugned decisions and instituting the review application. Secondly, such explanation as is provided is far from reasonable. We deal with these deficiencies separately.

(a) Incomplete explanation

42. The appellants' explanation demonstrably only seeks to justify the delay since the public outcry in February 2011. This despite the decisions having already been taken in 2008. In reply the appellants indeed concede that the appellants and the general public's "awareness" of e-tolling was not only raised in February 2011,[67] as was earlier suggested by them. Yet the period preceding February 2011 remains unexplained. In the light of the public declarations of tolling, there was no reasonable basis to have hoped that GFIP would be fully State-funded. Any such hope was clearly contradicted

[64] Vol 1 p 69 para 146.
[65] Vol 1 p 70 para 148.
[66] Vol 1 p 70 paras 146-151.
[67] Vol 11 p 1348 para 469.

by the consistent public statements and binding declarations to toll.[68] The appellants cannot simply slough off the delay from 2008 unaddressed in their founding papers – or even in reply.

(b) Unreasonable explanation

43. Even the explanation provided for the thirteen-month delay (over twice the period permitted by PAJA) since February 2011 is bad in law. It impermissibly seeks to invoke political processes[69] to justify the delay in instituting legal proceedings. This is not a legally-competent basis for granting condonation,[70] especially not in the circumstances.[71] All that it constitutes is an acknowledgement of what Froneman J identified as a major flaw in the appellants' case: "[t]he playing field for the contestation of executive government policy [not to use fuel levy-type funding] is the political process, not the judicial one."[72]

44. Moreover, it was (on the appellants' own version) apparent – even from the very inception of the political process – that Cabinet's adoption of the user-pay principle

---

[68] In cases where a sufficiently clear and firm indication of a decision-maker's intention exists, time begins to run for purposes of the delay rule even before the decision has been formally taken (*Turner v Allison* [1971] NZLR 833 (CA) at 852-854; *Auckland Casino Ltd v Casino Control Authority* [1995] 1 NZLR 142, to which reference is made below). In *Turner v Allison* formal conditions still had to be imposed, but the intention to grant the authorisation was clear. The same principle applies *a fortiori* to any suggestion that *in casu* the formal (and final) tolling decision – which the appellants concede is a separate administrative act (Vol 1 p 127 paras 369-370) – somehow may be reviewed years later, after the tariff has been imposed.

[69] The appellants explicitly refer to "the politically powerful opposition of COSATU" (Record p 186 para 187).

[70] *R v London Borough of Redbridge, ex parte G* [1991] COD 398; *R v London Borough of Bexley, ex parte Barnehurst Golf Club Limited* [1992] COD 382 (both cited in Fordham *Judicial Review Handbook* 5th ed (Hart Publishing, Oxford 2008) at 281).

[71] Vol 16 p 2185 para 101.

[72] Para 93 of the Constitutional Court's judgment.

(on which the impugned decisions rest) would not be revisited.[73] This was also conveyed via the media,[74] which reported estimated toll tariffs already during 2007.[75]

45. In addition, the appellants concede that at least SAVRALA knew about the intention to toll since mid-2008.[76] Nothing prevented SAVRALA and its members from instituting the review in due course.[77] It is most significant that the appellants entirely fail in their explanation for the delay to disclose that for the past five years (i.e. during the period of their delay to institute review proceedings – which must be explained in full) the CEO of Avis, a major member of SAVRALA, was (until recently) Wayne Duvenage. Mr Duvenage is also the chairman of OUTA.[78] The true decision-makers behind OUTA have accordingly at all times been aware of the impugned decisions.[79] Their election not to institute proceedings, and – many years later – to conjure up OUTA to do so, defeats any *bona fide* condonation application.

46. Furthermore, even if the Court accepts the appellants' contention that – despite work on the GFIP commencing for all to see on 24 June 2008[80] – the appellants (other than SAVRALA) were not "fully aware" of the decision to toll and its impact, it still does not explain why they have not been "fully aware" of the material facts. Nor do they explain why their lack of knowledge was reasonable. The circumstances show that the contended ignorance was patently unreasonable. The appellants – on whom the onus rests – have accordingly failed entirely to advance a proper case for condonation, even

---

[73] Vol 1 p 72 para 156.
[74] Vol 1 p 74 para 163.
[75] Vol 16 pp 2168-2169 para 52.
[76] Vol 1 pp 131 para 388.
[77] Vol 16 p 2171 para 58.
[78] See e.g. Downing "Avis CEO Wayne Duvenage resigns" *BDlive* (18 June 2012).
[79] Vol 16 p 2185 para 101.
[80] Vol 1 p 68 para 136.

were it to be assumed in their favour (but contrary to all probability)[81] that they truly were unaware of the decisions authorising e-tolling.

(c) Each of the appellants' pleaded bases for condonation lacks merit

47. Indeed, dealing with each of the ten bases on which the appellants contended in their pleadings for condonation, it is clear that none has merit.

48. The first ground advanced by the appellants in their founding affidavit is that OUTA did not exist at the time the decisions were taken, and could therefore not institute the proceedings until its formation on 12 March 2012.[82] This contention is contrary to law,[83] logic[84] and the appellants self-defeating admission that "any of the constituent members [of OUTA] could have [instituted the review] once the relevant facts came to their attention".[85] It should be dismissed out of hand.

49. Secondly, the appellants seek to advance a medley of legal arguments in favour of condonation.[86] As has already been demonstrated, these are not supportable in the light of our highest courts' caselaw. Moreover, some of these arguments are self-

---

[81] The "controversy" invoked by the appellants demonstrates that the public was aware of tolling long ago, and could have challenged it much earlier (Record p 3375 para 104).
[82] Vol 1 p 119 para 327.
[83] See again *R v London Borough of Redbridge, ex parte G* [1991] COD 398; *R v London Borough of Bexley, ex parte Barnehurst Golf Club Limited* [1992] COD 382 (cited in Fordham *Judicial Review Handbook* 5th ed (Hart Publishing, Oxford 2008) at 281).
[84] As we have shown above, the constituent members and eventual chairperson of OUTA were all closely involved in the public participation process since 2008. Even the further contentions by the appellants on this point are inconsistent: e.g. the argument at Vol 1 p 121 para 337 is contradicted by Vol 1 p 72 para 156 and Vol 1 p 74 para 163; and the argument at Vol 1 p 120 para 332 is contradicted by Vol 1 p 121 para 338.
[85] Vol 1 p 119 para 328.
[86] Vol 1 p 126-127 paras 365-370.

defeating,[87] and others are simply misconceived.[88] They too should accordingly be rejected without more.

50. Thirdly, we have already demonstrated that SAVRALA's knowledge of the project from its inception disqualifies not only its own, but also OUTA's application for condonation.[89] Even on the appellants' version that SAVRALA only became aware of the toll declarations in May 2009,[90] it could and should have instituted the review much earlier. SAVRALA avowedly aimed "to work towards the abandonment of the tolling of the proposed toll road network as the funding mechanism for GFIP".[91] This mechanism had been irrevocable since 2008 when the impugned decisions were made and published in the Government Gazette and many newspapers, and this was known to SAVRALA at the latest (on the appellants' version) in May 2009.

51. Moreover, that SAVRALA has only "learn[t] ... over time"[92] of practical and other reasons on which to mount its attack to the principle of tolling does not entitle it to condonation, as the appellants pleaded.[93] The answer is that there is no disclosed reason why its "learning" should have been deferred. A litigant is required to actively investigate legal and factual bases on which to impugn administrative action.[94] It is assisted in this regard by Rule 53 of the Uniform Rules of Court. Instead of acting appropriately in the circumstances, SAVRALA consulted only on 28 February 2012

---

[87] E.g. the concession that the declaration of toll roads and determination of tariffs are separate administrative acts, but nevertheless provides a basis for impugning the former only when the latter is determined years later (Vol 1 p 127 paras 369-370).
[88] E.g. the fact that "serious question marks" exists (Vol 1 p 127 para 367) has not found a basis for condonation anywhere in the world, as far as we are aware. It is simply not sufficient to seek to raise "question marks over the funding model" adopted by Government in order to justify the requirements for condonation.
[89] As SANRAL's answering affidavit shows, SAVRALA was invited to participate in the public participation process already in 2008 (Vol 6 p 480-481 para 9.18.4).
[90] Vol 1 p 128 para 371.
[91] Vol 1 p 134 para 400.
[92] Vol 1 p 136 para 410.
[93] *Ibid.*
[94] *Associated Institutions Pension Fund v Van Zyl* 2005 (2) SA 302 (SCA) at paras 50-52.

for the first time with its legal representatives in order to investigate "whether there were grounds for the bringing of the present application."[95]

52. Fourthly, the appellants contend that QASA's lack of knowledge (and its subsequent engagement with the Minister of Women, Children and People with Disabilities) constitutes a basis for condonation. The appellants contend that the only remedy available to QASA is to set aside the declarations to toll in their entirety. This is plainly incorrect. To set aside a project of the scale of the GFIP on the basis that a small minority of people might require some form of accommodation under it is overbroad and inappropriate relief. On this basis alone it is unnecessary to consider whether QASA's alleged ignorance, its subsequent conduct and its explanation for the delay in challenging the proceedings are reasonable. The other appellants' transparent attempt to gain condonation through QASA does not assist them.[96]

53. Fifthly, in their supplementary founding affidavit the appellants claim that numerous different bases for condonation arise from the "record". The first of these is that the consequences of the impugned decisions will last indefinitely. This ground is not a proper basis for condonation in the circumstances. Most planning decisions operate indefinitely. For this reason condonation is often refused in similar cases (e.g. the

---

[95] Vol 1 p 136 para 411.

[96] As this Court accepted, relief in judicial review proceedings is only available if the appropriate party asks for the appropriate remedy in the appropriate proceedings (*Tulip Diamonds FZE v Minister of Justice and Constitutional Development* [2013] ZACC 19 (13 June 2013) at paras 1 and 31; *Giant Concerts CC v Rinaldo Investments (Pty) Ltd* 2013 (3) BCLR 251 (CC) at paras 29-35; *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA); Hoexter *Administrative Law in South Africa* 2nd ed (Juta & Co, Cape Town 2012) at 488). This principle cannot be circumvented by contriving condonation by proxy.

construction of an additional runway for the Heathrow airport,[97] the construction of the Eurotunnel, and constructing a prison).[98]

54. When it is further considered that in the current circumstances, as the Constitutional Court correctly recorded, "99% of the burden of tolling will be borne by more affluent road users who make up the first and second quintile of income earners in Gauteng and that public transport users will be exempt from paying tolls",[99] the so-called "indefinite consequences" are borne by road-users who are clearly able to bear it.[100] Government, on the other hand, has demonstrated that – with its other constitutional responsibilities, including poverty alleviation, providing access to housing, healthcare and education – this burden should not be borne by the National Revenue Fund (thus indirectly by millions of people who do not use the Gauteng roads).

55. To grant condonation in circumstances where any resulting substantive relief necessitates the reallocation of budgets (which were drawn on the basis of the GFIP being funded by its users) is accordingly inequitable, because it will result in indefinite consequences to non-users of the system (i.e. to social-welfare and other people who are dependent on Government's developmental programmes). The inequitable result is a direct consequence of the appellants' failure to impugn the decision during the statutorily-prescribed time-period. Absent any timeous challenge Government underwrote billions of rands for a tolling system which would not have been necessary had the decisions to toll been challenged duly. Government also allocated the rest of

---

[97] For an example of public reaction and litigation flowing from the public dissatisfaction, see *Heathrow Airport Ltd v Garman* [2007] EWHC 1957 (QB) (6 August 2007), available at http://www.bailii. org/ew/ cases/ EWHC/QB/2007/1957.html.
[98] *Chairperson, Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd* 2008 (2) SA 638 (SCA).
[99] Para 62 of the Constitutional Court's judgment.
[100] Vol 16 p 2160-2161 para 28.7.

its budget in reliance on the fact that the 2008 decisions (to the effect that the users of the GFIP, instead of non-users nation-wide) stands unchallenged.

56. Sixthly, the appellants contended that the Gauteng freeways would have been upgraded and expanded in any event.[101] This contended basis for condonation is demonstrably unfounded. It only purports to provide a basis for SANRAL being unable to claim prejudice. It leaves out of account the fact that had the project been exclusively State-funded (i.e. had the user-pay principle not been applied), the substantial costs of collection (from the user) would not have had to be incurred (and guaranteed by Treasury). Accordingly, at best for the appellants, this ground for condonation operates only *vis-à-vis* the first respondent. It fails to provide a basis for condonation in circumstances where unprecedented prejudice stands to be suffered by the national economy should the appellants' excessive delay be condoned.

57. The appellants' seventh's ground for condonation is that congestion "was detrimental not only to commuters and the South Africa's economy [sic]".[102] To the extent that this contended basis for condonation is comprehensible, it appears to be a continuation of the preceding ground. For the reasons already stated, it too has no merit.

58. The appellants' eighth ground for condonation is similarly a repetition. It claims that the upgrade and expansion under the GFIP would in any event have occurred in contemplation of the 2010 World Cup.[103] This ground suffers from the same difficulty identified above. But this point is also confused for another reason: it inverts events. The GFIP was decided on, and the user-pays principle adopted, before South Africa's

---

[101] Vol 12 p 1605 para 254.
[102] Vol 12 p 1606 para 255 to Vol 12 p 1609 para 257.5.
[103] Vol 12 p 1609 para 258 to Vol 12 p 1610 para 261.

bid for the 2010 World Cup and before South Africa was identified as the host country. Accordingly it was Cabinet's prior resolution, announced in 2007, to expand and upgrade the road infrastructure which led to South Africa being in a position to host the World Cup. It was not the World Cup requiring the GFIP. The appellants' mistaken submissions are thus clearly no basis on which to contend for condonation.

59. The ninth ground for condonation contends that the upgrades will be paid for in any event.[104] The appellants argue that because the public must bear the cost of GFIP in any event, and because Government remains liable for SANRAL's obligations under the GFIP, condonation should somehow be granted. This allegation is obviously self-defeating. It confirms the prejudice to the South African economy and to the public at large, to be borne (on the appellants' version) by non-users of the Gauteng highways. When this argument was unsuccessfully advanced in the Constitutional Court in support of upholding the interim interdict, Moseneke DCJ rejected it out of hand for "avoid[ing] the point that the harm lies in National Government being obliged to fund a project it has decided should be funded on the 'user pay' principle".[105] On the same reasoning, the argument does not provide a basis for granting condonation. Instead, it confirms that condonation should be refused (or, at least, that no substantive relief should be granted – for reasons dealt with below).

60. The last basis invoked by the appellants in their pleadings in applying for condonation is what they present as a pro rule-of-law proposition,[106] but which in fact is its antithesis. The appellants invoke the "public outcry" and the "widely felt [sic] anger

[104] Vol 12 p 1610 para 262 to Vol 12 p 1611 para 265.
[105] At para 61 of the Constitutional Court's judgment.
[106] Vol 12 p 1611 para 266 to Vol 12 p 1612 para 269.

... towards SANRAL and the Government".[107] The contended legal premise underlying this ground is as mistaken as the resort to public emotion is misplaced. Legal relief (least of all an indulgence) is not granted by courts against other arms of Government on the basis of political disappointments of pressure groups. Instead, the rule of law requires that there be compliance with PAJA's 180-day time limit, in the interest of sound administration and certainty.

61. The time limitation imposed by section 7(1) of PAJA is "a significant limitation of the constitutional right [to just administrative action]".[108] This limitation (which is not impugned) circumscribes the right to review (and, consequentially, to a remedy). It serves the law's important imperative to achieve certainty, which – as the current circumstances graphically demonstrate – is required to enable Government to acquit itself of the developmental obligations imposed on it by the Constitution. The rule of law, the public interest and (to the extent that these are at all relevant) the public sentiments accordingly militate strongly against granting condonation.

62. Accordingly none of the ten grounds advanced for condonation supports the appellants.

(d) Lack of properly pleaded case for condonation compounded by written argument

63. Despite all of the above bases being dealt with as set out above in Treasury's heads of argument in the High Court, the appellants have still not been able to show that the grounds for condonation withstand scrutiny. As was the situation in the High Court, the appellants did not meet Treasury's treatment of their ten grounds for condonation.

---

[107] Vol 12 p 1611 para 267.
[108] Currie *et al AJA Benchbook* (SiberInk, Cape Town 2001) at para 7.4.

Instead, the appellants' heads of argument merely repeat these grounds and purport to infer what would have been understood by the erection of gantries.[109]

64. This exercise is self-destructive. It concedes that the significance of the construction of the gantries operates against the appellants "roughly at the end of 2010".[110] It further concedes "that the erection of the gantries could reasonably have led to enquiries being made and resulting in the public becoming aware of the earlier administrative action."[111] These concessions are fatal, because despite it being acknowledged that the reasonable litigant would and could have inquired already "roughly" at the end of 2010 and could have prepared their review application,[112] it is common cause that the appellants did not do so. As Treasury is entitled to do,[113] it holds the appellants to what constitutes a concession of unreasonable delay.

65. What is more, the appellants not only fail to deal competently with the prejudice to the national economy and Treasury's pleaded bases in opposition to condonation (which operated strongly on the Constitutional Court's approach to the Part A relief).[114] They

---

[109] Para 9.8 and 9.10 of the appellants' heads of argument.
[110] Para 9.10 of the appellants' heads of argument.
[111] Para 9.11 of the appellants' heads of argument.
[112] As Cameron J observed was required, and South African and foreign caselaw indeed confirm.
[113] Joubert *The Law of South Africa* 2nd ed (LexisNexis, Durban 2007rev) vol 14(2) para 144, citing *inter alia R v Matonsi* 1958 (2) SA 450 (A) at 456-457; *Klopper v Van Rensburg* 1920 EDL 239 at 242; *S v Louw* 1990 (3) SA 116 (A) at 124A-125E.
[114] The appellants' only attempt to deal with prejudice to Treasury is to contend that the tariff declarations necessary to toll requires the substantive validity of the toll declaration, and that the toll declaration is invalid for reasons it addressed in attacking the decisions on their merits. But this argument fails both in law and in logic. It fails in logic, because it presupposes invalidity before condonation, which is to put the cart before the horse. In fails in law, because the toll declarations are valid until set aside by a court (which can only happen if condonation is granted). The correctly legal position is that the toll declarations are indeed "validate[d]" and tariffs may be levied on that basis. As this Court explained, in *Norgold v The Minister of Minerals and Energy of the Republic of South Africa* (278/10) [2011] ZASCA 49 (30 March 2011) at para 48: "In *Harnaker v Minister of the Interior* [1965 (1) SA 372 (C) at 381B-C] Corbett J, in dealing with the effect of delay in setting aside administrative decisions, said the following:

> 'In such a case the grounds of review might, for example be that the body had exceeded its powers. If this ground were substantiated, the review would establish that the proceedings and any act following therefrom were null and void. The application of the delay rule in such a case would prevent the aggrieved party from establishing such nullity. In a sense delay would therefore "validate" a nullity.'"

also fail to deal with the authorities cited by Treasury.[115] Apart from the South African authorities cited above, numerous comparative precedents confirm that no proper case for condonation exists on the facts of this case.

(5) Comparable caselaw on delay

66. Both national and international courts refuse to interfere with administrative decisions outside the prescribed period for bringing review proceedings.[116]

67. English caselaw demonstrates the application of the delay rule, and is often followed in comparable jurisdictions. Lord Hope expressed the universal principle as follows: "applications [for judicial review] should be brought as speedily as possible".[117]

---

[115] Both Constitutional Court authority binding on this Court (e.g. *Van Wyk v Unitas Hospital supra*), and the most leading cases and most recent case on condonation by this Court (*Associated Institutions Pension Fund v Van Zyl supra* and *Gqwetha v Transkei Development Corporation Ltd*; and *Beweging vir Christelik-Volkseie Onderwys v Minister of Education supra*). The appellants' resort to caselaw is very limited, and the high watermark is this Court's adoption of Lord Atkin's 1933 aphorism that "finality is a good thing, but justice is better" (*Oudekraal Estates (Pty) Ltd v City of Cape Town* 2010 (1) SA 333 (SCA) at para 80, quoting *Ras Behari Lal v The King-Emperor* [1933] UKPC 60). Navsa JA was careful to record that Lord Arkin was dealing with a situation where a murder and rioting conviction (leading to a death penalty) was vitiated by irregularity. Neither judgment establishes a principle applicable in administrative law. (Nor is either context comparable with the present one). Indeed, in contemporary English law courts consistently invoke the need for certainty (see e.g. the Court of Appeal's judgment in *R v Independent Television Commission, ex parte TVNI Ltd*, 19 December 1991)

[116] A recent example of the application of this principle by the Court of Justice of the European Communities is *ClientEarth v European Commission* [2012] EUECJ T-278/11 (13 November 2012), available at http:// www. bailii. org/ eu/ cases/ EUECJ/ 2012/ T27811.html. The proceedings concerned "the right of access of the public to documents", which the statutory scheme in question "fully respected and, therefore [made] fully effective" by "the legislature", ensuring "the possibility of bringing court proceedings" (*id* at para 37). The Court confirmed that "according to settled case-law, the time-limit for bringing actions is a matter of public policy, since it was established in order to ensure that legal positions are clear and certain and to avoid any discrimination or arbitrary treatment in the administration of justice" (*id* at para 30, citing Case C-246/95 *Coen* [1997] ECR I-403 at para 21, and the order of 4 April 2008 in Case T-503/07 *Kulykovska-Pawlowski v Parliament and Council* at para 6). In the circumstances of that case the "time began to run ... on 5 February 2011 and expired ... on 14 April 2011, that is, more than one month before the action was brought on 25 May 2011" (*id* at para 41. In terms of Article 263 of the TFEU, proceedings must be instituted within two months of the publication of the measure, or of its notification to the applicant, or, in the absence thereof, of the day on which it came to the knowledge of the applicant, as the case may be (*id* at para 35)). The CJEC held that or this reason "the action must be rejected in its entirety as manifestly inadmissible, on the ground that it was out of time" (*id* at para 47). On this basis, raised by the Court *mero motu* (*id* at para 29), the merits did not arise for consideration.

[117] *R (on the application of Burkett) v Hammersmith and Fulham London Borough Council* [2002] 3 All ER 97 at para 64. Lord Diplock similarly observed in *O'Reilly v Mackman* [1982] 3 All ER 1124 (HL) at 1131, [1983] 2 AC 237 at 280-281:

Resulting prejudice and any consequential detriment to good administration which may arise if the review is entertained are pertinent considerations when the merits of the reasons provided for seeking condonation is considered.[118] In applying the rule, sufficient regard must be had to the fact that late challenges to decisions authorising developments inherently prejudices good administration.[119]

68. Ignorance of the decisions sought to be impugned is not a proper basis for condonation if the appellants were aware of the scheme, and should have enquired as to the decisions made under it.[120] The appellants' concession that this has indeed been the case is accordingly fatal. So too is their reliance on what they contend to be the fundamental nature of the cause of action: "the more fundamental the right, the more promptly one might expect complaint to be made".[121] Thus OUTA's invocation of the contended fundamental nature of the proceedings does not justify the delay. It instead militates against condoning the delay.

69. Nor is the situation alleviated by seeking out allegedly ignorant individuals through whom to challenge administrative action. It has indeed been held to be "absurd" to allow a late challenge to a development by identifying ignorant individuals.[122] A court is only tolerant to delay in circumstances where no prejudice is caused by the delay.[123]

"The public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision-making powers for any longer period than is absolutely necessary in fairness to the person affected by the decision."

[118] *Id* at paras 25-26.

[119] *R v Newbury District Council, ex parte Chieveley Parish Council* (1998) 10 Admin LR 676.

[120] *R v Cotswold District Council, ex p Barrington* (1998) 75 P & CR 515.

[121] *Ngati Apa Ki Te Waipounamu Trust v Attorney-General* [2006] UKPC 49; [2007] 2 NZLR 80 at para 67. The Privy Council held that even were there to have been any merits in the complaint, it had to be dismissed on the basis of delay – despite the court *a quo* not basing its decision on that ground.

[122] *R v North West Leicestershire District Council, ex parte Moses* [2000] Env LR 443 at 451-452.

[123] *R v Council of the Society of Lloyds, ex parte Johnson* (16 August 1996) unreported, cited in Fordham *Judicial Review Handbook* 5th ed (Hart Publishing, Oxford 2008) at 279.

70. Significantly the appellants were unable to place themselves in the category contemplated by Lord Woolf in *R v Commissioner for Local Administration, ex parte Croydon London Borough Council*:[124]

> "While in the public law field, it is essential that the courts should scrutinise with care any delay in making an application and a litigant who does delay in making an application is always at risk, the provisions of RSC Ord 53, r 4 and s 31(6) of the Supreme Court Act 1981 are not intended to be applied in a technical manner. As long as no prejudice is caused, which is my view of the position here, the courts will not rely on those provisions to deprive a litigant who has behaved sensibly and reasonably of relief to which he is otherwise entitled."

71. It is significant that the current appellants do not even attempt to bring themselves within the operation of this *dictum*. They demonstrably cannot do so, because on their own concession their conduct was unreasonable. Moreover, *in casu* the prejudice caused to the State is quantified at over R21bn; there was an excessive delay; the appellants did not act "sensibly and reasonably", because they persisted in their misplaced expectation that tolling will be cancelled despite the respondents consistently confirming that the user-pays principle and tolling will not be reconsidered, and they did not investigate the facts as required; and there is no *per se* entitlement to the relief sought – it is discretionary.

72. Moreover, an applicant is not permitted to rely on the fact that it elected to seek to persuade the decision-maker by deploying political means, rather than by seeking a

[124] [1989] 1 All ER 1033 at 1046g.

legal remedy.[125] Aggrieved parties to contentious decisions are further required to prepare themselves for foreseeable review proceedings should a political solution fail.[126]

73. Where third parties (as, *in casu*, Treasury and indeed all participants in the national economy, especially those outside Gauteng) are affected, courts are slow to set aside a decision where the risk of a venture was accepted on the strength of a firm decision to grant authority.[127] This, we submit, must apply *a fortiori* where authorisation has indeed been granted (as has happened *in casu*),[128] and it is not merely a third party, but an entire economy which is affected.

74. Applying these principles, English courts have held that even a period of just over some six months was unreasonable in circumstances where substantial intervals of time were left unexplained.[129] As we have shown, the appellants have failed entirely to explain the delay during the period since the impugned decisions were made (in 2007 and 2008) and the "public outcry" in February 2011. This itself is a long, unexplained period – it exceeds two years – and militates against granting condonation.[130]

---

[125] Fordham *Judicial Review Handbook* 5th ed (Hart Publishing, Oxford 2008) at 281), citing *R v London Borough of Redbridge, ex parte G* [1991] COD 398 and *R v London Borough of Bexley, ex parte Barnehurst Golf Club Limited* [1992] COD 382.

[126] The English courts require potential applicants for judicial review "to have block and tackle in order" (*Re Friends of the Earth* [1988] JPL 93 (CA) at 95; *R v Exeter City Council, ex parte JL Thomas & Co* [1991] 1 QB 471 at 483). In such circumstances a delay of even one month is unreasonable (*R v Secretary of State for the Home Department, ex parte Prison Officers' Association & Goodman* Queen's Bench Division, Crown Office List, CO 2736, 22 December 1992). In this light the appellants' revelation that "approximately 4 to 6 weeks" of preparation had started only late in February 2012 before instituting the review is self-destructive.

[127] *R v Secretary of State for Trade and Industry, ex parte Greenpeace Ltd* [1998] Env LR 415.

[128] *Cf R v North West Leicestershire District Council, ex parte Moses* [2000] Env LR 443 at 450, referring (in analogous circumstances) to the substantial expenditure incurred by third parties in reliance on planning permission granted for a runway.

[129] *R v Secretary of State for Health, ex parte Furneaux* [1994] 2 All ER 652 (CA).

[130] *Beweging vir Christelik-Volkseie Onderwys v Minister of Education supra* at para 60; *Associated Institutions Pension Fund v Van Zyl supra* at para 51.

75. Even were the appellants' contention that on the facts[131] the relevant time period only started running "roughly at the end of 2010" to be accepted (despite both SAVRALA and OUTA's chairman being at all times apprised of all relevant events, and despite the principles set out in the caselaw referred to above), the period between "roughly the end of 2010 and the institution of the review proceedings is excessive, and inadequately explained. Courts have refused to condone delays of as short as seven weeks,[132] a month,[133] two and a half months,[134] and just under three months.[135] Judgments have reiterated that it could "not sufficiently stress the crucial need in cases of this kind for appellants to proceed with the greatest possible urgency, giving moreover to those affected, the earliest warning of an intention to proceed."[136]

(6) Conclusion on delay

76. For the above reasons we submit that condonation should be refused. We further submit that the same considerations in any event militate against granting substantive relief, because the relief sought will cause – as a result of the very late stage at which it is sought – material adverse consequences to the respondents.

---

[131] Which must be approached on the respondents' version.
[132] *R v Secretary of State for Education, ex parte London Borough of Lambeth* (Queen's Bench Division, Crown Office List, CO 2736, 22 December 1992).
[133] *R v Secretary of State for the Home Department, ex parte Prison Officers' Association & Goodman* (Queen's Bench Division, 11 December 1992)
[134] *R v South New Hampshire District Council, ex parte Crest Homes plc* [1993] 3 PLR 75, observing that the legal position is that "people must act with the utmost promptitude because so many third parties are affected by the decision and are entitled to act on it unless they have clear and prompt notice that the decision is challenged." The appellants' presumed entitlement of six months of inactivity, with an obligation only to start their inertia after the period prescribed under section 7(1) of PAJA has expired is accordingly legally misconceived. This approach permeates the appellants' entire approach to their delay, and even manifests itself in the appellants' heads of argument in this Court (paras 9.13 to 9.15). This in itself demonstrates that the appellants' case for condonation is legally misconceived.
[135] *R v Exeter City Council, ex parte JL Thomas & Co* [1991] 1 QB 471 at 484.
[136] *Id* at 484.

C. Adverse consequences of relief sought by appellants

77. The consequences of restraining e-tolling have been fully set out in the respondents' pleadings,[137] and do not require repetition. The Constitutional Court described these as "dire",[138] because non-tolling

> "will trigger the right of creditors to call up the loan and demand full payment [of approximately R21bn][139] from the Government. If that were to happen, Government will have to make significant budgetary reallocations to meet the call-up. In other words, the impact of the restraining order is to invade the heartland of National Treasury's function and to force the hand of Parliament's budgetary role."[140]

78. Nonetheless, the appellants seek to suggest that the prejudice to the respondents is nothing but a "rounding error".[141] (This appears to be jargon for "very small".)[142] In this the appellants are mistaken, as a matter of fact.

79. The public funds which the appellants seek to redirect to the GFIP have already been allocated to other important social and development programmes. Government will in perpetuity have less revenue to allocate to pressing social and economic priorities (including health care, education and basic infrastructure in less-developed parts of the country).[143] It is Government's function to prioritise these needs and to decide on the proper funding mechanisms, and how to allocate national revenue. Courts are institutionally unequipped to make decisions on budgetary issues, and are required by

---

[137] See e.g. Vol 16 p 2165 para 44.4; Vol 16 p 2171 to 2172 para 59; Vol 16 p 2172 paras 60-62; Vol 16 p 2174 para 70; Vol 16 p 2175 para 72.1 and para 72.3; Vol 16 p 2175-2176 para 73; Vol 16 p 2176 para 74; Vol 16 pp 2176-2177 paras 75.1-75.3; Vol 16 p 2177 para 77- para 78; Vol 16 p 2178-2179 paras 81 and 82; Vol 16 p 2180 para 85; Vol 16 p 2180 para 86; Vol 16 p 2180 para 87; Vol 16 p 2181-2182 para 88 to 90.2.
[138] Para 69 of the Constitutional Court's judgment.
[139] Vol 16 p 2163 paras 33-34.
[140] Para 69 of the Constitutional Court's judgment.
[141] Vol 16 p 2334 para 449.
[142] Vol 16 p 2334 para 448.
[143] Vol 16 p 2182 para 90.1.

the constitutional principle of separation of powers to treat Government's decisions in this field with the appropriate respect.[144]

80. This applies particularly in an economic climate like the present, in which Government cannot afford any other funding alternative than the user-pay principle.[145] Because Government adopted this funding mechanism already in 2007, and it was unchallenged until 2012, Government had every reason to continue to rely on it for purposes of fiscal planning.

81. The appellants' attempt to belittle the State's overwhelming social developmental responsibilities is therefore misplaced – as a matter of fact,[146] constitutional principle[147] and in the light of the Constitutional Court's observations in the Part A proceedings.[148]

D. Courts' inherent remedial discretion

(1) Applicable legal principles

82. It is by now an established principle that in appropriate circumstances a court will decline to set aside invalid administrative acts.[149] This is authorised both by

---

[144] *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC) at para 38.
[145] Vol 16 p 2192-2193 para 118.2.5.
[146] *Plascon-Evans Paints Limited v Van Riebeeck Paints (Pty) Limited* 1984 (3) SA 623 (A) at 634 E-635C; *Associated Institutions Pension Fund v Van Zyl* 2005 (2) SA 302 (SCA) at para 53.
[147] *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC) at para 38.
[148] Para 69 of the Constitutional Court's judgment, quoted above.
[149] *Chairperson,* Standing *Tender Committee v JFE Sapela Electronics (Pty) Ltd* 2008 (2) SA 638 (SCA) at para 28; *Moseme Road Construction CC v King Civil Engineering Contractors (Pty) Ltd* 2010 (4) SA 359 (SCA) at para 21; *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province* 2008 (2) SA 481 (SCA) at para 23.

section 172 of the Constitution and section 8 of PAJA,[150] which require that relief granted be just and equitable – involving "a process of striking a balance between the applicant's interests, on the one hand, and the interest of the respondents, on the other".[151] Courts accordingly have an inherent remedial discretion – initially under the common law, and now "a generous jurisdiction"[152] under the Constitution and PAJA. As was held in *Oudekraal Estates (Pty) Ltd v City of Cape Town*:[153]

> "It is this discretion that accords to judicial review its essential and pivotal role in administrative law, for it constitutes the indispensable moderating tool for avoiding or minimising injustice when legality and certainly collide."

83. The most typical instance where courts apply this principle is "where an aggrieved party fails to institute review proceedings within a reasonable time."[154] It is applied even where there is no culpable delay on the part of the aggrieved party,[155] but should (we submit) apply *a fortiori* in circumstances where an excessive delay resulted and the delay is insufficiently explained.

84. The purpose of the rule is to prevent prejudice to the respondent; and to serve the public interest in finality of administrative decisions, the exercise of administrative functions, and considerations of pragmatism and practicality.[156] These considerations have often resulted in courts declaring glaringly unlawful administrative action invalid, but without setting it aside. One of the most material considerations for adopting this

---

[150] *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 (4) SA 113 (CC) at para 82.
[151] *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province* 2008 (2) SA 481 (SCA) at para 22.
[152] *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) at para 30.
[153] 2004 (6) SA 222 (SCA) at para 36.
[154] *Chairperson,* Standing *Tender Committee v JFE Sapela Electronics (Pty) Ltd* 2008 (2) SA 638 (SCA) at para 28; *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1987 (1) SA 13 (A).
[155] *Chairperson,* Standing *Tender Committee v JFE Sapela Electronics (Pty) Ltd* 2008 (2) SA 638 (SCA) at para 28.
[156] *Associated Institutions Pension Fund v Van Zyl* 2005 (2) SA 302 (SCA) at para 46; *Chairperson,* Standing *Tender Committee v JFE Sapela Electronics (Pty) Ltd* 2008 (2) SA 638 (SCA) at para 28.

approach is where the interests of the public purse are involved.[157]

85. The Constitutional Court has confirmed these principles and the Supreme Court of Appeal authorities establishing them.[158] In *Bengwenyama Minerals* it explained that the principle is a manifestation of the law being "a blend of logic and experience",[159] and provided the following flexible guidelines in applying it:

> "The apparent rigour of declaring conduct in conflict with the Constitution and PAJA unlawful is ameliorated in both the Constitution and PAJA by providing for a just and equitable remedy in its wake. I do not think that it is wise to attempt to lay down inflexible rules in determining a just and equitable remedy following upon a declaration of unlawful administrative action. The rule of law must never be relinquished, but the circumstances of each case must be examined in order to determine whether factual certainty requires some amelioration of legality and, if so, to what extent. The approach taken will depend on the kind of challenge presented – direct or collateral; the interests involved, and the extent or materiality of the breach of the constitutional right to just administrative action in each particular case."[160]

86. The same position applies in England[161] and other comparable jurisdictions.[162] As in

---

[157] *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province* 2008 (2) SA 481 (SCA) at para 29.

[158] *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 (4) SA 113 (CC) at paras 81-85.

[159] *Id* at para 85.

[160] *Ibid* (footnotes omitted). For a recent exposition by the Constitutional Court of the governing principles and precedents, see *Liebenberg NO v Bergrivier Municipality* [2013] ZACC 16 (6 June 2013) at paras 23-25, referring to *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA); *Nokeng Tsa Taemane Local Municipality v Dinokeng Property Owners Association* [2010] ZASCA 128; and *African Christian Democratic Party v Electoral Commission* 2006 (3) SA 305 (CC). The Constitutional Court rejected the challenge to the impugned rates (*id* at para 65), which constitutes a user-charge closely comparable to a toll tariff.

[161] E.g. *R (Gavin) v Haringey London Borough Council* [2003] EWHC 2591 (Admin) [2004] 1 PLR 61 at para 91. The judment involved planning permission. Because of an undue delay in instituting review proceedings, the impugned declaration was declared invalid but not set aside. Similarly in *R v Swale Borough Council and Medway Ports Authority, ex parte Royal Society for the Protection of Birds* [1991] JPL 39 relief was refused in a challenge against planning permission in reliance on which a dredging contract was concluded, because if the benefit of the contract were to have been lost, costs would increase, the development delayed and substantial financial loss would be incurred by the port authority. See also *R v Secretary of State for Health, ex parte Furneaux* [1994] 2 All ER 652 (CA) and *Re Friends of the Earth* [1988] JPL 93 (CA), refusing leave to apply for judicial review of a consent to the construction of a nuclear generating plant to which funding of £300m had already been committed in reliance on the impugned decision.

[162] In *Auckland Casino Ltd v Casino Control Authority* [1995] 1 NZLR 142 at 152 the Court of Appeal,

South African, highest courts of other jurisdictions have similarly confirmed that one of the bases on which courts readily refuse relief is undue delay.[163]

(2) Application of legal principles

87. We submit that when the principles set out above are applied to the facts of this case, the impugned decisions should not be set aside – even were the appellants to succeed in establishing any basis for the challenge.

88. When applying the factors set out by the Constitutional Court in *Bengwenyama*

Wellington summarised the legal position and relevant authorities applicable in New Zealand and comparable commonwealth countries:

> "... the discretionary remedy of judicial review may be refused to an applicant who has not moved with reasonable expedition. In New Zealand there are no fixed time limits under the Judicature Amendment Act 1972. Everything turns on the particular circumstances. See for example *Turner v Allison* [1971] NZLR 833, especially per Turner J at pp 852-853 (nearly a year's delay fatal after firm interim indication that supermarket would be authorised); *West Coast Province of Federated Farmers of New Zealand (Inc) v Birch* (Court of Appeal, Wellington, CA 25/82, 16 December 1983) (more than six months' delay fatal after decision to grant mining licence; project entailed large sums of money); *Malayan Breweries Ltd v Lion Corporation Ltd* (1988) 4 NZCLC 64,344 (delay of one week fatal to injunction claim against company merger). There are many other cases in this area in New Zealand and elsewhere."

Referring to English authorities, the Court of Appeal added:

> "Mention may be made of some drawn to our attention in argument: Re Friends of the Earth (Court of Appeal, England, 21 July 1987); R v Independent Television Commission, ex parte TVNI Ltd (Court of Appeal, England, 19 December 1991); and R v Secretary of State for the Home Department, ex parte Prison Officers' Association (Queen's Bench Division, 11 December 1992, Otton J). Those cases show that in England, where there is a prima facie period of three months for applying for judicial review, coupled with an overall obligation to apply promptly, delay within the three months can be fatal, and also that an applicant may need 'to have block and tackle in order' for foreseeable urgent proceedings. In R v Secretary of State for Health, ex parte Furneaux [1994] 2 All ER 652 an interval of six months was held fatal, as in the meantime a rival pharmacy had been established. The obligation to proceed promptly was described as 'of particular importance where third parties are concerned' per Mann LJ at p 658.

To these authorities may be added *Ritchies Transport Holdings Ltd v Otago Regional Council* CA 152/91. The Court of Appeal applied the Transit New Zealand Act 1989 and held that the impact on the public and the commercial uncertainty which would ensue should the decision be set aside led the Court to exercise its remedial discretion against granting relief – despite "significant defects" in the tendering process.

[163] See e.g. *Caswell v Dairy Produce Quota Tribunal for England and Wales* [1990] 2 All ER 434 (HL) at 439b-h/j and 440h-441h. In that case the failure to apply for leave to apply for judicial review promptly (and in any event within three months of the grounds for making the application arising), as required by RSC Ord 53, r 4(1), amounted to undue delay. This resulted in the House of Lords upholding both the court of first instance and the court *a quo*'s refusal to grant leave. The House of Lords held that unless there was good reason for extending the time within which to apply, the application will fail; but even if leave was granted, a court could still subsequently refuse substantive relief on the ground that relief would be likely to cause hardship or prejudice or be detrimental to good administration.

Minerals to the current case, it is clear, firstly, that the current challenge is a direct one, not a collateral challenge.[164] In a direct challenge courts are slow to interfere with administrative decisions which are belatedly challenged, after reliance have been placed in the finality of the decision. As recent Constitutional Court authority confirms,[165] the distinction between direct and indirect challenges is important in applying the interests of justice criterion (which, as mentioned, also governs the question of condonation for delay, and likewise impacts on the court's exercise of its remedial discretion).[166]

89. Secondly, the interests involved here require a careful consideration of how best State resources should be allocated. This involves numerous policy considerations. (Should

---

[164] In paras 9.28, 10.3.1 and 11.6-11.15 of the appellants' heads of argument they rely on *Kouga Municipality v Bellingan* 2012 (2) SA 95 (SCA) in an attempt to cast their direct challenge as a collateral challenge. In doing so the appellants overlook this Court's subsequent treatment of *Kouga Municipality* in *Head, Department of Education, Free State Province v Welkom High School* 2012 (6) SA 525 (SCA) at paras 12-16. In *Welkom High School* an attempt to cast a direct challenge in the form of a collateral challenge was rejected. This Court confirmed the operation of the *Oudekraal* principle as it applies to collateral challenges. The principle involves that

> "a statute will generally not be interpreted to mean that a subject is compelled to perform or refrain from performing an act in the absence of a lawful basis for that compulsion. It is in those cases – where the subject is sought to be coerced by a public authority into compliance with an unlawful administrative act – that the subject may be entitled to ignore the unlawful act with impunity and justify his conduct by raising what has come to be known as a defensive or a collateral challenge to the validity of the administrative act."

But in the absence of "coercive action directed at him consequent upon the implementation of the ... policies", the principle does not apply. It is only once the policy is invoked against an individual that "[t]he learners could have mounted a collateral challenge in order to resist attempts by the schools to prevent them from attending school, had the schools for instance applied to interdict them from doing so" (para 14). This Court went on (at para 15) to explain that when the collateral-challenge principle was applied in *Kouga Municipality*, this was done expressly on the basis that there is a difference between direct and collateral challenges, and that *Oudekraal* confirmed that

> "[e]ach remedy thus has its separate application to its appropriate circumstances and they ought not to be seen as interchangeable manifestations of a single remedy that arises whenever an administrative act is invalid."

The Court reiterated that "a collateral challenge to the validity of an administrative act will only be available 'if the right remedy is sought by the right person in the right proceedings'." The Court accordingly concluded that the implementation of an unlawful policy could not be challenged, as the HOD purported to do, by (mis)construing the challenge as a collateral one. On the same analysis, the current appellants' attempt to classify their direct challenge as a collateral challenge should fail.

[165] *Liebenberg NO v Bergrivier Municipality* [2013] ZACC 16 (6 June 2013) at para 16, in the comparable context of non-payment of rates (on the basis that imposing them were allegedly unlawful).

[166] See also Pretorius "The status and force of defective administrative decisions pending judicial pronouncement" 2009 *SALJ* 537 at 543, emphasising the contrast between direct and collateral challenges: "where a court is asked to set aside an invalid administrative act in review proceedings, the court has a discretion whether to grant or withhold the remedy."

the use of the Gauteng freeways be funded by the national revenue fund, or by the users of the roads? Should public money allocated for other developmental programmes be re-allocated to be spent on the Gauteng freeways, or should it be used for lesser-developed regions outside of the commercial heartland of the country? Can the South African economy bear an additional increase to the fuel levy?) These are for Government to consider, and courts must afford "due weight to findings of fact and policy decisions made by those with special expertise and experience in the field".[167]

90. Thirdly, following on the second, the alleged breach of the constitutional right to just administrative action in this case involves a contended failure to consult properly, and to give consideration to all material considerations (especially to the cost of tolling and the impact of toll tariffs on the road-users). But in the light of the very extensive public participation process since 4 February 2011, it is clear that – whatever the merits of any procedural objection – all material procedural complaints are substantially purged by the subsequent, and intense, public participation processes. Furthermore, by now it has been shown that the cost of toll collection is clearly not as disproportionate as the appellants initially contended; and Government's substantial further investment in the GFIP has considerably reduced the estimated toll tariffs. Whether the cost-benefit analysis is ultimately correctly struck is a matter on which a court should afford considerably leeway to the Executive.[168]

91. We accordingly submit that even if condonation is granted, and even if the Court upholds any of the substantive attacks, the appropriate, just and equitable remedy is at most declaratory relief. Accordingly no ancillary relief (i.e. setting aside the impugned

---

[167] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) at para 48.
[168] *Nyambirai v National Social Security Authority* 1996 (1) SA 636 (ZS) at 644F-I, 648D-D/E.

decisions) should be granted in these circumstances. This is, in short, because of the extraordinary delay in bringing the review proceedings, and the unprecedented prejudice to the State (and the national economy)[169] should e-tolling be prohibited.

E. Miscellaneous challenges purportedly introduced pursuant to Rule 53(4)

92. As mentioned, in a revealing attempt to shift weight from their primary case (after conceptual flaws were identified in the Constitutional Court's judgment),[170] the appellants sought to introduce two new bases for impugning the decisions. The first has subsequently been abandoned. It seeks to challenge section 27 of the SANRAL Act on the basis that it should have been introduced in Parliament by the Minister of Finance for constituting a money Bill. The second challenge has not been abandoned. It targets the toll decisions on the basis of an alleged violation of section 25 of the Constitution, which protects the right to property.

93. Treasury opposes the introduction of these challenges in the appellants' supplementary founding affidavit, because the grounds do not arise from the Rule 53 record (as contemplated by Rule 53(4)). Nevertheless, we deal shortly with these grounds below, demonstrating not only that neither has any merit, but also that the abandonment of the former disposes also of the latter.

---

[169] See again *Auckland Casino Ltd v Casino Control Authority* [1995] 1 NZLR 142 as example of a case where the court refused a remedy in the exercise of its remedial discretion, based on the general public interests and the impact on the economy. For a further example of a court taking into account the need for effective public administration, speed of decisions, financial markets, decisiveness and finality, see *R v Monopolies and Mergers Commission, ex parte Argyll Group plc* [1986] 1 WLR 763 (CA) at 774 (Sir John Donaldson MR)

[170] Hence "realising that the pinch of the shoe was a forewarning of an otherwise mortal pain" (*Van der Westhuizen v Arnold* 2002 (6) SA 453 (SCA) at para 16).

(1) Constitutionality of section 27 of the SANRAL Act

94. Because the money Bill challenge has correctly been abandoned, only short submissions on its demerits and the abandonment's consequences suffice.

95. Firstly, as regards the demerits of the challenge, the proposition that section 27 of the SANRAL Act is a money Bill was contrary to comparable and international caselaw. Numerous authorities confirm that in order to constitute a tax, a liability must be imposed for the public benefit and for public purposes; and it must not be for a service for specific individuals, but for a service in the public interest.[171] A toll tariff is a user-charge, which cannot be equated to a tax (or other measure rendering the legislation a money Bill).[172]

96. But even were section 27 of the SANRAL Act somehow to be construed as a money Bill, the Constitutional Court's own approach to technical challenges of this kind demonstrates that the argument was correctly abandoned.[173]

97. Secondly, the consequence of the abandonment of the challenge to section 27 of the SANRAL Act is that the statutory measure in terms of which the toll tariffs are imposed stands unimpugned. As a result the suggested deprivation of property is imposed under a law of general application, the constitutionality of which is now

---

[171] *Nyambirai v National Social Security Authority* 1996 (1) SA 636 (ZS) at 643B-D.

[172] *Inter alia Commission of the European Communities v French Republic* 2000 ECR I-06251 at paras 44-47; *E.C. Commission v United Kingdom* (Case C-359/97) [2000] 3 CMLR 919 at paras 44-46, where the European Court of Justice stated that a toll is not a tax. Tax is a payment of money not made in return for a particular service, but imposed by a body governed by public law. The purpose of tax is to generate revenue. It is imposed on all who meet the statutory conditions for liability to the fiscus.

[173] *Ex parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* 2000 (1) SA 732 (CC) at para 26, describing such challenge as "formalistic in the extreme to hold a Bill invalid on the ground that those steering it through Parliament erred in good faith in assuming that it was required to be dealt with under the s 76 procedure".

properly conceded.

98. This concession, as we now turn to show, disposes of the property challenge.

(2) Section 25(1) challenge

99. In what follows we first deal with the property challenge as it is now presented in this Court. We then deal with the relevant constitutional, comparative and international caselaw. Against this background we deal with the appellants' property challenge as it was initially pleaded.

100. On the basis of the submissions below, we submit that (while the limited property challenge now advanced is defeated by the irretrievable explicit abandonment of the challenge to section 27 of the SANRAL Act) it is understandable that the appellants' argument in this Court does not rely on their property challenge as pleaded.[174] But neither the appellants' pleaded case nor the one now presented in argument is legally or factually supportable.

(a) The property challenge presented in this Court is self-destructive

101. After experiencing considerable problems with its section 25(1) argument in the High Court, the appellants' current stance is that their property challenge "rel[ies] on the

[174] Paras 7.1-7.16.2 of the appellants' heads of argument contain not a single reference to their supplementary founding affidavit, in which the property challenge is allegedly introduced. This confirms that the property challenge stands and falls on the judicial review grounds, justiciable under PAJA (pursuant to section 33 of the Constitution, not section 25).

'first part' of section 25(1) of the Constitution.[175] By this they mean, as paragraph 7.4 of the appellants' heads of argument clarifies, that the challenge is now limited to the constitutional requirement that "payment is only permissible if ... it is 'in terms of law of general application'".[176]

102. Payments for tolling are imposed pursuant to section 27 of the SANRAL Act. The SANRAL Act is law of general application. Its constitutional validity is now correctly conceded. It follows that the surviving section 25 challenge as it is now presented is scuppered as a consequence of the abandonment of the constitutional challenge to section 27 of the SANRAL Act.

103. This disposes of the appellants' property challenge. We nevertheless proceed to show that the property challenge is, *per se*, in any event legally misconceived and factually unfounded.

(b) The property challenge is in any event legally misconceived

104. Constitutional Court caselaw, international and comparative authorities and academic commentary demonstrate that the appellants' property challenge is without merit. Section 25 firstly does not apply; the constitutional property right is secondly not infringed; and thirdly, even were it infringed, any such infringement is clearly justifiable in terms of section 36 of the Constitution. We deal with each of these aspects in turn.

---

[175] Para 7.4 fn 90 of the appellants' heads of argument.

[176] Section 25(1) provides: "No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property". It is the clause preceding the comma on which the appellants rely in this Court.

(i) Section 25 does not apply; only section 33 and PAJA do

105. The appellants' invocation of section 25 is expressly premised on what they suggest is their success in establishing the unlawfulness of the toll declarations,[177] which constitutes administrative action. From this "it follows", the appellants contend, "that the levying and collecting of toll will constitute arbitrary deprivation of property."[178] As their heads of argument demonstrate, the appellants raise this argument in an attempt to circumvent section 7(1) of PAJA,[179] which is an insuperable bar to the appellants.[180]

106. On the appellants' own approach, the section 25 argument only arises if the judicial review succeeds – which in turn depends on condonation being granted, and the discretionary declaratory relief being granted. For the reasons set out above, we submit that the necessary premise for the section 25 argument does not arise.

107. But even if it does arise, section 25 in any event does not apply. This is because an arbitrary deprivation of property by administrative action (as opposed to legislative measures) is not protected by section 25.[181] Any "early speculation" about the proper field of application of the constitutional property right has been "ended when the Constitutional Court finally had an opportunity to canvass the provision

---

[177] Para 7.9 of the appellants' heads of argument.
[178] *Ibid.*
[179] Para 7.16.1 of the appellants' heads of argument.
[180] The appellants further argue that the Court retains no remedial discretion where a section 25 challenge succeeds (para 7.16.2). As is the case with the proposition that the delay rule does not operate outside administrative action (which is contrary to e.g. *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) at para 25 and authorities there cited), the contention that courts have not constitutional remedial discretion is unfounded (for being contrary to section 38 and section 172 of the Constitution). Thus the motivation for the appellants' bootstraps argument is misconceived.
[181] *First National Bank of SA v Minister of Finance* 2002 (4) SA 768 (CC) at para 100: "a deprivation of property is 'arbitrary' as meant by section 25 when the 'law' referred to in section 25(1) ... is procedurally unfair."

comprehensively in *First National Bank v Commissioner for SARS: First National Bank v Minister of Finance*."[182] Since then, the property clause enquiry is clearly limited to facial challenges to legislation allegedly infringing section 25.[183] Accordingly

> "the constitutional property clause enquiry essentially breaks down into the following questions:
> (1) Is the interest at stake constitutionally protected property?
> (2) If so, does the legislation provide for deprivation or expropriation?
> (3) If it provides for deprivation, does the legislation meet the requirements of section 25(1)?
> (4) If it provides for expropriation, does the legislation meet the requirements of section 25(2) and (3)?"[184]

108. This is confirmed also by the Constitutional Court's judgment in *Mkontwana*,[185] which makes it clear that the *First National Bank* judgment accepts that section 25(1) applies (as its wording spells out) to "law". Both judgment thus accept that alleged procedural fairness of administrative action does not found a constitutional complaint under section 25(1).[186]

109. Academic commentators are *ad idem* that constitutional property protection does not extend to deprivations through administrative action. For section 25 to operate there must be a "law" that authorises arbitrariness.[187]

---

[182] 2002 (7) BCLR 702 (CC).
[183] Cheadle *et al South African Constitutional Law: The Bill of Rights* (LexisNexis, Durban 2012-SI13) at 20–5 to 20–6.
[184] Cheadle *et al South African Constitutional Law: The Bill of Rights* (LexisNexis, Durban 2012-SI13) at 20–9, emphasis added.
[185] *Supra* at para 65.
[186] See also *National Credit Regulator v Opperman* 2013 (2) SA 1 (CC) at para 68.
[187] Van der Walt "Procedurally arbitrary deprivation of property" 2012(1) *Stell LR* 88 at 92-93:
> "When administrative action in terms of legislation is challenged, the challenge should be based on PAJA. when the authorising legislation (in this case the relevant sections of the Gauteng Transport Infrastructure Act) is challenged for permitting administrative deprivation of property that is

110. Notably the appellants correctly do not suggest that the judgment in *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* supports them.[188] This is because any interpretation of the judgment that leads to an "impression that procedural unfairness that results in a deprivation might be arbitrary and therefore invalid in terms of section 25(1), even when the deprivation was caused by administrative action" "should be avoided, especially given the ambiguity of the decision on this particular point."[189]

111. Even such authorities as are invoked by the appellants in this regard do not assist them. *Mobile Telephone Networks (Pty) Ltd v SMI Trading CC* only serves to defeat the appellants' suggestion that section 27 of the SANRAL Act authorises an unfair procedure.[190] It demonstrates that the appellants' argument is misconceived, firstly because section 33 of the Constitution and PAJA "insulates [the SANRAL Act] against

---

procedurally unfair, the challenge should be based on section 33 of the Constitution. Procedural arbitrariness in terms of section 25(1) should only feature when PAJA does not apply for some reason."

Mostert *et al Bill of Rights Compendium* (LexisNexis, Durban) at 3FB7.1.2 (citing Blaauw-Wolf "The 'balancing of interests' with reference to the principle of proportionality and the doctrine of *Güterabwägung* – A comparative analysis" 1999 *SAPR/PL* 178ff; Gildenhuys *Onteieningsreg* 2nd ed (2001) 93):

"'Law' in this context includes statutes and accompanying legislative regulations, but could also conceivably be extended to the rules of common law and customary law. Administrative regulations or decrees will probably not pass this requirement."

See also *id* at 3FB7.2.2(a) (in the context of the same terminology, "law", used in section 25(2)):

"'Law' can mean a statute or the common law. Apart from recognising the state's power to expropriate against payment of compensation, the South African common law does not endow any authority in South Africa with the power to expropriate. Insofar as *expropriation* based upon the common law at this point seems unlikely, the source of law of general application would therefore apply to statutes and other legislative measures making provision for expropriation or amounting to expropriation. Most authors agree that internal administrative policy documents cannot be described as "law" for purposes of this requirement" (footnotes omitted).

See also Steytler (2011) "The legal instruments to raise property rates: policy, by-laws and resolutions" 26(2) *SA Public Law* 484 at 495, dealing with legal remedies against "[property] rates ... imposed [without] ... a solid legal basis". The remedy lies in "the basic principles of the rule of law and compliance with the Property Rates Act." Nowhere is it suggested that a constitutional challenge based on section 25 is an appropriate cause of action.

[188] 2009 (6) SA 391 (CC).

[189] Van der Walt "Procedurally arbitrary deprivation of property" 2012(1) *Stell LR* 88 at 92.

[190] 2012 (6) SA 638 (SCA).

constitutional invalidity by serving as a hedge against arbitrary deprivation".[191] Secondly, *Mobile Telephony Network* itself confirms that it is the requirements of administrative justice which governs. Administrative justice is entrenched by section 33 of the Constitution and given effect to by PAJA, not section 25 of the Constitution. Direct application of section 25 of the Constitution is conceptually confused and violates the principle of subsidiarity.[192]

112. Accordingly there is no support for the appellants' attempt to invoke section 25 in the current circumstances. Already for this reason the property challenge should fail. But even were it to be entertained, the property challenge is clearly without merit, as we show below with reference to Constitutional Court authority, and international and comparative caselaw.

(ii) Constitutional Court caselaw: the challenge fails at the entry-level

113. The appellants rely on paragraph 32 of the Constitutional Court's judgment in *Mkontwana v Nelson Mandela Metropolitan Municipality*[193] in support of the proposition that "exacting of payment of money ... constitutes a deprivation of property within the meaning of section 25(1) of the Constitution".[194] But *Mkontwana* does not support them.[195] In fact, the judgment is directly against the

---

[191] *Id* at para 35.
[192] *PFE International v Industrial Development Corporation of South Africa Ltd* 2013 (1) SA 1 (CC) at para 4, and authorities cited in fn 6.
[193] 2005 (2) BCLR 150 (CC).
[194] para 7.3 of the appellants' heads of argument.
[195] Para 32 reads:

> "Almost all the parties accepted that these provisions do bring about a deprivation of property. There was one submission however that they do not, but are merely regulatory provisions. They do not prevent transfer altogether, the argument went, but are measures that merely delay transfer until a certificate has been obtained. The contention has no merit. In *First National Bank* (the *FNB* case) this Court held that

appellants.

114. The Constitutional Court's approach in *Mkontwana* confirms that for section 25 to operate, the alleged deprivation must be arbitrary. This means that there must be a lack of an "appropriate relationship between means and ends, between the sacrifice the holder is asked to make and the public purpose the deprivation is intended to serve. Expressed differently, the question is *Does there exist sufficient reason for the deprivation?*[196]

115. Applying this approach, in *Mkontwana* Yacoob J summarised the position as follows:

> "[T]here must be sufficient reason for the deprivation otherwise the deprivation is arbitrary. The nature of the relationship between means and ends that must exist to satisfy the section 25(1) rationality requirement depends on the nature of the affected property and the extent of the deprivation. A mere rational connection between means and ends could be sufficient reason for a minimal deprivation. However, the greater the extent of the deprivation the more compelling the purpose and the closer the relationship between means and ends must be."[197]

116. Yacoob J outlined what had to be determined in such an enquiry:

> "(a) the nature of the property concerned and the extent of the deprivation;
> (b) the nature of the means-ends relationship that is required in light of the nature and extent of the deprivation;

---

the taking away of property is not required for a deprivation of property to occur. Whether there has been a deprivation depends on the extent of the interference with or limitation of use, enjoyment or exploitation. It is not necessary in this case to determine precisely what constitutes deprivation. No more need be said than that at the very least, substantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society would amount to deprivation."

As we shall show below, the imposition of tariffs for the use of infrastructure does not "go beyond the normal restrictions on property use or enjoyment found in an open and democratic society".

[196] *First National Bank of SA v Minister of Finance* 2002 (4) SA 768 (CC) at paras 98-99.

[197] *Id* at para 35.

(c) whether the relationship between means and ends accords with what is appropriate in the circumstances and whether it constitutes sufficient reason for the section 25(1) deprivation."[198]

117. The question in *Mkontwana* was whether legislation which limits an owner's power to transfer immovable property violated section 25 of the Constitution. In essence, the Court dealt with the question whether it was arbitrary to require an owner of property to bear the risk of non-payment of the consumption charges by unlawful occupiers of the property. The provision clearly constituted a deprivation. The question was whether there was a sufficient reason for the deprivation. The Court held that there would be a sufficient reason (i.e. the absence of arbitrariness) "if the Government purpose is both legitimate and compelling and if it would, in the circumstances, not be unreasonable to expect the owner to take the risk of non-payment".[199] The Court held that the measure was reasonable, because the relationship between the owner and the consumption charge was sufficiently close.[200] In that case

> "[t]he relationship between the property and the consumption charge in these circumstances is strong because the water and electricity is supplied to and consumed on the property in the course of its use and enjoyment. ..."[201]

118. Thus constitutional property right protection does not prohibit the imposition of user-charges,[202] because there is a sufficiently strong relationship between the charge and

---

[198] *Id* at para 44.
[199] *Id* at para 51.
[200] *Id* at para 54.
[201] Id at para 60.
[202] *Cf National Credit Regulator v Opperman* 2013 (2) SA 1 (CC) at para 63; *Law Society of South Africa v Minister for Transport* 2011 (1) SA 400 (CC) at para 83; Mostert *et al Bill of Rights Compendium* (LexisNexis, Durban) at 3FB6.2.2 (footnotes omitted):

> "Although constitutional property is related to and in a sense derived from property under private law, the concepts are poles apart. In the constitutional context, property is a social construct, subject to regulation and amendment in the public interest. Constitutionalisation of property places the balancing of private and public interests at the centre of a definition of property. This subjects the individual freedom of the property holder to restrictions based on constitutionally endorsed social obligations."

the reason for its imposition. Applying *Mkontwana* to e-tolling, the imposition of a charge for the use of a public road on the vehicle owner does not infringe section 25 of the Constitution. This conclusion is confirmed by international law and comparative law.

(iii) International law

119. Both African and European authorities strongly support the conclusion that a user charge does not infringe the right to property.

120. For instance, the African Commission's approach to Article 14 of the African Charter, which entrenches property rights,[203] demonstrates that the arbitrariness which is requires before an infringement is established is absent when governments act "in accordance with any established law". The Commission confirmed that "Article 14 of the Charter recognises that States are in certain circumstances entitled, among other things, to control the use of property in accordance with the public or general interest, by enforcing such laws as they deem necessary for the purpose." Accordingly, when a State has acted in the public interests or in terms of legislation ("laws"), the threshold for Article 14's application is not passed.[204]

121. A similar approach is applied by the European Court of Human Rights. It confirmed that Article 1 of Protocol No. 1 of the European Convention (which is the relevant

---

[203] Article 14 of the Charter provides:

"The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws".

[204] *INTERIGHTS, Institute for Human Rights and Development in Africa, and Association Mauritanienne des Droits de l'Homme / Mauritania* Communication no. 373/09 at paras 46-47. See also the African Commission's application of Article 14 of the African Charter (which is, in pertinent part, similar to the property clause in the South African Constitution), in *Institute for Human Rights and Development in Africa / Angola* Communication no. 292/04 at para 73 (confirming that the right to property is not absolute).

provision in European law) is not engaged when public authorities impose charges, taxes or penalties.[205]

122. In the specific context of levying tolls on public roads, the Court of Justice of the European Communities held that tolling constituted the provision of services in the form of infrastructure.[206] The services are supplied in return for consideration in the form of the toll levied. There is thus a direct link between the service provided and the consideration received, because a toll is paid for the provision of infrastructure.[207] Toll tariffs are paid in return for a specific service provided (i.e. the supply of certain parts of the roads infrastructure), thus the money paid is a fee which must be seen as a consideration for a service provided.

123. From this reasoning it follows that a toll tariff does not constitute a violation of a property right, because there is no arbitrary deprivation. The tariff comprises a *quid pro quo* for road infrastructure. It is imposed by law, and arbitrariness is absent.

(iv) Comparative law

124. In the light of the conclusion arrived at by our Constitutional Court and under international law, it is unsurprising that the Privy Council held that tolling does not violate constitutional property rights. In *Campbell-Rodriques v The Attorney General*

---

[205] *Sporrong and Lönnroth v Sweden* (1983) 5 EHRR 35 at para 61.

[206] *Commission of the European Communities v French Republic* 2000 ECR I-06251 at para 44-47. The reasoning and conclusion is consistent with *E.C. Commission v Netherlands* (235/85) 1987 ECR 1471; 1988 (2) CMLR 921; *Commission of the European Communities v Ireland* (Case C-358/97) 2000 European Court Reports I-06301 at paras 32-33 and *E.C. Commission v United Kingdom* (Case C-359/97) [2000] 3 CMLR 919 at paras 44-46, concluding: "There is, therefore, a direct and necessary link between the service provided and the financial consideration received."

[207] The European Court of Justice pertinently observed that a toll is not a tax. Tax is a payment of money not made in return for a particular service, but imposed by a body governed by public law. The purpose of tax is to generate revenue. It is imposed on all who meet the statutory conditions for liability to the fiscus.

of Jamaica the Privy Council considered whether tolling a public road constituted an infringement of the right to property under the Jamaican constitution.[208] The Council upheld the Jamaican Constitutional Court and Court of Appeal's judgments, concluding that the right to property was not infringed. Lord Carswell held for a unanimous Council (Lord Hoffmann, Lord Scott of Foscote, Lord Mance and Lord Neuberger of Abbotsbury concurring) that

> "The [toll road] project involved the replacement of an inadequate public road and bridge by an improved road and a new bridge, designed to enure for the benefit of the public in general by speeding the flow of traffic and relieving congestion. It was to be financed, not by the taxpayers as a whole, but by charging tolls to be paid by those using the road. Their Lordships consider that the words of Viscount Simonds in the OD Cars case at p 517 were apt, when he asked rhetorically whether anyone using the English language would say that this meant that the authority had taken property. The appellants cannot in their Lordships' opinion establish that the construction of the new road and the charging of a toll for its use constituted a taking or acquisition of any proprietary right capable of coming within section 18."[209]

125. Despite the ubiquity of toll road constitutional property protection, we are not aware of any other jurisdiction in which tolling has been imagined to violate property rights. All indications are to the contrary.[210]

126. For instance, in Canada a test case[211] challenged the authority of utility commissions and corporations to require cash deposits[212] as security for usage charges.[213] After analysing Canadian Supreme Court authorities, the Court held that no precedent existed

---

[208] 2007 WL 4266106 (3 December 2007).
[209] *Id* at para 19.
[210] Significantly the appellant are unable to suggest authority which supports them.
[211] *Clark v Peterborough Utilities Commission* 24 OR (3d) 7; 1995 CanLII 7090 (ON SC), available at http://canlii.ca/t/1vt6w.
[212] *Id* at para 3.
[213] *Id* at para 10.

for the proposition that the Charter was a violation of any fundamental right when a charge was levied for services.[214] The Court made the important observation that

> "This type of claim requires the kind of value and policy judgments and degree of social obligation which should properly be addressed by legislatures and responsible organs of government in a democratic society, not by courts under the guise of "principles of fundamental justice" under s. 7. I want to be very clear. This is not a matter of judicial deference to elected legislatures; it concerns limits and differences between the political process and the judicial in a democracy. It raises issues of priority and extent of social assistance and quality of life to which all should be automatically entitled. Courts are well equipped to hear and consider evidence, analyze concepts of law and justice, and apply those principles to the evidence. I think in these submissions the applicants seek to introduce social and economic ideas and policies which were intended to be considered and debated in a political forum when property-economic rights were excluded from s. 7. It is equally dangerous to attempt to introduce personal beliefs or agendas to a good end through improperly or ill-suited means as to do so to a less agreeable end, as exemplified by the judicial frustration of social welfare legislation for decades in the United States in the name of freedom of contract and the Fourteenth Amendment: *Lochner v. New York,* 198 U.S. 45 (1905); *Learned Hand: The Man and the Judge* (1994), by G. Gunther, p. 118.[215]

127. This observation is clearly consistent with the Constitutional Court's judgment in the Part A proceedings, and with the test applicable to section 25 established by the Constitutional Court in *First National Bank.*[216] This test is expressly formulated in a manner which gives due effect to the separation of powers between the judiciary and the legislature.[217]

---

[214] *Id* at paras 42 and 45.
[215] *Id* at para 43.
[216] See e.g. the examples collected by Ackermann J in *First National Bank of SA v Minister of Finance* 2002 (4) SA 768 (CC) at para 85, demonstrating that *inter alia* compulsory contributions to a State pension scheme, property taxes and exchange control impositions have been held not to infringe the right to property under the European Convention. The same should apply *a fortiori* where a direct benefit accrues to the user *in lieu* of payment of tolls, as opposed to tax measures (which is a source of general revenue).
[217] *First National Bank supra* para 98.

128. Applying this test the section 25 challenge should fail at the first stage for failing to demonstrate an infringement of the right to constitutional property.[218]

(v) Limitations analysis in any event saves any alleged infringement of property rights, were it to have been established

129. Finally it remains to observe that even where section 25 applicable, and even if tolling could be construed as a deprivation of property which infringes section 25, then the limitation of the right is clearly justifiable in terms of section 36 of the Constitution.[219]

130. It is significant that the appellants do not deal in their heads of argument with the limitations analysis which is fully pleaded by the respondents.[220] There is accordingly no basis for rejecting the respondents' factual and legal submissions that even were the tolling tariff to infringe section 25 of the Constitution, the infringement is demonstrably justified in the light of the clear advantages to the road-user concerned and the wide-ranging and far-reaching consequences to the South African economy were the user-pay principle not to be applied.

131. As the facts show, the GFIP is based on a carefully-considered Government policy supported by extensive research.[221] It is given effect to through an unimpugned law of general application. Requiring road-users to contribute the costs of the infrastructure from which they benefit is thus clearly justifiable in terms of section 36 of the

---

[218] There is no basis on which it can be contended that paying for the use of a road is an arbitrary deprivation of property. To the contrary, the user-pays principle (on which the GFIP is premised) indeed turns on the close *nexus* between using the road and paying for its use. This *nexus* means that the threshold question (i.e. whether the right to property is infringed by the SANRAL Act) must be answered in the negative (*First National Bank supra* para 100).

[219] Although the appellants suggested that an infringement of section 25 cannot be justified under section 36 of the Constitution, this argument contradicts the correct legal position as reflected in numerous authorities (see e.g. Mostert *et al Bill of Rights Compendium* (LexisNexis, Durban) at 3FB6.1.4, 3FB7.1.23, and FB5.2: "section 25, like all other rights in the Bill of Rights, remains subject to the limitation provisions of section 36").

[220] Vol 16 pp 2191-2194 paras 118.2.1-11.8.2.5.

[221] Vol 16 pp 2149-2150 para 15.

Constitution. Characterising all this as "highly contentious", the words with which the appellants commence their argument, gives away their case. It is essentially an appellate political resort to court – conflating this with the court of public opinion.

132. For all of these reasons the property challenge is legally misconceived. Plainly it only belatedly occurred to the appellants as a stratagem to try to outflank their difficulties on delay and remedy, which we have already addressed.

(c) The pleaded property challenge is flawed

133. In what remains we shortly demonstrate that even in its pleaded form (which, as mentioned, the appellants do not invoke before this Court) the property challenge is without merit.

134. In their supplementary founding affidavit the appellants appear to advance the following four essential bases for their property challenge:[222]

(a) Liability is "arbitrarily" imposed on the driver of a vehicle, but the system is only equipped to enforce payment against the owner.

(b) The system was introduced in a procedurally unfair manner.

(c) Collection costs are disproportionately high, which renders the whole system irrational.

(d) Alternative funding methods were irrationally not considered.

135. None of these bases has any merit, as we show in relation to each below.

---

[222] Vol 12 p 1596-1597 paras 181.3.1-181.3.4.

136. The first is demonstrably wrong. Section 27(1)(b) of the SANRAL Act clearly authorises collecting a toll

> "payable at a toll plaza by the person so driving or using the vehicle, or at any other place subject to the conditions that the Agency may determine and so make known".

137. The Act accordingly authorises toll being collected at any place other than a conventional toll plaza, in which case the person paying the toll need not necessarily be the driver. The appellants' claim that the system "imposes the liability to pay on the driver" is accordingly mistaken at the outset. Moreover, there is nothing constitutionally offensive about visiting the responsibility for paying tolls on the owner of a vehicle.[223] The first argument based on section 25(1) of the Constitution accordingly fails on every level.

138. The second argument is a repetition of the procedural fairness argument advanced in relation to the impugned decisions. The appellants thus purport to invoke procedural fairness to advance a section 25(1) challenge. This is legally misconceived, as the Constitutional Court and other authorities set out above demonstrate.

139. Similarly, the third argument is contrary to Constitutional Court authority.

---

[223] *S v Meaker* 1998 (8) BCLR 1038 (W) at 1055 per Cameron J (Mailula J conc):

> "Section 130 [which provides 'where in any prosecution ... relating to the driving of a vehicle on a public road ... it is material to prove who was the driver of the vehicle, it shall be presumed, until the contrary is proved, that such vehicle was driven by the owner thereof'] does not operate illogically. The criterion of ownership is entirely logical. It is also precisely targeted. Most vehicle owners purchase vehicles in order to drive them. That they will frequently be the drivers when an offence is committed is not inherently unlikely, even though it is not inevitable. What is more, a vehicle is almost invariably an expensive item which represents much value to the owner. For South Africans able to contemplate major purchases, acquiring a vehicle, after a house, probably represents their most precious investment. It is eminently logical for the State to infer that, if the owner was not driving when the offence was committed, whether in business or private contexts, he or she would know full well who was. It is also logical and fair for the State to impose on vehicle owners, who enjoy the public facility of the roads and their associated services, some measure of responsibility in hiring or lending out their vehicles. This the presumption effectively achieves."

Section 25(1) does not import the proportionality test. The test "is less strict than a full and exacting proportionality examination."[224] The premise for the third basis – i.e. disproportionately-high collection costs – is (whether or not factually borne out) accordingly flawed.

140. The fourth argument is factually unfounded. As Treasury's answering affidavit shows, already Government's 1996 White Paper on National Transport Policy provided the rationale for the financing arrangements proposed for public roads.[225] This policy is given effect to by section 27 of the SANRAL Act.[226] The GFIP was adopted within this enabling statutory framework to give effect to numerous legitimate governmental objectives, including alleviating traffic congestion, encouraging public transport, discouraging private car use and contributing to a more efficient spatial and transport network development.[227] Cabinet's adoption of the GFIP was based on a wide range of interconnected considerations (including logistical, spatial, developmental, economic and social criteria), and was supported by prior planning and feasibility studies and economic and environmental reviews.[228]

141. Similarly, the rationale for adopting the user-pay principle in relation to the GFIP is fully explained.[229] It includes principles of equity and fairness in fiscal arrangements;[230] and other considerations regarding revenue allocation,[231] public finance,[232] and redistributive,[233] social, economic, developmental and public service

---

[224] *First National Bank of SA v Minister of Finance* 2002 (4) SA 768 (CC) at para 98.
[225] Vol 16 p 2148 para 10.
[226] *Cf* Vol 16 p 2149 para 11.
[227] Vol 16 p 2150 para 16.
[228] Vol 16 p 2150 para 17.
[229] Vol 16 p 2152 para 24.1 to Vol 16 p 2155 para 24.9.
[230] Vol 16 p 2154 para 24.7.
[231] Vol 16 pp 2153-2154 para 24.5.
[232] Vol 16 pp 2152-2153 paras 24.3-24.4.

concerns particular to South Africa as a developing country.[234]

142. For reasons set out fully in Treasury's answering affidavit,[235] the appellants' proposed alternative funding model (i.e. ring-fencing of the fuel levy) was considered, but rejected by Cabinet.[236] Thus also the fourth argument is demonstrably untenable.

143. There is accordingly no merit in any of the pleaded bases on which the section 25(1) challenge was initially brought

F. Conclusion

(1) Substantive relief

144. For the reasons set out above, we submit that condonation should be refused. However, even if condonation is granted, the application should fail – even if one assumes in favour of the appellants that the substantive grounds of attack have some merit – in the exercise of the Court's discretion under section 8 of PAJA and sections 38 and 172 of the Constitution.

145. The property challenges introduced in the supplementary founding affidavit should also be rejected – whether for being improperly introduced, or on the merits.

(2) Costs

146. As regards costs, we submit (as we did in written and oral argument in the High Court)

---

[233] Vol 16 p 2154 para 24.6.
[234] Vol 16 p 2152 para 24.1.
[235] Vol 16 pp 2155-2156- para 25 to Record p 3350 para 29.
[236] Vol 16 p 2161 para 29.

that two main considerations militate in favour of a costs order against the appellants.

147. The first is the fatal Part A proceedings. As has already been explained, the conceptual error identified in the Constitutional Court's judgment rendered it apparent that the substantive review should ultimately fail – even if only because the considerations noted in the Constitutional Court's judgment, properly understood, strongly indicate that the circumstances of this matter justify exercising the court's remedial discretion in favour of the respondents.

148. The second is the extraordinary delay in instituting the review proceedings. As this Court held in *Beweging vir Christelik-Volkseie Onderwys v Minister of Education*,[237] the *Biowatch* principle (in terms of which unsuccessful private litigants bringing constitutional proceedings against the State are generally not ordered to pay the costs)[238] is subject to exceptions.[239]

149. The Constitutional Court explained that if "an application is frivolous or vexatious, or in any other way manifestly inappropriate, the applicant should not expect that the worthiness of its cause will immunise it against an adverse costs award".[240] This will be the case "if an applicant had delayed unreasonably before launching it and ought to have known that its prospects of having the delay condoned were slight."[241] In such cases "it would be unfair to expect the successful government respondent to bear its

---

[237] [2012] 2 All SA 462 (SCA).
[238] *Biowatch Trust v Registrar, Genetic Resources* 2009 (6) SA 232 (CC) at para 22.
[239] *Id* at para 68.
[240] At para 37, emphasis added.
[241] *Beweging vir Christelik-Volkseie Onderwys v Minister of Education supra* at para 68, with reference to *Wildlife and Environmental Society of South Africa v MEC for Economic Affairs, Environment and Tourism, Eastern Cape* 2005 (6) SA 123 (E).

own costs."[242] On this basis, in similar circumstances this Court upheld a costs order comparable to the one made *a quo*.[243]

150. We submit that having clearly considered the above submissions and authorities on costs the High Court properly exercised its discretion. (That the High Court does not recite what was argued before it does not detract from this). There is accordingly no basis for interfering with the exercise of its discretion.

151. We therefore submit that if the appeal fail (as we submit it must), the appellants should be ordered to pay the costs of the respondents jointly and severally. Although the matter justifies the employment of three counsel, we ask for the costs of two counsel in relation to the seventh respondent.

J.J. GAUNTLETT SC
T.N. NGCUKAITOBI
F.B. PELSER

Counsel for Treasury

Chambers
Cape Town and Johannesburg

8 July 2013

---

[242] *Ibid.*
[243] *Beweging vir Christelik-Volkseie Onderwys v Minister of Education supra* at para 71.

TREASURY'S LIST OF AUTHORITIES

Caselaw

1. **Associated Institutions Pension Fund v Van Zyl* 2005 (2) SA 302 (SCA) at paras 50-53

2. *Auckland Casino Ltd v Casino Control Authority* [1995] 1 NZLR 142 (CA) at 152

3. *Barkhuizen v Napier* 2007 (5) SA 323 (CC) at para 48

4. *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) at para 48

5. **Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 (4) SA 113 (CC) at paras 81-85

6. **Beweging vir Christelik-Volkseie Onderwys v Minister of Education supra* at para 44

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

8. *Brummer v Gorfil Brothers Investments (Pty) Ltd* 2000 (2) SA 837 (CC) at paras 3, 51

9. **Campbell-Rodriques v The Attorney General of Jamaica* 2007 WL 4266106 (3 December 2007) at para 19

10. *Camps Bay Ratepayers' and Residents' Association v Harrison* [2010] 2 All SA 519 (SCA) para 54

11. *Caswell v Dairy Produce Quota Tribunal for England and Wales* [1990] 2 All ER 434 (HL) at 439b-h/j and 440h-441h

12. *Chairperson,* Standing *Tender Committee v JFE Sapela Electronics (Pty) Ltd* 2008 (2) SA 638 (SCA) at para 28

13. *Children's Resource Centre Trust v Pioneer Food (Pty) Ltd* 2013 (2) SA 213 (SCA)

14. *Clark v Peterborough Utilities Commission* 24 OR (3d) 7; 1995 CanLII 7090 (ON SC), available at http://canlii.ca/t/1vt6w at paras 3, 10, 42, 43, 45

15. *ClientEarth v European Commission* [2012] EUECJ T-278/11 (13 November 2012), available at http:// www. bailii. org/ eu/ cases/ EUECJ/ 2012/ T27811.html

16. *Commission of the European Communities v French Republic* 2000 ECR I-06251 at paras 44-47

17. *Commission of the European Communities v Ireland* (Case C-358/97) 2000 European Court Reports I-06301 at paras 32-33

18. *E.C. Commission v United Kingdom* (Case C-359/97) [2000] 3 CMLR 919 at paras 44-46

19. *E.C. Commission v United Kingdom* (Case C-359/97) [2000] 3 CMLR 919 at paras 44-46

20. *Ex parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* 2000 (1) SA 732 (CC) at para 26

21. **First National Bank of SA v Minister of Finance* 2002 (4) SA 768 (CC) at paras 35, 44, 51, 54, 60, 85, 98-99, 100

22. *Giant Concerts CC v Rinaldo Investments (Pty) Ltd* 2013 (3) BCLR 251 (CC) at paras 29-35

23. *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) at para 25

24. **Gqwetha v Transkei Development Corporation Ltd* 2006 (2) SA 603 (SCA) at paras 22-23

25. *Harnaker v Minister of the Interior* [1965 (1) SA 372 (C) at 381B-C

26. *Head, Department of Education, Free State Province v Welkom High School* 2012 (6) SA 525 (SCA) at paras 12-16

27. *Institute for Human Rights and Development in Africa / Angola* Communication no. 292/04 at para 73

28. *Interights, Institute for Human Rights and Development in Africa, and Association Mauritanienne des Droits de l'Homme / Mauritania* Communication no. 373/09 at paras 46-47

29. *Kouga Municipality v Bellingan* 2012 (2) SA 95 (SCA)

30. *Law Society of South Africa v Minister for Transport* 2011 (1) SA 400 (CC) at para 83

31. *Liebenberg NO v Bergrivier Municipality* [2013] ZACC 16 (6 June 2013) at paras 23-25

32. *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province* 2008 (2) SA 481 (SCA) at paras 22, 23, 29

33. *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC) at para 38

34. **Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 (2) BCLR 150 (CC)

35. *Mobile Telephone Networks (Pty) Ltd v SMI Trading CC* 2012 (6) SA 638 (SCA) at para 35

36. *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC) at para 11

37. *Moseme Road Construction CC v King Civil Engineering Contractors (Pty) Ltd* 2010 (4) SA 359 (SCA) at para 21

38. *National Credit Regulator v Opperman* 2013 (2) SA 1 (CC) at para 63

39. **National Treasury v Opposition To Urban Tolling Alliance* 2012 (6) SA 223 (CC) at para 69

40. *Ngati Apa Ki Te Waipounamu Trust v Attorney-General* [2006] UKPC 49, [2007] 2 NZLR 80 at para 67

41. *Norgold v The Minister of Minerals and Energy of the Republic of South Africa* (278/10) [2011] ZASCA 49 (30 March 2011) at para 48

42. *Nyambirai v National Social Security Authority* 1996 (1) SA 636 (ZS) at 643B-D, 644F-I, 648D-D/E

43. *O'Reilly v Mackman* [1982] 3 All ER 1124 (HL) at 1131, [1983] 2 AC 237 at 280-281

44. *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) at para 36

45. *PFE International v Industrial Development Corporation of South Africa Ltd* 2013 (1) SA 1 (CC) at para 4

46. *Plascon-Evans Paints Limited v Van Riebeeck Paints (Pty) Limited* 1984 (3) SA 623 (A) at 634 E-635C

47. *R v Commissioner for Local Administration, ex parte Croydon London Borough Council* [1989] 1 All ER 1033 at 1046g

48. *R v Cotswold District Council, ex p Barrington* (1998) 75 P & CR 515

49. *R v Exeter City Council, ex parte JL Thomas & Co* [1991] 1 QB 471 at 483-484

50. *R v London Borough of Redbridge, ex parte G* [1991] COD 398

51. *R v London Borough of Bexley, ex parte Barnehurst Golf Club Limited* [1992] COD 382

52. *R v London Borough of Redbridge, ex parte G* [1991] COD 398

53. *R v Monopolies and Mergers Commission, ex parte Argyll Group plc* [1986] 1 WLR 763 (CA) at 774

54. *R v Newbury District Council, ex parte Chieveley Parish Council* (1998) 10 Admin LR 676

55. *R v North West Leicestershire District Council, ex parte Moses* [2000] Env LR 443 at 450-452

56. *R v Secretary of State for Education, ex parte London Borough of Lambeth* (Queen's Bench Division, Crown Office List, CO 2736, 22 December 1992

57. *R v Secretary of State for Health, ex parte Furneaux* [1994] 2 All ER 652 (CA)

58. *R v Secretary of State for the Home Department, ex parte Prison Officers' Association & Goodman* Queen's Bench Division, Crown Office List, CO 2736, 22 December 1992

59. *R v Secretary of State for Trade and Industry, ex parte Greenpeace Ltd* [1998] Env LR 415

60. *R v South New Hampshire District Council, ex parte Crest Homes plc* [1993] 3 PLR 75

61. *R v Swale Borough Council and Medway Ports Authority, ex parte Royal Society for the Protection of Birds* [1991] JPL 39

62. *R (Gavin) v Haringey London Borough Council* [2003] EWHC 2591 (Admin) [2004] 1 PLR 61 at para 91

63. *R (on the application of Burkett) v Hammersmith and Fulham London Borough Council* [2002] 3 All ER 97 at para 64

64. *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 (6) SA 391 (CC)

65. *Re Friends of the Earth* [1988] JPL 93 (CA) at 95

66. *Road Accident Fund v Mdeyide* 2011 (2) SA 26 (CC) at para 79

67. *S v Meaker* 1998 (8) BCLR 1038 (W) at 1055

68. *Sporrong and Lönnroth v Sweden* (1983) 5 EHRR 35 at para 61

69. *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) at para 30

70. *Tulip Diamonds FZE v Minister of Justice and Constitutional Development* [2013] ZACC 19 (13 June 2013) at paras 1 and 31

71. *Turner v Allison* [1971] NZLR 833 (CA) at 852-854

72. *Van Wyk v Unitas Hospital* 2008 (2) SA 472 (CC) at paras 20-22, 31-34

73. *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1987 (1) SA 13 (A)

Books and journal articles

74. Cheadle *et al South African Constitutional Law: The Bill of Rights* (LexisNexis, Durban 2012-SI13) at 20–5 to 20–6, 20–9

75. Currie *et al AJA Benchbook* (SiberInk, Cape Town 2001) at para 7.4

76. Fordham *Judicial Review Handbook* 5th ed (Hart Publishing, Oxford 2008) at 281

77. Hoexter *Administrative Law in South Africa* 2nd ed (Juta & Co, Cape Town 2012) at 488

78. Joubert *The Law of South Africa* 2nd ed (LexisNexis, Durban 2007rev) vol 14(2) para 144

79. Mostert *et al Bill of Rights Compendium* (LexisNexis, Durban) at 3FB6.1.4, 3FB7.1.23, FB5.2, 3FB6.2.2, 3FB7.1.2, 3FB7.2.2(a)

80. Steytler (2011) "The legal instruments to raise property rates: policy, by-laws and resolutions" 26(2) *SA Public Law* 484 at 495

81. *Van der Walt "Procedurally arbitrary deprivation of property" 2012(1) *Stell LR* 88