IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA
(JOHANNESBURG)

CC Case No. 38/2012

NGHC Case No. 17141/2012

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

SECOND APPLICANT'S WRITTEN SUBMISSIONS

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INTRODUCTION

1 This is an application for leave to appeal directly to this Court against the judgment and order of Prinsloo J, in terms of which *SANRAL* was interdicted from levying and collecting toll on the *Gauteng Roads*.

2 The interdict was granted pursuant to an urgent application, argued in the days preceding the handing down of the judgment on 28 April 2012. The interdict was sought by *OUTA et al* pending the finalisation of an application to review and set aside decisions to declare the *Gauteng Roads* as toll roads and to set aside the *environmental authorisations* for the *GFIP* granted by the *Director General* under section 24 of *NEMA*.

3 The decisions to declare the *Gauteng Roads* as toll roads were taken more than four years ago by *SANRAL* with the approval of the *Transport Minister* in accordance with the provisions of sections 27(1)(a)(i), read with 27(4) of *the SANRAL Act*. The *environmental authorisations* were granted even earlier than that, between November 2007 and February 2008.

4 On the strength of those decisions, approximately R20 billion was borrowed by *SANRAL* and the *GFIP* was undertaken, comprising large scale infrastructure

development, the widening and enhancement of roads, the construction of new interchanges and related facilities, the erection of gantries, the installation of an electronic tolling system, and the appointment of contractors and suppliers on long-term contracts.

5 There can be no doubt that the *GFIP* must be paid for and the loans taken out by *SANRAL* repaid. The *GFIP* and its infrastructural development was undertaken on the explicit premise that it would be funded in accordance with the "user-pays" principle in the form of tolling and yet *OUTA et al* now disagree with this funding mechanism.

6 For more than four years, however, *OUTA et al* stood by and watched as the *GFIP* was undertaken, the roads improved and the benefits from it accrued to the general public. It is common cause that at no stage prior to the launching of the urgent application on 23 March 2012, were the decisions challenged in any form.

7 In the interim, *National Treasury* has allocated revenue spend and has ranked Government budgetary priorities for the last four years on the assumption that *GFIP* would not be a cost borne through central revenue collection.

8 The interdict granted by Prinsloo J cuts a swathe through these years of planning and the proper functioning of both *SANRAL* and the Government. For so long as the interim interdict remains in place, *GFIP* cannot be funded through tolling and the liabilities must be met through the *National Treasury*.

9 The judgment is not premised on a finding that the impugned decisions are irregular but rather that there is *some prospect* that they *may at a later stage be* found to be irregular. Thus, on the basis that *OUTA et al* had 'managed to establish "a *prima facie* right, although open to some doubt" to have the decision reviewed and set aside',[1] Prinsloo J has effectively directed organs of state and the *National Treasury*—albeit on an interim basis—as to how money is to be raised and spent, and how on going liabilities are to be met.

10 Prinsloo J was well aware of the consequences that his judgment held out for both *SANRAL* and *National Treasury*. He was also aware that *National Treasury* would be required to step in to meet *SANRAL*'s liabilities,[2] with possible

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1 Record: Judgment Vol 15 page 1401 lines 13 to 14

2 This was expressly the approach adopted by *OUTA et al* in its application for the interim interdict: namely, that *SANRAL* would suffer no harm because *National Treasury* would step in to meet *SANRAL's* liabilities or because an alternative funding mechanism could be adopted. Record: Pauwen Vol 2 page 193 line 5 to page 194 line 3

negative effects permeating the entire economy. He rejected these considerations on the grounds of balance of convenience.[3]

11 We submit that his judgment is indefensible because of its flawed jurisprudential starting point, the breadth of its intrusion into the domain of the executive, and the foreseen consequences that have materialised in its aftermath.

12 We submit, for the reasons that follow, that the judgment should be set aside and replaced with an order that the application for interim relief be dismissed with costs.

THE STRUCTURE OF THESE HEADS OF ARGUMENT

13 The structure of these heads of argument is as follows:

13.1 First, we explain why, contrary to *OUTA et al's* contentions, this is no ordinary interim interdict pending a review.

13.2 Secondly, we address the merits of Prinsloo J's order and submit that:

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[3] Record: Judgment Vol 15 pages 1403 line 3 to page 1404 line 15

13.2.1 The High Court's approach to the interdict was fundamentally flawed because it applied a test for interim interdicts which fails to have sufficient regard to the separation of powers.

13.2.2 In the alternative, we submit that even applying the traditional test for interim interdicts, Prinsloo J was incorrect to grant the interdict.

13.3 Thirdly, we deal with the application for leave to appeal and explain why it is in the interests of justice for this Court to hear the appeal.

13.4 Finally, we set out the remedy that *SANRAL* seeks from the Court.

14 In filing these heads of argument, we are mindful of the time and space limitations resting on the applicants before the Court. With that in mind, we have attempted as far as possible to avoid filing submissions that are coextensive with the argument to be filed on behalf of the other applicants to the appeal.

15 In particular, we do not address in detail the topics of irreparable harm, balance of convenience, or the existence and application of a general discretion resting in a court hearing an application for an interim interdict to refuse an interdict.

These topics are, to be addressed in the submissions made on behalf of the other applicants, and we adopt those submissions.

NO ORDINARY CASE

16 *SANRAL* derives its powers from *the SANRAL Act*, with its main function and responsibility being all strategic planning, design, construction, operation, management, control, maintenance, and rehabilitation of national roads and for the financing of those activities.[4] Importantly, it is obliged to exercise its powers and perform its responsibilities 'within the framework of government policy'. The financing options that are available to *SANRAL* are set out in section 34(1) of *the SANRAL Act* and, for purposes of this application, include levies raised on the sale of fuel (ss (1)(b)), loans granted to or raised by *SANRAL* (ss (1)(c)), toll (ss (1)(g)), and moneys appropriated by Parliament (ss (1)(k)).

17 It is common cause between all of the parties to the application that the *Gauteng Roads* fall within the remit of *SANRAL*. It is also common cause that the development and improvement to these *Roads*, undertaken by *SANRAL* under the auspices of the *GFIP*, was critically necessary to alleviate congestion and to

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[4] Section 25(1) of the SANRAL Act

facilitate growth in Gauteng and economic growth nationally. The only question is how these improvements were to be funded.

18 The qualification on *SANRAL's* powers, that requires it to perform its functions within the framework of government policy, is an important one. For the reasons that are dealt with principally in the submissions on behalf of *National Treasury*, it is contrary to government policy to earmark revenue raised through a levy on fuel for any particular purpose. As a result, it was not open to *SANRAL* to obtain funding for *GFIP* through a ring-fenced fuel levy.

19 Once again, it is common cause that *SANRAL* elected to raise funds through borrowing, these loans in turn being guaranteed by Government and repayable over the term of the loan from income generated through tolling.[5] These loans were concluded and *GFIP* commenced only after the declaration of the *Gauteng Roads* as toll roads.

20 Hence, *GFIP* was undertaken on the strength of a funding mechanism premised on the decisions to toll, which decisions are now challenged. These interlinked decisions—to implement *GFIP*, to fund it initially through loans, to exclude the

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[5] *SANRAL's* decision to toll was also informed by a number of policy considerations including alleviating congestion, improving socio-economic wellbeing, and encouraging reliance on and thereby the development of public transport. Record: Alli Vol 6 page 564 para 27 to 567 para 37 and page 584 para 61 and following.

fuel levy as a funding mechanism, to repay the loans on the basis of a user-pay principle, and to implement tolling as the chosen means of achieving "user pay"—are, we submit, quintessentially policy decisions as to how public projects of acknowledged value are to be funded.

21 When regard is had to the judgment of the Court *a quo*, two of the primary grounds of review accepted by Prinsloo J and to which he and *OUTA et al* devoted a large proportion of their time and attention entail a second-guessing of these policy decisions on the grounds of reasonableness and rationality.[6] This task was undertaken by Prinsloo J relying on the standard test for the grant of an interim interdict as set out in *Setlogelo v Setlogelo*.[7]

22 The grant of the interdict in these circumstances had a direct and immediate impact on the separation of powers. At its core, the interdict prevents an organ of state from exercising its statutory duties to prevent any prejudice to the financial interests of the State, to take effective and appropriate steps to collect all revenue due to it, and to prevent irregular expenditure,[8] and it affects

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6 Record: Judgment Vol 15 page 1397 line 7 to page 1400 line 2

7 *Setlogelo v Setlogelo* 1914 AD 221. This is apparent from the reference, in the Judgment, to '*the trite and well known requirements which the applicants have to establish in order to obtain the interim interdictory relief sought before me*' (at Record: Vol 15 page 1394 line 20 and following).

8 These duties arise from the provisions of sections 50(1) and 51(1) of the *PFMA* which are referred to at Record: Gordhan Vol 16 page 1463 para 70

National Treasury's carefully balanced policy decisions about revenue procurement and allocation.[9] As far as *SANRAL* is concerned, the judgment casts doubt on its ability in the future to meet its statutory mandate—something that redounds to the detriment of South Africa as a whole.[10]

23 It is because of this disregard of the separation of powers and the consequences that flow from it, that the applicants have approached this Court urgently and directly to set aside the interdict.

24 We wish to make it clear that we do not submit—and it is not *SANRAL's* case—that organs of state should be immune from judicial oversight: the Constitution requires the courts to ensure that all branches of government act within the law. But, equally, the separation of powers requires that the courts refrain from usurping the role of the executive and of other organs of state. If a court finds in due course that *SANRAL* has acted outside of the law, then it will grant effective relief; it is quite a different thing for a court to intervene to the extent to which Prinsloo J has when unlawfulness has not yet been established.

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9 Record: Gordan Vol 16 page 1432 para 27

10 Record: Gordan Vol 16 page 1449 para 39 to page 1459 para 60; Alli Vol 17 pages 1508 to 1510 para 8

25 To this extent, then, this appeal is about setting the proper limits of judicial scrutiny and permitting intervention by a court in the policy-laden decisions of government only in the clearest of cases. The judgment of Prinsloo J trespasses upon the respect that is due to policy making by organs of state: first, by failing to recognise that the intensity of review that is permissible in respect of policy making is modest, and, secondly, by applying an inappropriate threshold to the showing that is necessary to secure an interim interdict to prevent the implementation of decisions predicated upon significant issues of public policy.

26 *OUTA et al* deny that this case is concerned with the proper limits of separation of powers and argue instead that the case is like any other interdict pending a review.[11] On the strength of *Minister of Health v Treatment Action Campaign (No 1)* 2002 (5) SA 703 (CC) at para 20, they claim that this Court has already rejected the notion that the separation of powers is implicated by an interim order pending a final determination of whether a government decision was reasonable.[12]

27 In this they are wrong: *TAC (No1)* did not deal with an interim interdict pending a review, but an interim order of execution pending an appeal. These two

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[11] Record: Corcoran Vol 17 page 1551 para 32

[12] Record: Corcoran Vol 17 page 1554 para 32.3

species of interdict are critically distinct.[13] An interim execution interdict pending an appeal is preceded by a court's determination that on a preponderance of probabilities, the applicant has been successful. By contrast, an interim interdict pending a review is preceded by no such finding.

28 This court's finding that the separation of powers was not implicated in *TAC (No 1)* must therefore be understood in light of the High Court having already determined that the government's policy was unreasonable. In this case, no court has yet determined that the decisions to declare the toll roads were unreasonable and are liable to be set aside.[14] It is because no such determination has yet been made that the interim interdict in this case does have implications for the separation of powers. It is one thing for a court to set aside government's funding policy after a full review and a determination that the impugned decisions were unreasonable or irrational; quite another for a court to set aside decisions, even temporarily, on the precarious basis that the applicants may show that the decisions are unreasonable.[15]

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13 The distinction was highlighted by this Court in *International Trade Administration Commission v SCAW South Africa (Pty) Ltd and Others* 2010 (5) BCLR (CC)

14 Prinsloo J expresly disavowed making any firm finding on the merits: Record: Judgment Vol 15 page 1396 lines 4 to 12 and page 1401 lines 5 to 9

15 This is especially so in circumstances, such as this case, where the effect of the interim interdict cannot subsequently be undone: toll cannot be recovered at a later stage (Record: Alli Vol 6 page 527 para 10.4 to page 530 para 10.11)

29 Like *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2010 (5) BCLR (CC), this case implicates the separation of powers. We submit the following important principles emerge from *SCAW*:

29.1 The proper question to be asked when a High Court grants an interim interdict against an organ of state is not whether such an order is competent, but rather whether it is a constitutionally appropriate order.[16]

29.2 Although the courts are the ultimate guardians of the Constitution, it is incumbent upon them "*to observe the limits of their own power*".[17] Courts must "*be conscious of the vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government*."[18]

29.3 The Court provided the following guidance:

> *Where the Constitution or valid legislation has entrusted specific powers and functions to a particular branch of government, courts may not usurp that power or function by making a decision of their preference. That would frustrate the balance of power implied in the principle of separation of powers. The primary responsibility of a court is not to make decisions reserved for or within the domain of other branches of government, but rather to ensure that the concerned branches of government exercise their authority within the*

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16 *SCAW* para 69

17 *SCAW* para 93

18 *SCAW* para 94 quoting *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC) at para 38

bounds of the Constitution. This would especially be so where the decision in issue is policy-laden as well as polycentric.

30 As in this case, in *SCAW*, the Minister of Trade and Industry contended that the interdict would hinder the proper administration of economic policy, a matter which the Constitution entrusts to the national executive.[19] Despite this, the High Court granted the interdict and was admonished by this Court for failing properly to consider the role of executive power and policy formulation in matters of national and international trade and industry.[20]

31 That this case is concerned with the type of decision referred to in *SCAW* is illustrated by the debate which takes place in the papers before this Court between the Minister of Finance and *OUTA et al's* two resident economists. These debates are underpinned by disagreement over the impact of a marginal increase in the fuel levy[21] and the effect, on *National Treasury's* plans to stabilise and reduce the national debt, of its assuming *SANRAL's GFIP* debt.[22] These sorts of debates are the proper province of the executive, with its experts and their specialist knowledge.

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19 *SCAW* para 97

20 *SCAW* para 99. At para 101 the Court held that when a court is invited to intrude into the terrain of the executive, "*it must do so only in the clearest of cases and only when irreparable harm is likely to ensue if interdictory relief is not granted*". It emphasised that this is particularly required "*when the decision entails multiple considerations of national policy choices and specialist knowledge, in regard to which courts are ill-suited to judge*".

21 OUTA et al's fourth affidavit filed on 6 July 2012 pages 8 to 14 paras 26 to 36

22 OUTA et al's fourth affidavit filed on 6 July 2012 pages 14 to 18 paras 37 to 56

32 We submit that the courts should be very reluctant to meddle in these areas in urgent proceedings and through the unqualified application of the test enunciated in *Setlogelo*.

33 In a slightly different context of separation of powers within the legislative arena, this Court has held in *UDM* that a court should not grant interim relief unless it is absolutely necessary to avoid likely irreparable harm and then only in the least intrusive manner possible.[23] In *Glenister*, the Court went further to require of an applicant that he show that there would be no effective remedy available to him once the process is complete and that the resultant harm would be material and irreversible.[24]

34 This approach is consistent with the approach adopted in England, Australia and Canada:

34.1 In England, the courts require an applicant seeking an interim injunction to prevent a statutory body from exercising its powers to establish a real prospect that he will succeed at trial.[25]

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[23] *President of the RSA v UDM (ACDP Intervening; IDASA as Amici Curiae)* 2003 (1) SA 472 (CC) at 31 to 34

[24] *Glenister v President of the RSA* 2009 (1) SA 287 (CC) at 44. The Court said that 'Such an approach takes account of the proper role of the courts in our constitutional order: While duty-bound to safeguard the Constitution, they are also required not to encroach on the powers of the executive and legislature.'

[25] *Smith v Inner London Education Authority* [1978] 1 All E.R. 411

34.2 In Australia, the standard against which the applicant's probability of success at trial is assessed is higher when the interdict sought will prevent certain decisions of the executive branch:

> *For example, special considerations apply where injunctive relief is sought to interfere with the decision of the executive branch of government to prosecute offences. Again, in* Castlemaine Tooheys Ltd v South Australia*, Mason A-CJ, in the original jurisdiction of this Court, said that '[i]n the absence of compelling grounds' it is the duty of the judicial branch to defer to the enactment of the legislature until that enactment is adjudged* ultra vires*, and dismissed applications for interlocutory injunctions to restrain enforcement of the law under challenge*.[26]

34.3 In Canada, the Supreme Court has held that a public body seeking to establish irreparable harm for the purposes of resisting an interdict will be subject to a less onerous standard than a private party.[27]

35 The cardinal question is therefore whether a different test should apply in these types of cases or whether the *Setlogelo* test should be retained but different considerations should be applied to that test.

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[26] *Australian Broadcasting Corporation v O'Neill* 227 CLR 57 80 ALJR 1672; 229 ALR 457; 2006 L 2758129; [2006] HCA 46; [2006] ALMD 8143 at para 66; see also *Castlemaine Tooheys Ltd v South Australia* 161 CLR 148 60 ALJR 679; 67 ALR 553; 1986 WL 590162 at pages 155 to 156

[27] RJR — MacDonald Inc. v. Canada [1994] 1 S.C.R. 311 para 76:

> In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. *The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action*. (emphasis added)

36 We submit that the test articulated by this Court in *SCAW* and in the *UDM* and *Glenister* cases lays the foundation for a higher threshold test. In such cases, the courts may only grant interim interdicts impinging upon executive policy decisions in "*the clearest of cases*" and only where material and irreversible harm is likely to result if the interdict is not granted. Whether this be an enhanced *Setlogelo* test[28] or a different test entirely is an issue that will no doubt resolve itself in the fullness of time.

37 Irrespective of its jurisprudential basis, if such a test were to be applied to this case, then *OUTA et al* would have been required to establish something more than a *prima facie* right open to some doubt before they could succeed in convincing the court to step into the terrain of second-guessing, at an interim stage, executive policy decisions. As we demonstrate below, *OUTA et al* could never have succeeded if such a test were to have been applied, and should not have succeeded even on the application of the prima facie right standard.

38 Significantly, the Court developed the "clearest of cases" test in *SCAW* in relation to a decision in which the High Court had found that the applicant had a

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[28] Jurisprudentially, it is open to the courts to read the test as simply a reformulation of the traditional test as it was established in *Setlogelo* and *Webster v Mitchell* 1948 (1) SA 1186 (W), but with the added gloss that the courts will not easily interfere with decisions of the executive that are policy-laden and polycentric. This reads into the test a requirement of deference from courts to the expertise and knowledge of the decision-maker—a deferenace that is, in any event, owed at the review stage.

clear right in the pending review. Notwithstanding this finding by the High Court, this Court held that the interim interdict should be set aside because it interfered in an illegitimate way with the exercise of the executive's powers.

39 We submit that this must be even more so in a case, such as this, where the High Court simply found that *OUTA et al* had established a *prima facie* right open to some doubt in the pending review. Such a finding does not meet the "*clearest of cases*" standard set by this Court in *SCAW*.

40 The decisions which *OUTA et al* seek to review were informed by government's policy on expenditure financing[29] and a series of inter-connected, logistical, spatial, developmental, economic and social considerations.[30] *OUTA et al* are therefore incorrect to claim that 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*". It is different because it implicates principally policy decisions and frustrates those decisions pending the outcome of the review application.

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[29] Record: Gordhan Vol 16 page 1433 para 27.3

[30] Record: Gordhan Vol 16 page 1437 para 29.2

41 Prinsloo J failed to appreciate this fundamental feature of the decisions which *OUTA et al* seek to impugn in Part B of their application and, as a result, failed to accord those decisions the deference which the reviewing court will be required to give them in due course.

42 We submit that this Court should step in and set aside the interim interdict to re-establish the appropriate balance between the courts and the government.

43 Not all interim interdicts pending a review have this impact on the national fiscus or on the ability of an organ of state to discharge its statutory obligations to maintain fiscal discipline. In that respect, therefore, this case is unique and merits the attention of this Court.

THE MERITS

The right

44 We submit that the conclusion reached in the judgment that the right to review had been *prima facie* established although open to some doubt is based on two errors:

44.1 First, there is insufficient appreciation for the nature of the interdict sought and the impact that it would have on the budgeting and revenue determinations of government. As a result, the incorrect test was applied to the determination of whether the interdict should have been granted.

44.2 Secondly, even if the *Setlogelo* test was correctly applied, Prinsloo J's conclusion that *OUTA et al* had satisfied that test is unsustainable.[31] *OUTA et al's* prospects in the review were severely compromised by their own delay in launching the application and the deficient grounds on which they sought to impugn the decisions under attack.

45 We deal with error each in turn.

The wrong test

46 The judgment is premised on the notion that all that *OUTA et al* had to establish was a *prima facie* right open to some doubt. Prinsloo J articulated the test in the following terms:

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[31] In the sections which follow we focus on the respects in which *OUTA et al* failed to meet even the traditional *Setlogelo* test for interim relief. It follows from this discussion that if *OUTA et al* failed to meet that test, a fortiori, they also failed to meet the higher test which this Court established in *SCAW*.

> *There must be a prima facie right on the part of the applicant to the relief sought. The degree of proof required to establish this right is less exacting than in the case of a final interdict. It is usually recognised that the applicant must prove a right which, though* prima facie *established, is open to some doubt*.[32]

47 In applying this test, Prinsloo J considered whether the applicants had managed to establish *prima facie* prospects of success on one or more of their review grounds. This approach to the case was, with respect, flawed.

48 The toll declaration decisions which *OUTA et al* sought to impugn in the review were, as the undisputed facts before this Court clearly show, informed by government policy on the appropriate funding mechanisms for infrastructure development and the decisions which had been made by Cabinet in its efforts to balance all the competing claims made on the public purse.[33]

49 Once this is so, an interdict to prevent government from implementing those decisions and to prevent *SANRAL* from executing them, touches on a sphere of executive competence which deserves a measure of deference from the courts. Only in the clearest of cases should courts interfere in that domain.[34]

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[32] Record: Judgment Vol 15 page 1395 lines 4 to 8

[33] Record: Gordhan Vol 16 page 1437 para 29.2

[34] *SCAW* at para 101

50 In cases such as this, where the consequences for *SANRAL* and *National Treasury* of the grant of the interim interdict are immediate, long lasting and irreversible, the criterion of a *prima facie* prospect of success in the review, is inapposite. A higher standard, which sanctions the grant of interim relief only in the clearest of cases, must be applied by courts faced with such applications in order to strike the appropriate balance between the different spheres of government.

51 We submit that the High Court's failure to apply this test is grounds, on its own, to set aside the interim interdict.

No *prima facie* right

52 In this section of the heads of argument, we focus on the merits of the decision arrived at on the "*prima facie* but open to some doubt" assessment of *OUTA et al's* challenges to the toll declaration decisions. We submit that even on this traditional test, the decision was wrong and ought to be set aside.

53 We do not deal in any detail with the merits of the environmental authorisations save for advancing a number of procedural deficiencies with *OUTA et al's*

attack on the environmental authorisations which, on their own, remove any prospect that *OUTA et al* may be successful in the review.

54 *OUTA et al* challenged the toll declaration decisions on a number of grounds. However, the mainstay of their attack and the weight of the judgment lay in the allegations that the decision to declare the toll roads was so unreasonable that no reasonable administrator could have so decided[35] because:

54.1 the expense of toll collection is grossly disproportionate to the revenue to be collected;

54.2 the enforcement of electronic tolling is practically impossible; and

54.3 *SANRAL* and/or the *Transport Minister* failed properly to consider alternative methods of funding.[36]

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35 Record: Corcoran Vol 17 page 1581 para 73.2.4

36 Although *OUTA et al* list this as one of the review grounds before the High Court they do not address it in their affidavit before this Court nor did they press the review ground in the hearing before the High Court. As a result, we do not deal with the review ground here. We assume no time was devoted to the issue in *OUTA et al's* affidavit before this Court because the point simply has no merit. Both the 2006 Proposal (which is Annexure NA6 to *SANRAL's* answering affidavit in the interdict application [Record Vol 9 pages 828 to 882] and to which we refer in greater detail below) and the letter sent to the *Transport Minister* seeking his approval of the toll declarations (which is Annexure NA5 to *SANRAL's* answering affidavit in the interdict application [Record Vol 9 pages 883 to 916) engaged extensively with the alternative funding options available.

55 This main ground of review was also buttressed by related grounds that certain information relevant to these issues was not placed before the *Transport Minister* by *SANRAL*.[37]

56 In addition to this main ground of review, *OUTA et al* challenged the toll declaration decisions on the two further grounds that:

56.1 they were preceded by inadequate notice to the public; and

56.2 the *Transport Minister's* approval of the toll declarations was based on the assumption that public transport alternatives[38] and viable alternative routes[39] were or would be in place when in fact this would not be so.

57 We deal with each of these review grounds in turn below.

Unreasonableness

58 In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC), this Court articulated the litmus test for impugning an administrative decision on the basis of unreasonableness. It held an

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37 Record: Corcoran Vol 17 page 1582 para 73.2.5

38 Record: Corcoran Vol 17 page 1583 para 73.2.8

39 Record: Corcoran Vol 17 page 1582 para 73.2.6

administrative decision will be reviewable if it is one that a reasonable decision-maker could not reach. The requirements of reasonableness depend on the circumstances of each case.[40]

59 In the present case, *OUTA et al* seek to set aside the toll declaration decisions on the basis that no reasonable administrator could have opted for tolling as the appropriate funding mechanism for the *GFIP* because of the costs of tolling and the practical difficulties associated with tolling.

60 When the reasonableness of the decision to toll is assessed it is both necessary and appropriate to consider that the decision was not taken only in relation to the costs of toll collection. It was taken against the backdrop of a myriad of other considerations which the government must constantly re-evaluate and weigh, including, the appropriate balance between general revenue allocations to roads and other social goods, the raising of debt, the need for road user charges, the affordability constraints on the fiscus, combined with the associated equity and policy objectives.[41]

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[40] According to this Court, "*factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected*." *Bato Star* paras 44 to 45.

[41] Record: Gordhan Vol 16 page 1437 para 29.2

61 It is therefore overly simplistic and quite simply wrong to test reasonableness only with reference to the relationship between the cost of toll collection and the cost of the road upgrades. The question that must be asked is whether the toll declaration decisions were reasonable given that the cost of toll collection was but one factor amongst the many that informed the decision to fund *GFIP* on the basis of the user pay principle.

62 *OUTA et al's* challenge ignores this rich, policy-informed context and instead focuses on the cost of tolling compared with the costs of the upgrade and conclude, without more, that the decisions must have been unreasonable.

63 We submit, based on the guidelines in *Bato Star*, that this is the wrong way to test the reasonableness of the toll declaration decisions *inter alia* because it fails to appreciate the multi-facetted and polycentric nature of those decisions.[42]

64 *OUTA et al's* misguided and narrow approach can be traced throughout their application and their affidavit opposing this application for leave to appeal.[43]

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[42] It is important to stress that we do not contend and it is not *SANRAL's* case, as *OUTA et al* maintain (Record: Corcoran Vol 17 page 1595 para 83.9), that the reasonableness of the toll declaration decisions is immune from judicial scrutiny. SANRAL's case is that there is no room for arguing, within the *Bato Star* formulation, that the decisions are unreasonable.

[43] For example, they state that "*none of the impugned decisions are decisions by Cabinet or by Treasury*" (Record: Corcoran Vol 17 page 1584 para 76). This may strictly speaking be correct, but it overlooks the facts detailed in the answering affidavit that Cabinet was party to the decisions, to the requirements of section 25(1) of *the SANRAL Act*, and the obvious point that the Transport Minister is a member of Cabinet and his decision to

Indeed, *OUTA et al* were so intent on showing that the decisions under review are not policy decisions that they filed a fourth affidavit in this Court alleging that the decisions they seek to impugn could not possibly interfere with the policy choice of Cabinet and the planned revenue raising of government because "*SANRAL's decision to declare Gauteng's freeways to be toll roads … was a decision made and approved by SANRAL two months before Cabinet was approach to 'approve' e-tolling in July 2007*".[44] This is factually and legally incorrect:

64.1 All that *SANRAL* decided in May 2007 was that it would embark on the necessary public participation process for the declaration of toll roads and that it would "*approach the Minister of Transport to declare the relevant roads toll roads*". This preliminary or preparatory step does not equate to a decision to declare the *Gauteng Roads* as toll roads.

64.2 Under the SANRAL Act, SANRAL must obtain the *Transport Minister*'s approval of any toll declarations. That approval must be obtained before any decision to declare the toll roads can be taken by SANRAL and the

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approve the toll declarations must be informed by the views of Cabinet and his fellow Ministers, including Finance. To contend that the decision to adopt tolling as a funding mechanism for *GFIP* was not influenced by the priorities of Cabinet and the policies of National Treasury, is naïve and misguided.

[44] OUTA et al's fourth affidavit filed on 6 July 2012 page 6 para 18

Transport Minister's approval would, in turn, have been informed, by Cabinet's—and *National Treasury*'s—policies.

65 It is therefore against the multi-dimensional framework, within which the decisions to approve and to declare the toll roads were made, that any assessment of the reasonableness of those decisions must be undertaken.

Toll collection costs

66 *OUTA et al's* case on toll collection costs is that the toll declaration decisions were unreasonable because the costs of toll collection would exceed the costs of the road upgrades themselves.[45]

67 But this is simply not factually correct. As annexure NA1 to SANRAL's supporting affidavit in this application makes clear, the total cost of toll collection constitutes roughly 20% of the total cost of the road upgrades.[46] The figures presented by *OUTA et al* in the High Court and which they continue to present to this Court are therefore simply incorrect.[47]

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45 Record: Corcoran Vol 17 page 1593 para 83.2

46 Record: Alli Vol 17 p 1512 para 11 to page 1520 para 12.16 read with annexure NA1A to SANRAL's replying affidavit.

47 *OUTA et al's* claim, before this Court (Record: Corcoran Vol 17 page 1594 para 83.4.2 and 83.4.3), that SANRAL has tried to hide the true costs of toll collection from them and the public, is surprising because they

68 Even if a court did consider these costs to be objectively high, this would not of itself lead to *prima facie* grounds for review: the decision to accept these costs as a necessary incident of tolling falls within the remit of *SANRAL* and Cabinet. The costs in this instance were reasonably considered acceptable taking into account the incidental advantages of the user pay principle and the policy militating against using a ring-fenced fuel levy.

69 We therefore submit that the toll declaration decisions cannot be impugned as being *prima facie* unreasonable on the basis of the costs of toll collection.

Enforcement

70 The applicants contend that the 7% delinquency level in respect of a million e-transactions would generate a default rate of 70 000 per day and in consequence SANRAL would be required to issue the same number of letters of demand and summons on a daily basis to enforce the system.[48] On this basis it is alleged that it was unreasonable for *SANRAL* to have adopted tolling as a payment

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know full well that *SANRAL* attempted to place these very figures before the High Court during the hearing and *OUTA et al* successfully opposed the introduction of the evidence which now appears in Annexure NA1 (replying affidavit para 15). This illustrates but one danger associated with a Court, on an urgent and interim basis, attempting to second-guess complex policy decisions.

[48] Record: Corcoran Vol 17 page 1601 paras 85.1 to 85.3

mechanism and Prinsloo J found that it was *prima facie* so unreasonable that no reasonable administrator could have adopted tolling.

71 This ground of review puts up the spectre of non-compliance on the part of South Africans as a barrier to administrative action. It is not—and can never be—an element of reasonableness that a decision must be capable of perfect implementation before it can lawfully be taken. Indeed, this Court has repeatedly held that the validity of a law or conduct cannot be determined on the basis of the circumstances for abuse.[49]

72 Moreover, the prospect of default remains but one consideration that had to be weighed by *SANRAL* as against the other considerable benefits arising from the *GFIP* and the adoption of a user-pays funding model.

73 SANRAL, like other public agencies which render public services in return for which they recover charges, will apply its powers to recover debt and secure appropriate sanctions in order to ensure a balance between debt recovery, the incentivizing of appropriate behaviour, and collection costs.

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[49] *Head of Department, Mpumalanga Department of Education & Another v Hoerskool Ermelo & Another* 2010 (2) SA 415 (CC) para 72; *Bernstein & Others v Bester & Others NNO* 1996 (2) SA 751 (CC) paras 51 – 52

74 Furthermore, there is no requirement that *SANRAL* issue a letter of demand or summons in respect of every act of default. The *SANRAL Act* vests a discretion in SANRAL as to how it will respond to defaulters, including mechanisms for enforcement. Those powers will be exercised in a practical and sensible fashion and repeat defaulters will be served with a summons in respect of cumulated debts when it is considered appropriate to do so.

75 Finally, when the Transport Minister approved the toll declarations, he would have been cognisant of his broad regulation-making powers under section 58 of the SANRAL Act, which afford him an opportunity in the future to address difficulties that might arise in enforcement.

76 Seen in this context, *OUTA et al's* affidavits fail to establish even a *prima facie* prospect of success in the review on the basis of enforcement issues.

Information before the Minister

77 *OUTA et al* seek to impugn the toll declaration decisions on the basis that information relating to the costs of toll collection was not placed before the *Transport Minister* when his approval for the declaration was sought.[50]

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[50] Record: Corcoran Vol 17 page 1582 para 73.2.5

78 *OUTA et al* are correct that the current figures for toll collection costs, which appear in Annexure NA1A, were not put before the Transport Minister: they could not have been as these are current 2012 Rand figures which have been calculated more than four years after the *Transport Minister*'s approval was originally sought.

79 But these present calculations are irrelevant to the review. All that is relevant for the purposes of impugning the toll declaration decisions are the figures which were available at the time that the decisions were taken. In order for *OUTA et al* to have any prospects on this ground of review, they therefore have to show that no information concerning the costs of toll collection was put before the *Transport Minister*. However, this they cannot do because, as they themselves accept, in *the 2006 Proposal*, the yearly estimated operation and maintenance costs of tolling was then indicated to be R200 million.[51]

80 While *OUTA et al* cannot avoid the fact that this information appears in the 2006 Proposal, they try to undercut its significance for this review ground by:

80.1 alleging that the figure was "manifestly unreliable";[52] and

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[51] Record Vol 9 page 911 – first two lines

[52] Record: Corcoran Vol 17 page 1598 para 83.18

80.2 alleging that this Proposal was not considered by the Minister when he approved the toll declarations.[53]

81 In so far as the allegation that the annual figure of R200 million is "manifestly unreliable" is concerned, *OUTA et al* do not put up any contrary evidence of unreliability, whether manifest or at all. Instead they found this assertion on the basis that the "*same page [of the Proposal] referred to the need for 'specialist studies' to be carried out to determine toll feasibility*".[54] This quote is taken out of context; what the 2006 Proposal in fact says is that:

> *The income generated at such a tariff [a reference to the proposed 30 to 35c/km tariff] seems adequate to finance the capital, maintenance and operational costs of the scheme. It still needs to be confirmed by means of specialist studies, which will commence after the principles of a freeway improvement scheme have been agreed upon.*

82 Appreciated in its full context, the quote is clear that what will be subjected to further specialist studies is not the figure of R200 million per annum for toll collection but whether the income generated from the tolling scheme will be sufficient to cover the entire costs of the system. It is a far cry from that to the proposition that the figure of R200 million is "manifestly unreliable".[55]

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53 Record: Corcoran Vol 17 page 1597 para 83.15

54 Record Corcoran Vol 17 page 1598 para 83.17

55 In any event, even if studies were to be conducted on the estimated costs of toll collection, the fact that further studies would be carried out to assess toll feasibility does not itself make the figure of R200 million manifestly

83 In so far as *OUTA et al* claim that the 2006 Proposal was not considered by the *Transport Minister* in approving the toll declarations, it is unclear how *OUTA et al* can possibly adopt this stance when the Minister, himself, attached the 2006 Proposal to his answering affidavit in the interim application and described its contents as informing the decision to approve the toll declarations.

84 At paragraph 2 of his affidavit, the *Transport Minister* sets out "*a brief factual background which explains how [he] took the decision sought to be reviewed in part B of the notice of motion*".[56] In the course of describing the factual background, the Transport Minister refers in detail to the 2006 Proposal.[57] He concludes by stating that the decision to adopt e-tolling as the revenue mechanism for *GFIP* was "*a product of a consideration of various models of funding the freeway improvement, and the adoption of one of the available options which were justified for the reasons set out in [the Proposal]*".[58]

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unreliable particularly in the absence of any evidence to show that that estimate, as it was *in 2006*, was inaccurate or unreliable.

56 Record: Mahlalela Vol 10 page 958 para 2

57 Record: Mahlalela Vol 10 pages 961 to 963 paras 7.1 to 7.6

58 Record: Mahlalela Vol 10 pages 963 to 964 para 10 (our emphasis). Annexure AA1 to the Minister's answering affidavit is the 2006 Proposal. To avoid duplication only the copy of the Proposal attached to SANRAL's affidavit is included in the record. It appears in Vol 9 from page 883.

85 In the face of these averments made under oath by the *Transport Minister*, *OUTA et al's* claims that the information in the Proposal did not inform the decision to approve the toll declarations must be rejected.

86 *OUTA et al* have therefore failed to establish any prospect in the review of setting aside the toll declaration decisions because material information on toll collection costs was not placed before the Transport Minister.

Adequate notice

87 *OUTA et al* complained that the content of the toll declaration notices was insufficient because they did not provide an indication of the anticipated cost of the toll and there was therefore a procedural shortcoming.[59]

88 This could only be a legitimate ground of complaint if the notices were required to inform the public and affected parties about the amount of toll which would be levied on the declared toll roads. However, there is no such requirement. [60]

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[59] Record: Corcoran Vol 17 page 1592 para 82.7

[60] Section 27(4) of the SANRAL Act sets out what is required to be placed in the notice and no reference is made to a specification of the quantum of the tariff. There is no challenge to the constitutionality of section 27(4) and consequently the content of the notices complied with a valid statute. Moreover, publication is required to be undertaken in the prescribed manner. *OUTA et al* do not suggest that the prescribed method of publication was not followed or that it is in some way unconstitutional or contrary to *PAJA.*

89 The declaration of roads as toll roads results from powers exercised by *SANRAL* under section 27(1) of the *SANRAL Act*. Under the *SANRAL Act*, setting the amount of toll to be levied is a distinct administrative act undertaken by the *Transport Minister* in terms of section 27(3)(d) of the *SANRAL Act*. The setting of the amount of toll can also only take place in respect of a declared toll road.

90 To be accepted, *OUTA et al*'s arguments would require notices to be published by *SANRAL*, which *precede* the toll declaration process, to contain information relevant to a process which can only occur *after* the relevant roads have been declared as toll roads.

91 Moreover, it was not for *SANRAL* to pre-empt the later decision of the *Transport Minister* because that any information on the amount of toll which *SANRAL* may have placed in this notice would:

91.1 potentially fetter the later decision of the *Transport Minister* under section 27(3)(d) of the SANRAL Act; or

91.2 if it were not to have fettered this later decision, may very well have been a completely inaccurate estimate of the amount that would finally have been imposed.

92 It was therefore not only unnecessary for the notices to specify the amount of toll which it was estimated would be levied but also beyond *SANRAL*'s powers to include such information in the notices.

93 In the circumstances, this ground of review is without merit.

Public transport alternatives

94 *OUTA et al* allege that the Transport Minister's approval of the toll declarations was based on the assumption that public transport alternatives and viable alternative routes were or would be in place when in fact this would not be so.[61] They contend that SANRAL presents an entirely different picture on this issue in the affidavits filed in this Court as compared with what was before the High Court.[62] This is not so.

95 *OUTA et al* are incorrect that the Minister was told that alternative public transport alternatives were or would be in place prior to tolling the relevant roads of the GFIP. The source of this alleged misinformation is said to be Addendum F to the letter from *SANRAL* to the Transport Minister which,

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61 Record: Corcoran Vol 17 page 1583 para 73.2.8 and page 1582 para 73.2.6 respectively

62 Record: Corcoran Vol 17 page 1603 para 86.1

according to OUTA et al "*created the impression that adequate public transport alternatives would be provided by SANRAL simultaneously with the upgrading and tolling of the proposed toll road network*".[63]

96 However, this contention is factually incorrect: the plain meaning of Addendum F creates no such impression. However, even if it could be read to have created this impression there is nothing misleading about the impression. That *SANRAL* would provide adequate public transport alternatives *during the upgrade and tolling* of the system means that this was a very long term commitment. Tolling of the system will continue if not perpetually, then at least for the foreseeable future and all that Addendum F, on OUTA et al's reading, commits *SANRAL* to do is to promote adequate public transport alternatives while the tolling system is operating.

Procedural limitations of the review

97 Even if, contrary to what is set out above, *OUTA et al* could establish some *prima facie* right in the review, the prospects of the reviewing court setting aside

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[63] Record: Pauwen Vol 2 pages 140 to 141 para 280.1. This allegation is repeated by *OUTA et al* in their affidavit before this Court at Record Vol 17 page 1604 para 86.2.3

the impugned decisions is extremely unlikely because the review application was brought more than four years after the decisions were taken.

98 Importantly, for purposes of this appeal, Prinsloo J completely failed to consider the question of delay or the provisions of section 7(1) of *PAJA* when he granted the interdict. Had he done so, he could never have concluded that *OUTA et al* enjoyed *prima* facie prospects of success on review.

99 Moreover, even if this delay were condoned, *OUTA et al* face two further hurdles in that:

99.1 In so far as the environmental authorisations are concerned, they did not exhaust the internal remedies available to them under NEMA and they did not seek exemption, as is required under *PAJA*, from their obligation to do so; and

99.2 In so far as both the toll declaration decisions and the environmental authorisations are concerned, even if *OUTA et al* were able to establish their invalidity, a reviewing court would likely exercise its discretion not

to set aside the decisions because of the reliance which has been placed on them over the four intervening years.[64]

100 These procedural hurdles stand in the way of a successful review and therefore High Court ought not to have found that *prima facie, OUTA et al* enjoyed any prospect of success before the reviewing court.

Irreparable Harm

101 *OUTA et al* allege that they and the general public will suffer irreparable harm if they are forced to pay for the tolls while the review is pending.[65] This complaint is unsustainable.

102 First, it is common cause that the road upgrades will have to be paid for by the public.[66] The only question is whether they pay for them by means of tolls or some other form of revenue raising mechanism. The proper comparison for the purposes of assessing the alleged harm is not between paying tolls and paying nothing but rather paying tolls and paying some other form of levy.

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64 *Chairperson, Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd* 2008 (2) SA 638 (SCA) para 28; *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 (4) SA 113 (CC) paras 84 and 85

65 Record: Corcoran Vol 17 page 1611 paras 96 to 99

66 Record: Gordhan Vol 16 page 1446 para 35 and page 1486 para 114.2

103 Secondly, the complete answer to *OUTA et al's* allegations that they will suffer irreparable harm in the event that they are forced to pay for the tolls in the interim but are ultimately successful in the review, is that at law, they would have an enrichment claim against *SANRAL* for reimbursement.[67] *OUTA et al* complain that the availability of this remedy is undermined by *SANRAL*'s failure to tender this repayment.[68] However, the absence of a tender does not alter what the motorists would be entitled to as a matter of law. Moreover, the existing law on interdicts is that it is the applicant for the interdict who is required to make the tender in order to secure the interdict, not the other way round.[69]

104 Thirdly, as *SANRAL's* replying affidavit reflects, the financial cost to motorists is not likely to be anywhere near as onerous as *OUTA et al* suggest.[70] The extent of the prejudice complained of is therefore much more limited.

Balance of Convenience

105 Whereas the discussion in the preceding section has disclosed that *OUTA et al* will suffer little or no harm in the event that the interdict is not granted, the harm

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67 *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue* 1992 (4) SA 202 (A)

68 Record: Corcoran Vol 17 page 1613 para 97.4

69 *Hix Networking Technologies v System Publishers (Pty) Ltd and Another* 1997 (1) SA 391 (A) 403D

70 SANRAL's replying affidavit paras 25 and 26

to *SANRAL* and the other applicants since the interdict was granted has been considerable. In accordance with the submissions which we made in the first section of these heads of argument, it is appropriate for courts faced with interim interdicts of this type to require the applicant for the interdict to establish a substantial net burden of harm. That standard was not met by *OUTA et al* before the High Court.

106 The harm flowing from the grant of the interdict is set out in detail at paragraphs 33 to 60 of the Minister of Finance's affidavit before this Court and at paras 7 to 8.7 of Mr Nazir Alli's affidavit before this Court. We understand that it will also be dealt with extensively in the arguments to be presented on behalf of *National Treasury*.

107 In the circumstances, we point to only four features of the harm specific to SANRAL:

107.1 In the week following the grant of the interdict, Moody's Investor Services announced a two-notch downgrade in its rating of SANRAL. In the circular issued by Moody's to announce the downgrade, it specifically linked the downgrade to the uncertainties brought about by the interdict.[71]

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[71] Record: Gordhan page 1450 para 39

107.2 As a result of this downgrade, SANRAL suspended its market-making activities and instructed its outside market-makers to limit any sell-off in SANRAL bonds as this may cause an increase in borrowing costs.[72] In addition, for as long as SANRAL cannot raise funding, it cannot embark on new projects. This means that future growth of the road network and other development projects must be delayed, and, as a consequence, further economic growth in the country will be impeded.[73]

107.3 SANRAL has had to redeploy the R5.75 billion special appropriation from *National Treasury*, which was received to reduce its debt exposure, in order to defray operational expenditure, interest payments and other toll-related expenditure.[74]

107.4 The Auditor-General has indicated to SANRAL that its financial statements for the year-end 31 March 2012 will need to reflect whether SANRAL is still a going concern for the next 12 months in order to avoid a qualified audit report.[75] Because SANRAL can no longer raise any

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72 Record: Gordhan page 1451 para 41.2

73 Record: Alli Vol 17 page 1510 para 8.7

74 Record: Gordhan page 1451 para 41.3

75 Record: Gordhan page 1452 para 46

further funding through its bond programme, when its current reserves are depleted, it will not be able to operate as a going concern.[76]

108 *OUTA et al* seek to overcome the impact of this obvious harm for their prospects in the interim interdict application on the basis that this harm was somehow not addressed by the applicants in the High Court.[77] This is not correct: the evidence before the High Court was detailed and was as follows:

108.1 For every month that tolling is delayed post-30 April 2012, *SANRAL* will forego approximately R225 million in revenue.[78] Without this income, *SANRAL* faces the real prospect of defaulting on its loan obligations. This would, in turn, compromise its international credit rating and jeopardise its ability to raise capital in the future.[79] It will also place *SANRAL* in breach of its existing contractual commitments and expose it to massive claims for damages from those contracting parties.[80]

108.2 Because *OUTA et al* have not tendered any guarantee against the losses that *SANRAL* will suffer if the interdict is granted, *SANRAL* will never be

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76 Record: Alli Vol 17 page 1510 para 8.6

77 Record: Corcoran Vol 17 page 1608 para 89

78 Record: Alli Vol 8 page 813 para 371.4

79 Record: Alli Vol 6 page 528 para 10.7

80 Record: Alli Vol 6 page 528 para 10.6

able recover the losses it suffers for as long as the interim interdict is in place.[81]

108.3 If the South African government is called on to step into the breach to save *SANRAL* from defaulting on these obligations, its existing budget allocations to areas such as the implementation of National Health Insurance, improvements to education, social welfare reforms and the provision of housing will all be under threat.[82] Were this to be required of the government, there is a real possibility that South Africa's own credit ratings would be compromised, to the detriment of future spending and budgetary allocations.[83]

108.4 In the end, it will be the South African public which suffers if the government's careful budget allocations are undermined by this order and it is forced to take money from other social improvement projects.[84]

109 It is clear, therefore, that not only was the harm to the applicants arising from the interdict anticipated before the High Court, but the aftermath of the grant of the interdict has also confirmed these predictions.

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[81] Record: Alli Vol 6 page 530 para 10.10

[82] Record: Alli Vol 6 page 529 para 10.8

[83] Record: Alli Vol 6 page 529 para 10.9

[84] Record: Alli Vol 6 page 530 para 10.11

LEAVE TO APPEAL

110 We submit that for precisely the same reasons that this Court granted the applicants in *SCAW* leave to appeal to this Court, it should grant the present applicants leave to appeal.

111 It is common case between the parties that the case raises a constitutional matter[85] and therefore the only remaining question is whether the interests of justice will be served by an appeal to this Court.

112 For all the reasons set out above, we submit that the interim interdict ought never to have been granted. Not only did the High Court fail to appreciate the nature and effect of the interdict it was being asked to grant, but it also came to the wrong conclusion even on the traditional test for interim relief. Because of the impact that this interdict has had and will continue to have on *SANRAL* and the government's fiscal planning and its policy of revenue procurement and allocation, it is imperative that this Court steps in to stop this intrusion into the executive domain.

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[85] Record: Corcoran Vol 17 page 1549 para 28

113 The applicants approached this Court directly for three reasons:

113.1 The case does not involve the development of the common law, on which the views of the Supreme Court of Appeal would be relevant.[86]

113.2 Given that the interdict impacts on the principle of the separation of powers in such a significant and unprecedented way, Cabinet resolved to approach this Court directly to ensure that the balance between the various arms of government is restored.[87]

113.3 Because of the harm being suffered by the applicants for as long as the interdict remains in place, approaching the Supreme Court of Appeal – via an application before the High Court—before approaching this Court would have likely only precipitated a further appeal to this Court and, consequently, a further delay in setting aside the interdict.[88]

114 For so long as the interim interdict remains in place, SANRAL is precluded from tolling. This is a state of affairs that could endure for a significant period. Certainly the review application has not progressed: no supplementary founding

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86 Record: Gordhan Vol 16 page 1466 para 77.1

87 Record: Gordhan Vol 16 page 1467 para 77.2

88 Record: Gordhan Vol 16 pages 1467 to 1768 paras 77.3 to 77.4

affidavit has been filed by *OUTA et al* and there is no date for the hearing of the application.

115 Furthermore, there can be no question that if it were not for the interim interdict, SANRAL would have been able to commence tolling on 30 April 2012. As is clearly set out in *SANRAL*'s replying affidavit, it has been running the tolling system throughout the month of June 2012.[89]

116 The criticism of SANRAL's preparedness to toll on the part of *OUTA et al* is misplaced: they are concerned not with SANRAL's ability to toll but with questions of enforcement or the effectiveness of tolling. These are distinct questions from whether or not SANRAL can commence tolling at all.

117 Once the system is running and toll is being collected, to the extent that *SANRAL* identifies shortcomings in its ability to toll, these can be remedied in the future through the promulgation of regulations or, if necessary, the amendment of legislation. Indeed, SANRAL is contemplating precisely such changes to bring about greater efficiencies in the system.

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[89] SANRAL's replying affidavit para 24.

REMEDY

118 For all the reasons given above, SANRAL seeks an order:

118.1 Granting the applicants leave to appeal directly to this Court; and

118.2 Upholding the appeal and, consequently, setting aside the interim interdict granted by the High Court on 28 April 2012.

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DN UNTERHALTER SC

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Counsel for SANRAL

16 July 2012

TABLE OF AUTHORITIES

Cases