IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No. 38/12

In the matter between:

NATIONAL TREASURY	First Applicant
THE SOUTH AFRICAN NATIONAL ROADS AGENCY LTD	Second Applicant
THE MINISTER, DEPARTMENT OF TRANSPORT REPUBLIC OF SOUTH AFRICA	Third Applicant
THE MEC, DEPARTMENT OF ROADS AND TRANSPORT, GAUTENG	Fourth Applicant
THE MINISTER, DEPARTMENT OF WATER AND ENVIRONMENTAL AFFAIRS	Fifth Applicant
THE DIRECTOR-GENERAL, DEPARTMENT OF WATER AND ENVIRONMENTAL AFFAIRS	Sixth Applicant

and

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

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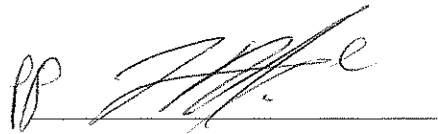
REPLYING AFFIDAVIT IN TERMS OF RULE 11(3)(b)

DATED at JOHANNESBURG on this the 07th day of JUNE 2012



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IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

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NATIONAL TREASURY	First Applicant
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QUADPARA ASSOCIATION OF SOUTH AFRICA	Third Respondent
SOUTH AFRICAN NATIONAL CONSUMER UNION	Fourth Respondent
NATIONAL CONSUMER COMMISSION	Fifth Respondent

REPLYING AFFIDAVIT IN TERMS OF RULE 11(3)(b)

I, the undersigned

PRAVIN JAMNADAS GORDHAN

do hereby affirm and state:

1 I am the Minister of Finance, and the deponent to the founding affidavit on behalf of the National Treasury ("Treasury") and the further applicants.

2 The facts contained in this affidavit are within my own knowledge and are, to the best of my belief, both true and correct. Where I refer to statistics and facts relating to South Africa's public finances, these are documented in records maintained by Treasury.

3 Where I depose to allegations of a legal nature I rely on the advice of the applicants' legal representatives.

4 I have read the opposing affidavit (with annexures) filed on behalf of the first to fourth respondents opposing the application for leave to appeal. In certain important respects the position relating to public finances in South Africa requires updating since my founding affidavit. In other respects propositions advanced in the opposing affidavit as facts are simply misconceived, and require correction in the interest of justice. This is particularly so in relation to central contentions concerning the apprehended effect on South Africa's public finances as a result of the interim order granted by Prinsloo J. This affidavit seeks to correct these important misconceptions, which are fundamental to OUTA's contention that it would not be in the interests of justice to allow the application.

5 In the urgent circumstances in which I depose to this reply, I confine this reply to salient features only of the answer, of particular relevance to Treasury. To the extent it is necessary, I record at the outset that any allegation or submission in the answering

affidavits at variance with the founding affidavit or this affidavit is denied as if expressly set out and traversed.

6 I deal with each of these main contentions in the same sequence.

(a) No proper constitutional issue raised?

7 OUTA concedes "that a constitutional issue is raised by the application" (para 28) but disputes "the reasons" for this. But quite inconsistent with this, OUTA ultimately contends that there is no constitutional matter – because "the order of Prinsloo J is, in substance, no different to any other order restraining the implementation of a decision pending the finalisation of a review" (para 32.3). An appeal court "will simply be considering whether the four elements of an interim interdict were met when he made his order" (para 33).

8 For reasons which I understand are further a matter for legal argument, it is plain that no common interdict was granted by Prinsloo J. The respondents refer to no other comparable instance in which relief of this kind has been granted by a South African court for what amounts to an indefinite period. It has the effect of obliging government, for a period it does not know, to embark upon a significant reordering of its planned revenue-raising and expenditure.In so doing Government will be compelled to depart from important policy choices made and approved by Cabinet, provided for in law and framed within an equitable division of revenue between national government and provinces, which is governed by specific constitutional principles.

9 Significantly OUTA, in disputing that a constitutional matter has arisen (which it admits) for the reasons I have given, avoids reference to this Court's decision in *Minister of Health v TAC (2)* 2002 (5) SA 721 (CC). There the Court stressed that the Constitution itself requires "rather a restrained and focused role for the courts, namely, to require the State to take measures to meet its constitutional obligations … not in themselves directed at rearranging budgets (*id* at paras 38). The Court emphasised that the cost of the remedy there sought "is not an issue … it is admittedly within the resources of the State" (*id* at para 71).

10 I submit that the present case is the exact converse. As shown in the founding affidavit (and further below), the loss for an unknown, indefinite period of a revenue stream obliges the Executive to embark upon consequential measures to raise revenue and/or reduce expenditure within the current deficit finance envelope. There could be material consequences for all South Africans in order to meet the effect of the lost revenue and continuing contractual commitments regarding GFIP, which is a project within the Gauteng Province only. Patently the facts of this matter are unique and striking; OUTA's attempt to suggest that this application would open floodgates for every unsuccessful respondent to an interdict is contrived.

11 There has been considerable speculation about the quantum of toll revenue to be collected, and the costs of its collection. There is of course uncertainty in these projections, amongst others in respect of traffic growth, compliance of road-users and future inflation. The latest SANRAL and National Treasury projection is that with a compliance rate of 93 per cent and a subsequent recovery rate of 40 per cent from non-compliant road-users, and assuming 6 per cent inflation, *net revenue* – i.e., toll revenue less collection costs – will amount to R2.2 billion in 2014/15 and will rise by

an average of 9 per cent a year for the projection period to 2037/38. Over this period, collection costs will average 23 per cent of projected revenue. GFIP debt will, on these projections, rise to approximately R44 billion in 2022/23, thereafter declining to be extinguished by 2037/38.

12 Should GFIP tolling not proceed, Government will be obliged to reduce expenditure in other areas impacting not only nationally but also on poorer members of the community in order to offset the loss of revenue, raise taxes further, or resort to some combination of these. The alternative is to take on more debt, which in turn will require future debt service costs to be met through reduced future expenditure or higher taxes.

13 The effect of Prinsloo J's order is to set in train a reallocation of resources and a revision of public finances, *inter alia* to be reflected in a forthcoming Appropriation Bill. I expand on this below. I accordingly do not understand in what sense OUTA concedes that a constitutional matter does arise, but then disputes "reasons" for it.

(b) The temporary interdict "is not finally dispositive of the issues in dispute"

14 OUTA contends that on the applicants' own version the review could "possibly be determined by August or September of this year, a mere month or two after this Court is being asked to hear this matter" (para 39.2).

15 What OUTA does not address in this context, is its outright rejection of the proposal by the applicants that the parties co-operate to achieve "the earliest available date indicated by the Deputy Judge President at the commencement of the next term

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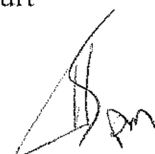
[August]". This is documented in annexure "OUTA13" to the opposing affidavit, read with OUTA's response at "OUTA14". It is astonishing that OUTA in the circumstances suggests that the review can still be heard within the timeframe the applicants had sought, when it has studiously avoided engaging itself in a co-operative plan to achieve an early review date.

16 Given the fact that OUTA has not even yet filed its threatened notices in terms of Rule 35 and Rule 53 to extract yet more documentation from the applicants, let alone filed its supplementary (Rule 53(4)) affidavit, to which all of the applicants in turn must answer, there is manifestly no prospect now of the review being heard before late this year. OUTA does not challenge the scenario of appeals indicated in the founding affidavit which could ensure that no final determination arises in respect of the review before the end of 2013.

17 OUTA also contends that if this application is allowed, it would mean that "the grant of any interim interdict would be appealable to this Court." This, OUTA says, is because the order made by Prinsloo J "is not finally dispositive of the issues in dispute" (paras 37 and 38). I am advised that this is not, as is suggested, the determinative and sole criterion. This Court has stressed that "the primary consideration ... is ... whether irreparable harm would result if leave to appeal is not granted" (Skweyiya J in *Minister of Health v TAC (1)* 2002 (5) SA 703 (CC), as followed in *Machele v Mailula* 2009 (8) BCLR 767 (CC) and *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2010 (5) BCLR 457 (CC) para 54). Our courts have in any event indicated that appealability does not require in all circumstances a final dispositive dealing by a court with the rights at issue: the essential test is whether the particular question in dispute can be remedied by the court



below at any later stage (*cf Shepstone & Wylie v Geyser NO* 1998 (3) SA 1036 (SCA) at 1042-1043, and further authorities there cited). While OUTA suggests that "if circumstances change", the applicants at some nebulous future stage "would be free to approach the court" for a "variation of the original interim order" (para 39.3), it indicates no realistic factual scenario in which this could happen.

18 For the reasons which follow, OUTA entirely misconceives the position in contending that no irreparable harm arises from the indefinite order by Prinsloo J.

(c) No irreparable harm?

19 OUTA contends in the first place that the decision announced on 26 April 2012, as a result of "a deal ... being struck between the ANC and COSATU" (para 53), to defer tolling for 30 days belies the applicants' contentions of irremediable harm arising from the order. OUTA terms this "political expediency" (*ibid*).

20 It was anything but "expediency" that e-tolling was deferred for a further month. It was in an endeavour to address misunderstandings and resolve conflict. This was no "ostensible purpose" (para 46); it was the open and obvious one. In fact, the endeavour to resolve differences if anything underscores the inherent policy choices entailed by e-tolling.

21 The factual contention that no attempt was made by the applicants before the High Court to distinguish the previous occasions where the commencement of e-tolling had been deferred (para 48) is quite wrong. Specific argument, relying on the record before the court, including supplementary argument OUTA was permitted to hand up,

demonstrated that the prior deferments of the commencement date of e-tolling were each for an explicable, justifiable reason. They in no way detracted from the position pertaining on 30 April.

22 OUTA's attempt to contend that the harm to which I deposed to in my founding affidavit "is in any event inaccurate and exaggerated" (para 60) is misconceived for a number of important factual reasons.

23 The first relates to the reliance on the personal view of Mr Chris Hart, former economist to ABSA, that there are "alternative funding mechanisms, such as the fuel levy, that can be implemented immediately"; that government can also fund SANRAL "with ease by means of … budgeted contingency"; that my evidence that government finances are under severe pressure are "untrue" (para 61). In relation to these and the further views of Mr Hart, and those of a further economist, Dr Azar Jammine (who states that he has been "confused" by certain of the views I expressed), I would draw attention to the following.

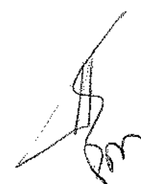
24 The current financing realities to be faced are the following. Government's fiscal stance is established in terms of the guidelines set out in the 2011 Budget, which establish countercyclicality, long term debt sustainability and inter-generational equity as the foundation of fiscal policy. The guidelines aim, inter alia, to strengthen parliamentary oversight of the budget process and enhance public accountability. Applied consistently, they will enable government to improve social conditions in a sustainable manner – as envisaged by the constitution - and strengthen South Africa's fiscal sovereignty in a volatile global environment.

25 Stable or declining debt stock as a percentage of GDP is a basic indicator of fiscal sustainability. The large primary deficits incurred since 2009 have resulted in a substantial build-up of public debt. By 2014/15, government would have added more than R1 trillion to its stock of debt since 2008. The 2012 Budget proposed a clear path towards the stabilisation of debt, which will arrest the growth of debt service costs and restore the sustainability of the fiscus.

26 For the 2012/13 year, the Executive has proposed expenditure of R1058 billion, equivalent to R32.1% of GDP, and consolidated revenue of R905 billion, leaving a deficit to be financed of R153 billion, or 4.6% of GDP. There is no room for expanding the deficit – I have explained in detail in the 2012 Budget Review why it is necessary to reduce the deficit (i.e. raise more revenue relative to GDP or reduce spending relative to GDP) over the period ahead. The fiscal framework presented to Parliament and approved by Parliament will bring the main budget balance down to 3% of GDP in 2014/15.

27 In these revenue plans for 2012/13:

- Personal income tax contributes R286 billion
- Company tax contributes R168 billion
- VAT contributes R210 billion
- The general fuel levy contributes R43 billion
- The RAF fuel levy contributes R17 billion
- Road tolls contribute R6.7 billion (of which approximately half is collected directly by SANRAL and half through concession contracts).



28 Road tolls, including the projected 2012/13 GFIP revenue, contribute approximately 0.73 per cent of consolidated government revenue. I have explained in my founding affidavit that in the considered judgment of Government, after weighing up a range of difficult policy choices and financial constraints, it is wholly appropriate that the R20 billion improvement in the Gauteng freeway system effected through the GFIP should be financed through an increase in toll revenue, collected from users of this system, rather than through an increase in other tax sources.

29 It is clear from these numbers that the overall burden of toll revenue on South African taxpayers is moderate by comparison to the burden of other taxes.

30 In this regard, two points must be stressed.

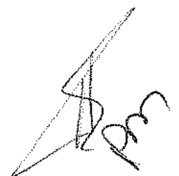
31 First, the "burden" of tax is not just its cost, and the administration and compliance cost associated with it, but also the economic distorting effect on the allocation of resources and expenditure patterns of households associated with its price and income effects. These rise not just proportionally, but at an increasing rate, as the rate of tax rises. In other words, the economic burden associated with a <u>marginal</u> increase in, say, VAT or the fuel levy, which are already substantial taxes, is considerably greater than the value of revenue raised, including administration and compliance costs. The economic burden of a higher general fuel levy, for example, includes the resulting impact on transport costs and resulting shifts in consumption and production choices across the entire economy, including parts of the country where there are far fewer transport options to individuals or businesses than in Gauteng. These are among the factors that will be taken into account as government develops options for both the interim period and longer term.

32 Second, the bulk of toll revenue is collected in provinces other than Gauteng, despite the fact that Gauteng accounts for a disproportionately large share of income and spending power. There is a straightforward sense in which GFIP tolls would now, if implemented, represent a shift towards a fairer distribution across the national economy of the burden of toll revenue.

33 But the more important point is that the overall burden of toll revenue, even after taking into account the full implementation of GFIP and its administration costs, is moderate and reasonable relative to other revenue sources available to government.

34 Other revenue sources already generate what some contend is an excessive share of overall government revenue. What is at stake as a consequence of the order by Prinsloo J is quite simply the loss of revenue for an unknown and unknowable (but on any approach, extensive) period. This revenue is required to enable SANRAL – after taking into account a fiscal contribution of R5.75 billion – to maintain the GFIP network and eventually settle associated debt without recourse to taxpayers.

35 Considerable contributions have already been made from the national fiscus to the costs of investment in transport infrastructure and services in the Gauteng Province. These include approximately half of the investment required for the Gautrain; a continuing programme of investment in public transport; and infrastructure systems and subsidisation of commuter rail and bus services. The intention to recover part of the costs of freeway improvements from road-users cannot be viewed in isolation from these other expenditures from the national share of revenue on transport infrastructure and services in Gauteng. Freeway improvements form part of the wider transport infrastructure.



36 It is important to add that the central fiscal decisions here were taken five years ago. It is furthermore my concern that the precedent set by a court overturning a decision to raise debt on the strength of a lawful and publicly-announced intention to toll would be damaging to the reputation of South Africa, until now as a borrower of impeccable standing (as OUTA itself concedes in para 62.6: "a fine reputation over many years of solid fiscal discipline", my emphasis) in domestic and global financial markets. Yet OUTA would subject "solid fiscal discipline" to a court's intervention – and this for what on any approach will be a significant period of time. The uncertainty and unprecedented nature of the intervention do not inure to the good of South Africa's public finances and international reputation.

37 These considerations are r einforced by international developments, particularly in relation to the serious uncertainty prevailing in Europe, since I deposed to my founding affidavit. The backdrop to OUTA's proposal that government now deviate from its policy determination regarding the need for e-tolling, pursuant to the very same "solid fiscal discipline" it commends, is a significant build-up of national debt since the 2008/9 recession (from 22.8 per cent of GDP towards 38.9 per cent of GDP). This is to be considered with the heightened global concerns about sovereign risk, which in several cases is the result of extra-budgetary liabilities crossing the line onto government's books.

38 While the debt build-up was necessary (in light of job losses and loss of revenue of almost R 61 billion associated with the recession), it has eroded the fiscal space available to respond to future shocks. Should a global crisis of similar proportions to 2008 occur again, government's fiscal capacity will rest to a large degree on the credibility of the fiscal stance.

39 The fiscal policy set out in Budget 2012 therefore establishes a clear and credible path towards the stabilisation of the national debt. Even a modest addition to the deficit could corrode the overall credibility of government's commitments and potentially raise investor concern about risks to the fiscus posed by extra-budgetary institutions and state owned companies. The balance sheets of these institutions are large, and a perception that debts incurred against these balance sheets could be borne by the fiscus would potentially damage government's ability to issue new debt at reasonable rates. This risk has been clearly highlighted in recent reports of international rating agencies on South Africa's sovereign credit standing.

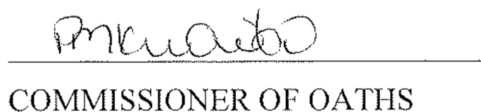
40 If the order granted by Prinsloo J is not discharged, then unavoidably government will have to consider both alternative national taxes or charges – thus bearing down upon the national population and with direct or indirect impact on the very poor – including measures such as a substantial increase in the fuel levy (which has the particular disadvantage of affecting those who do not benefit from the upgraded roads, penalising owners of less efficient vehicles (generally the poor), and making it impossible to exclude public transport.

41 As regards general taxation, consideration has to be given in such an event to an additional personal income tax bracket, and the reprioritisation of expenditure. In this regard, existing budget baselines have already been reprioritised. Moreover, the use of additional revenue, in effect, in support of private vehicle use road freight and for the high-income section of the population (I repeat that 94% of the e-tolling revenue is expected to come from the top quintile of the Gauteng income earners) is not in line with government policy.

42 In summary, OUTA (and its two economists) have no basis to assert that the harm which stands to arise if the order made by Prinsloo J is not discharged is "exaggerated and inaccurate". The effects of the order must be met within the current deficit envelope, necessarily obliging government to depart from the policy choices and planning which it has devised, after careful consideration of options, and to embark upon remedial revenue-raising and expenditure-limiting measures as described.

PRAVIN JAMNADAS GORDHAN

Signed and confirmed before me in the prescribed manner at PRETORIA on this the day of June 2012, the deponent having stated that he has conscientious objections to taking the prescribed oath and that he regards the affirmation as binding on his conscience.



COMMISSIONER OF OATHS

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