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IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES ~~YES~~/NO
(3) REVISED

DATE 15/5/12 SIGNATURE

CASE NUMBER: 17141/12

DATE: 2012-04-28

10 In the matter between: 15/5/12

OPPOSITION TO URBAN TOLLING ALLIANCE	1st Applicant
SOUTH AFRICAN VEHICLE RENTING AND LEASING ASSOCIATION	2ND Applicant
QUADPARA ASSOCIATION OF SOUTH AFRICA	3RD Applicant
SOUTH AFRICAN NATIONAL CONSUMER UNION	4TH Applicant
and	
THE SOUTH AFRICAN NATIONAL ROADS AGENCY LTD	1STRespondent
20 THE MINISTER, DEPARTMENT OF TRANSPORT REPUBLIC OF SOUTH AFRICA	2ND Respondent
THE MEC, DEPARTMENT OF ROADS AND TRANSPORT, GAUTENG	3RD Respondent
THE MINISTER, DEPARTMENT OF WATER AND ENVIRONMENTAL AFFAIRS	4TH Respondent

DIRECTOR-GENERAL, DEPARTMENT OF
WATER AND ENVIRONMENTAL AFFAIRS 5TH Respondent
NATIONAL CONSUMER COMMISSION 6TH Respondent
NATIONAL TREASURY 7TH Respondent

J U D G M E N T

PRINSLOO, J: The applicants applied before me on an urgent basis this week for interim interdictory relief aimed at restraining the first respondent from levying and collecting toll on certain sections of the Gauteng Freeways by making use of the electronic or "e-toll" method.

The interim interdict applied for is intended to restrain the first respondent from so levying and collecting toll, pending the outcome of a substantive review application to be heard in due course before a court of review. The interim relief is sought in terms of part A of the notice of motion and the substantive relief will be sought in due course in terms of prayers set out in part B of the notice of motion.

The urgent proceedings before me concerned only the interim interdictory relief sought in terms of part A. For illustrative purposes it is convenient to quote the wording of prayers 2 and 3 of part A of the notice of motion:

"2. That pending the final determination of the application for the relief sought in part B hereof, the first respondent be interdicted and restrained from levying and collecting toll on

the following roads:

2.1 national road N1 section 20 from Armadale to Midrand;

2.2 national road N1 section 21 from Midrand to the Proefplaas Interchange;

2.3 national road N3 section 12 from Old Barn Interchange to the Buccleuch Interchange;

2.4 national road N4 section 1 from Koedoespoort to Hans Strijdom Drive;

2.5 national road N12 section 18 from Diepkloof Interchange to Elands Interchange;

2.6 national road N12 section 19 from Gillooly's Interchange to the Gauteng/Mpumalanga Provincial Border; and

2.7 national road R21 (also known as the P157/1 and P157/2) sections 1 and 2 from Hans Strijdom Drive to Rietfontein Interchange N12, Province of Gauteng.

3. That pending the final resolution of the complaint filed by the fourth applicant with the 6th respondent in terms of section 71 of the Consumer Protection Act 68 of 2008 in respect of the first respondent's 'e-Toll Terms and Conditions' dated 28 February 2012, or the elapse of the time period referred to in section 114(1) of the Act, the first respondent be interdicted and restrained from levying and collecting toll on the roads referred to in paragraph 2.1 to

2.7 above on the terms and conditions set out in the first respondents 'e-Toll Terms and Conditions' "

The relief sought in prayer 3 was abandoned for purposes of this application.

In terms of part B of the notice of motion the court of review will in due course be moved to review and set aside the decision of the first respondent to declare the aforementioned sections of the freeways as continuous toll roads and also to review the establishment of electronic toll points on those aforementioned sections of the freeways. The court of review will also be moved to review and set aside the decisions of the second respondent ("The Transport Minister") to grant approval to the first respondent (The South African National Roads Agency Limited or "SANRAL") to make the aforesaid declarations in terms of the provisions of the South African National Roads Agency Limited and National Roads Act 7 of 1998 ("the Act:). There will also be applications before the review court in due course for decisions by the fourth and fifth respondents, (the Minister, Department of Water and Environmental Affairs and his or her Director General) to grant certain environmental authorisations required for the upgrading of certain interchanges and the like along the aforementioned sections of the freeways.

Before the review court the applicants will also apply for final interdictory relief restraining SANRAL from levying and collecting tolls specified in the aforesaid declarations. It is not necessary, for present purposes, to deal in greater particularity with the relief to be sought in due course before the court of review.

The 6th respondent before me is the National Consumer Commission which did not take part in the proceedings or oppose the application on a formal basis.

At the commencement of the proceedings the National Treasury applied to intervene as a 7th respondent in this urgent application. The application was duly granted. The 7th respondent ("The Treasury") actively took part in the hearing and opposed the application for interim interdictory relief.

Also during the course of the proceedings, the Road Freight Association and Afriforum made formal applications to be admitted as *amicus curiae* ("friends of the court"). They did so in terms of the provisions of uniform rule 16A on the basis that they had contributions to make in respect of constitutional arguments not raised by any of the other parties to the dispute. Their applications to be so permitted were opposed by some of the respondents. I will in due course briefly deal with the outcome of the two applications.

After the application which came before me was launched, no fewer than three notices were published in the *Government Gazette* in an attempt, so it was argued on behalf of the applicants, to create a legal infrastructure for the imposition of e-tolling on the Gauteng Freeway Improvement Project Network ("GFIP network") which is the relevant freeway network in respect of this application:

1. on 13 April 2012 a notice was published stipulating the tariffs to be paid ("the tariffs notice")';
2. On 18 April 2012 a notice entitled "Conditions of Toll" was

published ("the conditions notice"); and

3. on 18 April 2012 the Transport Minister published draft regulations to provide for exemptions from e-Tolling on the GFIP network ("the draft regulations")."

This was last week, no more than three court days before this hearing started. Since none of these documents existed when the application was launched, the applicants could not have been expected to refer to them in their papers and applied to amend their notice of motion and to file a supplementary founding affidavit in which reference is made to these new notices. In the process of the amendment the applicants also introduced a further (independent) ground for interim relief, namely that e-Tolling cannot commence on 30 April 2012, because there is no legal infrastructure in place to exempt the operators of public transport from liability to pay tolls. I will revert to this topic hereunder.

At this point it is convenient to interpose by mentioning that in the end nineteen eminent counsel appeared before me, ten of whom are senior counsel. I am indebted to all of the for their well crafted, constructive and useful contributions. The hearing in the urgent court lasted for approximately three days and the record ran into some 2 500 pages. Written heads of argument ran into a few hundred pages. The hearing ended two days ago, on Thursday afternoon. I am now forced to hand down this judgment under extremely urgent and pressing circumstances, over a long weekend, because the tolling of the roads forming the subject of the urgent application is scheduled to commence on Monday 30 April 2012, today being Saturday 28 April, and the

hearing before me commenced on Tuesday 24 April 2012.

At the commencement of the proceedings SANRAL, the Transport Minister and the Treasury contested the question of urgency, arguing that any urgency which may be present was created by the applicants themselves as the decision to toll the roads on the GFIP network was already published some years ago, in 2008, and it was not open to the applicants, under these circumstances, to launch this application on such an extremely urgent basis. It was argued that the applicants were guilty of abusing the rules of court so that the application fell to be struck from the roll.

I add that the fourth and fifth respondents (The Minister of the Department of Water and Environmental Affairs and his Director-General) did not actively take part in the proceedings before me and did not oppose the relief sought in part A of the notice of motion.

The applicants argued, broadly speaking, that they took part in the process which enfolded after the intention to toll these freeways was made public. They made representations and attended meetings. It is common cause that the Transport Minister on more than one occasion, four to be exact, suspended the whole tolling process, because of unprecedented public outcries leading to protests against the impending tolling of the freeways. The last such suspension came from the Minister as recently as January 2012.

I interpose to record that on Thursday afternoon, two days ago, there was an announcement of yet another, or fifth, postponement of the proposed tolling. This event, which took place on the day when the

hearing was concluded, was not part of the issues ventilated before me and barring one later reference to this occurrence I say no more.

It was argued on behalf of the applicants that they only realised that the tolling would become a reality when the Minister of Finance announced in his budget speech on 22 February 2012 that the tolling would be activated on 30 April 2012. When that announcement was made the applicants acted with the necessary expediency to prepare this substantive and lengthy application, which they managed to launch on 23 March 2012. They gave the respondents more than a month's notice before the scheduled hearing on 24 April.

I have already expressed the view that sufficient notice was given under the circumstances. For the sake of brevity and given the somewhat unusual and pressing conditions under which I am handing down this judgment, I do not propose dwelling any further on the details of the arguments as to urgency or the lack thereof. I ruled that the application was urgent and that it had to be heard on that basis. I was also inspired by the fact that this dispute has enjoyed nationwide prominence and interest. I felt that it was important for some degree of clarity to be achieved.

I return to deal with the application by the applicants to amend the notice of motion and file a supplementary founding affidavit. As I have indicated the application was opposed on the basis that it was only served on the respondents on Saturday 21 April, leaving the latter with too little time to react thereto. It was argued that the amendment introduced additional grounds, thereby widening the scope of the

application and also involved complex legal and factual issues so that the granting of the amendment at this stage would lead to the prejudice of the respondents. After hearing argument I struck the application for amendment and to introduce a supplementary founding affidavit from the roll with costs.

The Road Freight Association, as I mentioned, had given notice of its intention to apply for leave to join the proceedings as *amicus curiae*. When the amendment was refused, the Road Freight Association withdrew its application because the contribution it intended to make as *amicus* had a direct bearing on the subject the applicants sought to introduce by way of the proposed amendments.

When Afriforum, represented by Ms Engelbrecht, nevertheless later proceeded with its application to be admitted as *amicus curiae*, the application was opposed on the basis that the toll tariffs, only published less than two weeks before this hearing, on 13 April 2012, which was to form the target of Afriforum's attack in support of this application, was not part of the evidence before me (with the proposed amendment having been refused) or part of the issues between the parties to the application.

According to authorities I was referred to, it is inappropriate for an *amicus* to introduce new contentions base on fresh evidence. In the result I refused Afriforum's application without granting an adverse cost order. I am indebted to both *amici* for their efforts to be of assistance.

I turn to a brief description of details of the various applicants. This, in my view, is important and relevant for purposes of considering

the requirements which have to be established by the applicants in order to obtain interim relief.

The first applicant, the Opposition to Urban Tolling Alliance, is a voluntary association with perpetual succession authorised by its constitution to *inter alia* launch or oppose legal proceedings in its own name. The first applicant was established after the presentation of the budget speech in the National Assembly on 22 February 2012 which definitively signalled that the National Executive had resolved that the implementation of e-Tolling would proceed notwithstanding resistance from civil society and political opposition in the form of, for example, Cosatu.

The first applicant organisation came into existence on 12 March 2012. It supports the need for the upgrades and road additions that have been effected and have been planned in terms of the GFIP as well as all future urban and other route construction and improvements as and when the need arises.

The first applicant (to which I will also refer at times as "OUTA" which is the recognised abbreviation for the full name) opposes e-Tolling as a means to fund such construction and road improvements as well as, in this instance, the alleged unlawful manner in which SANRAL and the Transport Minister have sought to implement the proposed toll network. OUTA was established with the purpose of providing a platform for interested individuals, companies and organisations to meet and coordinate their efforts in opposing e-Tolling. It was also established for the purpose of acting in the public interest and in order

to represent those members of society who are economically or socially disenfranchised and who were otherwise not able to oppose the tolling of Gauteng's freeways in their own name.

The organisations that are members of OUTA include:

1. The second applicant, The South African Vehicle Renting and Leasing Association or "SAVRALA", which represents its 22 member companies that conduct business in the vehicle rental and leasing industry and which collectively own 160 000 motor vehicles and manage a further 390 000 motor vehicles, 220 000 of which are on the road in Gauteng. These rental companies include well-known national and international concerns such as AVIS and Europe Car.
2. The South Africa Tourist Service Association ("SATSA") an organisation representing 740 companies operating in the inbound tourism industry.
3. The Retail Motor Industries of South Africa ("RMI"), representing 7 500 members in over 14 sectors in the retail motor and related industries, including service stations, franchise car dealers, panel beaters, spare outlets and tyre fitment centres, many of which will be impacted not only by the cost of paying toll, but also by the increased cost of motor parts and related products, 60% of which come from Gauteng. RMI is also concerned about the adverse effect on the employees of its members, numbering approximately 300 000 who will suffer increased cost of transport and food.
4. The Automobile Association of South Africa ("AA"), an

organisation conducting business on the roads of South Africa and in Gauteng with a membership of 2,5 million drivers nationally and 1,125 million drivers in Gauteng, has also formally associated itself with OUTA and supports the present application. The head of Public Affairs of the AA, Gary Ronald, informed the deponent to the founding affidavit that the level of opposition to the proposed tolling amongst the AA's members is overwhelming.

5. OUTA also represents the interests of 94 businesses that have registered as supporters of OUTA, since the launch of its website approximately one month ago. The names of these businesses appear on the website.

6. OUTA further represents the 1831 individuals who have registered as supporters of OUTA since the launch of its website. Their names appear on the website. It is anticipated that after the launch of this application, the numbers aforementioned will increase dramatically.

I turn to a brief account of the personal circumstances of four individuals who are members of OUTA and will be prejudiced should the relief sought in the application not be granted, and on whose behalf OUTA is bringing this application. Their verifying affidavits form part of the record.

1. Hilda Maphoroma is a wife and mother of two children who is resident in Leondale Gardens and who works as a cashier at Norwood Spar. Her affidavit sets out how she and her husband, a policeman commuting from Leondale Gardens to his workplace,

have no option but to drive the toll routes to work. They illustrate how toll fees will swallow 9% of their combined income and drive their expenditure to R1 090,00 in excess of their combined income.

2. Denis Tabakin is a pensioner who is forced to continue working as a travelling salesman in order to support himself, his wife who has Alzheimers and their son. Tabakin's job for which he drives 400 to 500 kilometres per week compels him to make use *inter alia* of the proposed toll road network. He is already forced to live off saved capital in order to pay for his wife's care and medical expenses of approximately R18 000,00 per month. The extra R6 600,00 per annum that he will have to pay for toll fees will severely prejudice him and will erode his capital further.

3. Wayne Benjamin Osrin is a sole proprietor who runs a small plumbing business that uses two vans and a motor car. Like many in his industry, Osrin and his crew have to travel to diverse suburbs (listed in his affidavit) for work and in so doing often are required to make use of the proposed toll road network. Osrin explains the financial difficulty that he presently experiences (as do many plumbers, says Osrin) and how paying toll will negatively impact his business and make the retrenchment of one of his crew unavoidable.

4. Tsidi Leatse is a receptionist living in Boksburg who travels on the N3 and N12 freeways to her place of work in Illovo each day. Her salary, after tax, comes to R7 000,00 and her monthly expenses

to R6 000,00. Accordingly, should she have to pay approximately R500,00 in toll fees every month (approximately 7% of her after tax income) she will have only R500,00 to save or use for unexpected expenses.

Inasmuch as the *locus standi* or legal standing of OUTA is disputed on the papers, although not in argument before me, I find that it does indeed have *locus standi, inter alia* in view of the provisions of section 38 of the Constitution of South Africa Act 108 of 1996 ("The Constitution"). I need not dwell any further on this subject.

As far as the second applicant, SAVRALA, is concerned, it has been mentioned that it is a voluntary association that represents 22 member companies which conduct business in the vehicle rental and leasing industries. The members of SAVRALA will suffer material financial and administrative prejudice on account of the implementation of open road tolling or e-Tolling, a system that attaches liability and directs enforcement against the owners of motor vehicles as opposed to the individual driving the motor vehicle on the toll road, if the driver or user who should be held liable in terms of the scheme does not pay the toll or cannot be traced. I will return to this topic later.

This means that individuals leasing vehicles from SAVRALA members will drive on the toll roads without SAVRALA or its members having any control on those movements, but the latter will be held liable for the toll fees. It will be costly and cumbersome and logistically challenging for these rental companies to introduce systems which may allow them to recover the toll fees from their clients. I also find,

inasmuch as it may be necessary, that SAVRALA has the necessary *locus standi.*

The third applicant, Quadpara Association of South Africa ("QASA") is an organisation that protects and promotes the rights and interests of people with disabilities and people with mobility impairment. Details concerning QASA and its members are supplied by its CEO, Aristides Seirlis, whose confirmatory affidavit forms part of the record. QASA strives for the development and provision of projects, products and services, together with lobbying and advocacy, to assist and develop the capacity of quadruplegics and paraplegics to integrate and function within mainstream society. There are approximately 6 000 active members of QASA nationwide, 2 000 of whom are based in Gauteng. 78% of the members of QASA are black and less than 1% are gainfully employed. The sole source of income for 99% of QASA's members (and the same would apply to quadruplegics and paraplegics who are not members of QASA) is the disability pension of R1 200,00 per month provided by the state. The only viable mode of transport for QASA's members is private road transport. The vast majority of QASA's members do not own a car of their own and cannot afford to. They rely on friends, relatives and community members to transport them and typically will contribute to the cost of the transport provided by paying towards fuel costs. Public transport is of little or no use to QASA's members. According to Seirlis, who actively inspects public transport offerings in Gauteng on behalf of QASA members:

1. The Bus Rapid Transport System is not accessible for persons

with mobility impairment.

2. The Metro Rail Service is not accessible to QASA members, is unsafe and has no supplementary service assisting QASA's members to move from station to destination.

3. The Gautrain is far too expensive and its reach and/or routes are of no assistance to the vast majority of QASA' members.

4. Minibus taxis are not equipped to, and do not cater for persons with mobility impairment.

The members of QASA will be severely prejudiced by the tolling of the proposed toll road network in that they will have to pay for tolls out of the minimal amount they receive as a disability pension. Inasmuch as it may be necessary, I find that QASA also has the necessary *locus standi* on the strength of the provisions of section 38 of the Constitution.

The fourth applicant, the South African National Consumer Union ("SANCU") is an independent consumer organisation that protects and promotes the rights of millions of consumers in South Africa. SANCU has a statutory right of standing as an accredited consumer protection group in terms of section 78(1) of the Consumer Protection Act which permits it to:

> "Commence or undertake any act to protect the interests of a consumer individually or to consumers collectively in any matter or before any forum contemplated in the Consumer Protection Act"

On SANRAL's own version there will be:

"Approximately one million vehicles who utilise the proposed toll road network each day."

Given very high levels of unemployment, recent hikes in fuel prices, and the general state of the economy it is in my view reasonable to accept, on the overwhelming probabilities, as I do, that there must be thousands, if not tens of thousands of motorists and businesses who have to make use of the GFIP freeways that find themselves in the same predicament as that experienced and illustrated by the four individuals, Maphoroma, Tabakin, Osrin and Leatse, as well as the disabled members of QASA and others. In my view the nationwide objections to, and protests against, the proposed tolling lend support to such a conclusion.

I turn to making a few remarks about this proposed urban toll road network, the fist of its kind in South Africa, which forms the subject of this case. I do so by briefly summarising submissions on the subject, in the founding affidavit, which I do not consider to be seriously or convincingly controverted in the opposing papers.

Presently existing toll roads in south Africa are essentially examples of "rural" or "long haul" tolling where motorists are stopped at the toll plazas to pay their dues. The proposed GFIP network that is the subject matter before us and that has been the subject of major public controversy in South Africa since February 2011, is entirely different. It is different firstly, so the applicants allege, because the proposed toll road network is an urban toll road scheme. The sections of road that have been earmarked for tolling, constitute the main arteries for the

movement of motor vehicles in and around the two major cities of South Africa that constitute the economic and administrative heartland of the country.

It is different, secondly, so it is argued, because of the massive numbers of citizens who make use of the proposed toll roads. It is argued that the proposed toll roads are used every day by hundreds of thousands of commuters, urban residents and employees of businesses that drive north-south between Johannesburg and Pretoria and in all directions in and around both cities, and their adjoining municipal areas and from both centres to and from the country's major international airport (O. R. Tambo) situated on the outskirts of Johannesburg. The proposed toll road network, that is the subject matter of this application, is different, thirdly, so it is contended, because of the extent to which the road users referred to above are captive to the use of the network. Just as well known as the fact that the proposed toll roads are massively populated on a daily basis, is the fact, so it is contended by the applicants, that they are so populated precisely because there are no viable alternative metropolitan or secondary roads available for the use of urban commuters. This is because the metropolitan and secondary roads referred to in the founding affidavit, which include amongst others the R55, the R515, the M1 or M2 and the Old Johannesburg Road, R101, are themselves heavily congested on account of the use of such roads by persons residing or working locally as well as spill over from those road users that try to avoid the congestion of the major arterial network.

Even more captive to the proposed toll road network, are the long haul road users, many of whom are members of the Road Freight Association, who travel through the two metropolitan centres. The long haul road user travelling from the south of Johannesburg to the north of Pretoria, for all practical purposes, has no option but to use the main arteries forming part of the proposed toll road network. In reality, so the applicants contend, and I am in agreement with that submission, ordinary as well as long haul road users have little or no choice but to make use of the proposed toll roads.

In the case of ordinary private road users, the extent to which they are captive to the proposed toll road network is exacerbated by the acknowledged inadequacy of the public transport system in Johannesburg and Pretoria as well as between the two centres. Although efforts have been made recently, so the applicants concede, by *inter alia* local and provincial government to improve public transport infrastructure, and effect modal upgrades of buses mini-buses and railway options, public transport remains hopelessly inadequate as a viable alternative option to a very high proportion of residential and business road users within Gauteng.

I now turn to the trite and well known requirements which the applicants have to establish in order to obtain the interim interdictory relief sought before me. Where this judgment is being handed down under extremely urgent circumstances over a weekend, it is not practicable or appropriate to travel into too much detail. Where I fail to fully deal with comprehensive and in may instances compelling,

arguments presented to me by eminent counsel over many hours, I do so not out of disrespect, but because of, what I hope to be obvious, time and logistical constraints.

I mention the requirements. First 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.

Second, there must be a well grounded apprehension of irreparable harm if the interim relief is not granted.

Third, the balance of convenience must favour the granting of interim relief. The prejudice to be suffered by the applicants, if the relief is not granted, is to be weighed against the prejudice to be suffered by the respondents, if the relief is granted. The stronger the applicants' *prima facie* right, the less the need to rely on prejudice to themselves and the converse is also true.

Fourth, there must be no other ordinary remedy that is available to give adequate redress to the applicant.

I turn briefly to the question whether the applicants have established a *prima facie* right. It is useful to make a few general remarks about this requirement. It has been held that a reasonable prospect of success in the main action or application is a useful indicator, when considering applications for interim interdicts. This is, in my view, not the only consideration.

In the proceedings before me, eminent counsel on both sides

presented well researched and impressive arguments on the relevant strengths and weaknesses of the case of the applicants in the main action, or in this case, the main application.

I have carefully considered these arguments. At this preliminary stage, involving interim relief, the court does not prejudge the matter, but should generally refrain from discussing too many details or making a finding on the issues. The court of first instance hearing the application for interim relief has no right to fetter the discretion of the trial court, or in this case the review court hearing the main application. See for example *Stewart v Schwab and Others* 1956 (4) SA 791 (T) at 794 F to G and the discussion in *Interdicts and Related Orders* by *Johan Meyer*, first edition 1993.

In part B the applicants, as I have mentioned, seek orders reviewing and setting aside the decisions of SANRAL to declare the GFIP network as a toll road. These decisions were made in terms of section 27(1)(a)(i) of The Act. As I have already alluded to they also seek orders reviewing and setting aside decisions taken by the Transport Minister in terms of section 27(1)(a) read with section 27(4) of the Act to grant approval to SANRAL to make the aforesaid declarations.

Finally, they seek orders reviewing and setting aside the decisions of the fourth and fifth respondents to grant certain environmental authorisations relevant to the construction process in terms of section 25 of the National Environmental Management Act number 107 of 1998 ("NEMA"). The applicants argued that they have

established a *prima facie* right to have these decisions reviewed. They rely on the review grounds codified in section 6 of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"). They contend that the decisions under attack lacked rationality and they rely on a number of the selected review grounds listed in section 6 of PAJA. For reasons already mentioned, I will not travel into the details.

The review grounds are briefly the following:

1. The decisions were unreasonable because collection costs are disproportionate. The applicants demonstrated, through figures and calculations, details of which I cannot dwell on under the present circumstances, that over a 20 year period the public would be required to pay not less than R21,3 billion for the operation of the open road tolling system. Since the total capital cost of phase 1 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.

   SANRAL stated that the figures set out in the founding affidavit in regard to this subject was correct:

   "Based on a public non-compliance in excess of 60%."

   This qualification does not appear to be borne out by the details contained in the record. SANRAL has refused to disclose, despite a clear invitation in the founding affidavit for it to do so, the true cost of collecting e-Tolls or the contract concluded with ETC Joint Venture that would reflect the true cost of collecting e-Tolls.

Since the true facts lie exclusively within SANRAL's knowledge an adverse inference against the latter may, in my view, be justified in this respect, for present purposes. This crucial fact about collection costs exceeding upgrade costs was not appreciated by the Transport Minister, so the applicants argue, when he gave approval to SANRAL to declare the toll roads.

Reverting to the previous subject, I record that it was further submitted on behalf of the applicants that a public non compliance rate of 60% would in any event not be unduly high. Liability to pay the e-toll attaches to the "user or driver" of the vehicle at the moment when an e-transaction occurs, but SANRAL has no means of identifying the "user or driver" who declines to pay the e-Toll voluntarily.

The Minister still continues to deny the correctness of the very figures that SANRAL has admitted to be correct. The applicants argue that this state of affairs vitiates the Transport Minister's decision to give approval for the declaration of the toll roads and SANRAL's decision to issue the declarations. This argument is based on the review ground to be found in section 6(2)(h) of PAJA, namely that the exercise of the power in terms of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function.

The applicants contend that one of the factors that will necessarily be relevant to a decision to collect revenue from a

particular source involves the costs in collecting that revenue. It is common cause that the functions performed by the Minister and SANRAL resorts under "administrative action" as defined in PAJA and that the Minister and SANRAL perform the functions as "organs of state" as defined in the constitution.

2. A second review ground advanced by the applicants also resorts under section 6(2)(h) of PAJA, *supra,* on the basis that enforcement of the tolling system would be virtually impossible. In their answering affidavit, the Transport Minister and his MEC (the third respondent) did not deal with this allegation at all. On the available figures and projections, given the anticipated non-compliance percentages, and numbers of road users, there will, within seven days of the implementation of e-Tolling, be approximately 70 000 non-compliant defaulters from whom toll collection will have to be made each day. On SANRAL's own version it will be required to serve 70 000 summonses per day or a total of approximately 2,1 million summonses per month and institute proceedings against the same number of persons using whatever procedures are available in terms of the Criminal Procedure Act and the rules of the Magistrate's Court.

It is submitted by the applicants that this operation and challenge will be impossible, practically, to execute. The calculation is made on a relatively modest non-compliance percentage. The higher the percentage of non-compliance, the more overwhelming the challenge becomes. There are other issues flowing from this

review ground which I do not consider it practicable to deal with under these pressing circumstances.

3. Another review ground advanced is that SANRAL failed to give proper notice as required by section 27(4)(a) of the Act. For example the published notice of SANRAL's intention to declare the GFIP network as toll roads, did not indicate that the toll roads would operate on the basis of open road tolling and furnished no indication whatsoever of the likely amounts of the tolls.

All this is common cause. Section 4(1) of PAJA imposes an obligation to allow public participation in the case of administrative action which "materially and adversely affects the rights of the public". This requirement was not met, so the applicants argued.

4. A fourth ground of review is that the Minister was mislead regarding the existence of adequate public transport alternatives. The GFIP interim social impact report pointed out that "it is important that the toll option is only considered as part of an integrated transport plan and in the event of there being viable alternatives". The same report stated that "existing public transport alternatives are currently not viable and would have to undergo considerable expansion."

However, SANRAL's letter to the Minister seeking approval for the declaration of the toll roads made no mention of this critical consideration. It was strongly argued on behalf of the respondents that at the relevant stage when the decision under attack was taken, the

report, warning about the absence of viable alternatives, was not yet available.

For present purposes I am of the view that this argument was adequately addressed on behalf of the applicants in reply before me. As pointed out, it is not required or indeed permitted at this stage to express a firm view on the merits of any of the review grounds. *Prima facie* establishment of reasonable prospects of success on any one ground, together with other relevant considerations, peculiar to this particular case, will suffice for the applicants.

After careful consideration of the arguments, counter-arguments and submissions in reply, I have come to the conclusion that the applicants have managed to cross this hurdle. Against this background, I am persuaded that the applicants have managed to establish "a *prima facie* right, although open to some doubt" to have the decision reviewed and set aside as formulated in prayers 1 and 2 of part B of the notice of motion. Prayer 3 of part B, as I have said, concerns an application to review and set aside decisions by the fourth and/or the fifth respondents to grant certain environmental authorisations in terms of section 24 of NEMA.

The challenges by the applicants regarding the merits of these decisions do not appear to be controverted on the papers. The respondents rely rather on a technical argument relating to the failure by the applicants, as required by section 7 of PAJA, to first exhaust their internal remedies. In my view these arguments have also been sufficiently addressed on behalf of the applicants, in order to pass the

test applicable at this interim stage of the proceedings.

I am therefore satisfied that a proper case in the form of a *prima facie* right has also been established to have the decisions in this regard reviewed and set aside. In the result I am of the view that the applicants managed to establish the *prima facie* right required for the interim relief prayed for.

I turn to the second requirement namely that of a well grounded apprehension of irreparable harm if interim relief is not granted. I have referred to affidavits from aggrieved commuters who will be called upon to pay excessive toll monies which they cannot afford. On a general reading of the papers, the weight of the evidence suggests that there are no adequate alternative routes available to most of these commuters to be affected by the e-Tolling system in Gauteng, neither can they exercise an option to make use of safe and adequate public transport. In my view the irreparable harm they will suffer on an ongoing basis, is self evident. There is also the ongoing financial drain that will be placed on SAVRALA, details of which I have referred to and the ongoing financial hardships that will be visited upon the members of the Quadpara Association of South Africa. The same applies to the thousands of members of the South African National Consumer Union. Counter arguments offered to the effect that the perceived harm is not "irreparable", because toll paid unnecessarily, if it turns out that the final review application is successful, can be refunded to millions of aggrieved motorists, appear to me to be not persuasive enough to justify a finding at this stage that the applicants have failed to pass the

required test. In my view a proper case has been made out to establish this requirement for interim relief.

I turn to the third requirement, a need to establish that the balance of convenience favours the granting of interim relief. I have briefly referred to this requirement earlier. On behalf of the respondents it was argued with considerable force that these losses which SANRAL stand to suffer may lead to default on its part to meet its commitments towards the contractors. I am alive to the fact that SANRAL may well suffer considerable financial losses through the inability to levy toll monies during the period pending the outcome of the proceedings before the court of review. This could result in the business rating of SANRAL being downgraded and also impact on its ability to execute other necessary projects. The Government, which guaranteed compliance on behalf of SANRAL, may then be called upon, as a result of an acceleration clause in the contract, to pay the full debt of some R20 billion at once with possible negative effects permeating through the economy. These are serious considerations which I duly reflected on. I also paid proper regard to counter arguments offered on the subject by the applicants.

There is also a question whether the R20 billion debt may not be reduced considerably if the full amount is paid up front. I also cannot ignore the fact that SANRAL and the Transport Minister have in the past seen fit to postpone the implementation of the scheme on no less than four occasions (and two days ago, as I have mentioned, for a fifth time), despite the projections *supra* of the calamities which may result from

such a delay.

On the other hand tens of thousands of motorists, businesses and ordinary men and women, including family members of these affected motorists and business people, will suffer ongoing financial hardship if the interim relief is not granted. Ongoing and widespread protest actions against, and objections to, the proposed tolling underscore the exceptionally high levels of concern and resistance on the part of thousands of aggrieved motorists and business people. By the very nature of this extraordinary case it is difficult, if not impossible, to gauge in real terms the prejudice to be suffered by these aggrieved road users and business people, but what is plain is that it will be very substantial indeed. Given the vast numbers of motorists and business people involved, I am, after due reflection, of the view that on the probabilities the applicants have shown that the balance of convenience favours them.

I turn to the requirement that the applicants have to prove that they have no alternative remedy. In my view this is self evident. Interim relief is generally granted to preserve the status quo pending the outcome of the main action or application. When giving judgment earlier in the week on the question of urgency, I pointed out that there is ample authority for the proposition that an applicant for review at a stage when the impugned process (in this case the tolling) is already well underway, could be confronted with a decision not to reverse the process for practical and logistical reasons, even if the legal challenge turns out to be sound.

For the above reasons I have come to the conclusion that the applicants have made out a proper case for the interim interdictory relief so that an appropriate order has to be made. Quite apart from any other consideration I have a sense that this exceptional case, with its particular characteristics, and the public interest that it has evoked, should be afforded the attention and consideration of a court of final instance.

I make a brief observation with regard to the costs of this application. There is compelling authority for the proposition that there are sound reasons for not awarding the costs relating to an interim interdict to a successful applicant in the absence of exceptional circumstances. If such an applicant turns out to be unsuccessful in the action or application for final relief, the cost order in respect of the application for interim relief may, in retrospect, turn out to have been unjust.

In the circumstances I intend ordering that the costs of these proceedings are to be reserved for decision during the part B proceedings. I make the following order, which is also contained in a draft order marked XYZ, which draft order is made an order of court at the same time.

1. The first respondent is hereby interdicted and restrained from levying and collecting toll on the following roads, pending the final determination of the application for the relief sought in part B of the notice of motion dated 23 March 2012:

    1.1 National road N1, section 20 from Armadale to Midrand;

1.2 National road N1, section 21 from Midrand to the Proefplaas Interchange;

1.3 National road N3, section 12 from Old Barn Interchange to the Buccleuch Interchange;

1.4 National road N4, section 1 from Koedoespoort to Hans Strijdom Drive;

1.5 National road N12, section 18 from Diepkloof Interchange to Elands Interchange;

1.6 National road N12, section 19 from Gillooly's Interchange to the Gauteng Mpumalanga provincial border; and

1.7 National road R21 (also known as the P157/1 and P157/2) sections 1 and 2 from Hans Strijdom Drive to Rietfontein Interchange (N12) Province of Gauteng.

2. The interdict in paragraph 1 above is to operate with immediate effect.

3. The costs of the application for the relief sought in part A are reserved for determination at the application for the relief sought in part B.

I hand down the draft order XYZ.

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