

323/89
WHN

PUBLIC CARRIERS ASSOCIATION & OTHERS

versus

TOLL ROAD CONCESSIONARIES (PROPRIETARY) LIMITED
& OTHERS

NICHOLAS A J A

323/89

WHN

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

<u>PUBLIC CARRIERS ASSOCIATION</u>	First Appellant
<u>HULTRANS (PROPRIETARY) LIMITED</u>	Second Appellant
<u>CARGO CARRIERS LIMITED</u>	Third Appellant
<u>TANKER SERVICES (PROPRIETARY) LIMITED</u>	Fourth Appellant
<u>MAINLINE CARRIERS (PROPRIETARY) LIMITED</u>	Fifth Appellant

and

<u>TOLL ROAD CONCESSIONARIES (PROPRIETARY) LIMITED</u>	First Respondent
<u>THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA</u>	Second Respondent
<u>THE NATIONAL TRANSPORT COMMISSION</u>	Third Respondent
<u>MINISTER OF TRANSPORT</u>	Fourth Respondent

CORAM: JOUBERT, SMALBERGER, STEYN,
F H GROSSKOPF, JJA, et NICHOLAS, AJA

HEARD: 2 NOVEMBER 1989

DELIVERED: 30 November 1989

J U D G M E N T

: NICHOLAS A J A

I have had the privilege of reading the judgment prepared by SMALBERGER J A. Generally I am in agreement with his reasons for judgment, but I disagree in regard to the third question and would in consequence make an order on the appeal which differs from that proposed by him.

In terms of s 9(1) of the National Roads Act, 54 of 1971 ("the Act"),

- "9(1) The (National Transport Commission) may
- (a) subject to subsection (3), declare any bridge or tunnel on, or any portion of, a national road, as a toll road;
 - (b) in respect of the use of any vehicle on a toll road, levy a toll the amount of which has been determined and made known in terms of subsection (4) and which shall be payable by the person so using the vehicle;

(c) collect moneys payable as toll on a toll road, and for that purpose erect a toll gate or toll gates and facilities in connection therewith on the toll road;

(d) grant exemption from the payment of toll on a particular toll road-

(i) in respect of a vehicle of a category determined by the commission, or in respect of any such vehicle used on the toll road, at a time so determined;
or

(ii) to a person of a category determined by the commission, irrespective of the vehicle used by such person on the toll road, or to any such person using a vehicle on the toll road at a time so determined,

- and withdraw any such exemption;
- (e) restrict the levying of toll on a particular toll road to the hours or other times determined by the commission;
 - (f) suspend the levying of toll on a particular toll road for a specified or an unspecified period and in respect of all vehicles or in respect of vehicles of a category determined by the commission, and resume the levying after a suspension."

S 9(4) provides:

"(4) The amount of a toll levied under subsection (1), and any alteration thereof -

(a) shall be determined by the Minister on the recommendation of the commission;

(b) may differ in respect of -

- (i) different toll roads;
 - (ii) different vehicles or different categories of vehicles used on a toll road;
 - (iii) different times at which any vehicle or any vehicle of a particular category is used on a toll road;
- (c) shall be made known by notice in the Gazette;
- (d) shall be payable from a date determined by the Minister on the recommendation of the commission, which shall be mentioned in the notice whereby it is made known in terms of paragraph (c) and which shall not be a date earlier than 60 days after the date on which such notice appears in the Gazette."

Government Notice No 1875 dated 16 September 1988 read as

follows:

"NATIONAL ROADS ACT, 1971 (ACT 54 OF 1971),

AS AMENDED

EXTENSION OF TUGELA TOLL ROAD.- PUBLICATION
OF THE AMOUNTS OF TOLL FOR THE VARIOUS
CATEGORIES OF MOTOR VEHICLES, THE TIMES
AT WHICH THE TOLL ROAD MAY BE USED AND
THE DATE ON AND TIME AT WHICH THE TARIFFS
SHALL BECOME PAYABLE.

The National Transport Commission hereby,
in terms of section 9(4)(c) of the National
Roads Act, 1971 (Act 54 of 1971), as
amended, makes known that the amounts
of toll which it may levy under section
9(1)(b) of the said Act have been determined
by the Minister of Transport Affairs under
section 9(4)(a) thereof and that, the
said amounts shall be levied under section
9(4)(b) (ii) and (iii) and 9(4)(d) thereof,
as set out in the Schedule hereto.

R. G. MEYER,

Chairman: National Transport Commission."

Paragraph 3 of the Schedule to the Notice read:

"3. AMOUNTS OF TOLL

3.1 The amount of toll payable over the full distance of the toll road between the Frere Interchange and the Cedara Interchange near Hilton in respect of various motor vehicle classes shall not exceed the following:

Class 1: R10,00

Class 2: R12,00

Class 3: R18,00

Class 4: R22,00

Class 5: R26,00

Class 6: R30,00

."

(My underlining).

The short question is whether the Minister made an effective determination of the amounts of the toll.

It was contended on behalf of the appellants that the Minister did not make an effective determination.

In respect of each class of vehicle the Minister only assessed a maximum figure payable, thereby merely setting the range or the upper limit, whereas s 9(4) required him to set specific tolls fixing the actual amounts payable.

The starting-point in an examination of the question is the meaning of the word determined as used in s 9(4) and s 9(1)(b). For the reasons given by my learned colleague in his judgment, I have no doubt that it means decide or fix, and does not mean set bounds to, as decided by COMBRINK J in the judgment a quo.

In considering the soundness of the appellants' contention regard must be had to the purpose of s 9(4).

A toll is a tax paid for the use of a public road. It is levied on the user of the toll road and collected by the commission. Under s 2(1)(bA) of the

Act, all money paid by way of toll in terms of s 9 must be paid into the National Road Fund. The commission has not been left free to exact whatever toll it pleases. The legislature has made the toll a matter of ministerial responsibility, no doubt in order that the Minister should hold the balance between the needs of the commission and the interests of the public. Under the Act the power to determine a toll has been conferred on the Minister, who will have regard, presumably, to the costs, expenses and commitments of the commission, and the benefits and savings to be derived by the user of the toll road. The primary object is to safeguard the public against arbitrary and excessive imposts, by ensuring that the road-user is charged no more than the amount which the Minister considers to be fair. It is not to prevent the road-user from being charged less than that amount.

In terms of s 9(1)(c) of the Act, the commission may "collect moneys payable as toll on a toll road" (that is, toll in the amount determined under s 9(4)). This is a permissive power: the commission is entitled to collect toll in that amount but it is not under a statutory duty to do so. That is clear from s 9(1)(d), in terms of which the commission is empowered "to grant exemption from the payment of toll on a particular toll road", and from s 9(1)(f) in terms of which it is empowered to "suspend the levying of toll on a particular road".

If the words which I underlined in quoting from the Schedule to the Government Notice had read "shall be the following" there could have been no doubt that the Minister had made an effective determination of the amount of toll. I do not think that the use of the words "shall not exceed the following" alters that position. It did no

more than make explicit what was in any event implicit without them, namely that a lesser amount could be collected by the commission than was stated in the notice.

I do not think, with respect to my learned colleague, that this view of the matter is affected by the provisions of s 9(4)(a) or s 9(4)(d).

Under s 9(4)(a) any alteration of a toll shall be determined by the Minister. This connotes an alteration of a toll previously determined, and does not bear on what was required of the previous determination.

In terms of s 9(4)(d) at least 60 days must elapse between the date of the notice and the date when a toll becomes payable. I do not agree that the purpose of this is to allow for representations to be made to the Minister. There is nothing in the provision to suggest that, having made a determination, the Minister would be

open to representations before it comes into effect. Nor do I agree that the requirement of the 60 day period is to enable persons to arrange their affairs in advance with due regard to the amount of toll they will be required to pay.

I cannot conceive that any such arrangements could be upset by a reduction in the amount payable below that set out in the notice.

The point made by the appellants is at best highly technical: a charge of less than the amount fixed by the Minister can only redound to the benefit of toll-road users, and in particular hauliers such as the appellants; and a holding that the Minister's determination is ineffective can only result in general confusion and serious financial loss, without any advantage (other than merely a temporary one) to anybody. If the determination were to be set aside,

the Minister could immediately make a fresh determination stating that the amount of toll payable "shall be the following" without alteration of the amounts. This could be brought into effect from a date fixed in terms of s 9(4)(d) of the Act. Matters would then go on as they are at present.

The fact that the point is technical is not, of course, in itself a reason why it should not be sound. In my opinion, however, it is unsound, and its unsoundness is illustrated by the practical results if effect were to be given to it.

I would make the following order:

The appeal is dismissed with costs,
including in respect of each of the respondents the costs
of two counsel.

H C NICHOLAS AJA.

JOUBERT JA) Concur
F H GROSSKOPF JA)

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HEARD: 2 NOVEMBER 1989

DELIVERED: 30 NOVEMBER 1989

J U D G M E N T

SMALBERGER, JA :-

This appeal concerns the questions of the

validity of the declaration of a certain portion of the national road N3 in Natal as a toll road, and whether the toll levied in respect of the use of such road has been validly determined and is being lawfully collected.

By Government Notice No 1874 dated 16 September 1988 the third respondent ("the Commission"), acting in terms of section 9(1)(a) and (2) of the National Roads Act 54 of 1971 ("the Act"), declared portion of the N3 between the Cedara and Frere interchanges, districts of Lions River, Mooi River and Estcourt, to be a toll road ("the toll road"). The toll road is 97,8 kilometres in length. At the same time, by Government Notice No 1875, the Commission, acting in terms of section 9(4)(c) of the Act, made known that the amount of toll it was entitled to levy under section 9(1)(b) of the Act had been determined by

the fourth respondent ("the Minister") in the amounts detailed in section 3 of the schedule to the Notice. This Notice was later amended by Government Notice No 2218 dated 28 October 1988, inter alia, by the insertion of certain additional categories of toll.

The first respondent ("Tolcon") is a consortium of major road-building and construction companies. In 1986 Tolcon entered into an agreement with the second respondent ("the Government") and the Commission relating to the rehabilitation of certain existing roads and the construction of new roads and toll plazas. The agreement was an interim one which foreshadowed the conclusion of a final agreement between the parties at some later date. Its terms, to which more detailed reference will be made later, were embodied in a letter dated 6 November 1986 written by the Commission to Tolcon ("the interim agreement").

The interim agreement provided for the rehabilitation by Tolcon of that section of the N3 which was later declared the toll road, and the construction of toll plazas and toll gates along its route. Tolcon duly carried out, in respect of the toll road, the work it was required to do in terms of the interim agreement, including the construction of toll plazas and toll gates at the Mooi River South and Treverton interchanges. On 4 March 1988 the Commission and Tolcon entered into a further agreement ("the delegation agreement") which made provision, inter alia, for the delegation by the Commission to Tolcon of "the power to collect money payable by way of a toll at a toll gate on the toll road referred to in the interim agreement and to operate such toll road and toll gate upon and subject to the terms and conditions set out in the interim agreement". The delegation agreement will

also be adverted to in more detail later.

On approximately 30 November 1988 the toll road was opened for use by the public. Until 7 December 1988 the public were permitted to use the toll road free of charge. The collection of toll commenced on that date. Since then Tolcon has been operating the toll road and toll plazas, and has been collecting the toll paid at the various toll gates.

The first appellant is an association of public hauliers. The other appellants are all major haulage companies. They make extensive use of the toll road. In doing so they are obliged to pay substantial amounts in toll charges.

On 24 February 1989 the appellants launched an application in the Natal Provincial Division in which they sought an order in the following terms:-

"(a) that the operation of toll plazas and the levying of tolls by the

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First Respondent at the Mooi River South and Treverton interchanges on the N3 national road is declared to be unlawful;

- (b) that the First Respondent is interdicted and restrained from continuing to operate the said toll plazas and from levying tolls on motorists passing through them;
- (c) that the declaration of the national road between the Cedara interchange and the Frere interchange, Districts of Lions River, Mooi River and Estcourt commencing at the Cedara interchange at kilometre 1,60 and proceeding northwards to the Frere interchange at kilometre 38,40 (a total distance of 97,8 kilometres), as a toll road is set aside.
- (d) it is declared that the determination of the amount of the tolls by the Fourth Respondent as published in Government Notice 1875 dated 16 September 1988, and Government Notice No 2218 dated 28 October 1988 is unlawful and invalid;
- (e) alternatively to (a), (b) and (c) hereof, that the First Respondent

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is interdicted from levying tolls on motorists passing through the toll plazas at the Mooi River South and Treverton interchanges in terms of the Government Notices referred to in paragraph (d) hereof;

- (f) that the Respondents pay the costs of this application, jointly and severally, the one paying the other to be absolved including the cost of two counsel;"

Lengthy affidavits were filed by the parties. The matter eventually came before COMBRINK, J. He dismissed the application with costs, but subsequently granted the appellants leave to appeal to this Court. The judgment of the court a quo is reported in 1989(4) SA 574 (N) ("the reported judgment").

Before considering the issues arising on appeal there are two preliminary matters that need to be dealt with. The first relates to a petition by the second, third and fourth respondents for leave to re-open their cases and adduce further evidence. The

petition related to a point which had been open to the appellants to take, but had seemingly not been in issue in the court a quo. At the commencement of the proceedings the appellants' counsel advised us that the point in question would not be taken, and that consequently the petition was not being proceeded with. No costs order was sought in relation to the petition by any of the parties. The second matter relates to the locus standi of the first appellant, which was challenged pertinently for the first time in the second, third and fourth respondents' heads of argument. It was conceded by the appellants' counsel that the first appellant did not have locus standi. Except for limiting the appeal to one by the second to fifth appellants nothing further turns on this concession. The respondents do not ask for any order as to costs arising from it. Any future reference in

this judgment to the appellants excludes the first appellant.

The appeal in the present matter raises three distinct issues. A fourth issue raised in the appellants' heads of argument was not persisted in and therefore does not merit further consideration. The three issues are, succinctly stated, the following:-

1) The validity of the declaration by the Commission of the relevant portion of the N3 as a toll road.

2) Is Tolcon lawfully entitled to operate the toll road, in particular, to collect the toll?

3) Has there been a proper determination by the Minister of the toll payable by users of the toll road?

I propose to deal with each issue seriatim.

Is the declaration of the toll road valid?

The answer to this question depends upon the proper meaning to be ascribed to the words "an alternative road" in s 9(3) of the Act.

In terms of s 9(1)(a) of the Act the Commission may declare any portion of a national road as a toll road. Its power to do so, however, is limited by the provisions of s 9(3) of the Act. That section reads:-

"The commission shall not declare any portion of a national road under subsection (1)(a) as a toll road unless, in the opinion of the commission, at the time of the notification of such declaration in terms of subsection (2), and thereafter as long as the toll road retains its status as such road, an alternative road to the intended toll road, along which the same destination or destinations may be reached as that or those to which the route of the relevant toll road and national road leads, shall be available to road users, and which -

- (a) has been provided by the commission; or
- (b) is under the control of the

commission or any other road authority."

It follows from the provisions of s 9(3) that a pre-condition to the valid declaration of a toll road is the existence of an alternative road as envisaged by s 9(3). It is common cause that the alternative road which has been designated as such by the Commission extends for a distance of 119,4 kilometres. Its route, as described in the founding affidavit, takes the following course:

"N.3	36,8km	Cedara interchange to Mount West interchange
MR.147	7,7km	Mount West interchange to Nottingham Rd.
MR.1	27,7km	Nottingham Rd. to Hidcote intersection
MR.172	2,7km	Hidcote intersection to Hidcote interchange
N.3	42,2km	Hidcote interchange to Frere interchange
MR.11	2,3km	Frere interchange to Frere interchange with MR.1"

This route overlaps with the toll road for a total distance of 79 kilometres, but bypasses all the toll gates on the toll road thereby enabling motorists travelling along it to avoid paying toll. The roads designated to constitute the alternative road to the toll road all fall within the ambit of s 9(3)(a) and (b) of the Act.

The appellants contend that on a proper interpretation of s 9(3), it was contemplated by the use of the words "an alternative road" that there should be two distinct, entirely separate, roads: a toll road and an alternative road. Underlying this submission is the notion that by road is meant a roadway (in the sense of "the main or central portion of a road, esp. that used by vehicular traffic" - Shorter Oxford English Dictionary sv roadway). "Alternative" means "of two things: such that the one

or other may be chosen, the choice of either involving the rejection of the other"- Shorter Oxford English Dictionary sv alternative. Thus it was argued that for there to be an alternative road there must exist two physically separate roadways for the motorist to choose from. As the use of the so-called alternative road involves travelling a total of 79 kilometres along the toll road, it is not an alternative road within the meaning of s 9(3).

The respondents contend that no possible reason exists why the legislature should insist upon a totally separate and distinct road from the toll road irrespective of the cost or distance involved, and no matter what the physical terrain might dictate. Their submission is in effect that "alternative road" within the context of s 9(3), means "alternative route". As appears from the Shorter Oxford English Dictionary,

"road" can include "any path, way or (material) course" (sv road); "route" is defined, inter alia, as "a way, road or course" (sv route). Thus, "road" can be synonymous with "route". In this sense two roads (or routes) are alternative even though parts of them are common to both. This is in keeping with everyday speech. Thus, it is not incorrect to say,

"The main road between Johannesburg and Durban is by way of Harrismith: there is an alternative road by way of Newcastle", even though the roadway is common to both routes from between a point west of Ladysmith to Durban. There is nothing in the wording of the rest of the Act which in my view militates against such interpretation. The definition of "road" in s 1 of the Act as a public road does not assist in determining the proper meaning to be ascribed to the phrase "an alternative road". The Act

does draw a distinction between a "road" and a "route" - see eg s 4(1)(a) and (b); s 4(5)(a); s 6(3)(a); s 9(3); s 14(2)(d); s 29(2)(a) and (4). The word "route" is not defined in the Act. It appears to be used mainly in the abstract sense of a general line of travel in contradistinction to an established roadway. Such usage, however, does not detract from the meaning which the respondents seek to ascribe to the words "an alternative road".

The primary rule in the construction of statutory provisions is to ascertain the intention of the legislature. It is now well established that one seeks to achieve this, in the first instance, by giving the words of the enactment under consideration their ordinary grammatical meaning, unless to do so would lead to an absurdity so glaring that the legislature could not have contemplated it (Venter v Rex 1907 TS

910 at 913-4; Union Government (Minister of Finance) v Mack 1917 AD 731 at 739; Pick h Pay Retailers (Pty) Ltd v Minister of Mineral and Energy Affairs 1987(2) SA 865 (A) at 876 D). Subject to this proviso, no problem would normally arise where the words in question are only susceptible of one meaning: effect must be given to such meaning. In the present instance the words "an alternative road" are not linguistically limited to a single ordinary grammatical meaning. They are, in their context, on a literal interpretation, capable of bearing the different meanings ascribed to them by the appellants, on the one hand, and the respondents, on the other. Both interpretations being linguistically feasible, the question is how to resolve the resultant ambiguity. As there would not seem to be any presumptions or other recognised aids to interpretation which can assist to

resolve the ambiguity, it is in my view appropriate to have regard to the purpose of s 9(3) in order to determine the legislature's intention.

The notion of what is known as a "purposive construction" is not entirely alien in our law. The dictum of Lord Diplock in Catnic Components Limited and Another v Hill & Smith Limited 1982 RPC 183 (HL) at 243 that patent specifications should be given "a purposive construction rather than a purely literal one derived from applying to it the kind of meticulous verbal analysis in which lawyers are too often tempted by their training to indulge" has been favourably received by this Court in the realm of patent law (see Multotec Manufacturing (Pty) Ltd v Screenex Wire Weaving Manufacturers (Pty) Ltd 1983(1) SA 709 (A) at 722 A; Selas Corporation of America v Electric Furnace Co 1983(1) SA 1043 (A) at 1053; Stauffer

Chemical Co and Another v Salsan Marketing and Distribution Co (Pty) Ltd and Others 1987(2) SA 331 (A) at 343-4). Although it does not hitherto appear to have been more widely applied in our law, the same approach was extended to the interpretation of a statutory provision in Regina v Cuthbertson and Others 1981 AC 470 (HL). There, in delivering the judgment of the court, Lord DIPLOCK said at 483:

"I would apply a purposive construction to the section considered as a whole. What does it set out to do? Its evident purposes is" "

(See also D (a Minor) v Berkshire County Council and Others (1987)1 ALL ER 20 (HL) at 42.)

I see no reason in principle why such an approach should not also be applied in a matter such as the present. Mindful of the fact that the primary aim of statutory interpretation is to arrive at the intention of the legislature, the purpose of a

statutory provision can provide a reliable pointer to such intention where there is ambiguity. Steyn: Die Uitleg van Wette : 5th Edition pp 2-4 emphasises the need to ascertain the true intention of the legislature, and points out that the principle that the words of a statute are to be construed according to their clear literal meaning, and that the intention is to be gathered from the words used, leads to the result that one gets

"eerder n woordelike benadering as n benadering vanuit die gesigspunt van die bedoeling".

Be that as it may, it must be accepted that the literal interpretation principle is firmly entrenched in our law and I do not seek to challenge it. But where its application results in ambiguity and one seeks to determine which of more than one meaning was intended by the legislature, one may in my view

properly have regard to the purpose of the provision under consideration to achieve such objective. To this extent the application of a purposive construction is justified (cf. Cross: Statutory Interpretation : 2nd Edition : pp 56-7).

The purpose of s 9(3) is plain. It was well expressed by the judge a quo in the following passage in the reported judgment (at 584 B - D):

"The overriding object which the provision is aimed at appears to be to ensure that, before a toll road is declared, an alternative road would be available to road users who do not wish to pay toll, but who nonetheless wish to go where the toll road leads. This view is fortified by the enjoinder that the alternative road will continue to be so available for as long as the toll road remains such. That being the primary object of s 9(3), it is difficult to see why the Legislature would want to insist, as applicants argue it does, on an alternative road which is spatially separated from the toll road for its entire length, when the real choice which the motorist was intended to have relates to the payment or not of toll."

That this was the purpose of s 9(3) is not disputed by the appellants. Giving effect to this purpose resolves the ambiguity, and leads inexorably to the conclusion that the interpretation for which the respondents contend is the one consonant with the legislature's intention. In the result the words "an alternative road" in s 9(3) of the Act do not mean a road entirely separate and distinct from the declared toll road, but mean an alternative route which may be travelled without the need to pay toll to reach the same destination as the toll road, even though it traverses sections of the toll road. In the present case the designated alternative road satisfies the requirements of an alternative road in s 9(3) notwithstanding the fact that it has 79 kilometres of roadway in common with the toll road. Whether a road can be said to be an alternative to a toll road will depend upon the

facts of each particular case.

It follows from the foregoing that the requirements of s 9(3) of the Act were satisfied, and the declaration of the relevant portion of the N3 as a toll road was valid.

Is Tolcon lawfully entitled to operate the toll road and collect the toll?

The Transport (Co-ordination) Act 44 of 1948 provides for the establishment of a National Transport Commission and defines its functions. Section 12(1) makes provision for the appointment of all such officers as may be necessary to assist the Commission in the performance of its functions. In terms of s 12(2) all executive and administrative work arising out of the performance of its functions by the Commission, shall be undertaken by the Department of Transport.

Section 6(3) of the Act authorises a departure from these provisions. It reads:

- "(a) Notwithstanding the provisions of section 12 of the Transport (Co-ordination) Act, 1948 (Act No. 44 of 1948), the commission may have the construction of a particular national road or an investigation, survey, design, planning or other work which it is in terms of this Act empowered to do on or in connection with a particular national road or a particular route, including the collection of money payable by way of a toll at a toll gate on a toll road, and the operation of such toll gate, done by any other person on such terms and conditions as may be determined by agreement between the commission and such other person.
- (b) The commission may in writing delegate any power conferred on it by this Act, to such person or a representative or employee of such person if the commission deems it necessary for the efficient performance by such person of the work which he had to do in terms of such an agreement."

(The words underlined were inserted by s 3 of Act 79 of 1983.)

The provisions of s 6(3)(a) permit the Commission to have work of the kind mentioned done by an outside person (i e, someone not an officer of the Department of Transport) on such terms and conditions as they may mutually agree upon. Such terms and conditions would of necessity include provision for payment to the person concerned for services rendered or work performed by him. "Person" in s 6(3)(a) would include any registered company or body corporate (see section 2 of the Interpretation Act 33 of 1957 sv person). Thus, the Commission may engage the services of, inter alia, land surveyors, engineers and construction companies in connection with the construction of national roads (including, since 1983, toll roads). Since the advent of toll roads it is also empowered, in terms of section 9(1)(c) of the Act, to collect moneys payable as toll on a toll road, and

for that purpose erect a toll gate and facilities in connection therewith on a toll road. In terms of s 6(3)(a) it may engage the services of an outside person to perform these functions, and to operate any toll gate on a toll road. Moneys so collected would have to be dealt with in the manner prescribed by s 2(1)(b A) and s 2(3 A) of the Act i e they would have to be paid into the National Road Fund (s 2(1)(b A)), and the Commission will have to keep a separate account of all moneys received by way of toll in respect of a particular toll road paid into the Fund (s 2 (3 A)). The moneys in such account are to be utilized for the purposes envisaged by subsections (a) and (b) of s 2(3 A), which include the maintenance and operation of such toll road and any toll gates and facilities in connection therewith.

The interim agreement was entered into between the Commission and Tolcon pursuant to the powers conferred upon the Commission by s 6 (3)(a). (It is not necessary for present purposes to have regard to the Government's participation in the interim agreement.) The purpose of the interim agreement was to record the reciprocal rights and obligations of the respective parties pending the conclusion of a full written agreement ("the final agreement") between the Government, the Commission and Tolcon. The relevant provisions of the interim agreement are contained in clauses 4 and 5 thereof. These are conveniently set out in the reported judgment at 579 C - J and need not be repeated herein. In return for the work to be carried out by Tolcon on and in connection with the toll road (to which reference has previously been made), Tolcon was to be paid (in terms of clause 4.3)

"an amount equivalent to the gross proceeds of tolls collected prior to signature of the agreement as and when received, and such moneys will be used to meet its costs including setting-up costs". (The reference to "the agreement" is, in the context, a reference to the final agreement.) Clause 5 of the interim agreement provides for what is to happen in the event of the envisaged final agreement not being signed or, if signed, not becoming unconditional.

Stripped to its bare essentials the interim agreement is a simple private law agreement between the Commission and Tolcon in terms whereof Tolcon undertook to carry out certain rehabilitation and construction work on and in connection with the toll road in return for which it was to be compensated as provided for in clause 4.3 of the interim agreement. Its provisions fall squarely within the ambit of the powers conferred

on the Commission by s 6(3)(a) of the Act. What the interim agreement did not specifically authorise Tolcon to do was to collect moneys payable by way of toll at the toll gates on the toll road, and to operate the toll road and the toll gates in question. As Tolcon was to be paid the gross proceeds of toll collected for the performance of its obligations under the interim agreement, it was probably always intended by the parties that Tolcon would operate the toll gates and collect the toll as part of its duties. However, as I have pointed out, the interim agreement did not specifically provide for this.

It was to remedy this omission that the delegation agreement was entered into. That much is apparent from the terms of the delegation agreement which are recorded in full in the reported judgment at 580 C - H. It is not necessary to repeat them in this

judgment. Suffice it to say that the crux of the delegation agreement was contained in that provision in which the Commission delegated to Tolcon "the power to collect money payable by way of a toll at a toll gate on the toll road referred to in the interim agreement and to operate such toll road and toll gate upon and subject to the terms and conditions set out in the interim agreement The tolls so collected will be paid to Tolcon in terms of the provisions of clause 4.3 of the interim agreement." The whole purpose of the delegation agreement was to clarify and give effect to the interim agreement. To label the delegation agreement - as the appellants did in argument - as a "sham", is totally without justification.

In my view it was not necessary for the Commission to have specifically delegated any of its powers to Tolcon in terms of s 6(3)(b) of the Act.

All that was necessary was an agreement authorising Tolcon to collect tolls and operate the toll gates. Any such agreement would have fallen exactly within the scope of s 6(3)(a). This is no doubt what the parties had in mind to achieve when they entered into the delegation agreement. The fact that authority to collect tolls and operate the toll gates was delegated to Tolcon rather than transferred to it by simple agreement does not detract from the legal efficacy of the arrangement. The end result is the same - Tolcon is legally entitled to operate the toll gates and collect the tolls.

In challenging the validity of the interim agreement the thrust of the appellants' argument was that the Commission was in essence disposing of the toll road and the State's rights therein to Tolcon - an act, in modern parlance, of "privatisation", where the

State as owner of an asset or undertaking disposes thereof to a person or company in the private sector. For this, it was contended, specific legislative authority was required which the Act, in its present form, does not confer on the Commission. The interim agreement was therefore not valid as it purported to achieve what was not authorized by s 6(3)(a) of the Act. Likewise the delegation agreement was invalid, as s 6(3)(b) could only be invoked to facilitate the performance of a valid agreement under s 6(3)(a).

This argument is in my view devoid of substance. No doubt the ultimate aim of the Commission and Tolcon is to privatise the toll road. This is apparent from the proposed provisions of the final agreement as set out in the interim agreement. It is common cause that the final agreement has not yet come into operation. The reason for this is obvious -

under the Act in its present form the Commission does not have the necessary legal capacity to enter into an agreement containing the terms envisaged for the final agreement. In the meantime, however, there is nothing which precludes the Commission and Tolcon from entering into a valid contractual relationship (within the ambit of s 6(3)(a)) governing the interim position until the objectives of the final agreement can be achieved. This, in my view, is precisely what they have succeeded in doing.

One of the features on which the appellants relied to bolster their argument that the interim agreement was in essence one of privatisation, was Tolcon's alleged entitlement to collect tolls for its own account. This is not so. What is clear from the interim and delegation agreements is that the gross proceeds of all tolls collected by Tolcon are to be

paid to it as remuneration for the performance of its obligations under the agreements. The provisions of s 2(1)(b A) and (3 A) of the Act have still to be complied with - the delegation agreement specifically recognises this to be the case. But this does not mean that Tolcon must physically hand over all moneys received by way of toll to the Commission and in turn later be handed back an equivalent amount. This would create an unnecessary administrative burden. The provisions of the above sections can be satisfied by resorting to recognised and appropriate bookkeeping practices, and without the need for any physical transfer of money. Furthermore, having regard to Tolcon's obligations, the payment to it of the gross proceeds of the tolls collected ensures that the moneys received by way of toll are utilized for the purposes envisaged in s 2(3 A)(a) and (b) of the Act.

It follows that Tolcon is lawfully entitled to operate the toll road and collect the toll payable in terms of its agreement with the Commission.

Has there been a proper determination by the Minister of the toll payable by users of the toll road?

In terms of s 9(1)(b) of the Act:

"The commission may -

- (a)
- (b) in respect of the use of any vehicle on a toll road, levy a toll the amount of which has been determined and made known in terms of subsection (4) and which shall be payable by the person so using the vehicle;"

Section 9(4) of the Act provides:

"The amount of a toll levied under subsection (1), and any alteration thereof -

- (a) shall be determined by the Minister on the recommendation of the commission;

- (b) may differ in respect of -
 - (i) different toll roads;
 - (ii) different vehicles or different categories of vehicles used on a toll road;
 - (iii) different times at which any vehicle or any vehicle of a particular category is used on a toll road;
- (c) shall be made known by notice in the Gazette;
- (d) shall be payable from a date determined by the Minister on the recommendation of the commission, which shall be mentioned in the notice whereby it is made known in terms of paragraph (c) and which shall not be a date earlier than 60 days after the date on which such notice appears in the Gazette."

The amount of toll "determined" by the Minister in respect of the toll road was made known in Government Notice No 1875 in the Gazette of 16 September 1988. Section 2 of the Notice provides for the classification of motor vehicles. Section 3

provides for the amounts of toll. Section 3.1 reads:

"The amount of toll payable over the full distance of the toll road between the Frere Interchange and the Cedara Interchange near Hilton in respect of the various motor vehicle classes shall not exceed the following:

Class 1	:	R10,00
Class 2	:	R12,00
Class 3	:	R18,00
Class 4	:	R22,00
Class 5	:	R26,00
Class 6	:	R30,00"

(My underlining.)

Sections 3.2 and 3.3 provide for the amounts payable by vehicles in the different classes for trips between other sections of the toll road. In each instance it is stated that the amounts payable "shall not exceed" those laid down.

It is common cause that on all sections of the toll road the amounts of toll actually being charged are less than the permissible maximum for each class of vehicles as set out in section 3. What is

in issue is whether the amounts of toll charged have been properly determined as provided for in s 9(4)(a) of the Act. The appellants argue that they have not been so determined, as the determination of the amount of a toll, within the meaning of s 9(4)(a), involves the expression of such amount as a fixed figure, and not a maximum permissible one. The judge a quo considered the word "determine" to have both the narrower meaning of "to fix or establish" or the wider meaning of "to set bounds or limits to". After considering the provisions of the Act as a whole with a view to establishing the legislature's intention he concluded (at 587 C of the reported judgment) that :

"Parliament intended to give the Minister the greatest possible latitude in determining the amounts of toll. In the result, I consider that the wider import of the word 'determine' - i e 'to set a limit' -

was intended by Parliament in enacting s 9(4)(a), whereby the Minister was given the power to determine the toll amounts. I can find no sound reason, apparent from the Act itself, which suggests the converse."

The word "determined", depending upon its precise contextual setting, is capable of a variety of meanings. Webster's Third New International Dictionary ascribes to the word "determine" the meaning, inter alia, of "to fix conclusively and authoritatively" or "to set bounds or limits to". The Oxford English Dictionary defines it to include "to conclude, settle, decide, fix" or "to set bounds to", but indicates that in the latter sense the word is obsolete - it is no longer in use. No similar indication that such use is obsolete is to be found in Webster. The appellants did not contend that

"determine" is incapable of bearing the meaning of "to set bounds to", but rather that such meaning was inappropriate to the content of s 9(4)(a). For the purposes of the present appeal I shall accept that it is capable of such meaning, even though the matter is open to considerable doubt. That leaves the question whether the legislature intended the word "determined" in s 9(4)(a) to have the wider meaning of "set bounds to" or the narrower connotation of "fixed". Viewed purely within the contextual limits of s 9(4)(a) it is capable of either connotation. The Afrikaans text (which is the unsigned one) uses the word "bepaal". HAT, the Verklarende Afrikaanse Woordeboek and the Afrikaanse Woordeboek give the primary meaning of "bepaal" as "vasstel", which in ordinary grammatical usage connotes "to fix" rather than "to set bounds to". However, although the Afrikaans text suggests a

narrower rather than a wider import being given to the word "determined" it does not resolve the ambiguity. It is therefore necessary to seek assistance from other provisions of the Act to establish the meaning of "determined" in s 9(4)(a).

One of the strongest indications of the legislature's intention is, in my view, to be found in the use of the same word in the phrase "shall be payable from a date determined by the Minister" in s 9(4)(d) of the Act. In that context the word "determined" can only mean "fixed". It is essential that the public be informed when precisely their obligation to pay toll commences. To this end the public must be informed of the exact date on which toll becomes payable. The Minister must thus fix a definite date. He cannot stipulate a period during which the toll can be instituted. To do so would

create confusion in the minds of the public as to when their obligation to pay toll commences. Thus to afford the word "determined" in s 9(4)(d) any meaning other than "fixed" would import vagueness and uncertainty into the section. This the legislature could not have intended. Where the legislature uses the same word in the same section of an Act, it may reasonably be supposed it would intend the word to be understood in the same sense throughout the section, unless a clear indication to the contrary is given (Minister of the Interior v Machadodorp Investments (Pty) Ltd and Another 1957(2) SA 395 (A) at 404 D; Pantanowitz v Sekretaris van Binnelandse Inkomste 1968(4) SA 872 (A) at 879 E). There is in the section under consideration no clear indication, indeed no indication at all, that the word "determined" in ss (4)(d) should bear a different meaning from the same

word in ss (4)(a).

There are additional considerations to which regard may properly be had in order to determine the legislature's intention. It is clear from the provisions of s 9(4)(a) that the legislature intended the determination of the amount of a toll to ultimately be a matter of ministerial responsibility. The reason for this probably lies in the fact that a toll is a form of tax and that therefore the Minister, and not some lesser official, should be the final arbiter of the amount thereof. This only occurs if the Minister determines the actual amount payable. Where he merely fixes certain limits it is left to someone else to determine what amount of toll, within those limits, should be charged. This is precisely what has happened in the present instance. Someone other than the Minister has made the final determination of the

actual amounts of toll payable for the use of the toll road. This is apparent from what appears in Tolcon's opposing affidavit where it is stated:

"(T)he actual amounts charged were arrived at by discussion between Tolcon and the Third Respondent. Where there were complaints from users that the charges were too high the Third Respondent referred to complaints to Tolcon. In all cases where there had been a reduction this has been done with the approval and authority of the Third Respondent".

This amounts to a usurpation of the Minister's function, for it is he who is required to make the final determination. The matter is therefore no longer one of ultimate ministerial responsibility, contrary to what the legislature intended. The position may be different if the Minister lays down directives, or prescribes a formula, which will enable an amount of toll to be fixed according to his requirements without the exercise of an independent

judgment by someone else. Furthermore, the requirement in s 9(4)(a) that the Minister is to determine any alteration to the amount of the toll seems to underscore the fact that the actual amount of toll, rather than certain limits within which the amount of toll can be adjusted from time to time without reference to him, shall be fixed by him in the first place.

The notion that the Minister must set specific amounts of toll and not merely parameters within which tolls are to be charged is reinforced by the requirement of publication of the amounts of toll to be charged in the Gazette (s 9(4)(c)). The purpose thereof is obviously to inform the public. Although the Act is silent on the point, the reason why, in terms of s 9(4)(d), at least 60 days is to elapse between the date of publication and the date on

which the amount of toll becomes payable, is presumably to allow for representations to be made to the Minister in regard to the proposed amounts. This purpose would be stultified, if not defeated, if all that is made public is the upper limit of the tolls and not the actual amount thereof. How can representations be made, or be adequately made, when it is not known what actual amount they should address?

An equally important reason for the requirement of the 60 day period is to enable persons, particularly those engaged in a trade or business necessitating the use of the toll road, to arrange their affairs in advance with due regard to the amount of toll they will be required to pay. This cannot be properly or satisfactorily done if the actual amount of toll they will be required to pay is not known.

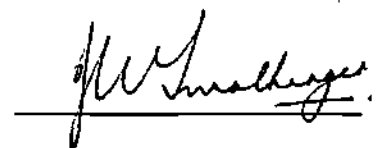
In the result I am in respectful disagreement with the conclusion reached by the judge a quo. The considerations I have mentioned establish, in my view, that the legislature, by the use of the words "the amount of a toll levied shall be determined by the Minister" in s 9(4)(a) of the Act, intended the Minister to fix the actual amount of the toll payable by motorists. This he did not do. There has accordingly not been a valid determination of the amount of toll motorists are required to pay.

Even if the maximum amounts fixed by the Minister had been the actual amounts of toll fixed by him, the reduced amounts being collected from users of the toll road would not constitute a valid charge. This is because the Commission does not have the power to reduce the amounts of toll fixed by the Minister. (I am assuming, in favour of the respondents, that the

reduced amounts were decided upon by the Commission, and not by Tolcon.) The Commission's powers in relation to tolls are limited to those conferred upon it by the Act. Section 9(1)(c) of the Act provides that : "The commission may collect moneys payable as toll " Although the power is permissive, if the Commission does collect moneys, it must collect the "moneys payable as toll", and such moneys, when regard is had to s 9(1)(b), relate to the amounts which have been fixed by the Minister. The Commission does not have a general power to reduce the amount of toll fixed by the Minister. Any reduction of the amount of toll would in fact be an alteration thereof, and only the Minister is empowered to make an alteration. The Commission may grant exemption from the payment of toll (s 9(1)(s)), restrict the levying of toll (s 9(1)(e)), or suspend the levying of toll (s 9(1)(f)), but its

power to do so is circumscribed by the subsections in question. An exemption is not the same as a reduction - it connotes the lifting of the obligation to pay any toll at all. In any event, the limited power of exemption which the Commission has under s 9(1)(d) cannot vest it with a general power to reduce the amount of toll fixed by the Minister.

In my view therefore the appeal should succeed on this point. I would accordingly allow the appeal with costs, including the costs of two counsel, and grant the appellants appropriate relief.



J W SMALBERGER
JUDGE OF APPEAL

STEYN, JA - concurs