CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 38/12
[2012] ZACC 18

In the matter between:

NATIONAL TREASURY	First Applicant
SOUTH AFRICAN NATIONAL ROADS AGENCY LIMITED	Second Applicant
MINISTER, DEPARTMENT OF TRANSPORT	Third Applicant
MEC, DEPARTMENT OF ROADS AND TRANSPORT, GAUTENG	Fourth Applicant
MINISTER, DEPARTMENT OF WATER AND ENVIRONMENTAL AFFAIRS	Fifth Applicant
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

and

ROAD FREIGHT ASSOCIATION Applicant for leave to intervene

Heard on : 15 August 2012

Decided on : 20 September 2012

JUDGMENT

MOSENEKE DCJ (Mogoeng CJ, Cameron J, Jafta J, Khampepe J, Skweyiya J and Van der Westhuizen J concurring):

Introduction

[1] In 2007, the Cabinet approved an extensive upgrade of roads in the economic hub of the Gauteng province as part of a highway construction project known as the Gauteng Freeway Improvement Project (GFIP). The upgrades were carried out by the South African National Roads Agency Limited (SANRAL or second applicant), an organ of state, established under the South African National Roads Agency Limited and National Roads Act[1] (SANRAL Act).

[2] This early, I would like to delineate the powers and the responsibilities of SANRAL. Its main functions and responsibilities include all strategic planning, design, construction, management, control, maintenance and rehabilitation of national roads. It

[1] 7 of 1998. See section 2.

also bears the responsibility of arranging financing for those activities.[2] For present purposes it is important to record that SANRAL is obliged to exercise its powers and execute its responsibilities "within the framework of government policy."[3] The SANRAL Act prescribes the funding options that are available to SANRAL.[4] The funding options relevant to the present dispute include loans granted to or raised by SANRAL, levies charged on the sale of fuel, toll and monies appropriated by Parliament.[5]

[3] The GFIP entailed extensive civil engineering work, the widening and enhancement of roads, the building of new on and off-ramps and the erection of gantries equipped with an electronic open road tolling system (e-tolling). SANRAL engaged contractors, service providers and suppliers to accomplish the project. It also incurred R21 billion debt to finance the vast capital expenditure of the first phase of the project, of which the Government guaranteed a total of R19 billion. In the event of default, SANRAL will be liable for the full and punctual repayment of the loans to third party funders.

[4] The first phase of the project has been completed. The modernised highways are used daily by motorists in Gauteng. The roads have been fitted with electronic

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

[3] Id.

[4] Section 34(1) of the SANRAL Act.

[5] Section 34(1)(b), (c), (g) and (k) of the SANRAL Act.

infrastructure for tolling their use. Subject to proclaiming toll fees, the electronic tolling system is just about ready for immediate implementation.

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

[6] The GFIP was a sequel to two important decisions by the Executive Government. In 2008, SANRAL took a decision, acting under the provisions of section 27(1)(a)(i) with the approval of the Transport Minister in terms of section 27(4) to declare certain Gauteng roads as toll roads.[6] Even earlier, between November 2007 and February 2008, the Director-General of Water and Environmental Affairs (Director-General or sixth

[6] Section 27(1)(a)(i) of the SANRAL Act provides that SANRAL, with the Minister's, approval may declare any specified national road or any specified portion thereof, including any bridge or tunnel on a national road, to be a toll road for the purposes of the Act.

Section 27(4) of the SANRAL Act prescribes the procedure to be followed by SANRAL before the Minister's approval under section 27(1)(a) can be obtained.

applicant) granted certain environmental approvals for the GFIP in terms of section 24 of the National Environmental Management Act[7] (NEMA).

[7] Nearly four years later, on 23 March 2012, the Opposition to Urban Tolling Alliance (OUTA or first respondent) together with the second to fifth respondents,[8] approached the North Gauteng High Court (High Court) on an urgent basis for an interim interdict restraining SANRAL from levying and collecting toll on the Gauteng roads pending the final determination of their application to review and set aside the decisions of (a) SANRAL and the Transport Minister to declare the Gauteng roads as toll roads and (b) the Director-General to grant certain environmental approvals related to the GFIP.

[8] Prinsloo J, sitting in the High Court, heard the urgent application and on Saturday 28 April 2012 issued an interim interdict prohibiting SANRAL from levying and collecting toll on certain Gauteng roads pending the review. The National Treasury and SANRAL have approached this Court, as a matter of urgency, for leave to appeal directly to it against the judgment and order of Prinsloo J.

[7] 107 of 1998. See section 24.

[8] South African Vehicle Renting and Leasing Association (second respondent); Quadpara Association of South Africa (third respondent); South African National Consumer Union (fourth respondent); and National Consumer Commission (fifth respondent).

Issues

[9] The issues that fall for determination are narrow. The first issue is whether it is in the interests of justice to hear the appeal directly to this Court on an urgent basis. Should we grant leave to appeal, we will have to decide the merits of the appeal. And that is whether the High Court was correct in granting the temporary restraining order. However, before I do so, I propose to dispose of three preliminary matters.

Preliminary issues

Democratic Alliance's application for admission as amicus curiae

[10] Rather belatedly, four court days before the hearing, the Democratic Alliance, a political party which is the official opposition in Parliament, lodged an application to be admitted as a friend of the court and to be permitted to submit written and present oral argument. Together with its application it lodged written argument it sought to advance. The National Treasury and SANRAL refused to grant their consent and opposed the application on several grounds including that the lateness of the application would prejudice their case.

[11] On 8 August 2012 this Court issued an order dismissing the amicus application. Then it undertook to furnish reasons in the main judgment.

[12] Our filing directions to the parties allowed for an expedited time frame that required the respondents' written argument to be filed 12 days before the date of hearing,

on 15 August 2012. That left less time than our Court Rules allow for a prospective amicus to apply for its admission. I am satisfied that the Democratic Alliance adequately explained the prompt steps it had taken and why it could not file its application any earlier. I condone the lateness.

[13] On the merits of its application, the National Treasury and SANRAL contended that the Democratic Alliance did not meet the established requirements for admission as a friend of the court. I do not propose to revisit the ideal attributes of a party that seeks to be admitted as a friend of the court. It is sufficient to observe that an amicus must make submissions that will be useful to the court, and which differ from those of the parties.[9] In other words, the submissions must be directed at assisting the court to arrive at a proper and just outcome in a matter in which the friend of the court does not have a direct or substantial interest as a party or litigant.[10] This does not mean an amicus may not urge upon a court to reach a particular outcome. However, it may do so only in the course of assisting a court to arrive at a just outcome and not to serve or bolster a sectarian or

[9] Rule 10 of the Constitutional Court Rules provides, in relevant part:

> "(6) An application to be admitted as an *amicus curiae* shall–
>
> . . .
>
> c) set out the admissions to be advanced by the *amicus curiae*, their relevance to the proceedings and his or her reasons for believing that the submissions will be useful to the Court and different from those of the other parties.
>
> (7) An *amicus curiae* shall have the right to lodge written argument, provided that such written argument does not repeat any matter set forth in the argument of the other parties and raises new contentions which may be useful to the Court."

[10] See *Ex Parte Institute for Security Studies: In Re S v Basson* [2005] ZACC 4; 2006 (6) SA 195 (CC) and *Fose v Minister of Safety and Security* [1997] ZACC 6; 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC) at para 9.

partisan interest against any of the parties in litigation.

[14] The Democratic Alliance says it is entitled to be admitted as amicus because in *Democratic Alliance v President*,[11] the Supreme Court of Appeal recognised its interest and standing in pursuing public interest litigation. That may be so. But, I do think that there is a distinct difference between a political party litigating to advance public interest in its own name, on the one hand, and propping itself up as a friend of the court, on the other. Here the Democratic Alliance has made common cause with the respondents and has strenuously urged us to dismiss the appeal. It is plainly the fifth wheel of the respondents. Its overall partisan position is better suited to a litigant than a friend of the court.

[15] The avowedly political nature of what the Democratic Alliance calls its "interest" in this case makes it inappropriate to seek admission as an amicus rather than as an intervening party. Moreover, its "interest" could find full expression in the National and Provincial Legislatures and Municipal Councils where it says it is widely represented. It would therefore be inappropriate to permit the Democratic Alliance to advance a sectarian interest under the guise of amicus curiae.

[16] Equally important is that the written submissions of the Democratic Alliance, in substance, do not introduce new contentions beyond the contrasting arguments already

[11] *Democratic Alliance v President of the Republic of South Africa and Others* 2012 (1) SA 417 (SCA).

filed by the parties. The Democratic Alliance, like the government applicants, supports the "user pay" principle but unlike the respondents, concedes that the policy decision to toll roads is not susceptible to judicial review. What may be reviewed, it contends, is the implementation of the policy. The concession of the Democratic Alliance does not constitute fresh insight because it coincides with or supports, in great part, the attitude already displayed by the government applicants. On the other hand, the Democratic Alliance's reasons why we should not interfere with the interim interdict echo the position of the respondents with slight variation. Thus its contentions are not new and will not add anything meaningful to a case that is already burdened by several procedural and substantive issues.

Road Freight Association's application to intervene

[17] The Road Freight Association (RFA) applied for leave to intervene as a party. We heard the parties on this and thereafter issued an order dismissing the application with costs including costs resulting from the employment of two counsel.

[18] A party seeking to intervene in proceedings in this Court must show that it has a direct and substantial interest in the case.[12] The RFA was not a party before the High Court. There, it initially applied to be admitted as an amicus but withdrew its application even before it could be heard. It now comes to this Court claiming that it wants to make

[12] *Gory v Kolver NO and Others (Starke and Others intervening)* [2006] ZACC 20; 2007 (4) SA 97 (CC); 2007 (3) BCLR 249 (CC) at para 13 and *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another (Mukhwevho Intervening)* [2001] ZACC 19; 2001 (3) SA 1151 (CC); 2001 (7) BCLR 652 (CC).

sure that the interim interdict is not set aside because this will preserve its "interest" to seek leave to intervene in the review proceedings. This argument lacks merit. First, up to this late stage the RFA has not applied to be admitted as a party to the pending High Court review proceedings. Second, for the RFA to do so successfully it does not require, nor is it entitled to, an interim interdict. It did not advance any argument why if the present interim interdict were to be set aside, that would stand in its way of becoming an intervening party in the review.

[19] The main contention of the RFA is that the SANRAL Act is invalid because it permits the devolution of certain coercive governmental powers to a private agency without the necessary accountability. This is a novel contention that was never in issue between the parties. We would have to dispose of it as a court of first and final instance. The National Treasury and SANRAL urged us to dismiss this contention summarily also because it lacks any merit whatsoever. They point out that SANRAL is not a private entity but an organ of state as defined in the Constitution.[13] They add that, in any event, it is the Minister, a member of the Executive branch of Government, who under the Act has the power to determine toll tariffs and not SANRAL.

[20] I say nothing about the merits of the RFA's contentions because they may resurface before the review court. Suffice it to state that it would not be in the interests of justice to entertain an entirely new cause of action to the probable detriment of all

[13] Section 239 of the Constitution.

concerned and certainly to the government applicants. The RFA has not shown a direct and substantial interest in the appeal before this Court against the grant of the interim interdict. In any event, it is not in the interests of justice to permit the RFA to impugn the constitutional validity of the SANRAL Act for the first time in these proceedings when none of the parties has done so before or now. Moreover, it is always open to it to impugn the constitutional validity of any statute before any High Court.

Additional affidavits

[21] The parties have filed affidavits beyond the two sets prescribed by our Rules of Court. The new sets of affidavits were updates on occurrences after the grant by the High Court of the interim interdict. Their contents are relevant to issues related to the assessment of continuing irreparable harm. None of the parties oppose their admission and in my view their admission will not prejudice any of the parties. The additional affidavits are admitted.

Leave to appeal

[22] There is no dispute between the parties that this appeal raises a constitutional matter. However, they differ on what the constitutional issue is. I am of the view that the pending judicial review raises at least two constitutional issues. The review has been brought under section 6 of the Promotion of Administrative Justice Act[14] (PAJA), a statute enacted to give effect to the right to just administrative action guaranteed by the

[14] 3 of 2000.

Constitution.[15] Second, the review poses the question whether the relief sought entails an improper trespass on the exclusive domain of the Executive. Similarly, in the appeal before us, the prominent issue is whether the grant of the interim interdict has impermissibly trenched upon the constitutional tenet of separation of powers. These are constitutional issues of considerable importance.

[23] The Constitution and Rules of this Court permit an aggrieved party to appeal directly to this Court if it is in the interests of justice to do so.[16] What remains is whether the interests of justice will be served by hearing an urgent and direct appeal to this Court against an interim interdict. The respondents say that, apart from prospects of success on appeal, (a) the interim interdict is not appealable because it does not have a final effect and does not dispose of a substantial portion of the relief claimed in the review; (b) there is no urgency of the kind claimed by the applicants and (c) there is no justification in leap-frogging the Supreme Court of Appeal and coming directly to this Court.

[24] It is so that courts are rightly reluctant to hear appeals against interim orders that have no final effect and that in any event are susceptible to reconsideration by a court when the final relief is determined. That, however, is not an inflexible rule. In each case, what best serves the interests of justice dictates whether an appeal against an interim

[15] Section 6(1) of PAJA provides that "[a]ny person may institute proceedings in a court or a tribunal for the judicial review of an administrative action."

[16] Section 167(6)(b) read with Rule 19.

order should be entertained. That accords well with developments in case law dealing with when an appeal against an interim order may be permitted.[17]

[25] This Court has granted leave to appeal in relation to interim orders before.[18] It has made it clear that the operative standard is "the interests of justice". To that end, it must have regard to and weigh carefully all germane circumstances. Whether an interim order has a final effect or disposes of a substantial portion of the relief sought in a pending review is a relevant and important consideration. Yet, it is not the only or always decisive consideration. It is just as important to assess whether the temporary restraining order has an immediate and substantial effect, including whether the harm that flows from it is serious, immediate, ongoing and irreparable.

[26] A court must also be alive to and carefully consider whether the temporary restraining order would unduly trespass upon the sole terrain of other branches of Government even before the final determination of the review grounds.[19] A court must be astute not to stop dead the exercise of executive or legislative power before the

[17] *International Trade Administration Commission v SCAW South Africa (Pty) Limited* [2010] ZACC 6; 2012 (4) SA 618 (CC); 2010 (5) BCLR 457 (CC) (*ITAC*) at paras 47-55.

[18] See *ITAC* id. See also *Machele and Others v Mailula and Others* [2009] ZACC 7; 2010 (2) SA 257 (CC); 2009 (8) BCLR 767 (CC); *President of the Republic of South Africa and Others v United Democratic Movement (African Christian Democratic Party and Others intervening; Institute for Democracy in South Africa and Another as* Amici Curiae*)* [2002] ZACC 34; 2003 (1) SA 472 (CC); 2002 (11) BCLR 1164 (CC) (*UDM*); and *Minister of Health and Others v Treatment Action Campaign and Others (No. 1)* [2002] ZACC 16; 2002 (5) SA 703 (CC); 2002 (10) BCLR 1075 (CC).

[19] 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 the applicant will succeed in trial. See *Smith v Inner London Education Authority* [1978] 1 All ER 411. In Canada, the Supreme Court has held that a public body seeking to establish irreparable harm for the purpose of resisting an interdict will be subject to a less onerous standard than a private party. See *RJR- MacDonald Inc v Canada* [1994] 1 R.C.S. 311 at 346.

exercise has been successfully and finally impugned on review. This approach accords well with the comity the courts owe to other branches of Government, provided they act lawfully. Yet another important consideration is whether in deciding an appeal against an interim order, the appellate court would in effect usurp the role of the review court. Ordinarily the appellate court should avoid anticipating the outcome of the review except perhaps where the review has no prospects of success whatsoever.

[27] In the present case, there can be no doubt that the impact of the temporary restraining order is immediate, ongoing and substantial. The order prohibits SANRAL from exercising statutory powers flowing from legislation whose constitutional validity is not challenged. In particular, the order prevents it from raising revenue through tolls, a power the statute vests in it. The immediate and ongoing result of the interdict is that the National Treasury, the Executive Government and the National Legislature will have to allocate R270 million per month to SANRAL in order to meet its ongoing capital and interest repayments in respect of the GFIP. Thus the order has wide ranging consequences for national finances and the management of our country's sovereign debt. At the behest of a court order, the National Executive is prevented from fulfilling its statutory and budgetary responsibilities for as long as the interim order is in place. In effect, the order compels a re-allocation of otherwise budgeted funds to satisfy the financial exigency. Thus the grant of the interdict has a direct and immediate impact on separation of powers as well as ongoing irreparable financial and budgetary harm.

[28] It must be added that this Court is being asked to decide whether the interim interdict has been properly granted. If it were to do so, it would not usurp the role of the review court. That role will be limited to deciding the merits of the review grounds, something this Court is not finally deciding.

[29] I am satisfied that the applicants were entitled to approach this Court directly and on an urgent basis. There is simply no merit in the respondents' suggestion that the applicants' case for urgency died when e-tolling was postponed on 26 April 2012. That is the day when the African National Congress, the governing party, and one of its alliance partners, the Congress of South African Trade Unions, agreed to postpone the start of e-tolling for one month. A short postponement of that sort directed at winning political or public buy-in cannot properly be equated to an order of court that stops dead the exercise of financial and budgetary authority of the Executive arm of Government and that will remain in force until the end of possibly protracted rounds of litigation.

[30] It is urgent that this Court resolves the dispute over the appropriateness of the interim interdict. The case does not require a development of the common law on which the views of the Supreme Court of Appeal would have been helpful. It rather raises separation of powers and thus a further appeal to this Court would be most likely and would unduly extend the delay in resolving the dispute. In any event it is not clear that the Supreme Court of Appeal will entertain an appeal against the grant of an interim

interdict. It is in the public interest and in the interests of justice that the dispute over the appropriateness of the interim interdict be resolved forthwith.

Merits of the appeal

Grounds of review

[31] Having granted leave to appeal, we must now decide the merits of the appeal. To do that I need not determine the cogency of the review grounds. It would not be appropriate to usurp the pending function of the review court and thereby anticipate its decision. I have kept in mind that the Rule 53 procedure[20] might result in the lodging of a supplemented case record which would not be before an appellate court and which may entail new matters or disputes of fact which will best be dealt with by the review court itself. I nonetheless proceed to describe the subject matter of the review for the restricted purpose of probing whether the High Court was right in granting the interim interdict.

[32] OUTA correctly draws attention to the fact that in July 2007, the Cabinet approved the implementation of the GFIP after considering a memorandum that served before it. The Cabinet's approval makes plain that when the GFIP is implemented "[n]ormal procedures for toll schemes will apply including the declaration of all identified roads in

[20] Rule 53 of the Uniform Rules of Court provide that in all applications for review an applicant shall call upon the decision-maker to show cause why a decision or proceedings should not be reviewed and corrected or set aside, and to despatch the record of the proceedings sought to be reviewed together with its reasons. Once such record is made available to the applicant he may make copies and within ten days bring an application to amend, add to or vary the terms of his review application and supplement the supporting affidavit.

the scheme as national roads, execution of the toll declaration process and the determination of toll tariffs."

[33] Pursuant to the Cabinet decision on 11 February 2008, the Transport Minister approved SANRAL's request to make toll declarations relating to the GFIP network. On 28 March and 28 July 2008, SANRAL declared GFIP roads as toll roads in terms of section 27(1)(a)(i) of the SANRAL Act.[21] However, in order for e-tolling to commence the Transport Minister will have to publish a tariff notice in terms of section 27(3)(c) of the SANRAL Act.[22] The parties accept that tariff notices by the Transport Minister are yet to be issued because two earlier tariff notices have been withdrawn.

[34] OUTA points out, correctly in my view, that it does not seek to set aside the Cabinet's approval of the GFIP in as much as it was not granted in terms of any specific statute. Also, the approval does not amount to administrative action that is susceptible to review under PAJA.[23] Again, OUTA is correct when it states that it does not seek the review of tariff notices which are yet to be declared because the decision to levy toll is a distinct administrative act from the declaration of toll roads, which occurred in 2008. It is also correct that the review court is seized only with the review of (a) SANRAL's declaration of certain roads as toll roads; (b) the Transport Minister's approval of

[21] Above n 6.

[22] Section 27(3)(c) provides that the amount of toll that may be levied must be made known by the head of the Department by notice in the *Gazette.*

[23] Above n 14.

SANRAL's request to declare the roads toll roads and (c) environmental authorisations for the upgrading of the roads granted by the Department of Water and Environmental Affairs.

[35] OUTA must be supported when it submits that the specific decisions that are impugned were not made by the Cabinet or the National Treasury. However, it is quite another matter to suggest that the impugned decisions of the Transport Minister and SANRAL had nothing to do with the Executive Government's policy including the policy that users of the upgraded roads are the ones who must pay or with the National Treasury's domestic budgetary responsibilities and its sovereign debt policy. Equally it cannot be said without more that the interim interdict has no bearing on or consequences for public finances or for the executive roles of the National Treasury, Transport Minister and the National Executive Government as a whole. To this matter I return later.

[36] I now describe briefly the grounds of review. OUTA asserts that the declaration of the toll roads and the Transport Minister's approval are irregular and must be set aside because costs of collecting e-tolls are unreasonably high and irrational. The nub of its complaint is that over a 20 year period the public would be required to pay no less than R21.5688 billion for the operation of the open road toll system. Since the total capital cost of phase one of the GFIP was R20.5 billion, this means that road users will be required to pay more for the collection of e-tolls than for the upgrading of the roads.

[37] Flowing from this, the second review ground is that the Transport Minister's approval of toll roads is irregular because he did not have before him, or appreciate, the high costs of collecting e-tolls in comparison with the costs of upgrading the roads. The further charge is that the Transport Minister's approval is vitiated by material irregularity because SANRAL misled him by representing that adequate public transport alternatives would be provided simultaneously with the upgrading and tolling of the proposed toll roads.

[38] Another ground of attack is that the decisions related to declaring toll roads were unreasonable because enforcement of the toll system would be virtually impossible. This, they say, is because the delinquency rate on the part of motorists is likely to be so high on each day that it will be impossible to enforce collection. To these grounds the respondents add that whilst SANRAL gave notice generally of the proposed declaration of toll roads as required by section 27(4)(a) of the SANRAL Act[24], the notices were

[24] Section 27(4)(a) provides:

> "The Minister will not give approval for the declaration of a toll road under subsection (1)(a), unless—
>
> (a) the Agency, in the prescribed manner, has given notice, generally, of the proposed declaration, and in the notice—
>
> (i) has given an indication of the approximate position of the toll plaza contemplated for the proposed toll road;
>
> (ii) has invited interested persons to comment and make representations on the proposed declaration and the position of the toll plaza, and has directed them to furnish their written comments and representations to the Agency not later than the date mentioned in the notice. However, a period of at least 30 days must be allowed for that purpose."

inadequate because they furnished no indication of the likely amounts of the tolls and were not prominent enough to attract or facilitate public participation.

[39] The respondents add that the decisions under attack are not so political or economic or policy-laden to warrant judicial deference. They add that the impugned decisions are not of the executive and polycentric kind this Court had to deal with in *ITAC*,[25] *UDM*[26] or *Glenister (1)*.[27] Even if they were of the same camp, the respondents contend, the decisions are so patently unreasonable that a court is bound to intervene to ensure that the decisions are not allowed to stand.

[40] The respondents also seek to set aside environmental authorisations granted to SANRAL in relation to the GFIP network on the ground that the Minister of Water and Environmental Affairs did not have regard to the socio-economic impact of the proposed e-tolling when she granted the authorisations.

The test

[41] The High Court relied on the well known requirements for the grant of an interim interdict set out in *Setlogelo*[28] and refined, 34 years later, in *Webster*.[29] The test requires

[25] *ITAC* above n 17.

[26] *UDM* above n 18.

[27] *Glenister v President of the Republic of South Africa and Others* [2008] ZACC 19; 2009 (1) SA 287 (CC); 2009 (2) BCLR 136 (CC) (*Glenister (1)*).

[28] *Setlogelo v Setlogelo* 1914 AD 221.

[29] *Webster v Mitchell* 1948 (1) SA 1186 (WLD).

that an applicant that claims an interim interdict must establish (a) a prima facie right even if it is open to some doubt; (b) a reasonable apprehension of irreparable and imminent harm to the right if an interdict is not granted; (c) the balance of convenience must favour the grant of the interdict and (d) the applicant must have no other remedy.[30]

[42] The government applicants questioned the suitability of the *Setlogelo* test. They urged upon us to resort to another standard or to adapt the existing test when the grant of an interim interdict trespasses on the exclusive domain of the Executive or the Legislature. It is true that the *Setlogelo* test was developed nearly 100 years ago and well before the normative scheme of our democratic Constitution. It was initially fashioned for and is ideally suited to interdicts between private parties. And yet even then courts had to confront claims for an interdict against the exercise of statutory power.

[43] A little less than 40 years before the advent of our Constitution, in *Gool*,[31] a full bench of the Cape Provincial Division was called upon to grant an interdict restraining the Minister *pendente lite* from exercising certain powers vested in him by a statute. Ogilvie Thompson J, writing for a unanimous Court, considered the requirements for an interim restraining order announced in *Setlogelo* and said the following:

[30] *Setlogelo* above n 28.

[31] *Gool v Minister of Justice and Another* 1955 (2) SA 682 (CPD). See also *Molteno Brothers and Others v South African Railways and Others* 1936 AD 321 at 329 and 331.

> "The present is however not an ordinary application for an interdict. In the first place, we are in the present case concerned with an application for an interdict restraining the exercise of statutory powers. In the absence of any allegation of *mala fides*, the Court does not readily grant such an interdict."[32]

And later the learned Judge observed:

> "The various considerations which I have mentioned lead, in my opinion, irresistibly to the conclusion that the Court should only grant an interdict such as that sought by the applicant in the present instance upon a strong case being made out for that relief. I have already held that the Court has jurisdiction to entertain an application such as the present, but in my judgment that jurisdiction will, for the reasons I have indicated, only be exercised in exceptional circumstances and when a strong case is made out for relief."[33] (Emphasis added.)

[44] The common law annotation to the *Setlogelo* test is that courts grant temporary restraining orders against the exercise of statutory power only in exceptional cases and when a strong case for that relief has been made out. Beyond the common law, separation of powers is an even more vital tenet of our constitutional democracy. This means that the Constitution requires courts to ensure that all branches of Government act within the law. However, courts in turn must refrain from entering the exclusive terrain of the Executive and the Legislative branches of Government unless the intrusion is mandated by the Constitution itself.

[32] *Gool* id at 688F.

[33] Id at 689B-C.

[45] It seems to me that it is unnecessary to fashion a new test for the grant of an interim interdict. The *Setlogelo* test, as adapted by case law, continues to be a handy and ready guide to the bench and practitioners alike in the grant of interdicts in busy Magistrates' Courts and High Courts. However, now the test must be applied cognisant of the normative scheme and democratic principles that underpin our Constitution. This means that when a court considers whether to grant an interim interdict it must do so in a way that promotes the objects, spirit and purport of the Constitution.

[46] Two ready examples come to mind. If the right asserted in a claim for an interim interdict is sourced from the Constitution it would be redundant to enquire whether that right exists. Similarly, when a court weighs up where the balance of convenience rests, it may not fail to consider the probable impact of the restraining order on the constitutional and statutory powers and duties of the state functionary or organ of state against which the interim order is sought.

[47] The balance of convenience enquiry must now carefully probe whether and to which extent the restraining order will probably intrude into the exclusive terrain of another branch of Government. The enquiry must, alongside other relevant harm, have proper regard to what may be called separation of powers harm. A court must keep in mind that a temporary restraint against the exercise of statutory power well ahead of the final adjudication of a claimant's case may be granted only in the clearest of cases and after a careful consideration of separation of powers harm. It is neither prudent nor

necessary to define "clearest of cases". However one important consideration would be whether the harm apprehended by the claimant amounts to a breach of one or more fundamental rights warranted by the Bill of Rights. This is not such a case.

High Court judgment

Prima facie right

[48] At the outset, the High Court had to decide whether the applicants had established a prima facie right although open to some doubt. It examined the grounds of review and was persuaded that they bore prospects of success and that therefore the applicants had established a prima facie right to have the decisions reviewed and set aside. Two comments are warranted. First, we heard full argument on the merits on the grounds of review. I am unable to say without more that they bear any prospects of success. That decision I leave to the review court.

[49] Second, there is a conceptual difficulty with the High Court's holding that the applicants have shown "a *prima facie* . . . right to have the decision reviewed and set aside as formulated in prayers 1 and 2".[34] The right to approach a court to review and set aside a decision, in the past, and even more so now, resides in everyone. The Constitution makes it plain that "[e]veryone has the right to administrative action that is

[34] *Opposition to Urban Tolling Alliance and Others v The South African National Roads Agency Ltd and Others* [2012] ZAGPPHC 63 at 26.

lawful, reasonable and procedurally fair" and in turn PAJA regulates the review of administrative action.[35]

[50] Under the *Setlogelo* test, the prima facie right a claimant must establish is not merely the right to approach a court in order to review an administrative decision.[36] It is a right to which, if not protected by an interdict, irreparable harm would ensue.[37] An interdict is meant to prevent future conduct and not decisions already made. Quite apart from the right to review and to set aside impugned decisions, the applicants should have demonstrated a prima facie right that is threatened by an impending or imminent irreparable harm. The right to review the impugned decisions did not require any preservation *pendente lite.*

[51] There is another difficulty with the ruling of the High Court that the applicants had shown a prima facie right. The applicants sought a temporary interdict for the reason that the levying of toll charges would lead to irreparable financial harm to motorists. But toll charges do not flow from the impugned decisions taken in 2008 to declare certain Gauteng roads as toll roads. It is common cause between the parties that a separate decision was necessary for levying tolls. The Transport Minister had not made that decision to levy tolls. Therefore, the harm the applicants rely upon will not be caused by

[35] Section 33(1) and (3) of the Constitution read together with PAJA.

[36] *Setlogelo* above n 28 at 227.

[37] For an instructive discussion of "prima facie right" - see Erasmus *Superior Court Practice* at E8-10.

the past decisions they impugn in the review. There is a misalignment between the decisions they seek to review and the source of the harm they fear.

[52] Given the outcome we reach on other grounds, we need not resolve, for present purposes, whether a prima facie right has been proven. We assume, without deciding, that the High Court properly found that the respondents had established a prima facie right. Our reluctance to make a definitive finding on the existence of a prima facie right is consistent with our approach not to reach the review grounds.

Irreparable harm

[53] OUTA had to show a reasonable apprehension of irreparable harm if the interim relief was not granted. The High Court found that it was self-evident that the aggrieved commuters would suffer irreparable harm although difficult and impossible to gauge in real terms. They would be left to pay "excessive toll monies which they cannot afford" without adequate alternative routes to avoid the tolls. The High Court recognised that there would be a financial drain on car rental companies that are members of the South African Vehicle Renting and Leasing Association in particular and on members of the third, fourth and fifth respondents. The High Court accepted that there would be financial hardship to tens of thousands of motorists and businesses. It recorded that there had been widespread protests and exceptionally high levels of concern and resistance on the part of thousands of aggrieved motorists.

[54] The Court rejected as not persuasive enough the submission that should the review be successful SANRAL will be obliged to refund the millions of aggrieved motorists the toll charges. It is questionable why the harm motorists are likely to face is irreparable. Should the decision to impose toll on the roads be set aside by a court, I know no reason why the affected motorists would not have an enrichment claim to recover toll so paid to SANRAL or why the National Executive Government or SANRAL would validly resist re-paying the toll charges.

Balance of convenience

[55] A court must be satisfied that the balance of convenience favours the granting of a temporary interdict. It must first weigh the harm to be endured by an applicant if interim relief is not granted as against the harm a respondent will bear, if the interdict is granted. Thus a court must asses all relevant factors carefully in order to decide where the balance of convenience rests.

[56] The High Court found that if motorists were to pay toll charges they would suffer irreparable financial hardship. There is no dispute between the parties that road upgrades under GFIP and future ones will have to be paid for by the public. Tolls are a revenue collection mechanism to fund the road upgrades. The National Executive Government has adopted the funding policy that revenue should be garnered from motorists who use the upgraded roads. In several affidavits, including those of expert witnesses in the field of economics and public finance, the respondents contend that road upgrades in Gauteng

should be financed from a ring-fenced fuel levy which would be a more efficient and cost-effective method of revenue collection. On either revenue mechanism, motorists must pay. In other words, motorists must bear the financial burden of the road upgrades. This means that the harm, if any, to be borne by motorists would be relative but never absent.

[57] The High Court acknowledged that the government applicants "argued with considerable force" that losses SANRAL stands to incur may lead to a failure to meet its commitments towards contractors. It accepted that SANRAL "may well suffer considerable financial losses through the inability to levy toll monies during that period pending the outcome of the . . . review." SANRAL's business rating could be downgraded and in turn that would impact on its ability to execute other necessary projects. The Court also noted that the Executive Government had furnished a sovereign guarantee for the due and punctual fulfilment of SANRAL's financial obligations. If SANRAL were to default, the Executive Government runs the risk of being called upon to pay the full outstanding debt of R20 billion at once. The Court accepted that the call up of the debt will have negative financial effects which will run through the economy.

[58] Some of the consequences of the interim order were indeed foreseeable when the order was granted. In this Court, the Finance Minister has tabulated some of the foreseeable consequences of the grant of the interdict and some have come to pass. The delay in implementing tolling has already cost R2.7 billion, 40% of SANRAL's estimated

2012 toll revenue. SANRAL's average monthly expenditure on the GFIP will amount to R601 million for the 2012/13 financial year. Absent tolling, the amount has to be funded by the National Treasury.

[59] Moody's Investor Services announced a two notch downgrade in SANRAL's credit worthiness rating. The Finance Minister informs us that the downgrade is linked to the grant of the interdict. SANRAL has suspended its marketing activities and limited the sale of its bonds to depress borrowing costs. We are assured that this means that future growth of road networks cannot be undertaken without SANRAL's ability to raise third party funding. Parliament had to make a special appropriation of an additional R2 billion to meet SANRAL's current interest and cost liabilities.

[60] The Finance Minister informs that all parties in Parliament approved a special appropriation of R5.75 billion, to reduce the impact of tolls on Gauteng roads. That amount had to be redeployed to reduce SANRAL's debt exposure by defraying operational expenditure, interest payments and other toll related expenditure. Should the interim interdict remain in place, Parliament may have to appropriate more money from the national revenue fund at the expense of all tax payers, even those who do not reside in Gauteng.

[61] In this Court, OUTA's response is that SANRAL will not suffer irreparable harm.

It adds that to the extent necessary, SANRAL will be funded in the interim by the National Treasury. Thus the Government, they say, "can easily afford to fund SANRAL in the interim". This proposition needs only to be stated to be rejected. OUTA suggests without more that because the National Treasury, which is funded almost exclusively by tax payers' money, has a deep pocket, it cannot suffer irreparable financial harm. This avoids the point that the harm lies in National Government being obliged to fund a project that it has decided should be funded on the "user pay" principle.

[62] The High Court should have placed due weight on the uncontested evidence that 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. The harm these users will experience will therefore not be of a pressing or acute kind.

[63] There is yet another and very important consideration when the balance of convenience is struck. It relates to separation of powers. In *ITAC* we followed earlier statements in *Doctors for Life*[38] and warned that:

> "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

[38] *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC).

> 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 bounds of the Constitution. This would especially be so where the decision in issue is policy-laden as well as polycentric."[39]

[64] In a dispute as the present one, this does not mean that an organ of state is immunised from judicial review only on account of separation of powers. The exercise of all public power is subject to constitutional control.[40] In an appropriate case an interdict may be granted against it. For instance, if the review court in due course were to find that SANRAL acted outside the law then it is entitled to grant effective interdictory relief. That would be so because the decisions of SANRAL would in effect be contrary to the law and thus void.

[65] When it evaluates where the balance of convenience rests, a court must recognise that it is invited to restrain the exercise of statutory power within the exclusive terrain of the Executive or Legislative branches of Government. It must assess carefully how and to what extent its interdict will disrupt executive or legislative functions conferred by the law and thus whether its restraining order will implicate the tenet of division of powers. Whilst a court has the power to grant a restraining order of that kind, it does not readily

[39] *ITAC* above n 17 at para 95.

[40] *Pharmaceutical Manufacturers Association of South Africa and Another: In Re Ex Parte President of the Republic of South Africa and Others* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 20.

do so except when a proper and strong case has been made out for the relief and, even so, only in the clearest of cases.

[66] A court must carefully consider whether the grant of the temporary restraining order pending a review will cut across or prevent the proper exercise of a power or duty that the law has vested in the authority to be interdicted. Thus courts are obliged to recognise and assess the impact of temporary restraining orders when dealing with those matters pertaining to the best application, operation and dissemination of public resources. What this means is that a court is obliged to ask itself not whether an interim interdict against an authorised state functionary is competent but rather whether it is constitutionally appropriate to grant the interdict.[41]

[67] The harm and inconvenience to motorists, which the High Court relies on, 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 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.

[41] *ITAC* above n 17 at para 69.

[68] Another consideration is that the collection and ordering of public resources inevitably calls for policy-laden and polycentric decision making. Courts are not always well suited to make decisions of that order. It bears repetition that a court considering the grant of an interim interdict against the exercise of power within the camp of Government must have the separation of powers consideration at the very forefront.

[69] The High Court enumerated the financial burden on motorists if it were not to grant a restraining order. To my mind, it has placed insufficient weight on some of the dire consequences of preventing SANRAL from performing its statutory duties. I rehearse only a few of these. SANRAL's debt is sovereign because the Government has furnished a guarantee for R20 billion. A repayment default will trigger the right of creditors to call up the loan and demand full payment from the Government. If that were to happen, the 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 function and to force the hand of Parliament's budgetary role.

[70] I accept that the High Court was burdened with an extensive record and had to hear no fewer than ten senior counsel with nine junior counsel. Due to the urgency of the matter it had to prepare its judgment under hurried circumstances. Even so, the depositions of the government applicants before the High Court are replete with submissions on separation of powers and how an interim order against SANRAL would

intrude on its statutory powers and duties to collect tolls that must be used to fund SANRAL's extensive indebtedness.

[71] The High Court does not mention a word about the submissions of the government applicants on separation of powers. As a result we do not have the benefit of its attitude to the submissions. It is equally unclear whether the High Court had considered the submissions at all. Before granting interdictory relief pending a review a court must, in the absence of mala fides, fraud or corruption, examine carefully whether its order will trespass upon the terrain of another arm of Government in a manner inconsistent with the doctrine of separation of powers. That would ordinarily be so, if, as in the present case, a state functionary is restrained from exercising statutory or constitutionally authorised power. In that event, a court should caution itself not to stall the exercise unless a compelling case has been made out for a temporary interdict. Even so, it should be done only in the clearest of cases. This is so because in the ordinary course valid law must be given effect to or implemented, except when the resultant harm and balance of convenience warrants otherwise.

[72] The High Court's deafening silence on the over-arching consideration of separation of powers, taken together with other factors that go to where the balance of convenience rests, entitles this Court to intervene. It should have held that the prejudice that will confront motorists in Gauteng if the interim interdict is not granted does not exceed the prejudice that the National Executive Government, National Treasury and

SANRAL will have to endure should the temporary restraining order be granted.

[73] The interim interdict falls to be set aside.

Order

[74] In the event, the following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The interim interdict granted by the High Court on 28 April 2012 is set aside.
4. Costs are to be costs in the review.

FRONEMAN J:

[75] I have had the pleasure of reading the Deputy Chief Justice's judgment (main judgment). It makes a compelling case for courts to be sensitive to the normative framework of the Constitution, including the principle of separation of powers, when adjudicating applications for temporary interdicts. I endorse that. The main judgment locates that exercise within the common law framework requirements for temporary interdicts. Perhaps overcautiously, I consider it better to regard temporary interdict cases involving the potential breach of national separation of powers as exceptional, deserving different treatment. This is one of those cases. Were it not, I would not have granted leave to appeal.

[76] In my view this Court should grant direct leave to appeal in a case where a temporary interdict has been granted, only if a compelling case is made out that a breach of separation of powers at national level may have occurred. The appeal should only be upheld if it is established that the breach did in fact occur. In this case both these requirements have been met. I thus agree that leave to appeal should be granted and that the appeal must be upheld.

[77] This Court[42] has held that the "interests of justice" test to determine whether direct appeals to this Court should be granted is not dependent on the jurisdictional requirement of a "judgment or order" within the meaning of section 20(1) of the Supreme Court Act.[43] It has, at the same time, acknowledged that the policy considerations underlying the non-appealability of temporary orders remain relevant to the interests of justice inquiry[44] under section 167(6)(b) of the Constitution[45] read with Rule 19 of this Court's Rules.[46]

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[42] *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* [2010] ZACC 6; 2012 (4) SA 618 (CC); 2010 (5) BCLR 457 (CC) (*ITAC*) at paras 47-55.

[43] 59 of 1959.

[44] *Minister of Health and Others v Treatment Action Campaign and Others (No. 1)* [2002] ZACC 16; 2002 (5) SA 703 (CC); 2002 (10) BCLR 1033 (CC) (*TAC 1*).

[45] Section 167(6)(b) provides:

> "National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court to appeal directly to the Constitutional Court from any other court."

[46] Rule 19 provides:

> "(1) The procedure set out in this rule shall be followed in an application for leave to appeal to the Court where a decision on a constitutional matter, other than an order of constitutional invalidity under section 172(2)(a) of the Constitution, has been given by any court including the Supreme Court of Appeal, and irrespective of whether the President has refused leave or special leave to appeal.

[78] It is as well to restate those considerations. If the grant of a temporary interdict were generally appealable the normal effect of granting leave to appeal would be that the temporary order would be stayed.[47] That stay would destroy the main object of a temporary interdict – to maintain the status quo until the main case is finalised. The stay in turn may lead to an application for leave to execute, to put the order into operation again.[48] In this inquiry, the court of first instance would have to determine harm and the balance of convenience on possibly incomplete information,[49] and later be asked to make findings that would contradict the effect of its original findings.[50] The appeal court would then have to reconsider the issues of harm and convenience, still without better information than the court of first instance.[51]

[79] It was for these reasons that, in the past, it was found preferable that the merits of the main case be left for later determination in the court dealing with that case. It was also found preferable that the temporary relief, to which the balance of convenience is

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(2) A litigant who is aggrieved by the decision of a court and who wishes to appeal against it directly to the Court on a constitutional matter shall, within 15 days of the order against which the appeal is sought to be brought and after giving notice to the other party or parties concerned, lodge with the Registrar an application for leave to appeal: Provided that where the President has refused leave to appeal the period prescribed in this rule shall run from the date of the order refusing leave."

[47] Rule 49(11) of the Uniform Rules of Court.

[48] Id.

[49] These are often brought in urgent proceedings, with the full picture only to be canvassed in the later substantive review or trial.

[50] *TAC 1* above n 44 at paras 10-2 and *Cronshaw and Another v Coin Security Group (Pty) Ltd* 1996 (3) SA 686 (SCA) (*Cronshaw*) at 691.

[51] *Cronshaw* id.

relevant, be considered once only. That remains the position as far as the appealability of the grant of temporary interdicts is concerned in the High Courts and the Supreme Court of Appeal.

[80] This Court has rightly considered that the interests of justice, in determining direct access to this Court, go wider than these considerations on occasion. Instructive examples of this are provided in *Glenister 1*,[52] an application for direct access, and in *ITAC*,[53] an application for direct leave to appeal. I say "instructive", because neither *Glenister 1* nor *ITAC* were decided on harm and convenience grounds forming part of the common law interdict requirements.

[81] In *Glenister 1* the sole question was whether it could ever be appropriate for this Court to intervene when draft legislation is being considered by Parliament, to set aside the decision of the executive to initiate the legislative process.[54] Relying on separation of powers considerations the Court held that intervention would only be appropriate if an applicant could show—

> "that there would be no effective remedy available to him or her once the legislative process is complete, as the unlawful conduct will have achieved its object in the course of

[52] *Glenister v President of the Republic of South Africa and Others* [2008] ZACC 19; 2009 (1) SA 287 (CC); 2009 (2) BCLR 136 (CC) (*Glenister 1*).

[53] *ITAC* above n 42.

[54] *Glenister 1* above n 52 at paras 9 and 36.

> the process. The applicant must show that the resultant harm will be material and irreversible."[55] (Footnotes omitted.)

Cases that would warrant intervention on this approach will be extremely rare.[56]

[82] In *ITAC* the temporary interdict was found to be appealable on the basis that the decision of the High Court, on the lawful lifespan of the existing anti-dumping duty at stake, was not open to alteration by the court of first instance and was final in its effect.[57] Leave was granted on the basis of a number of issues that this Court felt it should pronounce on in the interests of justice, none of them including mere harm and convenience issues.[58] It was stressed:

> "In the present appeal this court is not called upon to predetermine whether the 'clear right' the high court refers to is well founded. The appeal is about the constitutional

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[55] Id at para 44.

[56] Id at para 47.

[57] *ITAC* above n 42 at para 59:

> "I am satisfied that, although the interdict granted by the high court carries an interim tag, it is susceptible to an appeal. The decision on the lawful life span of the existing anti-dumping duty is not open to alteration by the court of first instance. It is final in effect. It is definitive of the rights of the parties on the duration of the anti-dumping duty and therefore has the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings."

[58] Id at para 61:

> "I think it is in the interests of justice for this court to pronounce on: (*a*) the lawful extent of the legislatively prescribed life span of an anti-dumping duty; (*b*) whether the interdict had the effect of extending the life span of the existing anti-dumping duty; and if so (*c*) whether the order trenches on separation of roles and powers between the national executive and the courts; (*d*) whether the judicial extension of the anti-dumping duties threatens South Africa's trade relations and other obligations under international law; (*e*) whether the matters to be determined by this court on appeal will come up for decision in the final review before the high court and therefore will not require this court to prejudge the outcome of the review; and lastly, (*f*) whether there are reasonable prospects that this court may find that whilst it may have been competent for the high court to make the order it did, it was not constitutionally permissible or appropriate for it to do so."

> appropriateness of granting an interdict that extends an existing anti-dumping duty in a manner that implicates the separation of powers and the international trade obligations of the Republic. That is not a matter which will be the subject of the review court. It is a constitutional matter which is not susceptible to reconsideration by the high court, but one which, given that the Supreme Court of Appeal had declined to hear the matter, only this court may properly decide."[59]

It then went on to hold that it was inappropriate for the High Court to have extended the term of the existing anti-dumping duties,[60] before turning to the question of the separation of powers.[61]

[83] In the course of the separation of powers discussion it was stated:

> "When a court is invited to intrude into the terrain of the executive, especially when the executive decision-making process is still uncompleted, 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."[62]

[84] The Court found that the interdict improperly breached the separation of powers in intruding upon the formulation and implementation of international trade policy, "a matter . . . that resides in the heartland of national executive function",[63] and allowed the appeal.[64]

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[59] Id at para 66.

[60] Id at para 87.

[61] Id at paras 90-111.

[62] Id at para 101.

[63] Id at para 102. See also id at paras 103 and 111.

[64] Id at para 116.

[85] What I make of these decisions is that when a court is confronted, as in *Glenister 1*, with an application to interdict any one of the other two national arms of government from pursuing conduct falling properly within their respective spheres of government, the test that must be applied is not the usual common law test relating to ordinary interdicts, but a more stringent one.[65] From *ITAC* I learn the same, with the addition that where this is not done, it provides a ground that justifies hearing an appeal in the interests of justice even where a temporary interdict has been granted in the court of first instance. But the justification for doing that is not based on interference with the determination of harm and convenience on the same deficient information as before the court of first instance, but something extraneous to that – that the court of first instance failed to appreciate and determine the appropriateness of its order trespassing on the legitimate terrain of other arms of government.

[86] So, while I have no quibble with the approach in the main judgment that a court should, as a matter of course, be sensitive to the normative framework of the Constitution, also in relation to the separation of powers, I am hesitant to locate that concern solely within the traditional framework of requirements for a temporary interdict when national separation of powers are at stake.

[65] That this was the case even before the advent of the Constitution is apparent from *Gool v Minister of Justice and Another* 1955 (2) SA 682 (CPD). See [43] and n 31-3 above.

[87] The reasons for my concern are, on the one hand, practical, and on the other, institutional.

[88] On the practical side I think it is better that the usual requirements for the granting of temporary interdicts be retained as the trusted working tools for busy courts of first instance in matters where separation of powers considerations play no part, or play a part only in relation to ordinary administrative action, unaffected directly by national executive policy issues. In those cases the justification for allowing appeals when temporary interdicts are granted may not be as strong when interference with national separation of powers is at stake.

[89] Institutionally, the intensity of review scrutiny at the national legislative and executive levels tends to the rationality end of the review spectrum.[66] That is an indication that ordinary temporary interdict requirements may be ill-suited to cases where comity at the highest levels of government plays an important role.

[90] In my view then, when a court is confronted with an application for a temporary interdict that has the potential of impinging on the legitimate preserve of another national arm of government it needs to determine that question first. It must ask: is this a case

[66] For legislation at national level see *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC) and for executive authority see *Albutt v Centre for the Study of Violence and Reconciliation, and Others* [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (5) BCLR 391 (CC).

where national legislative or executive power will be transgressed by a temporary interdict? If the answer is yes, the court will grant the remedy only in the clearest of cases. It is not possible to define what will constitute the clearest of cases, but one of the important considerations will be to what extent the fundamental constitutional rights of persons may be affected by the grant of a temporary interdict.

[91] The interests of justice rationale for granting leave to appeal against a temporary interdict granted in those circumstances, would then be the potential interference with separation of powers at the national level, and the outcome of the appeal will depend on whether the order granted amounted to inappropriate interference.

[92] Applied to this case, the first question for us to ask in determining whether leave to appeal should be granted, is whether interference with national separation of powers is plausibly at stake because of the grant of the temporary interdict. The answer is yes. The next question is whether there was inappropriate interference. The answer, again, is yes.

[93] It is undisputed that in July 2007 the Cabinet approved the Gauteng Freeway Improvement Project and the concomitant basis for its funding, e-tolling, after extensive investigation and a report to it on the issue. It is national executive and treasury policy not to use fuel levy-type funding for these kinds of projects. None of this was, or could be, attacked on review in this Court. The playing field for the contestation of executive government policy is the political process, not the judicial one.

[94] The main thrust of the respondents' review is the alleged unreasonableness of the decision to proclaim the toll roads. But unreasonable compared to what? The premise of their unreasonableness argument is that funding by way of tolling is unreasonable because there are better funding alternatives available, particularly fuel levies. But that premise is fatally flawed. The South African National Roads Agency Limited has to make its decision within the framework of government policy.[67] That policy excludes funding alternatives other than tolling. It is unchallenged on review. But the High Court order effectively went against it. Since the making of the policy falls within the proper preserve of the executive and was, on the papers before the court, perfectly lawful, the order undermining it was inappropriate.

[95] No fundamental rights of the respondents beyond that of just administrative action are at stake here. The 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.

[96] For these reasons I agree with the order made in the main judgment.

[67] Section 25(1) of the South African National Roads Agency Limited and National Roads Act 7 of 1998.

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