Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case number: 6165/2012

Before: The Hon. Mr Justice Binns-Ward
The Hon Ms Justice Boqwana

Hearing dates: 11-14, 17-18 August 2015
Judgment delivered: 30 September 2015

In the matter between:

CITY OF CAPE TOWN Applicant

And

SOUTH AFRICAN NATIONAL ROADS AGENCY LTD First Respondent
MINISTER OF TRANSPORT Second Respondent
MINISTER OF WATER & ENVIRONMENTAL AFFAIRS Third Respondent
AND SEVEN OTHERS Fourth to Tenth Respondents

JUDGMENT

BINNS-WARD J *et* BOQWANA J:

[1] The City of Cape Town ('the City') seeks the judicial review and setting aside of a number of decisions that were made by the first, second and third respondents in

the exercise of public powers. The decisions concerned the intended construction and upgrading of sections of the N1 and N2 national roads and their declaration as toll roads. The City has also applied for related declaratory and interdictal relief, which will be described later. The first respondent is the South African National Roads Agency ('SANRAL'). The second respondent is the Minister of Transport. The third respondent is the Minister of Water and Environmental Affairs, who has been cited in her capacity as the successor in law of the former Minister of Environmental Affairs and Tourism. A number of other parties were joined as respondents, but they played no active part in the proceedings.

[2] In some respects this case hardly needs introduction because of the wide extent of the publicity it has received. For the past few months, on an almost daily basis the news media have carried reports and commentaries– even by the litigants themselves – using parts of the content of the papers. [1] Urban road tolling has for some years been a highly controversial issue in this country and, predictably in the circumstances, the case has been the subject of much political tub-thumping using selective extracts from the court papers; on occasion even before they were filed of record. This came to our notice because judges follow the news like everyone else.

[3] Public argumentation on the content of the papers before a matter comes to hearing, particularly in a matter of heated political controversy, can engender misconceived expectations of what the court can and should deliver. It tends to generate the sort of publicity that beclouds the drier and less emotive legal questions on which this type of case usually turns. It also has the potential, because of the political fanfare it attaches to what, objectively, should be recognised as purely forensic proceedings, to leave the public disaffected if the judgment fails to meet the engendered expectations.

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[1] This is permissible in terms of the judgment in *City of Cape Town v South African National Roads Authority Limited* (sic) *and Others* 2015 (3) SA 386 (SCA), which gave an expansive definition of the concept of open justice under our Constitution. The judgment held that, save in exceptional circumstances, to be determined on a case by case basis, any documents filed of record in a court are immediately open for inspection by the press and the public and that their content thus becomes legitimate material for public debate before the pleadings are closed and the case comes before court, if it ever does. The court distinguished the position in this country from those which obtain in jurisdictions with a similar civil law procedural heritage such as England, Australia and Canada, which were described in broad terms in the decision of the court at first instance, *South African National Roads Agency Limited v City of Cape Town and Others: In Re: Protea Parkway Consortium v City of Cape Town and Others* [2014] 4 All SA 497 (WCC), at paras 24-51.

[4] We are concerned that the nature and extent of the pre-hearing publicity that the case has received, both before and after the hearing, might have given rise to a popular misconception that it is the function of the court to be the ultimate decider whether the roads should be tolled, or to the unfounded expectation that a successful challenge by the City would legally finally put paid to any plan by SANRAL and the national government to toll the roads. The widely publicised debate between the City and SANRAL after judgment had been reserved in which any decision that might be given upholding the review was reportedly characterised by SANRAL as handing the City 'a political victory' added to the concern.[2] It is thus important at the outset of this judgment to emphasise that it is *not* the function of the courts to determine one way or the other whether the roads should be tolled.

[5] We think it might be useful in the circumstances to commence with a brief explanation of the legal context of the City's application for judicial review and the constitutional nature of the court's power in adjudicating it.

The legal context of the City's application for the judicial review and setting aside of decisions directed at the tolling of sections of the N1 and N2 highways

[6] The Constitution provides a governmental framework based on a separation of powers between the legislative, executive and judicial arms of government. Each arm of government, as well as the various independent institutions established in terms of the Constitution, has its own constitutionally defined role. The separation is not hermetic because in discharging their respective functions in terms of the Constitution the actions of the different arms of government inevitably impact to a greater or lesser degree on the others.[3] Inherent in the separation of powers is a system of checks and

[2] In the context of the allegation by SANRAL in its answering affidavit that the City's application is politically motivated and that the City has been put up as the applicant as a surrogate for the Democratic Alliance Party, it perhaps bears noting that the papers show that opposition to the tolling project on the grounds of its perceived adverse effect on the people and economy of Cape Town and its surrounding areas has been consistently articulated by both the municipal and provincial spheres of government irrespective of the party in power - whether it be the African National Congress or the Democratic Alliance - at the various stages the toll roads proposal has been under consideration.

[3] Cf. e.g. *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (re government housing policy) and *Minister of Health And Others v Treatment Action Campaign and Others* (No 2) 2002 (5) SA 721 (CC) (re the provision by government of antiretroviral medication), which serve as salient examples of judgments which impacted on the functions of the executive arm of government without infringing the separation of powers.

balances.[4] The Constitution enjoins each arm of government to respect the powers of the others and not to overreach its own.[5] Indeed, it was in another tolling-related case, *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC); 2012 (11) BCLR 1148, that the Constitutional Court quite recently reiterated how careful the judiciary must be not to make orders that would trench inappropriately on the domains that the Constitution has allocated to other organs of state. That judgment was given in the context of proceedings for interdictal relief, but the relevant principles also have application in respect of the power of judicial review; both in respect of the ambit of the power and the determination of appropriate remedies in the exercise of the power.

[7] The position and role of the courts in the state's governmental framework were described in admirably crisp terms by the Constitutional Court in *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 (4) SA 618 (CC), 2010 (5) BCLR 457, as follows:

> Where the Constitution or valid legislation has entrusted specific powers and functions to a particular branch of government, courts may not usurp that power or function by making a decision of their preference. That would frustrate the balance of power implied in the principle of separation of powers. The primary responsibility of a court is not to make decisions reserved for or within the domain of other branches of government, but rather to ensure that the concerned branches of government exercise their authority within the bounds of the Constitution. This would especially be so where the decision in issue is policy-laden as well as polycentric.[6]

[8] The decisions that the City seeks to impugn in these proceedings resort exclusively within the functional domain of the executive arm of government. Whether the roads should be tolled or not is a matter to be decided within the relevant statutory framework by SANRAL and the Minister of Transport, not by the courts. It is not the function of the judicial arm of government in the exercise of its powers of judicial review to second-guess the executive by imposing the judges' views in the place of decisions lawfully made by the other arms of government, however unpopular or ill-advised they might be regarded in some quarters. Therein lies the difference between appeal and review remedies. The courts are generally, save when otherwise

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[4] *Ex Parte Chairperson of the Constitutional Assembly: In re: Certification of the Constitution of the Republic of South Africa 1996* 1996 (4) SA 744 (CC), at para 109.
[5] Section 41 of the Constitution.
[6] At para 95 (per Moseneke DCJ).

exceptionally provided by statute,[7] not invested with appellate authority over executive decisions. Appeals entail reconsidering the merits of an impugned decision (a rehearing in effect), with the appellate tribunal being empowered to substitute its decision for that of the first instance decision-maker. Reviews, on the other hand, are not concerned, other than sometimes incidentally, with the merits (i.e. in this case whether the roads should be tolled or not); they do not involve a rehearing, and only exceptionally will they give rise to a substitutive decision.

[9] It is a fundamental constitutional principle that public powers exist only to the extent that is provided by law, and they are competently exercised only in accordance with such law.[8] Judicial review is concerned with determining whether the impugned acts were made within the ambit of a power provided by law, and in accordance with the precepts of such law, in particular, and the Constitution, in general. This court is thus concerned in the City's review application (to the extent that we may entertain it in the face of the City's inordinate delay in instituting it), not with whether or not to endorse the national government's indicated preference (i.e. policy decision) to fund the construction and maintenance of certain national roads by tolling, but only with whether the decisions that the executive needed to make in order to toll the major arterial road routes linking Cape Town to the rest of the country were made within the powers conferred on the decision-makers by the applicable statutes, and after proper compliance with the requirements stipulated in the legislation, and consistently with the Constitution.

[10] It is important in the context of the current matter to be acutely conscious of the distinction between executive-government policy and executive-government decision-making in terms of legislation that has been enacted to enable the implementation of government policy. At a high level, decisions to toll national roads are taken in terms of national government policy.[9] '*The playing field for the contestation of executive-*

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[7] Appeals to the courts in tax matters have been described as proceedings that combine the characteristics of appeals and judicial review; see *Kommissaris van Binnelandse Inkomste v Transvaalse Suikerkorporasie Bpk* 1985 (2) SA 668 (T), at 676C and *ITC 936* 24 SATC 361.

[8] *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458, at para 56-59.

[9] The declaration of a national road as a toll road in terms of s 27 of the South African National Roads Agency Limited and National Roads Act No. 7 of 1998 ('the SANRAL Act') is one of the functions of the Agency provided in terms of ss 25 and 26 of the Act. Section 25(1) requires SANRAL to discharge its functions, amongst other matters '*within the framework of government policy*'. See paras [76]-[83], below.

government policy is the political process, not the judicial one'.[10] Judicial review, certainly in terms of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'), finds a basis for application in respect of decisions of an administrative nature made under laws enacted for the implementation of such policy.

[11] The government is able to lawfully exercise the power to construct and upgrade the roads and toll them only if it has duly complied with the requirements of the Environment Conservation Act 73 of 1989 ('the ECA') - read with the National Environmental Management Act 107 of 1998 ('NEMA') – and the South African National Roads Agency Limited and National Roads Act No. 7 of 1998 ('the SANRAL Act'). Decisions professedly made in terms of that legislation that qualify as 'administrative decisions', as defined in s 1 of PAJA,[11] can be impugned on any of the grounds set forth in s 6(2) of PAJA.[12] Beyond what is provided in PAJA, any exercise

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[10] *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC); 2012 (11) BCLR 1148, at para 93 (minority judgment, Froneman J).

[11] Section 1 of PAJA provides as follows insofar as currently relevant:

*"**administrative action**" means any decision taken, or any failure to take a decision, by-*

(a) an organ of state, when-

(i) exercising a power in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation; or

(b)…,

which adversely affects the rights of any person and which has a direct, external legal effect, but does not include- ….

***"decision"** means any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to-*

(a) making, suspending, revoking or refusing to make an order, award or determination;

(b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;

(c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;

(d) imposing a condition or restriction;

(e) making a declaration, demand or requirement;

(f) retaining, or refusing to deliver up, an article; or

(g) doing or refusing to do any other act or thing of an administrative nature,

and a reference to a failure to take a decision must be construed accordingly.

[12] Section 6(2) of PAJA provides:

A court or tribunal has the power to judicially review an administrative action if-

(a) the administrator who took it-

(i) was not authorised to do so by the empowering provision;

(ii) acted under a delegation of power which was not authorised by the empowering provision; or

(iii) was biased or reasonably suspected of bias;

(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;

(c) the action was procedurally unfair;

(d) the action was materially influenced by an error of law;

(e) the action was taken-

(i) for a reason not authorised by the empowering provision;

(ii) for an ulterior purpose or motive;

of public power may also be challenged if it does not comply with the overreaching constitutional requirement of legality; for example, judicial review may be applied for on the grounds of the alleged irrationality or unlawfully discriminatory effect of a decision or other exercise of power.

The effect of unreasonable delay on the feasibility of challenges by means of judicial review to the exercise of public power

[12] Most of the decisions that the City seeks to impugn in these proceedings were made by the first, second and third respondents in purported compliance with the requirements of the ECA and the SANRAL Act. It is a principle of law that - subject to the effect of permissible collateral challenges, something that does not require discussion in the context of this case - administrative decisions stand to be recognised as valid unless and until they are set aside on judicial review; see *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA), especially at para 26-27.

[13] Any person who wants to have an administrative decision set aside on judicial review must institute proceedings within a reasonable time. This is because there is a public interest in the certainty and finality of administrative decisions. It would ordinarily be inimical to good governance and the positions of third parties who might have ordered their affairs with reference to the decisions of public bodies if the courts entertained applications for the judicial review of such decisions in proceedings

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(iii) because irrelevant considerations were taken into account or relevant considerations were not considered;
(iv) because of the unauthorised or unwarranted dictates of another person or body;
(v) in bad faith; or
(vi) arbitrarily or capriciously;

(f) the action itself-
(i) contravenes a law or is not authorised by the empowering provision; or
(ii) is not rationally connected to-
(aa) the purpose for which it was taken;
(bb) the purpose of the empowering provision;
(cc) the information before the administrator; or
(dd) the reasons given for it by the administrator;

(g) the action concerned consists of a failure to take a decision;
(h) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance 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; or
(i) the action is otherwise unconstitutional or unlawful.

instituted after an unreasonable delay.[13] Under the common law the courts entertained applications for judicial review that had been instituted after an unreasonable delay only exceptionally. And only when they considered the interests of justice required them to condone or overlook the delay. The principle that informs these considerations at common law is colloquially referred to as 'the delay rule'.[14] The rule has been described as a manifestation of 'sound judicial policy'.[15] Thus, if a challenge is not mounted timeously, an unlawful decision may in a practical sense be validated by delay; cf. *Harnaker v Minister of the Interior* 1965 (1) SA 372 (C) at 381C.

[14] PAJA was enacted in fulfilment of the obligation on the State in terms of s 33(3) of the Constitution to provide legislation to give effect to the rights to just administrative action provided in s 33(1) and (2) of the Bill of Rights. Section 7(1) of PAJA provides:

> *Any proceedings for judicial review in terms of section 6 (1) must be instituted without unreasonable delay and not later than 180 days after the date-*
>
> *(a) …on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2) (a) have been concluded; or*
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> *(b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.*

Section 9 of the Act permits the parties to an application for review in terms of s 6, by agreement, to extend the period of 180 days to a fixed date, or failing that, the court to do so, on application, '*where the interests of justice so require*'.

[15] The effect of s 7(1) read with s 9 of PAJA is thus largely to restate and codify the common law delay rule.[16] Because PAJA is the legislation contemplated in terms

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[13] Cf. *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) at 41E-42C; *Gqwetha v Transkei Development Corporation Ltd and others* 2006 (2) SA 603 (SCA) at para 22-23 and *Opposition to Urban Tolling Alliance and Others v The South African National Roads Agency Ltd and Others* [2013] 4 All SA 639 (SCA), at para 25.

[14] Cf. e.g. *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2010 (1) SA 333 (SCA) ('*Oudekraal* 2'), at para 33, and *Opposition to Urban Tolling Alliance and Others v The South African National Roads Agency Ltd and Others* [2013] 4 All SA 639 (SCA) at para 22.

[15] See *Khumalo and Another v MEC for Education, KwaZulu-Natal* 2014 (5) SA 579 (CC), at para 47.

[16] A court may invoke the delay rule *mero motu* at common law (*Mamabolo v Rustenburg Regional Local Council* 2001 (1) SA 135 (SCA); [2000] 4 All SA 433 at para 10). It is an incident of the court's inherent jurisdiction to regulate its own procedure. In *Camps Bay Ratepayers' and Residents' Association and Another v Harrison and Another* 2011 (4) SA 42 (CC); 2011 (2) BCLR 121, at para 53, it was held that the position remains unaffected under the Constitution and PAJA. However, no consideration was given to the effect of an agreement between the parties in terms of s 9(1) of PAJA on the court's power to raise inordinate delay *mero motu* as a reason to refuse an application for

of s 33(3) of the Constitution, the provisions of s 7(1) read with s 9 confirm the delay rule as a legal principle pertaining to the exercise and enforcement of the fundamental right that everyone has to administrative action that is lawful, reasonable and procedurally fair. The ambit of the right of access to court in terms of s 34 of the Constitution thus falls to be defined consistently with the limiting and controlling effect of ss 7(1) and 9 of PAJA.

[16] In *Opposition to Urban Tolling Alliance and Others v The South African National Roads Agency Ltd and Others* [2013] 4 All SA 639 (SCA) (hereafter cited as '*OUTA* (SCA)'), it was held that if an application for review under PAJA is brought outside the 180 day period stipulated in s 7(1) a '*court is only empowered to entertain* [it] *if the interest of justice dictates an extension in terms of s 9*'.[17] This highlights the legal character of the effect of s 7(1) read with s 9, as distinct from the judicial policy nature of the delay rule under the common law. The common law delay rule continues to apply in the traditional way, as a matter of judicial policy, in respect of review challenges to the exercise of public power that do not fall within the purview of PAJA.

[17] The current application was instituted on 28 March 2012. Amongst other matters, the City seeks the judicial review and setting aside of the following decisions:

1. The decision of the 'competent authority' on 30 September 2003 to grant environmental authorisation, in terms of s 22(1) of the ECA, for the construction or upgrading of the roads (para 1.1 of the notice of motion);

2. The decision of the Minister of Environmental Affairs and Tourism on 10 October 2005, in terms of s 35(4) of the ECA, to effectively dismiss the appeals against the grant of environmental authorisation by the competent authority (para 1.2 of the notice of motion);

3. The decision of the Minister of Environmental Affairs and Tourism on 28 February 2008 (as amended in April 2008), also in terms of s 35(4)

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judicial review. The, on the face of it, unqualified right given to the parties to a review application to extend the period for the institution of proceedings by agreement appears potentially to negate the concept of protecting of the position of members of the general public who may have acted on the decision that is part of the rationale for the common law rule. The current case does not require us to decide the question, but it seems to us that it would be within the power of the court, in appropriate circumstances, especially when the position of persons other than the litigants might be prejudicially affected, to decline to recognise an agreement between the parties to extend the time limits provided in terms of s 7(1) of PAJA.

[17] See para 26 of the judgment.

of the ECA, to grant a revised environmental authorisation for the project (para 1.3 of the notice of motion);

4. The decision of the Minister of Transport on 2 September 2008, in terms of s 27(1) read with s 27(4) of the SANRAL Act, to approve the declaration of the roads as toll roads (para 1.4 of the notice of motion); and

5. The decision of SANRAL, which was published in the *Gazette* on 15 September 2008, also in terms of the SANRAL Act, to declare the affected roads as toll roads (para 1.5 of the notice of motion).

(The other relief sought by the City will be described later in the judgment.[18])

[18] The application for the review and setting aside of the aforementioned decisions has thus been brought well outside the 180 day limit provided in terms of s 7(1) of PAJA. There is no agreement between the parties affording an extension of the period within which the Act required the application to be instituted. On the contrary, SANRAL contends that the review application should not be entertained because of the unreasonable and inadequately explained delay. It is necessary in the circumstances to consider the City's application in terms of s 9 of PAJA for condonation of the delay.

The relevant principles concerning any condonation of the City's unreasonable delay in instituting review proceedings

[19] SANRAL's counsel contended that condonation of a delay in the institution of judicial review proceedings under PAJA should be determined first, before the review itself is considered, and submitted that 'unless the reasons for the delay are sufficiently compelling the court will not entertain the review application at all'.[19] This argument was broadly supported by counsel for the second and third respondents. SANRAL's heads of argument cited *OUTA* (SCA) supra, at para 22 and 43, and *Beweging vir Christelik-Volkseie Onderwys and others v Minister of Education and others* [2012] 2 All SA 462 (SCA), at para 44, in support of the submission. To the extent that the argument might be understood to suggest that there should be something akin to a

[18] At paragraph [122], below.
[19] Para 17-18 of SANRAL's heads of argument.

separation of issues - with delay being considered first, and separately from the other aspects of the case - we do not think those judgments support such a proposition.

[20] The dicta in *OUTA* (SCA) were uttered in the context of the court of first instance in that matter having determined the review adversely to the applicant, and having held on that basis that it had been unnecessary for it to deal with application for condonation of the unreasonable delay in the institution of the proceedings, thus leaving it undetermined. The point that Brand JA articulated in the passages of the judgment relied upon by SANRAL's counsel was that the court a quo had erred in the approach it had adopted by failing to appreciate that, in terms of s 7(1) of PAJA, it had been empowered to entertain the review *only* if it had granted condonation for the delay. It was in that context that the learned judge of appeal referred to the earlier judgment given by Plasket AJA in *Beweging vir Christelik-Volkseie Onderwys*, which, in the relevant part, rejected an argument advanced to the court that a determination of the merits was a mandatory precursor to any consideration of whether to condone an unreasonable delay.

[21] The outcome of an application for condonation in terms of s 9 of PAJA falls, according to the tenor of the provision, to be determined in the court's assessment of whether, notwithstanding an unreasonable delay by the applicant in commencing proceedings, the interests of justice nevertheless require it to entertain the review. The exercise involved in adjudicating an application for condonation under the statute is essentially the same as that undertaken by the court in what has been characterised as the second leg of enquiry in terms of the delay rule under the common law.[20] It entails the exercise by the court of a judicial discretion. The discretion falls to be exercised with regard to all the relevant circumstances; cf. e.g. *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) at 39; *Gqwetha v Transkei Development Corporation Ltd and Others* 2006 (2) SA 603 (SCA); [2006] 3 All SA 245 at para 33-34 and *Khumalo and Another v MEC for Education, KwaZulu-Natal* 2014 (5) SA 579 (CC), at para 52. It follows that what requires to be considered and the extent of and order in which the necessary consideration occurs will depend on the nature of the case.

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[20] See *Setsokosane Busdiens (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie en 'n Ander* 1986 (2) SA 57 (A), at 86A-D, quoting from Miller JA's judgment in *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) at 39C.

[22] The broad nature of the exercise enjoins the court to have regard, amongst other matters, to what the review application is about, its prospects of success and the broader consequences, in the context of the delay, of it being upheld or turned away. The peculiarly case-specific nature of any assessment of what the interests of justice require excludes the feasibility of any attempt at defining a *numerus clausus* of relevant considerations for use in all such condonation applications. Thus, despite the fact that a court can entertain an unreasonably delayed application for judicial review only if it condones the delay, it will in most cases, for practical reasons, have to hear the matter as if it were entertaining the review, even if only - if condonation were to be refused - to definitively determine nothing other than the antecedent question.[21]

[23] It was shown during the course of the argument that an analysis of the reported judgments on the issue since the turn of the century turns up apparent inconsistencies in the approach to condonation. The differences seem to us to be a matter of nuance. They appear to have arisen because of the different characteristics of the individual cases involved.

[24] So, Nugent JA's majority judgment in *Gqwetha*, at para 34, might be understood to indicate that the consequences of upholding an unreasonably delayed review application, and not its prospects of success *per se*, are the relevant considerations in exercising the discretion whether to condone the delay. (PAJA was not implicated in *Gqwetha* because the decision in issue in that matter had been made in 1995.) The Constitutional Court, on the other hand, might be taken to have expressed a different view in *Khumalo*. At para 57 of the majority judgment in *Khumalo* (which was a legality review, and thus also not subject to PAJA), Skweyiya J stated '*An additional consideration in overlooking an unreasonable delay lies in the nature of the impugned decision. In my view this requires analysing the impugned decision within the legal challenge made against it and considering the merits of that challenge*'. It seems to us, however, that Nugent JA's remarks in *Gqwetha* were very much directed at the peculiar facts of that case. The point that the learned judge was making was that the prospects of success in that matter were not a weighty consideration in the context of it being unlikely, even were the unreasonable delay in that case condoned, and the ensuing

[21] The same considerations might inform the drafting of the court's judgment; cf. *Loghdey and Others v City of Cape Town and Others; Advanced Parking Solutions CC and Another v City of Cape Town and Others* 2010 (6) BCLR 591 (WCC) at para 57.

review successful, that the result would be of any practical effect. The absence of any substantive inconsistency between the two judgments is supported by the fact that the judgment in *Khumalo* cites references to para 34 of the judgment in *Gqwetha* without any indication of an intention to distinguish what was said there.

[25] So also is Nugent JA's observation at para 34 of *Gqwetha*, that '*Different considerations arise in relation to applications to condone delay in the conduct of litigation - for example to condone the late filing of pleadings or to condone a late appeal - and the test that is applied in those cases is not necessarily transposable to unduly delayed proceedings for review*' difficult to reconcile with the approach propounded by the Supreme Court of Appeal in *Price Waterhouse Coopers Inc and Others v Van Vollenhoven NO and Another* [2010] 2 All SA 256 (SCA), at para 6. There, treating of the determination of the 'interests of justice' in the context of s 9 of PAJA, the appeal court (without reference to the dicta in *Gqwetha*) indiscriminately adopted the following passage from *Van Wyk v Unitas Hospital & Another (Open Democratic Advice Centre as Amicus Curiae)* 2008 (2) SA 472 (CC), at para 20:

> This court has held that the standard for considering an application for condonation is the interests of justice. Whether it is in the interests of justice to grant condonation depends on the facts and circumstances of each case. Factors that are relevant to this enquiry include but are not limited to the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised in the intended appeal and the prospects of success.

Van Wyk concerned an application for the condonation of the late filing of an application for leave to appeal. It was therefore an application of the very sort that Nugent JA sought to distinguish from ones involving the condonation of delay in the context of judicial review applications. The essential import of the passage from para 20 of *Van Wyk*, however, is that a wide range of considerations is relevant. It identifies those that will be pertinent in almost every case, but is in no way prescriptive – either as to what must be taken into account, or the manner in which it should be done.

[26] *Khumalo* was decided before the Constitutional Court became the sole apex court, but the interpretation and application of s 7(1) and s 9 of PAJA, in particular, and the condonation of unreasonable delay in judicial review, in general, are constitutional questions, and therefore, to the extent that there is scope for uncertainty arising out of

the arguably conflicting *dicta* in the judgments of the appeal court, this court is bound to follow *Khumalo*. This means that the merits of the review challenge are indeed, by themselves, an aspect validly to be taken into consideration in deciding whether to condone the unreasonably delayed institution of the application. The extent to which a favourable assessment of the prospects of success will affect the decision whether or not to condone an unreasonable delay will depend on the other features of the case.

[27] This is borne out by the principle that we understand to have been expressed in *Gqwetha* at paras 33-34 that the strength of the prospects of a case in an unreasonably delayed review application has to be weighed in the balance in the peculiar context with the policy considerations that inform the delay rule. The principle enunciated by Nugent JA amounts to a recognition that a good case on the merits cannot, by itself, negate the effect of s 7(1) of the Act and be sufficient cause, without more, to grant condonation in terms of s 9.

[28] A proper assessment of the interests of justice under s 9(2) of PAJA requires a court to be mindful that the incidence of the delay rule, with its implied recognition of the importance for efficient and effective government of the finality and certainty of government decision-making, has been institutionalised by constitutional legislation as part of the principle of legality.[22] The inherent tension to which this will give rise in an apparently good case on the merits in an unreasonably delayed application for judicial review is self-evident. The law in the post constitutional era remains the same as it was when Corbett J gave his judgment in *Harnaker* supra, half a century ago: delay can effectively 'validate' an unlawful administrative decision or government action. Indeed, an unreasonable delayed review challenge will inevitably run up against the validating effect of delay, unless the interests of justice otherwise require.

[29] Actually adjudicating a review on its merits entails a different undertaking from merely considering the merits of a review for the purposes of assessing its prospects of success for another purpose, such as whether to condone delay, or grant interim relief. The former exercise is determinative and thus final, while the latter involves arriving at an essentially provisional conclusion. However, even if the court is inclined to pronounce conclusively on the illegality of an impugned decision, its finding in that

[22] Cf. the remarks of Skweyiya J in analogous circumstances concerning the effect of s 237 of the Constitution in *Khumalo* supra, at para 46.

regard will not, without more, displace the effect of the delay rule on its ability or preparedness to exercise its power of judicial review; cf. the *Oudekraal* decisions.[23]

[30] With the aforementioned principles in mind, we therefore reject the argument advanced to us on the basis of a detailed analysis by counsel for the respondents of the higher courts' jurisprudence on delay from *Associated Institutions Pension Fund v Van Zyl and Others* 2005 (2) SA 302 (SCA), [2004] 4 All SA 133 to *Khumalo* supra, and with special reference to *Van Wyk* supra, at para 22, that absent (i) a full explanation for the delay, (ii) covering the entire period of delay and (iii) the explanation given being reasonable (what counsel called 'the three elements'), condonation could not be granted. We are not persuaded that a proper reading of the judgments through which the respondents' counsel took us[24] sustains the contention. On the contrary, we consider that the judgments confirm that whether it is in the interests of justice to grant condonation depends on the facts and circumstances of each case.[25] This is indeed what we would have expected.

[31] The determinant criteria in any application in terms of s 9(2) of PAJA are the requirements of the interests of justice. The criteria are assessed in the context of an acceptance that there has been an unreasonable delay. The applicant's explanation for the delay is undoubtedly a material consideration, but it seems to us that in principle an enquiry into the requirements of the interests of justice effectively could not occur in some cases if the absence of an explanation for the delay that satisfied each of 'the three elements' were to be treated as an absolute bar to further consideration of the application. Certainly, the delay in *Oudekraal (2)*[26] could not competently have been

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[23] 2004 (6) SA 222 (SCA) and 2010 (1) SA 333 (SCA).

[24] *Associated Institutions Pension Fund v Van Zyl and Others* supra, *Gqwetha v Transkei Development Corporation Ltd* supra; *Van Wyk v Unitas Hospital* supra*; Oudekraal (2)* supra; *Price Waterhouse Coopers Inc and Others v Van Vollenhoven NO and Another* [2010] 2 All SA 256 (SCA); *Camps Bay Ratepayers' and Residents' Association v Harrison* [2010] 2 All SA 519 (SCA); *Camps Bay Ratepayers' and Residents' Association and Another v Harrison and Another* 2011 (4) SA 42 (CC); *Beweging vir Christelik-Volkseie Onderwys v Minister of Education* supra; *OUTA* (SCA) supra and *Khumalo v MEC for Education: KwaZulu-Natal* supra**.**

[25] *Van Wyk v Unitas Hospital* supra, at para 20.

[26] Note 14, above. We are mindful that *Oudekraal* 2 was not a PAJA regulated review because the impugned decision preceded the enactment of that legislation by several decades, but s 7(1) read with s 9 of PAJA does not seem to us to have introduced anything relevant that could be considered new in respect of the courts' application of the delay rule. As we have noted (in para [16]), the only relevant change has been the translation of what used to be a matter of judicial policy into a matter of constitutional law. That might explain why (at para 81) the judgment appeared to hold that the issue of delay and the principle of legality were distinct – a proposition that is no longer tenable in the context

condoned by the courts if the approach contended for by the respondents had been applied.

[32] *Oudekraal (2)* admittedly stands out as an exception from the other recent decisions of the Constitutional Court and the Supreme Court of Appeal in which condonation for delay has been in issue because the judgment gives no indication that any consideration was given to the City's explanation for the delay in that matter whatsoever. The court did, however, observe that in respect of any consideration whether to condone an unreasonable delay '*a court has a broad discretion to be exercised in the light of all relevant facts*'.[27] That is wholly consistent with the iterations of the nature of the enquiry into the condonation of unreasonable delay in some of the other judgments to which the respondents' counsel referred us.[28] The 'relevant facts' will obviously include the extent of the delay, the explanation given for it and its effect in the context of the impugned decision in issue. These fall to be weighed together with all the other relevant facts and considerations to determine what the interests of justice require. The weight to be accorded to each of the aspects of the matter that need to be taken into account will depend on the peculiar character of the case and, as we have noted, is not something amenable to formulaic prescription.

[33] The judgment in *Khumalo* demonstrates that the absence of an acceptable explanation by the applicant for the unreasonable delay, while it is a material consideration to be weighed in the exercise of the court's discretion, is not necessarily determinative, by itself, of whether condonation should be granted; a broader consideration is still necessary.

General background

[34] As the impugned decisions were made separately in terms of two sets of legislation - the ECA and the SANRAL Act - it is convenient to consider them compartmentally, with regard to their respective statutory contexts. We shall also deal with the nature and extent of the City's delay, and its explanation therefor in relation to each compartment. The ECA decisions preceded those made under the SANRAL Act and so they will be addressed first. The factual background to the decisions was

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of PAJA regulated reviews now that the delay rule has been constitutionally incorporated as part of the principle of legality.

[27] *Oudekraal 2* supra, at para 57.

[28] See e.g. *Van Wyk v Unitas Hospital* supra, at para 20.

summarised in the court's judgment in the City's application for interim interdictal relief pending the determination of the current proceedings (*City of Cape Town v South African National Roads Agency Ltd and Others* [2013] ZAWCHC 74 (21 May 2013). It has been convenient for present purposes to draw on the narrative in the earlier judgment.

[35] The decision to declare the affected portions of the N1 and N2 as toll roads had its genesis in an unsolicited proposal submitted to SANRAL in March 1998 by the Protea Parkways Consortium ('PPC') [29] for the design, financing, construction, upgrading and operation of the sections of the roads concerned as toll roads. The ultimate object of the proposal was the conclusion of an agreement with SANRAL of the nature contemplated in s 28 of the SANRAL Act, [30] in terms of which the consortium would operate the tolls on the sections of road it had upgraded or constructed for a period[31] that would enable it to recoup its capital investment and make a profit, whereafter it would transfer the tolling operation as a going concern to SANRAL, with the roads restored to be as good as new when they are handed back. This type of contract is referred to in the business as a 'BOT' contract, the acronym deriving from the expression 'build, operate and transfer'.

The impugned decisions in terms of the Environment Conservation Act

[36] The construction and upgrade measures involved in the consortium's proposal entailed certain activities listed in terms of the ECA as activities that may have 'a substantial detrimental effect on the environment'.[32] The undertaking of such activities was subject to authorisation in terms of s 22 of the ECA. The functionary responsible for determining whether to grant the required authorisation was the Minister of Environmental Affairs, alternatively, his delegate, the so-called 'competent authority' referred to in s 22(1) of the Act.

[37] Consequent upon SANRAL's consideration of the consortium's proposal, an application in terms of s 21 of the ECA (the so-called 'EIA application' [33]) was submitted to the competent authority in May 2000. The competent authority, in the

[29] PPC was cited as the sixth respondent. It did not play an active part in the proceedings.
[30] The text of s 28 of the SANRAL Act is set out in para [231], below.
[31] Thirty years.
[32] Section 21 of the ECA.
[33] 'EIA' is the acronym for 'environmental impact assessment'.

person of a deputy director-general in the Department of Environmental Affairs, issued a 'record of decision', dated 30 September 2003, in terms of the General EIA Regulations,[34] whereby the required authorisation was granted. (This was the decision described in paragraph [17].1, above.)

[38] The record of decision was accompanied by a letter from the competent authority that stated '*Please note that all decisions with regard to the tolling of the road* [are] *the responsibility of the Department of Transport. In terms of the applicable legislation all issues related to the positioning of the toll plazas, other than the biophysical impacts, are also the responsibility of the Department of Transport.*' This is relevant because, in a letter to the Department of Environmental Affairs, dated 21 October 2002, the City had raised a concern about what it regarded as the unlawful circumscription of the ambit of the environmental impact assessment, more particularly, the exclusion of a consideration of the socio-economic impacts of tolling the roads. The Director-General of the Department of Environmental Affairs had replied, in November 2002, explaining that the EIA process would focus on the biophysical impacts associated with the location and positioning of the tollgates including, amongst other things, 'lighting, noise and vibration, air pollution, water pollution, storm water management, destruction of vegetation and red data species…'. The Director-General advised, however, that the 'intention to toll' was 'a separate process' falling under the aegis of the Minister of Transport. He advised that the investigation of 'the socio-economic aspects of tolling, toll structuring and toll fees' fell to be addressed in the intent to toll process.[35] This was consistent with the import of a 'working agreement' entered into between the Department and SANRAL in October 1999, which was referred to in the final environmental impact report ('EIR')[36]

[39] Section 35(3) of the ECA provided for the right of any person aggrieved by a decision by a competent authority in terms of the EIA regulations to appeal to the

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[34] Promulgated in GN R 1183 of 5 September 1997 and amended by GN R 1645 of 11 December 1998 and GN R 672 of 10 May 2002 (corrected by GN R 783 of 7 June 2002). The character of a 'record of decision' was regulated in terms of regulation 10 of the General EIA Regulations.

[35] The '*intent to toll process*' was the expression adopted by all the parties to describe the process provided for in terms of s 27(4) of the SANRAL Act, which is quoted in para [76], below.

[36] The agreement contained a definition of 'roads' that anticipated that which was inserted into the EIA regulations in item 11 of schedule 1 to GN R1182 of 5 September 1997, as amended by GN R 1355 of 17 October 1997, by GN R 670 of 10 May 2002. The provision in the agreement most pertinent for current purposes recorded that '*DEAT will only be concerned with the biophysical impacts associated with toll plaza's* (sic). *The Toll principle is already covered by the* [SANRAL] *Act (Act No 7 of 1998)*'.

Minister of Environmental Affairs. A large number of interested parties, including the City, lodged appeals.

[40] The City's principal complaint in its appeal in terms of s 35 of the ECA was that no or insufficient attention had been given to investigating and considering the socio-economic impacts of the contemplated tolling of the roads. The City maintains that position in the current proceedings. Salient amongst the City's concerns is the adverse impact that tolling might have on the poor and mainly black communities who live in areas from which the arterial roads in question serve as the primary feeder routes into the City and other places of work. Another of its material concerns is the knock-on effects on roads maintained by the City of increased traffic that it anticipates will be caused by drivers seeking to avoid the tolled roads and using alternative routes. The postulated effects include increased demands on the City's budget through greater road maintenance and upgrade requirements, suburban traffic congestion and noise and pollution in affected residential areas. The City submitted that the abovementioned 'working agreement' between the Department and SANRAL had subverted the requirements of NEMA, and should be 'regarded as null and void' because 'no party can contract contrary to the provisions of a statute'. Its appeal document stated five 'concerns and issues' as the basis for the appeal. The first three, and apparently most pertinent, of these were (i) that socio-economic issues and impacts had not been taken into account in the record of decision and conditions of approval, (ii) the impacts of diversionary traffic had not been determined and (iii) '[a]lternative approaches to financing road maintenance and construction' had not been considered.

[41] The Minister (Mr Marthinus van Schalkwyk) announced his decision in respect of the appeals in October 2005. (This was the decision mentioned in paragraph [17].2, above.) He recorded that he had proceeded on the premise that tolling and the 'structuring of toll fees' were matters falling outside the ambit of the EIA regulations and thus beyond his remit. He stated '*Socio-economic considerations associated with tolling are* (sic) *adequately considered in "the intent to toll" process. Any attempt by* [the Department of Environmental Affairs] *to address these issues through the EIA process would constitute unnecessary and unjustified duplication of effort between government departments*'. He also recorded that *'...matters raised in terms of intergovernmental consultation related to tolling and the implications thereof on local and provincial government departments' areas of jurisdiction are also referred to the*

Minister of Transport [for consideration in the toll-road related processes to be conducted in terms of the SANRAL Act]'. The Minister found certain aspects of the record of decision issued by the competent authority to be unsatisfactory. He issued remedial directions and indicated his intention to issue a revised record of decision within 30 days of the receipt of certain documentation to be submitted to him pursuant to his directions.

[42] Further investigations were thereafter carried out and reported upon, which meant that nearly two and a half years went by before the Minister of Environmental Affairs eventually issued a revised record of decision on 28 February 2008.[37] (This was the decision mentioned in paragraph [17].3, above.) The revised decision gave authority to SANRAL under the ECA for the '[c]*onstruction and upgrading of roads and associated infrastructure on certain sections of the National Road (N1) between the R300 and Sandhills, Western Cape and on the National Road 2 (N2) Western Cape, the construction and upgrading of portions of the road, construction of toll plazas between the R300 and Bot Rivier and the construction of the new, closed "cut and cover" tunnel alignment through Helderzicht, extending from west of the Danie Ackerman Primary School up to the Victoria Street interchange…*'.[38]. At para 2.1 of the record of decision, the Minister recorded that he had taken into consideration, amongst other matters, the grounds of appeal which focused on '[i]*n principle opposition to tolling of the N1 and N2 in the Winelands area*' and '[c]*oncerns about the consequences of tolling, in particular diversion of traffic to the R44 road to avoid paying toll fees*'. He reiterated in that regard that matters related to the tolling of the roads and the structuring of toll fees fell outside the ambit of the EIA regulations, and would be addressed by the appropriate authority in terms of the SANRAL Act.

[43] The central object of the EIA application that was the subject of the aforementioned three decisions had been for SANRAL to obtain authorisation to undertake the activity listed in item 1(d) of Schedule 1 to the 'Regulations under Section 21 of the Environment Conservation Act 73 of 1989 – Identification of Activities which may have a substantial detrimental effect on the Environment',[39] viz. '*The construction,*

[37] The February 2008 decision was amended in respects not material for present purposes in April 2008.
[38] Interestingly, the authorisation in respect of the erection of toll plazas appears to have been limited to the N2 on the portion of that national road between the R300 and Bot River.
[39] Promulgated in GN R 1182 of 5 September 1997 and amended by GN R 1355 of 17 October 1997, GN R 448 of 27 March 1998 and GN R 670 of 10 May 2002 (corrected by GN R 782 of 7 June 2002)

erection or upgrading of – roads, railways, airfields and associated structures'. The City has reservations about the need to undertake all the proposed construction and upgrading of the roads at this stage, but it does not appear to be against the upgrading in principle. Its opposition is directed primarily at the concept of financing the road improvements by way of a tolling operation, and, even more so, one in terms of a BOT agreement. Its material concerns are about the social and economic impacts of financing the project by tolling, not about the ecological impact of constructing and upgrading the roads.

[44] Section 2 of NEMA prescribes a set of principles (the National Environmental Management Principles) by which decisions by all organs of state which could have a significant impact on the environment have to be guided. These principles fell to be applied in all of the ECA decisions that the City seeks to impugn in these proceedings. The enactment of the principles is a manifestation of the legislative measures contemplated by s 24(b) of the Constitution.[40] The principles include the enjoinder that all development must be socially, environmentally and economically sustainable. Section 2(4)(i) of NEMA [41] states that determining whether any development is sustainable requires the decision-maker to consider, assess and evaluate the social, economic and environmental impacts of activities, including disadvantages and benefits, and to make decisions that are appropriate in the light of the indicated

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[40] See the preamble to NEMA.

[41] Section 2(4)(a) provides:

Sustainable development requires the consideration of all relevant factors including the following:

(i) *That the disturbance of ecosystems and loss of biological diversity are avoided, or, where they cannot be altogether avoided, are minimised and remedied;*

(ii) *that pollution and degradation of the environment are avoided, or, where they cannot be altogether avoided, are minimised and remedied;*

(iii) *that the disturbance of landscapes and sites that constitute the nation's cultural heritage is avoided, or where it cannot be altogether avoided, is minimised and remedied;*

(iv) *that waste is avoided, or where it cannot be altogether avoided, minimised and re-used or recycled where possible and otherwise disposed of in a responsible manner;*

(v) *that the use and exploitation of non-renewable natural resources is responsible and equitable, and takes into account the consequences of the depletion of the resource;*

(vi) *that the development, use and exploitation of renewable resources and the ecosystems of which they are part do not exceed the level beyond which their integrity is jeopardised;*

(vii) *that a risk-averse and cautious approach is applied, which takes into account the limits of current knowledge about the consequences of decisions and actions; and*

(viii) *that negative impacts on the environment and on people's environmental rights be anticipated and prevented, and where they cannot be altogether prevented, are minimised and remedied.*

Cf. also *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, and Others* 2007 (6) SA 4 (CC) at para 61.

assessment and evaluation. The object of the requirement is to promote the achievement of 'sustainable development'; as defined in s 1(1)(xxix) of NEMA.[42] (Consider in this regard the remarks at para 113 of the minority judgment in *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, and Others* 2007 (6) SA 4 (CC)[43] - which we do not read as inconsonant in principle with anything said in the majority judgment.)

[45] Socio-economic considerations were reported on and apparently taken into account in the EIA decision-making process,[44] but this did not extend to the socio-economic impact of tolling the roads. The City contends that the environmental decision-makers therefore misconceived the nature of the responsibilities imposed upon them, did not apply their minds to relevant considerations, failed to comply with their statutory obligations and decided the EIA application influenced by a material error of law. The soundness of the contentions depends on the ambit of the exercise that the relevant functionaries were required to undertake in terms of the ECA and related regulations, which is to be determined upon a proper construction of the applicable provisions.

[46] There is no doubting that the tolling of the major land route portals of the country's second largest conurbation may very conceivably have significant socio-economic impacts. Whether the socio-economic impacts of *tolling* the roads fall to be

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[42] *"[S]**ustainable development**" means the integration of social, economic and environmental factors into planning, implementation and decision-making so as to ensure that development serves present and future generations*.

[43] '*Running right through the preamble and guiding principles of NEMA is the overarching theme of environmental protection and its relation to social and economic development. This theme is repeated again and again. Economic sustainability is not treated as an independent factor to be evaluated as a discrete element in its own terms. Its significance for NEMA lies in the extent to which it is inter-related with environmental protection. Sustainable development presupposes accommodation, reconciliation and (in some instances) integration between economic development, social development and environmental protection. It does not envisage social, economic and environmental sustainability as proceeding along three separate tracks, each of which has to be weighed separately and then somehow all brought together in a global analysis. The essence of sustainable development is balanced integration of socio-economic development and environmental priorities and norms. Economic sustainability is thus not part of a check-list that has to be ticked off as a separate item in the sustainable development enquiry. Rather, it is an element that takes on significance to the extent that it implicates the environment. When economic development potentially threatens the environment it becomes relevant to NEMA. Only then does it become a material ingredient to be put in the scales of a NEMA evaluation*'. (Our underlining for emphasis.)

[44] The most obvious confirmation that some socio-economic considerations were taken into account in the environmental authorisation decision-making is to be found in the ameliorating provisions made in respect of the impact on the Helderzicht community in Somerset West.

investigated in terms of the ECA, as distinct from only the narrower considerations attendant upon the activities of *constructing or upgrading* them, falls to be decided upon the proper construction of item 1(d) of Schedule 1 to the 'Regulations under Section 21 of the Environment Conservation Act 73 of 1989 – Identification of Activities which may have a substantial detrimental effect on the Environment'.[45]

[47] By the time the initial record of decision was issued by the competent authority, a definition of the word '*road*' had been inserted into the regulations by way of item 11 of Schedule 1 thereto. It provided:

> 'In these Regulations, unless the context indicates otherwise –
>
> '**road**' means –
>
> (a) Any road determined to be a national road in terms of section 40 of the South African National Roads Agency Limited and National Roads Act, 1998, (Act No. 7 of 1998), including any part of such road;
>
> (b) Any road for which a fee is charged for the use thereof;
>
> (c) Any provincial road administered by a provincial authority;
>
> (d) Any arterial road or major collector street administered by a metropolitan or local authority;
>
> (e) Any road or track in an area protected by legislation for the conservation of biological diversity or archaeological, architectural or cultural sites or an area that has been zoned open space or an equivalent zoning; or
>
> (f) Any road or track in an area regarded by the relevant authority as a sensitive area.

[48] The first and third respondents contend that the listed activity that the Department of Environmental Affairs was called upon to consider was the construction or upgrading of the roads, not the tolling of them. It is their contention that the effect of paragraph (b) of the definition of 'road' in the EIA regulations is merely to identify the roads in question as ones that can be constructed or upgraded only after authorisation in terms of the ECA has been obtained. They emphasise that tolling is not a listed activity. Inherent in the City's argument, on the other hand, is that the contemplated use of the road to be constructed or upgraded has to be an integral part of any environmental impact assessment and that in the current case that includes the tolling of the roads.

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[45] Quoted in para [43], above.

[49] A proper approach to statutory interpretation entails determining the meaning of the words of a statute having appropriate regard to their tenor within the apparent scope and objects of the instrument.[46] The respondents' contentions have a literal emphasis, whereas those of the City are sought to be grounded on a purposive approach. A proper contextual analysis should give an answer that reconciles the literal and purposive approaches; cf. *Jaga v Dönges NO and Another; Bhana v Dönges NO and Another* 1950 (4) SA 653 (A) at 662-664 (per Schreiner JA). This will be so, however, only if the apparent purpose of the legislation has been correctly identified; something that also entails contextual analysis.

[50] One can readily appreciate why the construction or upgrading of the types of road identified in paragraphs (a) and (c) to (f) of the definition quoted above[47] should have been listed as having the potential to have a substantial detrimental effect on the environment. National, provincial and arterial roads or major collector streets are all roads which by their characterisation or nature are likely to carry relatively high volumes of traffic and be of comparatively larger spatial dimensions. They are likely to have a greater impact than lesser roads on the land on which they are constructed and its environs. It also does not require much imagination to understand that the construction of roads in protected environments or 'sensitive areas' might have a substantial detrimental effect in the sense contemplated in Part V of the ECA. It is not so clear, however, why the construction or upgrading of a road for the use of which a fee is to be charged should be included as a separate category. It may be that the potentially diversionary effect on road traffic that charging a fee might bring about was the reason for the category provided in para (b) of the definition. The roads currently in issue qualify under one or more of the other categories of road identified in the definition in any event. Indeed, it is only roads that are national roads that may be tolled in terms of the SANRAL Act.

[51] If regard is had to the NEMA integrated environmental management principles, the intended use of a road the construction or upgrading of which has made it the subject of an EIA application seems to be an obvious matter for consideration. The question is to what end? In the context of the intended construction of a toll road, the extent and

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[46] Cf. *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA); [2012] 2 All SA 262 at para 18-19.
[47] In para [47].

effects of the consequent diversion of traffic to other routes by reason of affordability constraints would seem to be a manifestly relevant consideration in the indicated investigation. Notionally, however, tolling could be introduced on existing roads without upgrading them.[48] In such a case, notwithstanding that the foreseeable knock-on consequences might be the same as in the case of a road that required construction or upgrading for the purpose, the matter would not fall within the ambit of the ECA. This consideration lends support to the argument that the listed activity concerns the action of construction or upgrading the road and that the consequent physical use to which the road would be put would be a relevant consideration, but not the non-physical act of raising a fee for its use; for otherwise, the provision has to be seen to potentially give rise to anomalous results at odds with the apparent objects of the legislation. If charging a fee for the use of a road were considered an activity that might have a significantly adverse environmental impact, one would have expected that to have been listed as an activity in itself because it can occur quite independently of construction or upgrade activities.

[52] More significantly, the narrower interpretation contended for by the respondents would also be consistent with the effect of the definition of '*environment*' in NEMA, [49] which, conformably with the wording of s 24(a) of the Constitution, focuses on the concern of the use of the environment with regard to the effect thereof on 'human health and well-being'; in other words on physical well-being, rather than economic well-being. It is s 24 of the Constitution that this court must have in mind when considering the proper construction of the legislation in accordance with the enjoinder in s 39(2) of the Constitution. In that context, the investigation of the socio-economic activities of

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[48] The City's counsel argued that this could not happen because erecting gantries to read the cars' registration numbers in an open road tolling system would require EIA approval because the gantries would be 'associated structures' within the meaning of the listed activity. We do not purport to decide the point, but it is not clear to us that this is necessarily so. Unlike a toll plaza, a gantry is not an integral part of the road works. Inasmuch it is arguable whether a roadside advertising billboard is an 'associated structure', so too is the proper characterisation of a metering gadget next to the road as an 'associated structure' uncertain. Neither of them is inherently associated with the construction or layout of the road, or its use.

[49] In terms of s 1 of NEMA 'environment' is defined as follows:

*'**environment**' means the surroundings within which humans exist and that are made up of-*

(i) the land, water and atmosphere of the earth;

(ii) micro-organisms, plant and animal life;

(iii) any part or combination of (i) and (ii) and the interrelationships among and between them; and

(iv) the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and well-being.

the activity required in terms of the NEMA principles would be one directed at weighing any adverse biophysical impacts (matters that would tend to be inimical to human health and well-being) against the socio-economic benefits with a view to realising the fundamental constitutional right that everyone has to have the environment protected in ways that '*secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development*'.[50] That incidence of the operation of the principles was manifested, for example, on the facts in *Fuel Retailers* supra, in which the relevant environmental concern required a weighing by the environmental decision-maker of the commercial viability of the construction of an additional filling station in an area already well served by such amenities in circumstances in which the operation and decommissioning of such facilities had negative ecological implications because of the potential threats that would be occasioned thereby to an environmentally significant aquifer. The socio-economic factors related to the contemplated opening of an additional filling station fell to be considered in order to determine whether risking the associated additional potentially adverse biophysical impacts was justifiable in the sense of s 24(b)(iii) of the Constitution. A weighing of the commercial viability of an additional filling station in the context of the cumulative impact on the environment of an increased number of filling stations was entailed in determining whether the proposed development would qualify as sustainable development within the meaning of NEMA.

[53] A further consideration arises in the context of s 24 of NEMA as it read at the relevant time.[51] It is plain that the Department of Environmental Affairs was

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[50] Section 24(b)(iii) of the Constitution; underlining provided for emphasis.

[51] Section 24 of NEMA provided as follows in relevant part before its substitution with effect from 7 January 2005 in terms of the National Environmental Management Amendment Act 8 of 2004:

Implementation

(1) In order to give effect to the general objectives of integrated environmental management laid down in this Chapter, the potential impact on-

(a) the environment;

(b) socio-economic conditions; and

(c) the cultural heritage,

of activities that require authorisation or permission by law and which may significantly affect the environment,* ***must be considered, investigated and assessed prior to their implementation and reported to the organ of state charged by law with authorising, permitting, or otherwise allowing the implementation of an activity****.*

(2) The Minister may with the concurrence of the MEC, and every MEC may with the concurrence of the Minister, in the prescribed manner-

(a) identify activities which may not be commenced without prior authorisation from the Minister or MEC;

responsible for authorising the construction or upgrading of the roads, but equally clear, we think, that the Department of Transport was responsible for authorising their tolling. Section 24 of NEMA, as it read at the relevant time, provided that the prescribed investigation for environmental authorisation purposes had to include the potential impact on socio-economic conditions of the listed activity; in this case of the construction and upgrading of the roads. It also provided in subsection (1) for the investigation of any activity - even if had not been listed – that required authorisation

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(b) identify geographical areas in which specified activities may not be commenced without prior authorisation from the Minister or MEC and specify such activities;
(c) …;
(d) ..; and
(e) ...:
Provided that where authorisation for an activity falls under the jurisdiction of another Minister, a decision in respect of paragraph (a) or (b) must be taken in consultation with such other Minister.
(3) (a) The investigation, assessment and communication of the potential impact of activities contemplated in subsection (1) must take place in accordance with procedures complying with subsection (7).
(b) Every Minister and MEC responsible for an organ of state that is charged by law with authorising, permitting, or otherwise allowing an activity contemplated in subsection (1) may prescribe regulations laying down the procedures to be followed and the report to be prepared for the purpose of compliance with paragraph (a).
(c) Any regulations made in terms of this subsection or any other law that contemplates the assessment of the potential environmental impact of activities must, notwithstanding any other law, comply with subsection (7).
(d) ….
(4) ….
(5) ….
(6) …).
(7) Procedures for the investigation, assessment and communication of the potential impact of activities must, as a minimum, ensure the following:
(a) Investigation of the environment likely to be significantly affected by the proposed activity and alternatives thereto;
(b) investigation of the potential impact, including cumulative effects, of the activity and its alternatives on the environment, socio-economic conditions and cultural heritage, and assessment of the significance of that potential impact;
(c) investigation of mitigation measures to keep adverse impacts to a minimum, as well as the option of not implementing the activity;
(d) public information and participation, independent review and conflict resolution in all phases of the investigation and assessment of impacts;
(e) …;
(f) …;
(g) co-ordination and co-operation between organs of state in the consideration of assessments where an activity falls under the jurisdiction of more than one organ of state;
(h) that the findings and recommendations flowing from such investigation, and the general objectives of integrated environmental management laid down in this Act and the principles of environmental management set out in section 2 are taken into account in any decision made by an organ of state in relation to the proposed policy, programme, plan or project; and
(i) ….
(Underlining and bold type used for highlighting.)
* *"**activities**"* was defined as follows prior to the amendment effected in terms of Act 56 of 2002:
*'**activities**' when used in Chapter 5 means policies, programmes, plans and projects*

by law if it might significantly affect the environment. Accepting, as we do, that the tolling of the roads, even though it is not an activity listed under the ECA, may have a significant impact on the environment, the responsibility for considering the socio-economic consequences thereof appears, in terms of s 24(1) of NEMA, as it read when the environmental authorisation in terms of the ECA was granted, to have been the responsibility of SANRAL and the Department of Transport. Section 2(1)(a) of NEMA supports the notion that that remains the case, notwithstanding the subsequent substitution of s 24.[52]

[54] The City's counsel contended that the EIA process involves an assessment of different factors to those which require to be considered in the 'intent to toll process' under s 27 of the SANRAL Act. That contention seems to hold up only insofar as the assessment of bio-physical or ecological impacts that is central to any assessment under the former process will not ordinarily be the focus under the latter process. But insofar as the City's concern is not about the environmental impact of the construction and upgrading of the roads, but rather the failure of the decision-makers to properly consider the financial and social viability of funding the construction and upgrading by means of tolling, it seems to us something more appropriately addressed in the intent to toll process. This is especially so if, as we shall discuss presently, the decision to toll the roads has to be made consistently with government policy to use tolling as a road building and maintenance funding mechanism if it is financially and socially appropriate in the circumstances.[53] A purposive construction of the relevant legislation in a wider contextual evaluation than that employed for the purposes of the City's argument would support understanding the legislative framework in a way that would avoid the duplication of work by government departments. That, indeed, is an object

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[52] See s 2(1)(a) of NEMA, which provides:
'*The principles set out in this section apply throughout the Republic to the actions of all organs of state that may significantly affect the environment and-*
(a) shall apply alongside all other appropriate and relevant considerations, including the State's responsibility to respect, protect, promote and fulfil the social and economic rights in Chapter 2 of the Constitution and in particular the basic needs of categories of persons disadvantaged by unfair discrimination'.

[53] We have not overlooked that the EIA regulations (although not the special definition therein of '*road*') predate the SANRAL Act. The legislative framework applicable when the EIA regulations were made was not, however, materially different from the current regime. Section 9 of the then applicable National Roads Act 54 of 1971 was equivalent in material respects to s 27 of the SANRAL Act. It provided for a broadly equivalent 'intent to toll' process.

which NEMA itself expressly acknowledges; cf. the long title to the Act[54] and Chapter 3 thereof, entitled '*Procedures for Co-Operative Governance*'. The Department of Transport is listed in Schedule 1 to the Act as one of the national departments 'exercising functions which may affect the environment'.

[55] It is in any event difficult to conceive how the Department of Environmental Affairs could meaningfully have undertaken an assessment of the socio-economic impact of the tolls to be imposed when it had no means of assessing what those were likely to be. This was not only because a contract for the design, construction operation and maintenance of the roads had not yet been negotiated. It was also because the roads had not yet been declared as toll roads (which could happen only after a separately provided for public participation process under s 27(4) of the SANRAL Act had occurred) and the Minister of Transport, under whose aegis SANRAL's activities, in general, and the determination of toll fees, in particular, fell, had no meaningful idea, at the time the EIA process was undertaken, of the financing arrangements within which the determination of the tolls would have to be made.

[56] It seems to us that in matters of this nature (the relevant considerations in *Fuel Retailers* afford another example) in which the intended activity or development of a nature that may significantly affect the environment involves authorisation being obtained from more than one government authority, proper use should be made of the principles of integrated environmental management provided in terms of chapter 5 of NEMA. In such a situation the relevant authorities should instigate a process, through mutual co-operation as contemplated in terms of s 24(4)(a) of NEMA, to achieve co-ordinated (or 'integrated') decision-making. [55] The abovementioned working agreement between the Department of Environmental Affairs and SANRAL appears to have been inspired by these principles, even if it was not implemented in a manner that would actually achieve the object of integrated environmental management.

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[54] '*ACT To provide for co-operative environmental governance by establishing principles for decision-making on matters affecting the environment, institutions that will promote cooperative governance and procedures for co-ordinating environmental functions exercised by organs of state; to provide for certain aspects of the administration and enforcement of other environmental management laws; and to provide for matters connected therewith.*'

[55] The original iteration of s 24 of NEMA (prior to the substitution of the provision in terms of Act 8 of 2004; see note 51, above) contained similar enjoinders in respect of co-operative and co-ordinated decision making between different departments of government. The Department of Transport's commitment to integrated environmental management was recorded in the White Paper on National Transport Policy (20 August 1996), sv. '*Policy Goal and Objectives: To achieve the above objectives in a manner which is economically and environmentally sustainable and minimises side effects*'.

[57] In our judgment, the amendment to the regulations that introduced the definition of 'road' was directed not at altering the import of the originally listed activity, but rather at limiting the types of road the construction or upgrading of which required environmental authorisation to those listed in the definition. The definition of 'road' in the regulations does not define the listed activity. It merely narrows the ordinary import of the word by rendering the term applicable only to the given categories or types of road.

[58] For these reasons, we are inclined to prefer the interpretation contended for by the respondents. Upholding that interpretation would be fatal to the City's application for the review and setting aside of the environmental authorisation. But even if we are wrong in our interpretation of the EIA regulations, there are other features of the matter, to which we shall now turn, which weigh against holding that the interests of justice require the condonation of the City's unreasonable delay in applying for a judicial review of the environmental decisions.

[59] The grounds upon which the City seeks to impugn the environmental authorisation decisions on review are pre-eminently ones that could have been pursued by it in terms of s 36 of the ECA when the first of three decisions in issue was made known at the end of September 2003. Section 36 of the ECA provides:

> **Review by court**
> (1) Notwithstanding the provisions of section 35, any person whose interests are affected by a decision of an administrative body[56] under this Act, may within 30 days after having become aware of such decision, request such body in writing to furnish reasons for the decision within 30 days after receiving the request.
> (2) Within 30 days after having been furnished with reasons in terms of subsection (1), or after the expiration of the period within which reasons had to be so furnished by the administrative body, the person in question may apply to a division of the Supreme Court having jurisdiction, to review the decision.

[60] The essential nature of the dispute that the City had with the Department of Environmental Affairs was whether the latter was required to consider the socio-economic effects of tolling. As we have described, the nub of the argument was whether the socio-economic impacts of tolling, as distinct from the bio-physical

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[56] In s 1 of the Act, '*administrative body*' is defined as meaning '*a Minister, competent authority, local authority, government institution or a person who makes a decision in terms of the provisions of this Act*'.

impacts of constructing and upgrading the roads, were matters to be dealt with in the context of an environmental authorisation in terms of the ECA, or something to be considered within the ambit of the powers to declare roads as toll roads and fix tolls under the SANRAL Act. The issue involved was purely legal in character and, as such, plainly more suitable to determination by means of judicial review than administrative appeal; particularly when the City had no reason to believe that the Minister of Environmental Affairs would hold an opinion different from that already articulated by his department as to the ambit of the legislation.

[61] Two things follow clearly from s 36 of the ECA. Firstly, that a person aggrieved about a record of decision on grounds that would support an application for judicial review of the decision is not obliged first to exhaust the internal remedy of an appeal in terms of s 35(3) of the ECA; cf. *Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism And Another* 2005 (3) SA 156 (C) at paras 32 and 38-41. Secondly, the 30 day time limits provided in terms of sub-sections (1) and (2) highlight the promptitude the legislature considered it appropriate to require of persons seeking to institute judicial review proceedings in respect of decisions made under the ECA. Section 36(2) specially defines the relevant time within which review proceedings in respect of ECA decisions must be instituted in a stricter and narrower sense than the more general provisions of s 7(1) of PAJA.

[62] The comparatively short period provided in terms of s 36 of the ECA appears to have been prescribed recognising that it is not in the interest of the administration of the legislation, which imposes fetters on land use and development involving any of the listed activities, to allow for undue further delay beyond that already imposed by the processes required under the Act. It is readily conceivable that such delay would be inimical to economic development and upliftment, and costly, not only to the parties immediately involved, but society in general. That, no doubt, is why an alternative judicial review remedy was expressly provided to be used in appropriate cases instead of the appeal remedy in terms of s 35 of the Act. It is therefore relevant that in the peculiar context of the City's principal complaint and the knowledge that it had of an inter-departmental understanding between the Departments of Environmental Affairs and of Transport, in terms of which matters that the City contended fell within the statutory remit of the former had been 'abdicated' (to use the term employed by the

City) to the latter, judicial review was the more appropriate remedy in the circumstances than appeal.

[63] The fact that the scheme of ss 35 and 36 of the ECA permitted a choice of remedy[57] does not afford any justification for taking the more time consuming and cumbersome route when the shorter and more direct route would be more appropriate; *a fortiori*, when the aggrieved party is an organ of state. The City's failure to have taken the more appropriate route at a much earlier opportunity has undoubtedly contributed to the delay in resolving the critical issue and is a factor to be weighed adversely to it in deciding whether to grant condonation for the institution of the current proceedings only ten years later.

[64] SANRAL and the Minister of Environmental Affairs did not take the point that the City should have availed of s 36 of the ECA, but it is an objectively discernible factor to which the court is entitled to have regard *mero motu* when considering the nature and extent of the delay. It must follow that if a court is entitled to raise delay of its own accord,[58] it can also raise questions pertinent to delay that are apparent on the record, even if the parties have overlooked, or failed to address them. The City's counsel did not contend otherwise.

[65] They did argue, however, that a resort by the City to judicial review in terms of s 36 of the ECA, instead of pursuing the appeal procedure in terms of s 35 of the Act, would have been to have acted inconsistently with the obligation, in terms of s 41(1) of the Constitution, on all spheres of government and all organs of state within each sphere to co-operate with one another in mutual trust and good faith by avoiding legal proceedings against one another. There is no merit in that submission. The dispute resolution processes provided in terms of the legislation contemplated by s 41(2) of the Constitution had not yet been created at that stage. The City had repeatedly stated its concerns to the Department of Environmental Affairs about the legality of an EIA process that did not take into account the socio-economic impact of tolling. In the circumstances the City should have recognised that, if it availed of the more appropriate and expeditious remedy in terms of s 36 of the ECA, any suggestion by the Department of Environmental Affairs that it had not done enough in a spirit of mutual trust and good

[57] Cf. *MEC for Agriculture, Conservation, Environment and Land Affairs v Sasol Oil (Pty) Ltd and Another* 2006 (5) SA 483 (SCA), at para 26.
[58] See note 16 above.

faith to avoid litigation would be rejected as baseless; cf. *City of Cape Town v Premier, Western Cape and Others* 2008 (6) SA 345 (C), at paras 15-24.

[66] From 2005, the provisions of the Intergovernmental Relations Framework Act 13 of 2005 were available. Having failed to avail of the judicial remedy within the time limits in s 36 of the ECA, the City was again remiss in failing to use the statutory dispute mechanism introduced by Act 13 of 2005 after its appeal under the ECA had been effectively dismissed in terms of the 2005 decision. It should have appreciated that the matters reserved by the Minister of Environmental Affairs for later determination did not bear on its grounds of objection to the environmental authorisation. It also did not matter that the time limit provided in terms of s 7(1) of PAJA arguably would commence to run only after the Minister issued the revised record of decision, which, as it happened, was two and a half years later. It is in the public interest that material disputes or disagreements between organs of state in matters of this nature are determined expeditiously. The City's failure to take effective steps towards obtaining resolution of the dispute expeditiously after the 2005 decision was just a further indication of the inexcusable lassitude, certainly between 2005 and 2011, that characterised its manner of dealing with its dissatisfaction with the series of tolling-directed decisions. It is not in the interests of justice for courts to encourage this sort of remissness by too readily condoning unreasonable delay in the institution of judicial review proceedings.

[67] We accept that in the peculiar factual context of the current matter, the lengthy period of three years between the date of the record of decision at first instance and the essential determination of the appeal, which was followed by a further period of over two years before a revised record of decision was issued by the appellate functionary, detracts somewhat from the application of the principle of promptitude inherent in s 36. The City's ability to derive favourable consideration from this has, however, been undermined by its further inordinate delay after the 2008 decision.

[68] A further factor that has weighed with us in our consideration of the City's application for the condonation of its delay in seeking to have the environmental authorisation decisions judicially reviewed is the indications that the City - notwithstanding its protestations about the failure of the environmental authorities to investigate the impacts of the tolling of the roads - acquiesced in the idea that the relevant socio-economic impacts would be considered in the intent to toll process.

Thus, in a letter from the City's Directorate: Transport, Roads and Stormwater to SANRAL, dated 17 March 2007, it was stated that

> The City remains of the view that the implications of diversionary traffic have not been fully assessed in the environmental impact assessment and that further study and negotiation are required prior to any declaration of "intent to toll" portions of the N1 and N2. It is therefore requested that the relevant road authorities within the metropolitan area commence negotiations to seek agreement on the impact of diversionary traffic and mechanisms to address any associated costs thereof.
>
> Your favourable response to the above request would be appreciated.

The City alleges that SANRAL did not reply to the letter, but there was subsequent correspondence in the same vein. So, on 30 May 2008, three months after the s 35 appeal process under the ECA had run its course and three years after the appeals had effectively been dismissed in 2005, the City's Executive Director: Transport, Roads and Stormwater wrote to SANRAL, in respect of the proposal to declare the roads as toll roads that had been advertised in terms of s 27 of the SANRAL Act, asserting, amongst other matters, that –

> The City does not support this proposal to declare the abovementioned portion of N1 and N2 toll roads as it does not align with the City's Integrated Development Plan – 2007 to 2011 or its policy on the provision of road tolls.
>
> Furthermore, the City requests that the Road Agency consider the socio-economic impacts of the tolling since they were not considered by the Department of Environmental Affairs and the Tourism (DEAT).
>
> If the Road Agency was to subsequently approve this proposal and either ignores or overlooks the socio-economic impact outcome, then the City's reserves it right to implement a legal challenge to either or both the Road Agency and DEAT processes.

[69] The correspondence shows that the City was cognisant of its right to challenge the environmental decisions, but chose to refrain from doing so pending the outcome of the applicable processes under the SANRAL Act. It thereby signalled its acceptance that its concerns could be addressed in the intent to toll process.

[70] The City has not given a satisfactory explanation for the delay in challenging the decisions made under the ECA. This much was properly conceded by its counsel during oral argument. We shall deal more fully, below, in the context of our consideration of the City's challenge to the tolling decisions, with the factual history of the delay from 2008 to the institution of review proceedings. Suffice it to say that, insofar as the environmental decisions are concerned, the explanation for the failure to

institute a review challenge before 2012 amounted to little more (apart from an interval related to a dispute resolution process under the Intergovernmental Relations Framework Act 13 of 2005) than that the City had harboured a hope during that period that SANRAL would not proceed with the toll project.

[71] As it appears that the City acknowledges and supports the need to upgrade the roads and takes issue not on any ecological impact of the undertaking, but rather essentially with the proposed means of funding the work by means of the tolling option, the interests of justice do not require that its unreasonable delay in seeking to challenge the environmental decisions should be condoned. The City's concerns go more to issues of economics and differences about government policy and the failure of the transport decision-makers to have proper regard thereto than to the protection of the environment.

[72] Not entertaining the challenge to the environmental decisions will not, of itself, prevent the court's consideration of the legality of the tolling issue, which is the City's principal concern and which, on the City's case, is the issue that potentially will have significant impact if condonation is not granted. Whether the challenges to the impugned tolling decisions under the SANRAL Act should be entertained in the face of the delay attendant on those challenges lends itself to a separate enquiry.

[73] There is a dispute as to whether the environmental authorisation, which was time-limited, is still effective. That cannot be determined on the papers. If the City is correct, and SANRAL has in fact not physically commenced with the authorised listed activities, then the authorisation has in any event lapsed. On the other hand, if it has not lapsed, which is the respondents' contention, premised on factual allegations which we must accept for current purposes, the prejudice in requiring SANRAL to go back to where it was in 2000 and recommence the process (which would surely be required because of the passage of time[59]) is so significant that it is not justifiable on the evidence to require the Agency to submit to it in the face of the City's inordinate delay. A related consideration is that the environmental authorisations, if they are still effective, could be used for the construction and upgrading of the roads without tolling. This detracts

[59] Cf *Sea Front For All and Another v MEC, Environment and Development Planning Western Cape and Others* 2011 (3) SA 55 (WCC), at para 65-76.

from the argument that the environmental and tolling decisions are inextricably interlinked.

[74] In the circumstances, and having regard to the principles concerning the operation of the delay rule reviewed earlier, we have not been persuaded the interests of justice require us to extend the period within the City might be permitted to institute a challenge to the environmental authorisations for the construction and upgrading of the roads to the date upon which it commenced the current proceedings. This court is thus unable to entertain the application for relief in terms of paragraphs 1.1 -1.3 of the notice of motion.[60]

The impugned decisions in terms of the SANRAL Act

[75] Turning now to consider the relief sought by the City in respect of the tolling decisions described in paragraphs [17].4 and [17].5, above.

[76] The statutory basis for both impugned decisions lies in s 27 of the SANRAL Act, which currently provides as follows in relevant part:

> **27 Levying of toll by Agency**
>
> (1) Subject to the provisions of this section, the Agency-
>
> (a) with the Minister's approval-
>
> (i) may declare any specified national road or any specified portion thereof, including any bridge or tunnel on a national road, to be a toll road for the purposes of this Act; and
>
> (ii) may amend or withdraw any declaration so made;
>
> (b) for the driving or use of any vehicle on a toll road, may levy and collect a toll the amount of which has been determined and made known in terms of subsection (3), which will be payable at a toll plaza by the person so driving or using the vehicle, or at any other place subject to the conditions that the Agency may determine and so make known;
>
> (c) may grant exemption from the payment of toll on a particular toll road-
>
> (i) in respect of all vehicles of a category determined by the Agency and specified in a notice ….;
>
> (ii) to all users of the road of a category determined by the Agency and specified in such a notice….;
>
> (d) …;
>
> (e) …;
>
> (f) ….

[60] The relief described in para [17].1-3, above.

(2) A declaration, amendment, withdrawal, exemption, restriction or suspension under subsection (1), will become effective only 14 days after a notice to that effect by the Agency has been published in the Gazette.

(3) The amount of toll that may be levied under subsection (1), any rebate thereon and any increase or reduction thereof-

(a) is determined by the Minister on the recommendation of the Agency;

(b) may differ in respect of-

(i) different toll roads;

(ii) different vehicles or different categories of vehicles driven or used on a toll road;

(iii) different times at which any vehicle or any vehicle of a particular category is driven or used on a toll road;

(iv) different categories of road users, irrespective of the vehicles driven or used by them;

(v) the means by which the passage of a vehicle beneath or through a toll plaza is identified and the liability to pay toll is recorded; and

[*Sub-para. (v) added by s. 3 (a) of Act 3 of 2013 and not in effect when the impugned decisions were made.*]

(vi) the means of payment, including pre-payment of toll liability;

[*Sub-para. (vi) added by s. 3 (a) of Act 3 of 2013 and not in effect when the impugned decisions were made.*]

(c) must be made known by the head of the Department by notice in the Gazette;

(d) will be payable from a date and time determined by the Minister on the recommendation of the Agency, and must be specified in that notice. However, that date may not be earlier than 14 days after the date on which that notice was published in the Gazette.

(4) The Minister will not give approval for the declaration of a toll road under subsection (1) (a), unless-

(a) the Agency, in the prescribed manner, has given notice, generally, of the proposed declaration, and in the notice-

(i) has given an indication of the approximate position of the toll plaza contemplated for the proposed toll road;

(ii) has invited interested persons to comment and make representations on the proposed declaration and the position of the toll plaza, and has directed them to furnish their written comments and representations to the Agency not later than the date mentioned in the notice. However, a period of at least 30 days must be allowed for that purpose;

(b) the Agency in writing-

(i) has requested the Premier in whose province the road proposed as a toll road is situated, to comment on the proposed declaration and any other matter with regard to the toll road (and particularly, as to the position of the toll plaza) within a specified period (which may not be shorter than 60 days); and

(ii) has given every municipality in whose area of jurisdiction that road is situated the same opportunity to so comment;

(c) the Agency, in applying for the Minister's approval for the declaration, has forwarded its proposals in that regard to the Minister together with a report on the comments and representations that have been received (if any). In that report the Agency must indicate the extent to which any of the matters raised in those comments and representations have been accommodated in those proposals; and

(d) the Minister is satisfied that the Agency has considered those comments and representations.

Where the Agency has failed to comply with paragraph (a), (b) or (c), or if the Minister is not satisfied as required by paragraph (d), the Minister must refer the Agency's application and proposals back to it and order its proper compliance with the relevant paragraph or (as the case may be) its proper consideration of the comments and representations, before the application and the Agency's proposals will be considered for approval.

[77] The provisions of s 27(4) have been amended and supplemented in terms of s 3(b) and (c) of the Transport Laws and Related Matters Amendment Act 3 of 2013. The Amendment Act came into operation generally on 9 October 2013, but the provisions of s 3(b) and (c) will only come into effect on a date yet to be announced. The pertinent amending provisions read as follows in relevant part:

Section 27 of The South African National Roads Agency Limited and National Roads Act, 1998, is hereby amended –

(a) …

(b) by the insertion in subsection (4) of the following paragraphs after paragraph *(b):*

"*(b*A*)* the Agency, in co-operation with the municipality contemplated in subsection (4)*(b)*(ii) and the province in which the proposed toll road is situated, has performed a socio-economic and traffic impact assessment pertaining to the proposed toll road which must be submitted to the Minister and made available to the province and every municipality contemplated in subsection (4)*(b)*;

*(b*B*)* a notice of the publication of the report contemplated in paragraph *(b*A*)* is published in the *Gazette*, indicating the availability of such report;"; and

(c) by the substitution in subsection (4) for paragraph *(c)* of the following paragraph;

> "*(c)* the Agency, in applying for the Minister's approval for the declaration, has forwarded its proposals in that regard to the Minister together with a report on the comments and representations that have been received (if any). In that report the Agency must indicate –
>
> (i) the outcome of the assessment contemplated in paragraph *(b*A*);*
>
> (ii) the extent to which any of the matters raised in those comments and representations have been accommodated; and
>
> (iii) the steps proposed to mitigate against the impact or likely impact on alternative roads with regard to maintenance and traffic management that may result from the declaration contemplated in subsection (1); and".

[78] The powers invested in SANRAL in terms of s 27 of the SANRAL Act are adumbrated in the provisions of ss 25 and 26 of the Act, which are headed 'Main functions of Agency' and 'Additional powers of Agency', respectively. Section 25(1) provides:

> The Agency, within the framework of government policy, is responsible for, and is hereby given power to perform, all strategic planning with regard to the South African national roads system, as well as the planning, design, construction, operation, management, control, maintenance and rehabilitation of national roads for the Republic, and is responsible for the financing of all those functions in accordance with its business and financial plan, so as to ensure that government's goals and policy objectives concerning national roads are achieved, subject to section 32(3).[61]

Section 26(f) provides:

> In addition to the Agency's main powers and functions under section 25, the Agency is competent-
>
> (f) to operate any national road or part thereof as a toll road and levy a toll on the users of such a road as provided for in this Chapter, and to collect the toll or have it collected by any authorised person, and for those purposes to provide, establish, erect, operate and maintain toll plazas on a national road, subject to section 27 or 28.

[79] As to '*government policy*' referred to in s 25(1) of the SANRAL Act, s 39 provides:

> **39 National roads policy**
>
> (1) The Government's policy with regard to national roads must be made known from time to time by the Minister by notice in the *Gazette*. The notice must state, amongst others-

[61] Section 32(3) is not relevant on the facts of the City's case.

(a) the goals with regard to national roads which the Government wants to achieve; and

(b) the policy objectives to be followed so that those goals may be achieved.

(2) Whenever any proposals relevant to determining or amending the national roads policy is to be considered and decided by the Government, the Minister by notice published in the *Gazette* must make known those proposals and in that notice invite any interested persons and the public to comment on the proposals and make representations with regard thereto.

(3) The Agency must determine its business and financial plan and strategic plan and the standards and criteria for road design and construction and for road safety within the framework of the national roads policy as determined by the Government and published in terms of subsection (1).

It is common cause that, notwithstanding the passage of more than 17 years since the SANRAL Act came into operation, the Minister of Transport has not published the government's policy with regard to national roads. In their answer to the City's application, both SANRAL and the Minister of Transport pointed to the 1996 White Paper on National Transport Policy and the Department of Transport's National Land Transport Strategic Framework published in the Government Gazette in October 2006 in terms of s 29(1) of the National Land Transport Transition Act 22 of 2000, and averred, with reference to s 39 of the SANRAL Act, that those were '*the relevant policies which have a bearing on SANRAL, including but not limited to the financing of its activities*'.[62] The City's counsel accepted the proposition for the purposes of their oral argument.

[80] The import of the following provisions of the aforementioned policy documents was emphasised for the purposes of the City's case:

1. The statement in clause 3.3.3 of the National Land Transport Strategic Framework that

- In consultation with all three spheres of government, and with a view to providing effective mobility and access as a contribution to the development of South Africa, a strategic countrywide road network will be identified.
- The network will based on:
  - a logical analysis of transport needs,
  - social and economic development imperatives,

[62] As appears from the *OUTA* (SCA) judgment supra, the White Paper also featured as the relevant policy document in the high profile litigation in which the decision to toll seven highways in Gauteng - the so-called 'GFIP project' - was challenged.

- the linkage between the primary sea, air and dry ports and public transport nodes,
- support of spatial development initiatives, tourism needs, commuter travel and freight movements,
- an integrated plan so as to avoid the unnecessary duplication of infrastructure, and
- an integrated and co-ordinated network within the Southern African Development Community (SADC) region.

- The network may include toll roads where they are financially and socially viable and where tolls can contribute significantly to funding these roads. (Underlining supplied for emphasis.)

2. The indications in the White Paper s.v. '*Financing Principles*' that tolling might be used as a funding mechanism under the '*the principle of use charging or cost recovery from direct users*' '*where viable or appropriate*'. (Underlining supplied for emphasis.)

[81] The 'business and financial plan' of SANRAL referred to in s 25(1) of the SANRAL Act is formally regulated in terms of s 35 of the Act. Section 35 requires SANRAL annually to submit a financial and business plan to the Minister of Transport for approval, not later than 30 days before the end of its financial year. The business and financial plan has to set out and explain the Agency's proposed operations, projects, activities and other objectives for the following financial year, as well as (a) their cost; (b) the manner in which it is proposed to finance them; and (c) the planned performance indicators applicable to them. It must also provide a statement of the Agency's estimated income and expenditure for that financial year; any other information and particulars that may be prescribed; and any additional relevant information that may be requested by the Minister in writing.[63] SANRAL is required, along with its business and financial plan, also to submit a 'strategic plan' dealing with its plans for the forthcoming five year period including the year dealt with in the relevant business and financial plan.

[82] An acknowledgement of the public's interest in the activities of SANRAL is contained in s 35(5), which provides that '*Any business and financial plan and strategic plan must be made known by the Agency by having it published in the Gazette. However, if satisfied that in the circumstances the interests of the public require that greater*

[63] Section 35(2) of the SANRAL Act.

prominence be given to such a plan, the Minister may order the further publication of the plan, at the expense of the State, in one or more newspapers with a nation-wide circulation'.

[83] Section 34 of the SANRAL Act provides for the funding of SANRAL and provides, in subsections (1) and (2), as follows:

> **34 Funding of Agency**
>
> (1) The Agency is funded and provided with capital from-
>
> (a) the capital invested in or lent to the Agency as contemplated in section 8;
>
> (b) the levies on petrol and distillate fuel to be paid to the Agency in compliance with or in terms of any law by or in terms of which that levy is imposed;
>
> (c) loans granted to or raised by the Agency in terms of section 33;
>
> (d) interest on the Agency's cash balances or on moneys invested by it;
>
> (e) income earned from the Agency's participation in joint ventures in terms of section 26 (d);
>
> (f) income derived from the sale of the Agency's assets;
>
> (g) all toll payable to the Agency in terms of Chapter 3;
>
> (h) fines payable by persons as penalty on their conviction of offences created by this Act, and all civil fines or penalties payable by persons for contravening of this Act, whether imposed under section 27 (5) or through the application of a points demerit system in terms of section 29, or otherwise;
>
> (i) income generated through developing, leasing out or otherwise managing its assets within the scope of this Act;
>
> (j) any other levies and any fees, rentals or other moneys charged by and payable to the Agency in terms of this Act;
>
> (k) moneys appropriated by Parliament from time to time to supplement the Agency's funds; and
>
> (l) moneys received by way of grant, donation or inheritance from any source, whether inside or outside the Republic.
>
> (2) Moneys that in terms of subsection (1) are the funds of the Agency, will be used in accordance with the Agency's business and financial plan as approved by the Minister, to meet the expenditure incurred by the Agency in connection with its functioning, operations and work in terms of this Act.

In *OUTA* (SCA) supra, at para 8, Brand JA described the import of the 1996 White Paper on National Transport Policy as envisaging that parliamentary appropriations would be applied to fund the upgrading of transport infrastructure in the poor rural areas, with the result that 'in other areas, where economically feasible, the principle of users pay through tolling was to be regarded as the funding method of preference'.

Indeed, the use of the word 'supplement' in s 34(1)(k) of the SANRAL Act tends to confirm that SANRAL is expected to generate its income primarily from the other sources enumerated in the subsection, with funding from parliamentary appropriations serving only as a top-up.

[84] Having sketched the statutory context, we come now to the history of the impugned tolling decisions.

The history of the impugned tolling decisions

[85] SANRAL appointed PPC as the scheme developer for the tolling project, which was then at a conceptual stage, in 2000. The application for environmental authorisation was submitted in the same year.

[86] In 2004, a memorandum was submitted to the SANRAL Board by the chief executive officer. Its purpose was described as being to 'inform the Board of particular issues and concerns regarding the development of [the proposed N1-N2 Winelands Toll Highway] within the terms of The Policy of the South African National Roads Agency in Respect of Unsolicited Proposals (May 1999)'. It is relevant for present purposes to interpose that the policy in question set out, amongst other matters, what the contents of an unsolicited proposal such as that submitted by PPC had to contain. These included a 'cost estimate of sufficient accuracy to illustrate the financial viability of the project', specifically identifying 'whether the Agency is expected to contribute financially'. (Logically, one would have expected this type of information, in the same detail, to have been disclosed by SANRAL in the intent to toll process in terms of s 27(4).)

[87] The memorandum placed before the Board in January 2004 stated the estimated value of the initial construction works to be 'in the order of R1,9 billion', excluding the work to be done in respect of commissioning the second bore of the Huguenot Tunnel It also indicated that the 'total estimated infrastructure investment over a 30 year concession [to be] R5 billion'. (Those were present values at the time.) It was further reported that there was an outstanding debt of over R500 million in respect of the existing Huguenot Tunnel on the Agency's books and the opinion was expressed that the 'concessioning (sic) of the proposed toll highways will provide the opportunity to relieve the debt burden and to provide funding for other projects which have been delayed for lack thereof'. No details were provided that would enable an assessment of the financial viability of the project.

[88] The memorandum also reported the City of Cape Town's opposition to tolling within the metropolitan boundaries and its preference for alternative funding mechanisms such as a dedicated fuel levy in the Western Cape Province. It set out the Agency's view that the stance of the City 'ignores all previous research and existing national and provincial policies'. Reference was made to the abovementioned White Paper in this connection. It mentioned that a meeting had been held with provincial and City representatives, including the then MEC for Transport (Ms Tasneem Essop). It recorded that it had been agreed at the meeting that SANRAL would provide a programme by the end of January 2004 'for the process to be followed for the implementation of the project'. (There is nothing in the evidence to indicate that such a programme was ever provided.)

[89] The memorandum concluded by recommending that SANRAL should proceed 'with the completion of the tender documents and the acquisition of the necessary land'. It stated that '[F]urther reports will be submitted [to the Board] regarding the projects as and when required'. There is no evidence, however, of any written reports on the project having been submitted to the Board between 2004 and the date of the declaration of the roads as toll roads in 2008.

[90] Two documents were attached as annexures to the memorandum. The first was a copy of the minutes of a meeting of the City's Transport, Roads and Stormwater portfolio committee on 8 September 2003, which recorded the City's opposition to tolling, setting forth its concerns and explaining its preference for different funding mechanisms. The minutes recorded that if a mutually agreeable accommodation could not be achieved with SANRAL '*the City could challenge the validity of the Act 7 of 1998 in the Constitutional Court and/or object strongly to the Notice of Intent Toll* (sic) *specific routes*'. The second annexure was a draft notice by SANRAL of its intention 'to recommend to the Minister of Transport the declaration of [the roads] as the Winelands Toll Highway'.

[91] The minutes of the SANRAL board meeting on 20 January 2004 record that the Board noted the contents of the report contained in the memorandum and the 'advices on the way forward'.

[92] There is no further documented record of any consideration by the Board of the tolling of the roads between 2004 and 2014, when a resolution, to be described below,[64] was adopted by a differently constituted Board to that which had considered the matter in January 2004 and to that which was in place in 2008 when the roads were declared as toll roads in terms of s 27(1)(a)(i) of the SANRAL Act.

[93] It will be recalled from the discussion of the environmental decisions earlier in this judgment that the period from 2004 to 2008 coincided with the protracted appeal process then in train in terms of s 35 of the ECA. As mentioned,[65] during that time the City's Directorate: Transport, Roads and Stormwater wrote to SANRAL on 17 March 2007 and, pursuant to certain remarks in the 2005 record of decision, which stated that certain issues related to the impacts of diversionary traffic should be negotiated between SANRAL and the affected road authorities, proposed that negotiations on such impacts and 'mechanisms to address any associated costs' should commence.

[94] SANRAL did not respond in writing to the City's request for negotiations, but, in the answering affidavit, its chief executive officer, Mr Nazir Alli, averred that a subsequent meeting with the executive mayor on 11 May 2007 had addressed it in part. Mr Alli also asserted, however, that the 11 May meeting was primarily concerned with issues related to the R300 freeway, which is not part of the declared toll roads. Whatever it was that was actually discussed at the meeting with the mayor, it is apparent that it did not resolve any of the City's concerns about or objections to the proposed tolling of the roads.

[95] After the final determination of the environmental appeal in February 2008, SANRAL wrote to the City on 25 March 2008 giving formal notice of the intention to toll the roads and, in terms of s 27(4)(b)(ii) of the SANRAL Act, inviting the City to comment on the proposals within 60 days of receipt of the letter or by not later than 30 May 2008. Public notice of the intention to 'recommend to the Minister of Transport the declaration' of the roads as toll roads was also advertised in the Gazette and in various newspapers on 28 and 30 March 2008. The public was afforded until 30 April 2008 to comment on the proposal. All persons who had registered as interested and affected parties in the environmental authorisation process were also given notice of the proposals by email. SANRAL's notices about the proposed declaration of the roads

[64] In paras [123] and [159]-[161].
[65] At para [68].

as toll roads contained a minimum of information. The notices gave no information about the proposals, other than to show a map of the relevant sections of the roads indicating where the toll plazas would be positioned and to state that an open road tolling system that would dispense with the need for toll plazas was also being considered. The notice to the public was, however, formally compliant with the requirements prescribed in the 'Regulations regarding Representations on Declaration of Toll Road' published in GN R 2267, dated 30 December 1994.[66]

[96] On 10 May 2008, Mr Marius Fransman, then the Western Cape MEC for Transport, wrote to SANRAL recording the Province's objection to the proposals unless certain concerns and preconditions were addressed or satisfied. It is apparent that the MEC's letter was written in response to the notice SANRAL was required to give to the Premier in terms of s 27(4)(b)(i) of the Act. Amongst the concerns expressed by the MEC were (i) a possible misalignment between the proposals and the affected municipalities' integrated transport plans, (ii) the need for SANRAL or the toll roads concessionaire to accept responsibility for the costs of upgrading provincial and municipal roads to deal with diverted traffic and (iii) doubt about the necessity to undertake all of the contemplated construction and upgrading work at once. The MEC was also clearly concerned about the capacity of 'the public and the economy of the Western Cape to absorb the increased transport costs resulting from the implementation on tolls on roads'. He questioned the benefit the region would derive in exchange for the cost. Mr Fransman also complained about SANRAL's failure to have responded to a letter from his office concerning the proposal, dated 30 December 2004.

[97] SANRAL replied to the MEC's letter on 18 July 2008. It pointed out that the letter of December 2004 referred to in Mr Fransman's letter had in fact been addressed by his predecessor, Mr Skwatsha, to the then Minister of Transport, Mr Radebe. SANRAL was uncertain whether the letter had been favoured with a reply. SANRAL claimed that the project had been a standing item on the agenda of the 'regular liaison meetings' between it and the provincial department of transport. It also claimed that '*a detailed socio-economic impact study was carried out in 2002 and updated in 2008 to deal with the socio-economic impacts and benefits of tolling the N1-N2*'. SANRAL

[66] The regulations were made in terms of s 20 of the National Roads Act 54 of 1971, which was the statutory predecessor of the SANRAL Act. In terms of s 58(3) of the SANRAL Act, the regulations made under the previous Act are still in force for the purposes of SANRAL Act.

stated that 'intensive traffic modelling' indicated that 'an upgraded and tolled freeway network' would attract traffic and therefore absorb traffic growth that would otherwise have built up on the secondary network. It represented that the project would be implemented 'at no cost to the state' and would result in a road in good condition being returned to the state at the end of the concession period, also at no cost to the state. The letter also stated that SANRAL had been in discussion with the City about the project since 1999 and that therefore it 'believe[d] that the project should be in line with the City's Integrated Development Plan'. (The latter statement, of course, suggested that, despite the discussions it claimed had occurred, SANRAL was, in fact, unaware of the actual content of the City's transportation framework plan. This impression was confirmed in subsequent correspondence between SANRAL and the Minister of Transport, to be described presently.)

[98] The 2002 and 2008[67] 'detailed socio-economic reports' referred to in SANRAL's letter to the MEC were reports prepared by Professor Barry Standish. Standish has disavowed the characterisation of his reports as socio-economic impact reports. They were expressly prepared as economic impact reports. Moreover, as will become apparent presently, SANRAL appears to have been in no proper position to assert, as it did, that the implementation of the project would be at no cost to the state. This would depend on whether the toll tariff to be determined in terms of s 27(3) of the SANRAL Act would allow the generation of revenue based on the contemplated contractually stipulated 'base toll tariff'.[68] That was, and remains, an uncertain prospect.

[99] By letter, dated 30 May 2008, the City responded to the notice given by SANRAL in terms of s 27(4) of the SANRAL Act and indicated its opposition to the proposal on the grounds that it did not '*align with the City's Integrated Development Plan 2007 to 2011 or its policy on the provision of toll roads*'. The City also requested that SANRAL consider the socio-economic impacts of tolling, as these had not been considered by the Department of Environmental Affairs in the environmental authorisation decision-making process. The City's letter warned that if SANRAL were to approve the proposal without due consideration of the socio-economic impacts, the

[67] The so-called '2008 report' was in fact an updated version of a report prepared by Prof Standish in 2007.
[68] The meaning of 'base toll tariff' is explained at para [235], below.

City's right to 'implement a legal challenge to either or both the Road Agency and DEAT processes' was reserved. The letter further indicated that the response from the office of the executive mayor might be received after the closing date for comment, as the relevant municipal council portfolio committee would be 'workshopping' the proposal only on 5 June 2008.

[100] SANRAL responded to the City's letter of 30 May 2008 on 9 June 2008. It professed to find it 'strange' that the City's Integrated Development Plan was not 'in line' with the proposed tolling project in the face of discussions that SANRAL had been having with the City thereanent since 1999. (The evidence apparent on the papers does not substantiate the claim of extensive discussions having occurred between the two government bodies. Most of the meetings that were held appear to have been at a technical, rather than a policy level.) SANRAL's letter made reference to the two Standish reports and stated '*The EIA deals with all the socio-economic impacts of the project. A specialist impact report prepared by the Graduate School of Business, University of Cape Town, dated September 2002, and again updated in 2008, quantifies the socio-economic impacts of tolling, including the affordability thereof. So again we find it strange that the City officials have not consulted this, and by extension the EIR*'. (It bears mention that the updated Standish report was completed only on 26 May 2008, just four days before the deadline stipulated for the City's input and some weeks after the deadline for comment from the public had passed. The updated report had not been made available for comment to either the City or the public.) SANRAL's reply also indicated that the results obtained from 'a large number of traffic monitoring stations' it had put in place since 2006 indicated that there would be a net attraction of traffic to the tolled roads and that the impact of diversionary traffic on the surrounding provincial and city road network would be 'insignificant'.

[101] On 24 June 2008, the executive mayor wrote to SANRAL reiterating the objections and concerns expressed in the City's aforementioned letter of 30 May 2008. The mayor requested to be informed as to how SANRAL would take the City's representations regarding the need to consider the socio-economic impact of the proposed tolling into account. The mayor's letter quoted several extracts from the judgment of the Constitutional Court in *Fuel Retailers* supra, in support of the City's demand that the socio-economic impacts had to be considered, and warned that if a response from SANRAL were not forthcoming by the end of the month she would

consider how to proceed further 'including approaching the Court to seek review of the decisions made in this regard'. The mayor did not, however, add anything of substantive import regarding the City's position to what had already been set out in the City's aforementioned letter of 30 May 2008.

[102] SANRAL replied to the mayor's letter on 15 July 2008. The reply expressed regret at the failure of the City to discuss its position on tolling with SANRAL before finalising its own transport policies. SANRAL referred to the condition attached to the environmental authorisation that it should take the recommendations of the final environmental impact report into account in the toll road declaration process. It again referred to the 2002 and 2008 Standish reports, and described them as a 'specialist socio-economic impact report'. The letter concluded 'We confirm that SANRAL will take any reasonable concerns and comments into account when making recommendations to the Minister of Transport'. SANRAL did not inform the mayor that it would not deal with her letter in its report to the Minister in terms of s 27(4) of the SANRAL Act because it had been received after the 30 May deadline.

[103] On 2 September 2008, SANRAL applied, in terms of s 27(1) read with s 27(4) of the SANRAL Act, for the approval of the Minister of Transport of its proposals to declare the roads as toll roads. The application, which comprised 1560 pages of documentation, was delivered by hand to the Minister's office under cover of a letter from SANRAL's chief executive officer. The documentation submitted to the Minister included a 63-page report by SANRAL together with copies of the comments and objections received in response to the invitations given and published in terms of s 27(4)(a)(ii) and (4)(b) of the Act and its replies thereto. Only responses received before the published deadlines for comment were included in the report to the Minister. The aforementioned letter from the executive mayor, dated 24 June 2008, was not placed before the Minister. Indeed, the report to the Minister stated that '*all representations not conforming with* (sic) *the stipulated requirements were ... disregarded*'. The report to the Minister did, however, accurately summarise the content of the City's letter of 30 May 2008 (including the concern expressed therein that the proposal did not align with the City's integrated development plan) and the import of SANRAL's reply thereto, dated 9 June 2008.

[104] SANRAL's description in the report of its response to the City's concerns about the alleged non-alignment of the proposals with its integrated development plan went

as follows: '*Integrated Transport Plans: The South African National Roads Agency (SANRAL) has been in discussion with the City of Cape Town about the project since 1999, so we find the statement strange that this large project is not in line with the City's Integrated Development Plan - 2007 to 2011. As you* [i.e. the City] *should be aware more than 90% of the project is existing national road and the remainder is within a proclaimed national road reserve which was proclaimed many years ago and in line with the Provincial (sic) and City's Planning*'. This should have been sufficient to alert the Minister to the fact that SANRAL had not apprised itself of the content of the City's transportation framework plan, and therefore not even attempted to determine how it might be accommodated in the proposals. It should also have placed him on guard with regard to the issues of mutual respect and co-operation between spheres of government and organs of state in terms of s 41 of the Constitution. SANRAL's response to the City should also have been recognised by the Minister as fundamentally inconsistent with the extract from the National Land Transport Strategic Framework policy document, quoted in paragraph [80], above, which emphasises the importance that the published government policy attaches to co-operative governance and integrated planning.

[105] The report contained a short section s.v. '*Social Impact*', in which it was submitted that the implementation of the project would bring a number of benefits, including improved road safety, pedestrian bridges and employment opportunities. The report to the Minister did not directly address the question of the socio-economic impacts of tolling the roads. It did, however, identify the following aspects, amongst others, as requiring 'further input': (i) the need for discussions with the affected communities of De Doorns, Bot River and Grabouw on the mitigation of impacts of the tolling of the roads and (ii) possible discounts on the toll tariffs to 'various qualifying users'. The report to the Minister indicated that SANRAL's response to the City's concern about the absence of a study of the socio-economic impacts of tolling the roads had been as follows: '*SOCIO-ECONOMIC IMPACTS The EIA deals with all the socio-economic impacts of the project. A specialist impact report prepared by the Graduate School of Business, University of Cape Town, dated September 2002 and again updated in 2008, quantifies the socio-economic impacts of tolling including the affordability thereof. So again we find it strange that the city officials have not consulted this, and by extension the EIR.*' It did not point out that in terms of the agreement between

SANRAL and the Department of Environmental Affairs mentioned earlier,[69] and which had been referred to in the EIR, the socio-economic impacts of tolling were not considered as part of the environmental impact assessment. It also did not disclose that the City had been informed that these impacts would be addressed in the intent to toll process. Furthermore, it did not draw to the Minister's attention that the updated Standish report had been produced only four days before the expiry of the time afforded to the City to comment on the proposals, and that it had not been made available to the City.

[106] A copy of the updated economic impact report prepared by Professor Standish was annexed to SANRAL's report to the Minister. The body of the report runs to 120 pages of densely printed information, which in parts do not make for easy reading, certainly for the layman. It confirms that tolling is a more expensive and less economically efficient means of financing the construction, upgrading and maintenance of the roads than direct funding by the fiscus, whether from the consolidated revenue fund or by means of a dedicated fuel levy. The report makes it clear that it had been prepared on the basis that national government policy did not countenance the ring fencing of government sources of revenue for particular projects and accepting that, by reason of other pressing demands on the government purse - notably funding poverty alleviation, education and health - the availability of direct funding for road building and maintenance fell materially below what was required to optimally maintain and expand the national road system to the extent necessary for the integrity of the national economy. The report was thus composed on the assumption that the proposed tolling project was a given. It consequently did not evaluate alternative means to achieve the end of upgrading and maintaining the roads. Plainly implicit in the economic impact report, however, is that funding the construction and maintenance of roads by the less economically efficient means of tolling could be economically rational only if the tolling revenue substantially covered the costs. Tolling the roads could not make financial or economic sense if direct government funding were required to substantially supplement toll-generated funding in order to cover the cost of the project. That, indeed, is consistent with the published government policy referred to earlier.[70]

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[69] At para [38].
[70] At para [80].

[107] The report identified various areas in which information relevant to the dependability of its assessments was lacking. These included the lack of any indication of what the toll tariffs were likely to be and the absence of relevant traffic modelling data. In the result, the authors of the report had been required to make assumptions in this regard. One would think that this aspect of the report would have served as a red flag warning to any critical reader seeking assurance as to the social and financial viability of the tolling project, which were material considerations in assessing whether proceeding with the project would be appropriate in terms of the published government policy.

[108] The economic impact report contained a section which dealt with the micro-economic impacts of tolling the roads. On the basis of the assumed tolls (which were extrapolated from the range of tolls charged on existing toll roads under aegis of SANRAL), it indicated that quite significant impacts could be felt by the high proportion of low income users of the roads. It also speculated that taxis and public transport carriers might simply add the extra costs incurred in respect of having to pay the tolls to the fares charged without making any provision for savings in fuel and vehicle wear that it was postulated would be brought about by the improved roads. The report also identified certain geographic areas and types of business enterprise that were likely to be significantly adversely affected by the tolling of the roads. These included the deciduous fruit growers in the Elgin and Hex River Valley areas. It noted that '*the deciduous fruit sector is critical to the functioning of the economies in the rural and semi-rural area along the proposed toll roads. A significant number of permanent and seasonal jobs are supported by the industry…(which) makes an important contribution to the generation of foreign exchange and has the highest economic multiplier of all agricultural sectors*'. The report observed that the fruit producers were '*captive to the toll road and would thus be forced to use it*'. To some extent therefore the report confirms the existence of a substantive basis for serious consideration of the issues raised by the City.

[109] The Minister of Transport signified his unqualified approval of SANRAL's proposal to declare the roads as toll roads on the same day that he received the application and voluminous supporting documents. The Minister's consideration of the application took place without the assistance of a departmental memorandum. There was an unmistakable note of incredulity in the City's papers and heads of argument

about the Minister's ability to have properly applied himself in a single day to all of the information contained in the application, but in oral argument its counsel accepted that it could not go behind the Minister's averments under oath that he had been familiar with the project by reason of his history of previous interaction with SANRAL officials on the subject and that he had therefore been able to get through the papers in such a short time. There is no evidence, however, that the Minister was alerted to the considerations arising out of SANRAL's failure to engage substantively with the content of the City's letter of objection in the respects identified earlier in this judgment (at para [103]), or that he was astute to the fact that the socio-economic impacts of tolling the roads had not been included in the EIA process in terms of the 1999 agreement between SANRAL and the Department of Environmental Affairs.

[110] The declaration of the roads as toll roads was publically announced by SANRAL in GN 978 in the Government Gazette on 15 September 2008.

[111] It would appear that the City must subsequently have made enquiries about the project, because, on 19 June 2009, SANRAL's regional manager wrote to the City's executive director; Transport, Roads and Stormwater, in answer to a letter from the latter, dated 12 June 2009, and reported 'that good progress is being made on the project'.

[112] In March 2010, SANRAL advertised for tenders from prospective concessionaires for the proposed BOT undertaking. The closing date for the submission of tenders was 1 November 2010. In April 2010, officials from the City met with their provincial counterparts to discuss the tolling project. The meeting was also attended by SANRAL's regional management. City officials and councillors representing the Helderberg region of the City's metropolitan area attended a presentation on the project in November 2010.

[113] The City's municipal manager sought in the papers to explain the City's failure to actively challenge the declaration of the roads as toll roads at that stage (the end of 2010) as having been due to a change of political leadership of the City, with the induction of a new executive mayor. He averred that 'clarity had to be obtained as to the City's approach' and, without providing any detail, indicated that the 'process took a substantial period'. We think that the municipal manager's memory must have failed him in this connection because it is a matter of common knowledge and public record

that the new mayor (Ms De Lille) came into office only after the municipal elections in mid-2011. It may be, however, that the inertia at that stage was related to an anticipated change in the City's leadership. Whatever the actual position, this is but an instance of the City's vague and unsatisfactory attempt to explain the inordinate delay in instituting review proceedings.

[114] As appears from the report of a transport economist, annexed to the City's supplementary founding papers, the Minister of Transport's announcement, in February 2011, of the tolls payable in respect of the use of the freeways built as part of the Gauteng Freeway Improvement Programme ('GFIP') gave rise to a public outcry. This led, amongst other things, to the appointment of an inter-ministerial committee chaired by the Deputy President. In the result, the tolls were significantly reduced, but, as the report notes, 'the reduced amount was still widely rejected by the public'. It is a matter of common knowledge, and confirmed in Ms Naude's report, dated 13 May 2014, that the tolls were consequently further reduced in October 2012. The so-called OUTA (Opposition to Urban Tolling Alliance) litigation[71] was part of the manifestation of the public's disaffection with the tolling of the Gauteng freeways. An extraordinary parliamentary appropriation of R5 billion was required to meet the effect on SANRAL's ability to meet its loan obligations of the deficit in operating revenue caused by the non-payment of toll fees and downward adjustments to the originally announced toll tariffs.

[115] Clearly then, from February 2011, the issue of tolling urban roads had become a matter of high public profile, with attendant intense political interest. The City's papers do not contain any admission to this effect, but in oral argument their counsel candidly acknowledged that it is no coincidence that the City began to take a notably more active position in respect of the declaration of the roads as toll roads at the same time as the controversy concerning the tolling of the Gauteng freeways began to make news headlines.

[116] Thus, on 19 April 2011, which happened also to be the day upon which PPC and another consortium were selected at the end of the first phase of the BOT contract

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[71] *Opposition to Urban Tolling Alliance and Others v South African National Roads Agency Ltd and Others* [2012] ZAGPPHC 63 (28 April 2012); *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC); 2012 (11) BCLR 1148; *Opposition to Urban Tolling Alliance and Others v South African National Roads Agency Ltd and Others* [2012] ZAGPPHC 323 (13 December 2012) and OUTA (SCA) supra.

tender evaluation process as the bidders chosen to submit best and final offers, the City's Executive Director: Transport, Roads and Major Projects wrote urgently to SANRAL requesting that it defer any award of the concession contract for a period of at least three months so as '*to explore, in consultation with the City and other relevant authorities, the possibility of utilising alternative funding models to finance the upgrade*' of the roads. The letter further advised that in the City's view any such consultation '*should also be informed by a proper assessment of the socio-economic implications of the various options*'. The letter gives as its context the indication by the then Minister of Transport (Mr S. Ndebele) that he would be convening a 'Road Funding Summit' '*to explore the potential for using financing mechanisms other than tolling to fund the upgrade of existing roads and development of new roads*'. The City's letter called upon SANRAL to reply by 26 April 2011 and indicated that should it fail to respond positively to the City's request, the City would '*have no alternative but to seek legal recourse…*'.

[117] Notwithstanding reminders from the City that a response was outstanding, SANRAL replied to the City's letter only on 8 July 2011. It declined to suspend the tender process and advised that it had selected two of the three parties which had submitted bids to make best and final offers in competition with each other for nomination as preferred tenderer for the purpose of negotiating and concluding a concession contract. SANRAL asserted that the City's concerns about the impact of tolling could be addressed during the process prescribed in terms of s 27(3) of the SANRAL Act for the determination of the toll tariffs.[72] SANRAL must have appreciated that that process was likely to occur only after the initial contract works under the contemplated BOT contract had been completed. As the City has emphasised, a challenge to the tolling decisions at that stage would face similar problems to that faced by the appellant in *OUTA* (SCA) supra. The horse would have bolted by then.

[118] Upon receipt of SANRAL's reply, the City declared an intergovernmental dispute between itself and SANRAL in terms of s 41 of the Intergovernmental Relations Framework Act 13 of 2005. That happened on 18 July 2011. That date effectively marked the end of the City's unreasonable delay. It would be subversive of the object of Act 13 of 2005 to treat any period taken up in dispute resolution under the aegis of

[72] See para [76], above, for the text of s 27(3) of the SANRAL Act.

the Act as unreasonable delay within the meaning of s 7(1) of PAJA. Any notional contradiction between that premise and the literal effect of s 7 of PAJA falls to be resolved having regard to the status of both statutes as constitutional legislation and the evident predominating constitutional objective that litigation between organs of state should happen as a last resort; cf. s 41(3) of the Constitution and s 45(1) of Act 13 of 2005. Unsurprisingly, no party sought to argue to the contrary.

[119] In September 2011, after reports had appeared in the press announcing the selection of PPC as the preferred bidder, the City applied for an interim interdict prohibiting SANRAL from implementing the project pending the conclusion of the intergovernmental dispute resolution process. That application was postponed indefinitely after SANRAL furnished certain undertakings, including an undertaking not to proceed with the project without giving the City prior notice.

[120] It is common ground that the intergovernmental dispute resolution process was expanded to include the relevant government departments. The process came to an end in March 2012 without success. The City instituted the review application 12 days later, on 28 March 2012.

[121] On 6 March 2013, SANRAL gave the City notice, as agreed in terms of the arrangements made for the postponement of the City's 2011 interim interdict application, that it intended to go ahead with implementing the project. Three weeks later the City instituted a second application for interim interdictal relief pending the determination of its application for the judicial review of the environmental decisions and the declaration of the roads as toll roads. The interim interdict application was heard in May 2013 together with two interlocutory applications in the review concerning an amendment of the City's notice of motion and the failure by SANRAL to make certain documents available as part of the administrative record in terms of uniform rule 53. An interim interdict prohibiting SANRAL from concluding a BOT contract in respect of the project pending the final determination of the review proceedings was granted; see *City of Cape Town v South African National Roads Agency Ltd and Others* [2013] ZAWCHC 74 (21 May 2013).

Additional relief claimed by the City in respect of the tolling-related decisions

[122] The review proceedings generated an extraordinary amount of paper (over 7400 pages, excluding heads of argument running to nearly 650 pages) and the process of

bringing it to hearing was attended by a number of interlocutory disputes (including that which was the subject of the judgments in *South African National Roads Agency Limited v City of Cape Town and Others; In Re: Protea Parkway Consortium v City of Cape Town and Others* [2014] 4 All SA 497 (WCC), *City of Cape Town v South African National Roads Agency Limited* [2014] ZAWCHC 151 (8 October 2014) and *City of Cape Town v South African National Roads Authority Limited and Others* 2015 (3) SA 386 (SCA)). The City's notice of motion was amended on four occasions along the way. As a result, in addition to the relief described in paragraph [17], above, orders in the following terms were also claimed in terms of paragraphs 2-7 of the finally amended notice of motion, which, insofar as remains relevant, read as follows:

> 2.1A The decision of SANRAL to select the sixth respondent as the Preferred Bidder in respect of the N1 N2 Winelands Concession Contract and / or to award the tender for the N1 N2 Winelands Concession Contract to the Sixth respondent in or about September 2011 is declared to be unlawful, invalid and of no force or effect;
>
> 2.1 The following decisions are reviewed and set aside –
>
> 2.1.1 The decision of SANRAL to select the sixth respondent as the Preferred Bidder in respect of the N1/N2 Winelands Concession Contract and / or to award the tender for the N1/N2 Winelands Concession Contract ("the Tender") to the sixth respondent in or about September 2011;
>
> 2.1.2 The failure by SANRAL to make a decision to withdraw the Declaration as provided for in s 27(1)(a)(ii) of the SANRAL Act.
>
> 2.2 SANRAL is directed to:
>
> 2.2.1 consider and decide whether to withdraw the declaration of portions of the N1 N2 Winelands Highways as toll roads;
>
> 2.2.2 notify the City of its decision in this regard within ten days of making such decision, and if it decides not to withdraw the declaration, of the reasons for such decisions.
>
> 3. <u>Conditional constitutional challenge to the validity of the SANRAL Act</u>
>
> …
>
> 3A The round robin resolution by the SANRAL board to declare as toll roads [the roads] and the subsequent ratification thereof at the SANRAL board meeting of 3 June 2014…is declared to be invalid and of no force and effect.
>
> 3B The 2014 declaration decision is reviewed and set aside.
>
> 4. ...
>
> 5. SANRAL is interdicted from entering into an agreement with a person contemplated in s 28(1)(b) of the SANRAL Act in circumstances where such agreement would place an obligation on SANRAL or the State to provide such person with a guarantee or benefit, the provision of which is linked either:

5.1 to the amount of toll, any rebate thereon or any increase or reduction thereof which SANRAL, in terms of s 27(3) of the SANRAL Act, must recommend to the Transport Minister; or

5.2 to the amount of toll, any rebate thereon or any increase or reduction thereof which the Transport Minister must determine in terms of s 27(3) of the SANRAL Act.

6. SANRAL is interdicted from entering into any agreement with a person contemplated in s 28(1)(b) of the SANRAL Act in circumstances where such agreement:

6.1 prescribed to SANRAL or fetters SANRAL's discretion in deciding the amount of toll, any rebate thereon or any increase or reduction thereof it should recommend to the Transport Minister in terms of s 27(3) of the SANRAL Act;

6.2 prescribes to the Transport Minister or fetters the discretion of the Transport Minister in determining, in terms of s 27(3) of the SANRAL Act, the amount of a toll, any rebate thereon or any increase or reduction thereof;

6.3 has the effect of predetermining the amount of a toll, any rebate thereon or any increase or reduction thereof which must be determined in terms of s 27(3) of the SANRAL Act before an open, transparent and fair public participation process has taken place.

(It was conceded by the City's counsel at the hearing that the matter to which paragraph 3 of the amended notice of motion was directed was not a live issue before this court. They also intimated that the City was not pressing for relief in terms of paragraph 4.)

[123] The substantive amendments to the notice of motion were inspired by three things. Firstly, the discovery, upon the City's consideration of the administrative record made available by SANRAL in terms of rule 53 and the interlocutory directions given by the court, that there was no documented record of a decision having been made by the SANRAL Board to apply to the Minister of Transport for approval of a proposal to declare the roads as toll roads and, upon such approval having been obtained, to declare them as such. Secondly, the endeavour by SANRAL during the course of the legal proceedings to deal with the absence of a minute of such decisions by means of a round robin resolution by its directors, in terms of which the directors purported, during April and May 2014, to resolve to declare the roads as toll roads in terms of s 27(1) of the SANRAL Act and to authorise the chief executive officer of SANRAL to cause such declaration to be published in the Government Gazette. (The round robin decision was subsequently 'ratified' at a Board meeting on 3 June 2014.) And thirdly, the effect of the City's analysis, supported by the opinions of expert witnesses, of the effect of the

terms of the draft concession contract construed in the context of PPC's 'best and final offer', which led it to contend that the tolls that would have to be imposed in terms of s 27(3) of the SANRAL Act to achieve the base toll tariffs to be provided in the draft contract in amounts sufficient to cover the costs of the project would exceed those being levied on the Gauteng freeways by a multiple of nearly three. This, in the context of a provision in the draft contract (the so-called 'reimbursement clause') that would oblige SANRAL to compensate the concessionaire for any shortfall between the revenue that would be generated on the basis of the contractually stipulated base toll tariffs and that realised in terms of the tolls actually imposed in terms of the Act. The City argued that this provision would oblige the State (effectively the National Treasury) to guarantee or underwrite SANRAL's obligation in this regard. The draft contract only became available to the City in the context of the judicial review procedures after the institution of proceedings.

The scheme of section 27(4) of the SANRAL Act

[124] The two decisions in terms of the SANRAL Act that the City seeks to impugn on judicial review[73] are both connected to the declaration of the roads as toll roads in terms of s 27(1)(a)(i) read with s 27(4) of the SANRAL Act.[74] Those provisions of the Act determine a scheme in terms of which any proposed declaration of a toll road must be advertised by SANRAL in the prescribed manner and interested persons must be afforded at least 30 days within which to furnish their written comments and representations on the proposed declaration and the proposed position of any toll plazas contemplated for the road. SANRAL is also obliged thereby to request the Premier of the province in which the proposed toll road is situated to comment on its proposals and must afford the Premier at least 60 days within which to do so. The same opportunity has to be given to every municipality through which the proposed toll road is routed. By virtue of the fact that the declaration of a toll road is a non-delegable function of the Board,[75] notice of the proposed declaration will be given only after the Board has considered the proposals and decided to proceed with them.

[125] After the expiry of the period for comments and representations, SANRAL is required, if it wishes to proceed with the proposed declaration, to apply to the Minister

[73] See para [17].4 and [17].5, above.
[74] The relevant provisions of s 27 of the SANRAL Act have been set out in para [76], above.
[75] In terms of s 18(5)(d) of the SANRAL Act.

of Transport for approval of its proposals. Its application is required to consist of the proposals themselves, to be accompanied by a report indicating the extent to which any of the matters raised in the comments and representations have been accommodated in the proposals. In the nature of the requirements, SANRAL's directors would have to apply their minds to the responses elicited to the notices given in terms of s 27(4)(a) and (b) and consider how they might be accommodated in the Agency's proposals. It is thus apparent that if the statutory requirements had been complied with the Board would have considered the proposals on at least two occasions before the application was submitted to the Minister; firstly, for the purpose of deciding to give notice of the proposed declaration and secondly, to consider the representations received in response to the notices and decide how they might be accommodated.

[126] The Minister is not able to consider the application unless SANRAL has complied with the aforementioned procedural requirements. If there has been any shortcoming in compliance with the prescribed procedures, the Minister is required to return the application to SANRAL with directions for proper compliance to be effected. The Minister must also return the application if she is not satisfied that SANRAL has properly considered the comments and representations elicited upon notice of the proposals. Section 27(4)(d) of the SANRAL Act places a positive duty on the Minister to satisfy herself that SANRAL has considered the comments and representations. The Minister is able to fulfil this duty only by apprising herself of the content of such comments and representations and qualitatively evaluating the extent of SANRAL's engagement therewith in the report it has forwarded in terms of s 27(4)(c) as part of the application.

[127] The Minister's duty in terms of s 27(4)(d) is complementary to an obligation on SANRAL to conscientiously consider the accommodation of the comments and representations in the proposals for the toll road. That much is a necessary implication in the provisions of s 27(4) read as a whole. It is only after SANRAL has discharged that obligation that it will be able to compose a report to the Minister properly compliant with s 27(4)(c) of the Act.

[128] The Minister may consider approving the proposals only after SANRAL has complied with the procedural and substantive obligations on it in terms of s 27(4)(a)-(c) of the Act. The Minister's determination whether the procedural requirements of s 27(4) have been satisfied predicates a factual enquiry, while satisfying herself that the

Agency has conscientiously considered the comments and representations submitted to it in respect of its proposals entails the exercise of a value judgment. The Minister must act reasonably in making her value judgment.

[129] If the Minister approves the proposal, SANRAL may proceed to declare the road as a toll road in terms of s 27(1)(a)(i) of the SANRAL Act. Any such declaration becomes effective only 14 days after notice thereof has been published by SANRAL in the Government Gazette.

[130] SANRAL is governed and controlled by a board of directors.[76] It is evident from s 18(5)(d) of the SANRAL Act that a declaration of a road as a toll road may occur competently only upon a decision to that effect by SANRAL's board of directors. The provision states the powers, functions and duties contemplated in terms of s 27(1) may not be delegated by the Board. It seems to us that any decision to propose the declaration of a road as a toll road is similarly a non-delegable power and function of the Board. We say this because s 18(5)(f) of the Act provides that the Boards powers and functions in terms of s 35 of the Act are non-delegable 'in so far as the Board necessarily has to decide on the Agency's business plan and strategic plan'. As we have noted above,[77] SANRAL is required annually to publicly make known to the public and submit to the Minister for approval a business plan which must, amongst other matters, set out and explain its proposed operations, projects, activities and other objectives for the following year. It would be inconsistent with the scheme of the Act, save in a situation of emergency, for the Agency to embark upon a project or take measures to achieve an objective that had not been decided upon and disclosed in its business plan.

The City's challenge to the Minister's approval of SANRAL's proposals for the declaration of the roads as toll roads

[131] The City has challenged the Minister's decision to grant SANRAL's application for the approval of its proposals to declare the roads as toll roads on the following grounds:

1. That the Minister had misconstrued the nature of his powers and functions in terms of s 27(4) of the SANRAL Act.

[76] Section 12 of the SANRAL Act.
[77] At para [82].

2. That the Minister's ability to grant approval to SANRAL's proposals was precluded because SANRAL had not complied with a procedurally fair public consultation process.

3. That the Minister's decision-making was itself procedurally unfair because he should have called for representations, if not from the public, then at least from the relevant road authorities, namely the Province and the affected municipalities.

4. That, objectively, the Minister could not have been satisfied that the SANRAL Board had considered the comments and representations received; alternatively that his approval was granted under the mistaken impression that the Board had considered them.

5. The Minister failed to consider the socio-economic impact of implementing the proposals and the social and financial viability of the project.

6. That the decision was irrational.

[132] The respondents argued that the Minister's decision was not subject to review in terms of s 6 of PAJA because it did not constitute '*administrative action*' as defined in s 1 of Act 3 of 2000. SANRAL's counsel submitted, moreover, that the Minister had in any event not misapplied himself in considering and approving the Agency's proposals to declare the roads as toll roads. They submitted that the Minister's functions in terms of s 27(1) of the SANRAL Act were narrowly confined to the matters set out in paragraphs (a) to (d) of s 27(4). That was also the position expressed in the answering affidavit of the then Minister of Transport, Mr Jeffrey Radebe, and in the second respondent's principal answering affidavit deposed to by Mr C.B. Hlabisa, the deputy director-general for the roads branch in the Department of Transport, as well as in the Ministers' counsel's heads of argument.

[133] In oral argument, however, the Ministers' counsel, having had the benefit of listening to the exchanges we had had with SANRAL's counsel on the point, conceded that the Minister had been entitled, and indeed required, to have regard to wider considerations. They accepted that the Minister's role in terms of s 27(4) of the SANRAL Act was 'more than mechanical'. It was submitted that the Minister was not required to approve the Agency's recommendations merely because SANRAL had complied with the procedural requirements of s 27(4). The Ministers' counsel argued

that the Minister had to assess the proposals for consistency with government policy. The Minister, however, averred in his affidavit that the Transport Minister is required by s 27(4) only to determine whether SANRAL had complied with the requirements of the Act and 'not to make a separate decision in respect of the declaration of a toll road on the basis of a consideration of any expert reports provided'. This is somewhat ambiguous because it is not clear from the averment, read in isolation, whether by referring to 'the requirements of the Act', the deponent meant the statute as a whole, or only the requirements of s 27(4). Mr Radebe's averments fall to be read contextually with the content of the affidavit of Mr Hlabisa, who stated that the Minister 'may refuse the declaration only when she is not satisfied that SANRAL has complied with the listed sections';[78] viz. paragraphs (a)-(c) of s 27(4). If it were the third respondent's case that Mr Radebe had acted under a different apprehension when purporting to approve the application, his affidavit would no doubt have been drafted to say so clearly. It may be accepted therefore that Mr Radebe understood s 27(4) to work in the same way that Mr Hlabisa does.

[134] The thrust of the argument advanced by the Ministers' counsel remained, however, that the declaration of roads as toll roads was primarily the responsibility of SANRAL. In this connection, counsel stressed the ambit of SANRAL's functions in terms of s 25(1) of the Act (which we have quoted in paragraph [78] above) and the import of the word 'only' in s 25(3), which provides '*Except in so far as this Act provides otherwise, the responsibility and capacity to perform the functions mentioned in subsection (1) in the Republic, are entrusted to the Agency only*'. The Ministers' counsel contrasted the pertinent provisions of s 27 of the SANRAL Act with those of s 9 of the National Roads Act, 1971, which had previously regulated the declaration of toll roads by SANRAL's statutory predecessor, the National Roads Board. They pointed out that the principal difference between the provisions was the introduction, in s 27 of the SANRAL Act, of the requirement of the Minister's approval. They suggested that the requirement had been inserted in response to the Appellate Division's judgment in *South African Roads Board v Johannesburg City Council* 1991 (4) SA 1 (A), in which, applying 'the *audi* principle' in the rules of natural justice, it was held that a decision to declare a road as a toll road in terms of s 9 of the National Roads Act, 1971, could not lawfully be made without first affording an opportunity to persons

[78] Underlining in the original.

whose rights might be adversely affected thereby to make representations. They submitted that the historical context supported the inference that the object sought to be achieved by bringing the Minister into the declaration process in terms of s 27 of the new statute had been essentially to provide procedural oversight in respect of the public consultation aspect of the process.

Discussion of the City's challenge to the Minister of Transport's decision in terms of s 27(4) of the SANRAL Act to approve SANRAL's proposals for the declaration of the roads as toll roads

[135] For the purpose of deciding whether there is merit in the City's challenge to the Minister's decision it is necessary only to consider the question whether the Minister's misconceived his powers and functions in terms of s 27(1) read with s 27(4). We shall, however, also treat briefly of the City's contentions concerning the alleged procedural unfairness of the Minister's decision-making.

[136] In our judgment, the respondents' conception of the Minister's role in respect of the consideration and approval of the declaration of national roads as toll roads is not sustained by the plain language of s 27, either on a reading of the section on its own, or in its context in the statute considered as a whole.

[137] Firstly, s 27(1) speaks of '*the Minister's approval*' in unqualified terms. It makes it plain that a declaration of a toll road by SANRAL may be made only with the Minister's approval. Nothing in the wording of s 27(1)(a), read on its own, suggests that the Minister's power to grant or withhold such approval is constrained in any way, or that it should be exercised only with reference to defined or limited considerations.

[138] Secondly, the constraints upon the Minister's power to grant approval imposed in terms of s 27(4)(a) to (d) of the SANRAL Act are expressly directed at prescribing prerequisites for the exercise of the power, and not at circumscribing its ambit. Thus, the existence of the power having been provided for in general and undefined terms in subsection (1), subsection (4) stipulates three preconditions that must be satisfied before '*the application and the Agency's proposals will be considered for approval*'. Subsection (4) has been clumsily formulated, but its import is clear enough. It posits a dichotomous exercise by the Minister. Firstly, she must establish that the prescribed notice of the proposals has been given and, with reference to the Agency's report on the comments and representations elicited in response to such notice, satisfy herself that

the comments and representations have been properly considered and then, and only if the requirements of the first leg of the exercise have been met, may she secondly consider the proposals for the purpose of deciding whether to approve them, or not.

[139] If the legislative object of s 27(1) read with s 27(4) of the SANRAL Act had been merely to give the Minister the responsibility of procedural oversight, one would have expected the provisions to have been worded differently. Moreover, having regard to the scheme of the Act as a whole, and in particular its requirement, in a number of material respects, that SANRAL may act only with the Minister's acquiescence or approval, it would be anomalous were the Minister's powers and functions with regard to the declaration of toll roads as limited as the respondents' contention would have them.

[140] The facts of this case and, indeed, also those documented in the judgments in the OUTA litigation concerning the urban toll roads in Gauteng, illustrate that the construction and upgrading of national roads for use as toll roads can have significant fiscal implications, even, it would seem, when large multi-billion rand projects are involved, to the extent of potential impact on the country's credit rating. Furthermore, certain of the City's concerns in the current matter about the potential effect of tolling on the road system for which it is responsible - which echo those which moved the Johannesburg City Council to litigate in the *South African Roads Board* case supra - illustrate that the declaration of roads as toll roads can also have adverse effects on the constitutional ideal of a relationship of comity between the national government and the other two spheres of government. That tolling urban roads can have political, as well as social and economic, implications is also manifest. It is thus unsurprising to find provision made in the SANRAL Act for the responsible member of the Cabinet to maintain a measure of direct control over tolling, at least to the extent of having the final say over any proposals by SANRAL in that regard. These are objective considerations that, irrespective of the effect of the contextual indicators in the other provisions of the statute - to which we shall refer presently - make the respondents' construction of the Minister's powers and functions in terms of s 27 unpersuasive. It is unlikely that Parliament would have restricted the role it unambiguously decided to give the Minister to consider approving such proposals to the limited administrative, indeed almost clerical, function for which the respondents (albeit in the case of the third respondent, somewhat equivocally) contended.

[141] No corroborative material was offered in support of the submission that s 27(4) had been introduced to provide only procedural oversight by the Minister to ensure that the effect of the judgment in *South African Roads Board* supra, was respected in practice. To the extent that a legislative response to the judgment was considered necessary, it seems to us in any event to have been provided by the substitution, in terms of s 7(b) of the National Roads Amendment Act 100 of 1992, of s 9(3) of the National Roads Act with a provision expressly providing for notice and comment in terms substantially equivalent to those required of SANRAL in terms of s 27(4) of the current statute.[79] A more plausible explanation for the introduction of a requirement of ministerial approval for tolling in the current legislation, where it was previously lacking, is that it was to provide, understandably, for a greater measure of political oversight of the tolling of national roads.

[142] Our construction of the nature of the powers and functions invested in the Minister in terms of s 27(1) and (4) is supported not only on the wording of those provisions, but also upon a contextual assessment of the nature of the Minister's relationship of authority over SANRAL in terms of the SANRAL Act read as a whole. Thus, the Minister is the person in whom the State's rights as the only member and shareholder in SANRAL are invested.[80] As mentioned, SANRAL is required to fulfil its functions within the framework of government policy and in accordance with its business and financial plan.[81] The Minister is responsible for making Government policy known and is the functionary responsible for receiving any representations on the determination or amendment of such policy.[82] SANRAL's business and financial plans, as well as its strategic plans, require approval by the Minister annually.[83] The Agency is only able to use its funds in accordance with a business and financial plan approved by the Minister,[84] and it may only raise loans from the State through the Minister, or from any other source with the written permission of the Minister.[85] The Minister, on the recommendation of the Agency, determines the amount of toll that SANRAL or a concessionaire may levy and collect for the driving or use of a vehicle

[79] The substituted provision was further amended in terms of Act 27 of 1994 and Act 24 of 1996.
[80] Section 3 of the SANRAL Act.
[81] Section 25 of the SANRAL Act.
[82] Section 39 of the SANRAL Act.
[83] Section 35 of the SANRAL Act.
[84] Section 34(2) of the SANRAL Act.
[85] Section 33 of the SANRAL Act.

on a toll road. This is not an exhaustive analysis of the Minister's role under the Act, but it is sufficient to illustrate the extent to which, for reasons which to us appear obvious, the scheme of the statute provides for a significant measure of operational supervision and control of the Agency by the Minister. The requirement which the language of s 27(1) read with s 27(4) appears to impose that SANRAL may declare a road as a toll road only after the Minister's approval obtained after a substantive consideration of the proposal is wholly conformable with the scheme of the Act.

[143] Section 25(3), on which the Minister's counsel placed special reliance, goes only to the exclusive entrustment of the 'responsibility and capacity to perform the functions' mentioned in s 25(1) of the Act, not to the political authority required for the exercise of the responsibility and the employment of the capacity. The fact that the Act makes SANRAL the organ of state exclusively responsible for national roads does not imply that provisions in the statute providing a degree of political control over it should be narrowly construed.

[144] It follows that the Minister's consideration, in terms of s 27(4), of the substance of SANRAL's proposal to declare a national road as a toll road occurs in the second leg of the dichotomous exercise we described in paragraph [138], above. The Act is not prescriptive of the considerations to which the Minister will have regard in considering the merits of the proposal. In the context of the other provisions to which we have referred it might be expected, however, that the Minister would, amongst other matters, consider (i) how the proposal fitted within the framework of government policy, which, by reason of its current formulation, would include assessing whether the proposed tolling was socially and financially viable and (ii) the conformity of the proposal to the Agency's approved business and financial plan, including the indications the statute requires to be given therein concerning the cost of the project, the manner in which it is proposed to finance it and the planned performance indicators applicable to it. (In this respect, it appears to us that the amendments to s 27(4) in terms of s 3(b) of Act 3 of 2013[86] are essentially expositionary. A socio-economic assessment is necessary to provide the information that SANRAL and the Minister would need to be able to conscientiously assess how the proposals conformed to government policy that tolling be used to fund roads when it is socially and financially viable to do so. A traffic impact

[86] See para [77], above.

assessment is also an integrally necessary component of any such assessment for a number of quite obvious reasons: its results are necessary to inform the proper assessment of the financial viability of the proposals and their socio-economic impacts. The amendments are also consistent with the nature of the oversight role we understand the Minister to have in terms of s 27(1) and (4), as they read before the amendments to s 27(4). We do not read the amendments as reflecting a fundamental change in the scope and objects of the provisions in the manner that the respondents' counsel's arguments on their construction would have us accept.)

[145] The first respondent's counsel argued that the declaration of a road as a toll road in terms of s 27(1) read with s 27(4) was merely a preparatory step to tolling – they described it as doing no more than creating a 'gateway' – and, as such, was not an exercise that required any consideration to be given to issues such as the social and financial viability of financing the construction and upgrading of the roads by tolling. The social and financial viability of the project, they argued, was an issue that would be considered only when the terms of the BOT contract had been finalised. The argument is untenable in our view. Quite apart from it being inconsistent with how SANRAL itself represented the position in 2008 when it assured the MEC of Transport and the City that the socio-economic impacts were being considered in the intent to toll process, and told the Minister that the Standish report was a socio-economic impact report, the argument is also irreconcilable with a number of the applicable statutory provisions.

[146] If all that were entailed in declaring a road as a toll road was a provisional 'in principle' decision, it is difficult to understand why the Minister's approval should be required, or why making the decision should be rated as important enough to be a non-delegable function of the Board. The special provisions in s 27(4) for public participation and for obtaining input from the provincial and local government spheres of government would also be anomalous if all that were entailed in the declaration decision was a statement of principle. It would be very odd indeed for the legislature to have made elaborate provision for consultation in respect of a decision of virtually no practical import at all, but none at all in respect of what the respondent's counsel's argument implies would be a subsequent decision - not expressly provided for in the Act - with much greater practical implications.

[147] The notion that SANRAL and the Minister could not establish the social and financial viability of the undertaking before the terms of the BOT contract had been settled is moreover inconsistent with the requirement, in terms of s 35 of the SANRAL Act, that SANRAL's planned activities be set out in a plan showing the anticipated costs and performance indicators. It is also, incidentally, inconsistent with the indications in SANRAL's own policy that parties making unsolicited proposals in respect of BOT projects should be able to set out the estimated costs involved and indicate whether SANRAL would be required to make a financial contribution. The scheme of the Act clearly contemplates that when SANRAL decides, in terms of s 27(4), to make proposals for the declaration of a section of national road as a toll road, it will have done its homework and have a reasonably detailed conception of what it is about.

[148] We are in no doubt that the Minister's decision to approve SANRAL's proposals qualified as '*administrative action*' in the ordinary sense of the term as it was understood before the enactment of PAJA, as well as within the definition given in s 1 of that Act.[87] In considering SANRAL's application and giving it his approval, the Minister was executing a statutory function. To the extent that the exercise by the Minister of his discretionary power in terms of s 27(1) would include 'overtones of policy'[88] it would be in the 'narrower sense' referred to by O'Regan J in *Permanent Secretary, Department of Education and Welfare, Eastern Cape and Another v Ed-U-College (PE) (Section 21) Inc* 2001 (2) SA 1 (CC), 2001 (2) BCLR 118, at para 18-21. Granting the approval was a necessary precursor to the declaration of the roads as toll roads, and it was given to that end, in an exercise of an administrative nature, in implementing the requirements of the legislation. The declaration was, in turn, directed at bringing about the actual tolling of the roads. In the current case it was also directed at permitting the contemplated conclusion of an unconditionally binding agreement in terms of s 28(1) of the SANRAL Act. Any contract of the nature contemplated by s 28 entered into before the declaration of the affected road as a toll road would necessarily have to be conditional upon a declaration being made in terms of s 27(1)(a)(i).

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[87] The definition has been quoted in note 11, above.
[88] *Hayes and Another v Minister of Finance and Development Planning, Western Cape, and Others* 2003 (4) SA 598 (C) at 611C.

[149] The method of determining upon the characterisation of decisions as administrative action has been discussed in a number of leading authorities.[89] It is an imprecise art, and can sometimes be a difficult exercise because there will inevitably be grey areas. But taking a decision in the context of discharging a function in terms of a statute of a nature that, while it might entail carrying out policy, clearly does not involve making it, is something that readily falls within the established concept of 'administrative action'. The approval of SANRAL's proposal by the Minister was, moreover, not 'internal thinking' in the sense discussed in *National Roads Board* supra, at 9-10. It was a decision that had a direct external legal effect in that it gave SANRAL permission to declare the roads as toll roads and effectively conclude a contract of the nature contemplated by s 28 of the SANRAL Act. It also had the potential to adversely affect the rights of any person. This much is demonstrable by the fact that the Minister was required in the exercise of making the decision to consider the representations and comments of interested and affected parties. One of the purposes of such consideration was to determine whether SANRAL's proposal to toll the roads should be approved notwithstanding the contentions of affected parties to the contrary. The potential for the rights and interests of parties such as municipalities, and obviously also users of the road, to be adversely affected by tolling declarations has already been authoritatively recognised in the Appellate Division's judgment in *National Roads Board* supra. The altered statutory context has not affected the pertinence of the considerations that led to the appeal court's conclusions in that case.

[150] That the Minister's approval did not, of itself, have the effect of actually declaring the roads as toll roads does not detract from the vital significance of the decision towards the achievement of that end. A valid declaration of the roads as toll roads was dependent upon the valid exercise by the Minister of his power under s 27(4). If the Minister did not exercise the power competently because of a failure by him to appreciate its nature, then the resultant legal invalidity of his purported decision would, by virtue of a valid approval by the Minister being a statutory prerequisite to exercise by the Agency of its power, pre-empt the ability of SANRAL to lawfully make a declaration of the roads in terms of s 27(1)(a). A setting aside of the Minister's invalidly made decision would necessarily result in the declaration by SANRAL falling

[89] Notably, *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC), 1999 (10) BCLR 1059, at para 135 -143. For a general discussion of the concept, see Cora Hoexter, *Administrative Law in South Africa*, 2nd ed, (Juta, 2012), at chap 4.

with it; cf. *Seale v Van Rooyen NO and Others; Provincial Government, North West Province v Van Rooyen NO and Others* 2008 (4) SA 43 (SCA), [2008] 3 All SA 245, at para 13 (p. 50C-D (SALR)).

[151] The Supreme Court of Appeal's decision in *Director: Mineral Development, Gauteng Region and Another v Save the Vaal Environment and Others* 1999 (2) SA 709 (SCA), 1999 (8) BCLR 845, [1999] 2 All SA 381, especially at para 16-17, testifies to the fallacy of any argument in a case of this nature that an aggrieved party should be restricted to challenging the ultimate decision (in this case, the decision by SANRAL to make the declaration). The applicants in the court of first instance in *Save the Vaal* had successfully challenged on review a decision by the director of mineral development to issue a licence in circumstances in which the director had failed to consider objections based on environmental concerns in respect of the proposed open cast mining operation for which the licence had been sought. The director contended that that the mere issue of the licence in terms of s 9 of the Minerals Act 50 of 1991 could have no tangible, physical effect on the environment and that, for that reason, no environmental rights could be infringed by the mere issue of the licence. He argued that a challenge based on an alleged infringement of environmental rights could competently be mounted only after mining had been permitted to commence after the subsequent approval of an environmental management plan in terms of s 39 of the statute. Olivier JA disposed of the director's argument as follows:

> The argument cannot be sustained. The issue of a licence in terms of s 9 enables the holder to proceed with the preparation of an environmental management programme, which, if approved, will enable him to commence mining operations. Without the s 9 licence he cannot seek such approval. The granting of the s 9 licence opens the door to the licensee and sets in motion a chain of events which can, and in the ordinary course of events might well, lead to the commencement of mining operations. It is settled law that a mere preliminary decision can have serious consequences in particular cases, inter alia where it lays '. . . the necessary foundation for a possible decision . . .' which may have grave results. [90]

That reasoning finds a basis for application in respect of the Minister's decision in the circumstances of the current case. The Minister's decision in the current matter similarly 'opened the door' for SANRAL to declare the roads as toll roads.

[90] At para 17 of the judgment.

[152] We have said enough to make it clear that if the application for the review and setting aside of the Minister's decision were to be entertained, it would be upheld. In the circumstances it is strictly unnecessary for us to say anything more on the subject of the merits of the attack on the Minister's decision. In view of our ultimate decision of this aspect of the case we consider it appropriate, however, if only for the future guidance of the parties, to also express ourselves on the City's allegations about the shortcomings in the public participation process in relation to the Minister's decision-making in terms of s 27(4) of the SANRAL Act.

[153] We do not agree with the City's contention that the Minister's decision whether to approve SANRAL's proposals concerning the declaration of the roads as toll roads had to be preceded by a discrete process of public consultation to that which SANRAL was required to have undertaken in terms of s 27(4)(a) and (b). As discussed earlier,[91] the Minister is required to have direct regard to the comments and representations elicited in response to the notices that SANRAL has given of its proposals. She has to do this in the first leg of what we called the required 'dichotomous exercise' in order to satisfy herself that SANRAL has conscientiously considered and accommodated them. She is obviously also able herself to have regard to them, quite independently of SANRAL's response, in determining, in the second leg of the exercise, whether to approve SANRAL's application. It would be inimical to efficient government in the circumstances to require the Minister to afford interested parties a second opportunity to make submissions. Parties who have submitted comments in response to the notices given by SANRAL in terms of s 27(4)(a) and (b) must be taken to be aware that their responses will be put before the Minister.

[154] We do consider, however, that a fair procedural process in the circumstances would have required SANRAL to furnish a copy of its report to the persons who had responded to its notices. It would have to be furnished in time to afford such persons a reasonable period to make such further submissions to the Minister in reaction to the report as they might wish. It is of no moment that the statute does not expressly make provision for this. There is an overriding obligation in terms of ss 3 and 4 of PAJA on 'administrators'[92] to ensure that administrative decisions are made in a procedurally fair

[91] At para [124]-[130], above.
[92] In terms of s 1 of PAJA, '*administrator*' means an organ of state or any natural or juristic person taking administrative action.

manner.[93] Nothing in s 27(4) of the SANRAL Act excludes the broader incidence of the obligation. What is required in order to carry out the obligation depends on the circumstances of the given case. Making SANRAL's report to the Minister available to the persons who had submitted comments and representations would not only be fair, but also consistent with the founding values of openness and accountability and the basic values and principles governing public administration in terms of s 195 of the Constitution.

[155] Similarly, we consider that, in the context of its intention to support its proposals with the economic impact report prepared by Prof Standish, it also was incumbent upon SANRAL to have included reference to the report in its notices inviting comment and representations and to have provided for access thereto by interested parties to enable them to formulate their comments and representations on a properly informed basis. Thus, although the notices given in the current matter complied with the formal requirements of the applicable regulation, they nonetheless fell short of compliance with the fair procedure requirements in the circumstances.

The City's challenge to decision by SANRAL to declare the roads as toll roads

[156] The declaration by SANRAL of the roads as toll roads was challenged on the following main grounds:

1. That SANRAL's Board had not resolved to apply to the Minister of Transport for the approval of a proposal to declare the roads as toll roads, or to declare them as such upon the Minister's approval having been obtained.

2. That there was, in any event, insufficient information available for the Board to have validly made a decision to apply to the Minister for approval and thereafter declare the roads as toll roads.

3. That the public consultation process in terms of s 27(4) was 'a sham'.

[93] See also the Regulations on Fair Administrative Procedures published in GN R1022 of 2002 on 31 July 2002 as amended by GN R614 of 2005 dated 27 June 2005.

4. That material information that underpinned SANRAL's proposals was not made available to the persons whose comments and representations were invited.

[157] As noted earlier[94], a setting aside on review of the Minister's decision would necessarily also nullify the ensuing declaration by SANRAL. In view of our findings in respect of the Minister's decision it is thus strictly speaking unnecessary for us in considering the City's prospects of success, were we to entertain the review, to deal with the attack on SANRAL's decision to declare the roads as toll roads. We have nevertheless considered it appropriate to do so because if it were to be found that that too was, in itself, attended by illegality, the nature and extent of the unlawful conduct and its effects would fall to be weighed with the other considerations in determining what the interests of justice require in respect of the determination of the City's application in terms of s 9(2) of PAJA. A finding in this regard would also affect the determination of an appropriate remedy if we were to set aside the declaration of the roads.

[158] SANRAL alleged that its board of directors made a decision (i) to apply to the Minister for approval of its proposal that the roads should be declared as toll roads and (ii) in the event of such approval being granted, to declare the roads as toll roads. As explained in our discussion of the pertinent provisions of the SANRAL Act,[95] these decisions had to be made by the Board as they concerned matters that the Act prohibits being delegated to the chief executive officer or any other employee of SANRAL. They had to be made by the directors collectively. SANRAL has been unable to produce any documented record of any such decisions having been taken by the Board. In the circumstances the City alleged that the requisite decisions had not been made by the Board.

[159] SANRAL's answer to the City's allegation was contained in a single paragraph (paragraph 16) in the answering affidavit made by its chief executive officer, Mr Alli:

> Insofar as the decision of the Board is concerned I confirm that before SANRAL submitted its application to the Minister of Transport requesting the approval contemplated by section 27 of SANRAL Act, the Board took a decision (i) to apply for the Minister of Transport's approval and (ii) that in the event of the Minister of Transport providing such approval, to declare the

[94] At para [150].
[95] See paras [76]-[83], above.

> national road concerned a toll road. At the time the Board was properly apprised of the Project, including the intent to toll process and the application to the Minister of Transport, and the Board had regard to all relevant considerations in this regard. Following the Minister of Transport's approval pursuant to the instructions of the Board I accordingly arranged for the publication of Government Notice 978. SANRAL has been unable to find documents specifically recording this Board decision. Accordingly in order to prevent any uncertainty in this regard a resolution was passed by the Board in May 2014, a copy of which is attached marked "**NA1"**.

[160] Part of annexure NA1 to Mr Alli's affidavit was an explanatory memorandum circulated by him to board members in 2014 in the context of seeking their signatures to a round robin resolution directed at confirming the declaration of the roads as toll roads and curing the absence of a documented record of the decision to make the declaration. The City's counsel relied on the content of that memorandum to argue that it provided confirmation by Mr Alli himself that the Board had in fact not made the requisite decisions before notice of the declaration was published in the Government Gazette in 2008. In the alternative to that argument, counsel submitted that Mr Alli's averment that the Board had made the decisions was so clearly farfetched and untenable that it could be rejected merely on the papers and without the need for oral evidence, in the manner contemplated by the rider to the rule in *Plascon-Evans*.[96]

[161] It is therefore necessary to consider Mr Alli's explanatory memorandum in some detail. It was a three and half page closely typed document. We shall quote only the portions that are directly relevant to an understanding of the City's argument.

[162] Mr Alli described the purpose of the memorandum in the document as follows:

> The purpose of this memorandum is to ask the Board to resolve that the national road….be declared as toll roads. This element in the procedures to declare a road as a toll road was inadvertently omitted in the process to declare the above roads as toll roads.

He summarised the factual background for the 2014 Board as follows:

> The legislative process for the declaration of the roads had been followed except for an inadvertent omission that seems to have occurred with regard to the formal resolution of the Board to declare the roads as toll roads. This needs to be now corrected.

He proceeded in paragraph 4 of the memorandum to say:

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[96] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A), at 634E-635C.

> In consequence of the City's attack on the validity of the Declaration, diligent efforts were made to locate the Board resolution expressly authorising the Declaration. Unfortunately no such resolution was found. Notwithstanding that there is sufficient documentary evidence (see attached documents) that the project was discussed and considered by the Board at various stages of its development, doubt accordingly arises as to the validity of the Declaration.

In paragraph 5 of the memorandum, Mr Alli stated that '[d]*espite the absence of such a resolution, the Board was kept fully informed of the various steps undertaken in connection with the ... Project, which is evident from the following:*'. He thereafter listed 12 salient stages of the history of the project from 2000 until the approval by the Minister of SANRAL's application on 2 September 2008. It is not necessary to go through them. They essentially gave a potted history of the events that have been described earlier in this judgment. Suffice it to say that the last indication of any direct consideration of the matter by the Board was given as having been on 20 January 2004. That is consistent with what may be discerned from the minutes that SANRAL has disclosed. The 'attached documents' referred to in paragraph 4 of the memorandum also contained nothing to show that the declaration of the roads as toll roads had enjoyed the Board's attention since January 2004. The substantive part of the memorandum ended, in paragraph 6, as follows:

> The Board was at all times aware of, and updated on, the status of the …Project. There has been no material change in the circumstances relevant to [The Minister' approval] referred to in paragraph 5 above since 2 September 2008. In the circumstances and in order to avoid any doubt as to the legal status of the N1-N2 Winelands Highway as a toll road the Board is requested to formally declare the [roads] as toll roads in terms of section 27(1)(a)(i) of the SANRAL Act and to authorise SANRAL's Chief Executive Officer to cause such declaration to be published in the Government Gazette by passing the resolution attached to this memorandum.

[163] The City's counsel contended that these passages in the memorandum provided confirmation by Mr Alli that the matter of the declaration had not been placed before the Board after January 2004, which meant that the Board had not considered the proposals put up to the Minister for approval, or the representations and comments elicited in terms of s 27(4)(a) and (b), and had not decided to make the declaration that was published on 15 September 2008. Thus, so the argument proceeded, the averments in paragraph 16 of the answering affidavit deposed to by Mr Alli did not give rise to a dispute of fact and the *Plascon-Evans* rule found no basis for application.

[164] In our judgment the contention cannot be upheld. The memorandum is ambiguous. It also has to be read contextually with the averments by Mr Alli in his affidavit. The gravamen of his evidence in this regard, when it is considered contextually, is that a decision by the Board was in fact made, but that a documentary record of it cannot be found.

[165] The question then arises whether Mr Alli's evidence in this regard raises a genuine (often called '*bona fide*') dispute of fact, or whether it can be rejected on the papers as clearly far-fetched and untenable. It hardly needs mentioning that, in matters in which final relief is sought in motion proceedings, courts do not resolve disputes of fact on the basis of the balance of probabilities as it might appear on the papers. In the absence of oral evidence, any genuine dispute of fact on the papers is resolved, for the purposes of determining the case, on the basis of an acceptance of the respondent's version, unless the respondent's evidence is so far-fetched and untenable as to defy belief.[97] The test for finding such untenability has been described as 'a stringent one'.[98] The probabilities are plainly a relevant consideration in this regard. While a mere balance of probabilities on the papers is not enough, the untenability or far-fetchedness of a version may be established if the improbability of the evidence is towards the extremity of the negative end of the continuum of the measure of probability.

[166] Having acknowledged that it is only when the evidence for the respondent is blatantly implausible that it may be rejected on the papers, the court should not shrink

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[97] In *South African Veterinary Council and Another v Szymanski* 2003 (4) SA 42 (SCA), 2003 (4) BCLR 378, at para 24, it was suggested in passing that 'denials that are 'so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers' constitute a separate category of 'uncreditworthy denials' from those which do not raise 'a real, genuine or *bona fide* dispute of fact'. With respect, we doubt whether there is in fact a basis for such a distinction: a denial that is so far-fetched or clearly untenable to be rejected on the papers cannot provide the evidential basis for a genuine dispute of fact. We read the distinction drawn by Corbett JA in *Plascon Evans* supra, at 634I-635C, as having been made on a different basis; viz. as between the effect of the failure by the respondent who makes a bald denial to an inherently credible allegation by the applicant and fails to apply to cross-examine the applicant as being insufficient, within the ambit of the general rule, to raise a genuine dispute of fact and, by way of an exception to the general rule, the rejection of the respondent's evidence where its allegations or denials of the respondent are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers. In both of the posited situations, whether within the general rule, or by way of an exception to it, the effect will be the same; the respondent's averments will not be sufficient to bar the applicant from obtaining final relief on the papers. In the current matter the City needed to persuade us to disregard SANRAL's denial in terms of the exception to the *Plascon-Evans* rule.

[98] See *National Scrap Metal (Cape Town) (Pty) Ltd and Another v Murray & Roberts Ltd and Others* 2012 (5) SA 300 (SCA) at para 21 and 22 and *Mathewson and Another v Van Niekerk and Others* [2012] ZASCA 12 at para 7.

from rejecting evidence on that basis when the situation arises. As Cameron JA observed in *South African Veterinary Council and Another v Szymanski* 2003 (4) SA 42 (SCA), 2003 (4) BCLR 378,[99] '*Provincial Division practice may sometimes be robust (in* [his] *view, often rightly so) in applying* [the] *category of "far-fetched or clearly untenable*" *denials*' as the basis for deciding matters on paper. Qualified support for a robust approach in appropriate circumstances is also to be found in the *dicta* of Heher JA in *Wightman t/a JW Construction v Headfour (Pty) Ltd* 2008 (3) SA 371 (SCA), [2008] 2 All SA 512, at para 13 (a passage endorsed in a number of later judgments of the appeal court[100]):

> A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say "generally" because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter.

[167] The averments in paragraphs 15 and 16 of SANRAL's answering affidavit were directed at the allegation in the City's supplementary founding affidavit that the 'inescapable conclusion' was that the Board had not resolved (i) to seek the Minister's approval in terms of s 27(1) of the Act, or (ii) that the Agency should declare the roads

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[99] At para 26.

[100] See e.g. *Mokala Beleggings and Another v Minister of Rural Development and Land Reform and Others* 2012 (4) SA 22 (SCA) at para 11; *Wright v Wright and Another* 2015 (1) SA 262 (SCA) at para 15; and *Grancy Property Ltd v Manala and Others* 2015 (3) SA 313 (SCA) at para 19-20.

as toll roads in terms of the said provision. The City's allegation was supported by a detailed analysis of the documentation disclosed by SANRAL in compliance with the order of this court made in terms of uniform rule 35(11) on 21 May 2013 directing SANRAL '*to produce all … documents in its possession evidencing any deliberations or decisions by its board of directors pertaining to the decisions to seek the Minister's approval for the declaration of portions of the N1 and N2 national roads as toll roads and to declare the roads as toll roads*'. The analysis demonstrated that there had been no documented consideration by the Board of a proposal to declare the roads as toll roads between January 2004 and 15 September 2008, when the declaration was published in the Government Gazette. This, in the face of a requirement, in terms of s 17 of the SANRAL Act, that the Board must have minutes prepared and kept of the proceedings of their respective meetings and must have copies of the minutes circulated to their respective members that are required to be confirmed and signed at the next meeting, and which stand as *prima facie* evidence of those proceedings in matters before a court of law, any tribunal or a commission of inquiry.

[168] The last minuted consideration of the project by the Board in January 2004 concerned has been described above, at para. [86]-[91]. It is evident from the documentation disclosed by SANRAL that the usual practice - as to be expected - was for agendas to be drawn up for meetings of directors, for supporting documentation to be provided in respect of items on the agenda, for minutes of meetings to be kept, and for such minutes to be confirmed and approved at the next meeting of the Board. By virtue of s 5 of the SANRAL Act, the provisions of s 242 of the Companies Act 61 of 1973 would have been applicable to the Agency. The documentation that was disclosed by SANRAL in terms of rule 53 and the aforementioned disclosure order in terms of rule 35(11) indicated that SANRAL routinely complied with the requirements of those provisions as to the keeping and approval of minutes of directors' meetings. There is no reason to understand that the Agency would not also have been cognisant of and compliant with the obligation also to keep a copy of such minutes in a bound minute book as required by s 242(2) and (3), or that the directors would not have been aware of the potential consequences for them individually, by way of criminal liability, for non-compliance with those provisions.[101]

[101] Section 242 of the Companies Act, 1973, provided:

[169] If decisions were indeed taken by the directors to apply for the Minister's approval of a proposal to declare the roads as toll roads and, assuming such approval to be forthcoming, to give notice of the declaration, one would expect there to be a documentary record. It would be extraordinary for there to be no minute of an important decision involving a multi-billion rand project. It would be more extraordinary still, in the curious event that such a decision had not been minuted, that none of the directors would have detected the omission when the minutes of the meeting at which the decision was taken were considered for confirmation and adoption at the next meeting. The improbability inherent in the absence of any minute that a decision was taken is further compounded by the absence of any other documentation that might in the ordinary course have been expected to attend such decisions, such as a relevant item on any agenda for a board meeting, or a copy of a pack prepared for directors including the comments and representations received in response to the notices for consideration at a meeting if there were to be compliance with the Board's obligations in terms of s 27(4) before an application to the Minister could competently be submitted. SANRAL did not even produce a minute of a decision by the directors adopting a business plan in terms of s 35 including provision for the project to be undertaken. Moreover, as described earlier, proper compliance with s 27(4) of the SANRAL Act would have required the proposals to come before the Board for decision at least twice before the application for their approval was submitted to the Minister.[102] If the

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Keeping of minutes of directors' and managers' meetings
(1) The directors of a company shall cause minutes in one of the official languages of the Republic of all proceedings of meetings of directors or managers to be entered in one or more books to be kept for that purpose at the registered office of the company or at the office where such minutes are made up.
(2) Any resolution of directors or managers of a company in the form of a written resolution signed by the directors or managers shall be deemed to be a minute of a meeting and shall be entered in the book or books provided for in subsection (1) and be noted by the next following meeting of directors or managers.
(3) For the purposes of this section loose leaves of paper shall not be deemed to constitute a minute book unless they are bound together permanently without means provided for the withdrawal or insertion of leaves, and the pages or leaves are consecutively numbered.
(4) The minutes of any meeting of the directors or managers of a company purporting to be signed by the chairman of that meeting or by the chairman of the next succeeding meeting shall be evidence of the proceedings at that meeting.
(5) If default is made in complying with any requirement of subsection (1), (2) or (3), the company, and any director, manager or officer of the company who knowingly is a party to the default, shall be guilty of an offence.

[102] At para [125], above.

statutory requirements were complied with, there is therefore not an absence of any record of only one set of deliberations, but of at least two.

[170] While it is correct, as pointed out by SANRAL's counsel, that a decision taken by the Board would not be invalid or ineffectual by reason of a failure to minute it,[103] it is extremely unlikely in the context of (i) the Board's statutory obligations, (ii) the nature of the exercise that would have been entailed in making the decisions in terms of s 27(4) in a statutorily compliant manner and (iii) the modus operandi of the Board illustrated by the record of its earlier and subsequent consideration of the project, that there would be no documentary corroboration whatsoever of the Board having dealt with the matter in terms of the relevant provision.

[171] These features, considered together, irresistibly compel the conclusion that no decisions, as required by s 27(4), were taken by the Board. Mr Alli's bald assertion to the contrary is insufficient to displace their inexorable effect. He has failed even to attempt to explain how there could be such a complete absence of a document trail if the decisions had been made. He has not even been able to reconstruct from the Board's calendar when the alleged decisions would have been made. SANRAL has not been able to put up the evidence of a single director as to the occasions upon which and the circumstances in which the alleged decisions were made, or as to the content of any discussions that must have preceded them.

[172] It would not be enough - as SANRAL sought to do by applying belatedly for the admission of some of the supplementary affidavits, discussed below – for the Agency to adduce evidence by some members of the Board that they had been aware in general terms of the declaration of the roads as toll roads and that they had, individually, at some unidentified time, seen some of the relevant documentation, such as the Standish report. The SANRAL Act requires that the Board must act as a body in making decisions in terms of s 27(4). The attendance of at least five directors is required to make a meeting of the Board quorate.[104]

[173] Moreover, it is evident from the provisions of s 12(2) of the SANRAL Act, which regulate the composition of the Board, that the statutory object is that a mix of skills and interests should be brought to bear in the Board's decision-making. Thus,

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[103] Cf. *Sugden and Others v Beaconhurst Dairies (Pty) Ltd and Others* 1963 (2) SA 174 (E) at 181 *fin* – 182A.
[104] Section 15(2) of the SANRAL Act.

there is currently provision for representation on the Board of a senior officer from the Department of Finance, obviously because of the impact that decisions by SANRAL potentially can have on the exchequer, and also, apart from the chief executive officer[105] and a representative of the Department of Transport, the other members of the Board must have special qualifications, skills, expertise or experience in matters concerning national roads, corporate governance, financial management, business or the operations of the Agency.

[174] Indeed, with effect from 15 May 2008,[106] only the chairperson and the four directors appointed in terms of s 12(2) of the Act[107] who are required to be specially qualified or skilled have voting rights.[108] The non-delegable character of the Board's power to declare roads as toll roads underscores the importance that the legislation attaches to the collective application of all the aforementioned skills and interests in the making of the relevant decisions, and, of course, in the consideration of the comments and representations elicited from interested parties in terms of s 27(4). In the circumstances, if there had been a meeting of the Board at which these matters were discussed and decided, one would expect at least some of the directors present to remember it and be able to place it chronologically. One would also expect some form of cogent explanation as to why the omission to minute the decisions had not been detected when the minutes of the meeting at which the decisions were made were subsequently considered for approval. That the omission should have escaped the attention of all the directors, and on more than occasion, is highly improbable, for as the Act itself testifies,[109] the decisions concerned were amongst the more important that the directors could be called upon to make in terms of their statutory mandate.

[175] The equivocal tenor of Mr Alli's explanatory memorandum to the directors in office in 2014 does nothing to ameliorate the effect of the extreme improbability in the circumstances just discussed of his bald averment that the Board did make the

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[105] The chief executive officer is a director *ex officio*.
[106] When s 12(2A), which was inserted in the SANRAL Act in terms of s 14(b) of Act 42 of 2007, came into effect.
[107] Even before the substitution of s 12(2), with effect from 15 May 2008, a contextual construction of the Act would support the inference that in appointing the members of the Board, in terms of s 12(2) as it read prior to substitution, the Minister would be mindful, having regard to the nature of the decisions that the Board would be called upon to make in terms of the statute, of the need for an appropriate mix of qualifications, skills and experience in the directorship.
[108] Section 12(2A) of the SANRAL Act.
[109] Section 18(5) of the SANRAL Act.

decisions. On the contrary, much about its content suggests an appreciation by Mr Alli that the City had uncovered a fatal flaw in the process and a sense of desperation on his part to try to recover the situation.

[176] For all these reasons we have concluded that SANRAL's bald denial of the City's allegation that the Board did not make the necessary decisions in terms of s 27(4) of the SANRAL Act did not give rise to a genuine dispute of fact because, in the absence of any of the sort of corroborating evidence that SANRAL should have been able to adduce in the circumstances, Mr Alli's bland averment that the Board did make the decisions is untenable.

[177] For this reason too, the declaration of the roads as toll roads would fall to be set aside if this court were to condone the City's delay and entertain the application for the relief described in paragraph [17].5, above.

Reasons for the dismissal of an eleventh hour application by SANRAL for the admission of supplementary answering affidavits

[178] It is convenient at this stage to refer to an application that we heard in the week before the commencement of argument in the review application for the admission, out of time, of certain supplementary answering affidavits by persons who were members of the Board at the time the declaration of the roads as toll roads was published and by others who were directors in 2014 when the round robin resolution to which Mr Alli's explanatory memorandum was addressed was circulated. The content of the affidavits of the deponents who had been directors in 2008 affirmed the averments made by Mr Alli in paragraph 16 of the principal answering affidavit. We refused to admit the supplementary affidavits and indicated that our reasons for doing so would be provided in this judgment. We also reserved the determination of the costs of the interlocutory proceedings. We did that in recognition of the provisional status of our order refusing the application, and mindful that it was open to SANRAL to renew the application, or for us to recall our ruling should it appear appropriate in the light of any developments that might have arisen before judgment was delivered.

[179] SANRAL gave notice on 17 July 2015, less than one month before the hearing of the principal case was due to commence, of its intention to apply at the commencement of proceedings on 11 August 2015 for the admission of the supplementary affidavits. Two of the affidavits, those deposed to by Messrs Donaldson

and Macozoma, respectively, related to the issue of whether the Board had resolved to apply for the approval of the Minister of Transport for the declaration of the roads as toll roads and thereafter to declare the roads as toll roads. The content of those affidavits added nothing of factual substance to what had already been averred in paragraph 16 of SANRAL's principal answering affidavit deposed to by Mr Alli on 22 October 2014.

[180] The City gave notice of its opposition to the application to introduce the additional affidavits and also of its intention to apply for SANRAL's application to be heard a week before the hearing of principal application and, contingent upon any decision by the court, despite its opposition, to admit the affidavits, to seek leave to subpoena the 2008 board member deponents (Messrs Donaldson and Macozoma) to appear on the first day of the hearing of the principal application to be cross-examined on the content of their affidavits. The City's contingent application also included a prayer that an affidavit made by the City's attorney of record, Mr Cullinan, concerning the content of a telephonic conversation he had had with Mr Donaldson regarding the latter's affidavit, be admitted in reply to Donaldson's affidavit.

[181] We heard the interlocutory applications on 4 August 2015, pursuant to directions by the case manager judge for them to be set down on that date.

[182] The principles applicable in the determination of an application to admit affidavits outside of the provisions of the rules governing the delivery of papers in the ordinary course in motion proceedings are well-known,[110] and it is unnecessary to rehearse them.

[183] In contending for the admission of the affidavits of Donaldson and Macozoma, SANRAL's counsel submitted that they went to a material issue in the review, namely whether the Board had, as required in terms of the SANRAL Act, considered and approved the application to the Minister and determined upon the declaration of the roads as toll roads in the event of the application obtaining the Minister's approval. Counsel submitted that SANRAL was concerned - in particular, by certain submissions thereanent in the City's heads of argument - that its position in the case was vulnerable

[110] Cf. *James Brown & Hamer (Pty) Ltd (Previously named Gilbert Hamer & Co Ltd) v Simmons, NO* 1963 (4) SA 656 (A), at 660 and *Hano Trading CC v JR 209 Investments (Pty) Ltd and Another* 2013 (1) SA 161 (SCA) at para 12.

by reason of the absence of any affidavits by other board members confirming what Mr Alli had said in the answering affidavit.

[184] It appeared to us that the vulnerability arising from the evidence of Mr Alli in this regard that was already on record in paragraph 16 of the answering affidavit lay more in the absence of any written record of the resolutions he claimed had been adopted by the board of directors, or of any other documentation to evidence that the matter had been considered by it. For purposes of the determination of the issue in motion proceedings, however, this court would be bound to treat the evidence in accordance with the *Plascon-Evans* principles, discussed earlier. The City had not applied to cross-examine Mr Alli and it had adduced no direct (or primary) evidence in contradiction of his averments in paragraph 16 of the answering affidavit. SANRAL's counsel's submissions as to the existence of a vulnerability in SANRAL's case, which in the interests of justice might fall to be addressed by the admission of the additional affidavits, had to be assessed in that context.

[185] It seemed to us that the evidence of Messrs Donaldson and Macozoma on the point in issue was subject to characterisation as far-fetched and untenable on exactly the same basis as that of Mr Alli is. Their affidavits contained no indication whatsoever as to when, where, or in what circumstances, the alleged resolutions were adopted. Neither of them gave any indication of any recollection of any discussion by the Board of the submissions received from the public or the municipalities. Like that of Mr Alli, their evidence also offered no explanation of how such important decisions could not have been recorded in a board meeting agenda document, or minuted, or how the omission to have minuted them could not have been detected by any of the directors at the next meeting of the board when it would have been standard procedure – as evidenced in minutes that have been produced – to note and adopt the minutes of the previous meeting. Thus, if Mr Alli's evidence on the point were to be determined in the principal case to be so far-fetched and untenable as to be rejected out of hand on the papers, so would theirs, and for the same reason.

[186] Indications in the affidavits that the respective deponents were aware that an application had been submitted for ministerial approval, or that they had, at some unidentified stage, seen a report or a pack of submissions did not, by virtue of the contextual vagueness of the averments, take the question of whether the directors, constituted collectively as the Board, had considered the matters they were required to,

and adopted the relevant resolutions, any further than Mr Alli's affidavit already did. In the circumstances it seemed to us that no point would be served by the extraordinary admission of the additional affidavits.

[187] Any concern that SANRAL might have had about the submission in the City's replying affidavit and heads of argument that the 'most reasonable inference' to be drawn from the failure by SANRAL to have attached a confirmatory affidavit by Donaldson was that he had refused to provide one had been addressed by its very attempt to introduce the affidavit. It is no longer a relevant consideration in the context of SANRAL's attempt to introduce an affidavit by Mr Donaldson, but it seemed to us that there was in any event a weakness in the City's argument in that respect because there had been no suggestion that Donaldson had not been equally available to it as a witness.

[188] We therefore did not reach the City's contingent application. Lest it be material, should this matter be taken further, we would nevertheless make these observations. In the absence of any indication that the City was equipped with direct evidence to contradict the witnesses, it did not seem to us that the contemplated cross-examination[111] would affect the probabilities as they appeared on the papers. We were not persuaded that the cross-examination of Donaldson and Macozoma on the points that the City's counsel had identified for that purpose would be likely to serve any effective purpose in the determination of the matter if Mr Alli's evidence were to be left undisturbed by cross-examination.

[189] The evidence in the affidavits by Messrs Morar and Hlabisa, who are currently board members, also added nothing of substance to the evidence already before the court. We understood (correctly, as it turned out) it not to be in dispute that the documented round robin resolution was adopted and subsequently confirmed at a meeting of the board in 2014. We also understood, correctly, that SANRAL would not be contending in the principal application that the 2014 board members had revisited the representations in respect of the contemplated tolling of the roads that had been submitted in 2008 during the consultation process prescribed in terms of s 27(4) of the SANRAL Act. In the circumstances we understood the issue in the main case to be whether the 2014 resolutions could effectively have addressed the absence of any

[111] At our request, the City's counsel provided us with a list of topics that they would wish to canvas in the proposed cross-examination.

relevant resolutions in 2008, alternatively the absence of any documentation of such resolutions as required in terms of 17 of the SANRAL Act. The additional affidavits that SANRAL sought to introduce would not contribute to the determination of the issue one way or the other beyond what was already before the court. There was thus also no reason to admit those affidavits in evidence out of the ordinary course.

The additional grounds upon which SANRAL's declaration of the roads as toll roads were challenged

[190] By virtue of the conclusion stated in paragraph [177], above, it is not necessary for us to arrive at a decision in respect of the second and third of the three grounds of the City's challenge to the declaration decision described earlier, in paragraph [156]. We shall, however, nevertheless express ourselves briefly on those grounds lest this matter go further and another court differ from us in respect of our rejection of the averments in paragraph 16 of Mr Alli's affidavit.

Insufficient information available for the Board to have validly made a decision to apply to the Minister for approval and thereafter declare the roads as toll roads.

[191] We have already remarked on the information that was not available to Professor Standish when he prepared his economic impact reports.[112] There is nothing in the evidence to indicate that the Board, if it had made the decisions which Mr Alli claims it did, would have been better informed than Professor Standish was. Indeed, there is nothing to substantiate any suggestion that even the Standish reports ever served before the Board. SANRAL has not disclosed any documentation that would indicate that the Board (or the Minister) was apprised of any reasoned estimate of the cost of the project or the range of tolls that would be required to cover the costs and generate a profit for a concessionaire.

[192] Mr Alli averred in the answering affidavit that SANRAL's financial assessment of all its toll road projects was typically carried out using the 'Loan Supportable by Revenue' (LSR) method. As pointed out by the City's counsel in their written argument, however, Alli did not assert that such an assessment had in fact been done in respect of the project, and no results of any such assessment were offered in evidence. The city manager indicated in the City's replying affidavit that nothing had been

[112] At para [107], above.

disclosed in the rule 53 record that showed that the Board had been provided with an LSR assessment.

[193] The documented record suggests that the most detailed information presented to the Board was that set out in the aforementioned memorandum submitted to the Board in January 2004.[113] In that memorandum the estimated value of the initial construction works was given as being 'in the order of R1,9 billion' excluding the completion of the second bore of the Huguenot Tunnel. It was also stated that the 'total estimated infrastructure investment over a 30 year concession is R5 billion'. The memorandum did not provide any particularity as to what was comprehended by the 'initial contract works' and provided no explanation of how the aforementioned values had been computed.

[194] The estimated volume of traffic using the toll roads would be a critical consideration in any such calculations. It is evident that SANRAL adopted two irreconcilable positions in this regard. It contended on the one hand that the toll roads would be a net attractor of traffic, while on the other apparently conceding that provision would have to be made for the effect of diversionary traffic onto provincial and municipal roads. The change of position would appear from the information in Prof Standish's later report to have been premised on the results of a traffic modelling exercise. There is no evidence to indicate that the Board was provided with any particularity of projected traffic volumes or traffic modelling.

[195] The documented information placed before the Board that is vouched on the record falls materially short in detail of what would be required in respect of the project had SANRAL complied with the requirements of s 35(2) of the SANRAL Act in regard to the information that should have been set out in its relevant business and financial plans. No evidence of the existence of such plans was placed before us by either side in the case, but it seems unlikely in the context of the nature of the City's challenge that SANRAL would not have put the plans in evidence if they would have served to rebut the City's allegations that the Board was inadequately equipped to be able to make an informed decision.

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[113] Annexure AE 116 to the City's supplementary founding affidavit; discussed at para [86]-[91], above.

The allegation that the public consultation process in terms of s 27(4) was 'a sham'

[196] This ground of attack, which was predicated on the alleged failure by the Board to have considered the representations and comments elicited in terms of s 27(4)(a) and (b), overlapped with the allegation that the Board had not made the required decisions. Obviously, if the directors did not collectively consider and apply their minds to the responses obtained in terms of the intent to toll process, they were not in a position to competently decide to apply for the Minister's approval, or to authorise the declaration.

[197] It is significant that SANRAL adduced no evidence whatsoever to indicate that a meeting of the Board had taken place between 30 May 2008, when the period for the submission of comments and representations closed, and 2 September 2008, when SANRAL's proposals were submitted to the Minister for approval. In the context of the unsatisfactory nature of the averments in paragraph 16 of the principal answering affidavit that we discussed earlier at some length, the inference is compelling that there was indeed no consideration of the comments by the Board.

[198] In our judgment the further grounds upon which the City relied in support of the relief described in paragraph [17].5 would also afford valid reasons to uphold its challenge.

Indirect unfair discrimination

[199] We find it unnecessary and, indeed, inappropriate to reach the challenge to the tolling decisions on the basis of their allegedly unlawfully discriminatory effect. We doubt whether the challenge would be sustainable. It was addressed only briefly in the City's heads of argument, and hardly at all in the oral submissions. Without attempting to decide the question, it seems to us on the face of it that a decision to toll the roads would not be discriminatory in the relevant sense.[114] In any event, the nature of any discriminatory effect would, if it were to arise, be evident only if and when the toll tariffs were determined.[115]

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[114] Compare, for example, the comment at note 46 in *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) about the inadvisability of an unfair discrimination challenge to the gender neutral provisions of s 21 of the Insolvency Act, which, it was accepted, would nevertheless adversely affect women more than it would men.

[115] Compare the remarks in *City of Cape Town v South African National Roads Agency Ltd and Others* [2013] ZAWCHC 74 (21 May 2013) at para 91.

Requirements of the interests of justice

[200] The City contended that the tolling of the roads would bear heavily on the population of Cape Town and the surrounding areas for decades to come and that the interests of justice required the court to entertain the review if the decisions to declare the roads as toll roads had been made unlawfully. The contention was predicated on the City's assessment of the tolls that would have to be recovered to provide the base toll tariff that the draft contract documentation in respect of a contemplated BOT contract with PPC appeared to warrant.

[201] Pointing to a clause in the draft contract (discussed in detail in para [234]-[237], below) that would require SANRAL to meet any deficit between the tolls actually charged and the contractually stipulated base toll tariff, the City alleged that if the tolls actually imposed were substantially lower than the base toll tariff, a significant burden would be placed on the National Treasury, on which SANRAL's contingent obligation would ultimately fall, which would redound equally adversely to the public interest. The City estimated that the amount involved would exceed the cost of funding the construction and upgrading of the roads directly from the Consolidated Revenue Fund.

[202] It seems to us, however, that the remedies afforded by political accountability are probably sufficient and more appropriate responses to the considerations urged by the City than judicial review. In this respect it weighs with us that further decisions have yet to be made before a conclusively binding contract in the form of the draft can come into effect, containing as it does a financial guarantee by SANRAL and a deed of suretyship. The Ministers of Transport and Finance will have to apply their minds to determine whether the contemplated guarantee should be issued. No doubt, the experience of the Gauteng tolling project will conduce to the most anxious consideration of the financial implications of the project at that stage, if it is reached.

[203] It also weighs with us that SANRAL and the Minister have the power to withdraw the declaration, and the Minister may also, unilaterally, forbid SANRAL from proceeding with the project if she is satisfied that it would be prejudicial to the national interest or the strategic or economic interests of the Republic. Even if SANRAL and the Minister were previously inadequately informed of the City's reasons for opposing the project, the current proceedings, including the expert witness reports introduced by

the City in support of its case, will have resulted in them now being fully apprised of the considerations that the City considers to be material.

[204] There are, however, other considerations that have persuaded us that the interests of justice do require the court to entertain the application for the judicial review of the tolling decisions.

[205] It is clear from the discussion above that the provisions of the SANRAL Act have been ignored, or misapplied in a number of material respects. The resultant breaches of the principle of legality are stark, especially when they are considered cumulatively. It is of special concern that the nature of the unlawful conduct that has been identified in these proceedings goes in material part to a failure to give proper effect to the right of public participation. That is something that is fundamental to the effective expression of everyone's right to administrative action that is lawful, reasonable and procedurally fair. It also a feature of the decision-making that puts it strikingly at odds with the founding values of accountability, responsiveness and openness, which are meant to underpin democratic government in this country and critically distinguish it from the authoritarian system that prevailed in the pre-Constitutional era. As remarked in Hoexter, *Administrative Law in South Africa* Second Edition (Juta, 2012) at 363,[116] in a passage quoted with approval by the Constitutional Court[117]*:*

> Procedural fairness . . . is concerned with giving people an opportunity to participate in the decisions that will affect them, and - crucially - a chance of influencing the outcome of those decisions. Such participation is a safeguard that not only signals respect for the dignity and worth of the participants, but is also likely to improve the quality and rationality of administrative decision-making and to enhance its legitimacy.

There is a very evident need for corrective steps to be taken, both within SANRAL and also at the executive level of national government.

[206] It is apparent that decisions in terms of s 27 of the SANRAL Act are likely to arise for consideration again, probably on numerous occasions, in the future. The current proceedings render it opportune for the shortcomings in compliance with the Act to be squarely addressed, so that hopefully they will not occur again. The

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[116] Citing Woolf et al, *De Smith's Judicial Review* 6ed (2007) at 318-19.
[117] In *Joseph and Others v City of Johannesburg* 2010 (4) SA 55 (CC), 2010 (3) BCLR 212 at para 42 (per Skweyiya J).

administration of the SANRAL Act potentially affects a wide range of rights and interests of a broad cross-section of the national community. It is obviously in the public interest that the Act be lawfully administered and that it be implemented in faithful compliance with its provisions and the Constitution.

[207] We have not overlooked the prejudicial effect of the City's delay on SANRAL's interests. We accept that a considerable sum of money has been expended in taking the tender process up to a stage where the Agency is close to being able to conclude a BOT agreement with PPC. As noted, however, that process is not assured of a positive final outcome because of the further consideration that is likely to be required in terms of the Public Finance Management Act 1 of 1999 ('the PFMA'). We have also been mindful of the prejudice that PPC may suffer if the effect of a successful challenge by the City puts an end to the project (something which is by no means certain) into which it has no doubt invested much time and expense since the roads were declared as toll roads. In our judgment, however, these considerations do not weigh heavily enough to displace the requirements of the interests of justice that we have identified. The fact that the determination of the challenge to the declaration of the roads as toll roads will require SANRAL and the Minister to repeat the process in terms of s 27(4) of the SANRAL in proper compliance with the requirements of those provisions if they wish to continue with the project does not mean that the tender process undertaken to date will necessarily be redundant. The time that would be involved in a fresh process in terms of s 27(4), if it were efficiently undertaken, would also not unduly delay the desirable construction and upgrading of the roads, if it were to be lawfully decided at the conclusion of such a process to proceed with the tolling project.

[208] The City's application in terms of s 9(2) of PAJA will therefore be upheld in respect of the application for the review of the tolling decisions. In the result, and by virtue of what we have said concerning the merits of the City's challenge to those decisions, the relief sought by the City in terms of paragraphs 1.4 and 1.5 of the notice of motion[118] will also be granted. It will be directed that if SANRAL wishes to proceed with the tolling project, its Board must initiate a fresh process *ab initio* to that end in terms of s 27(4), with due regard to the findings in this judgment as to the import of the provisions.

[118] Described in para [17].4 and [17].5, above.

Alternative relief sought by the City in terms of paragraph 2 of the notice of motion

[209] It is not necessary in the circumstances for us to determine the relief sought by the City in terms of paragraph 2 of the notice motion (quoted in paragraph [122], above) in the alternative to the orders prayed in paragraph 1. We shall nonetheless state what our decision would have been, to avoid any possible need for the matter to be sent back to us if our finding in favour of the City's review challenge were to be upset on appeal.

[210] It will be recalled that in the alternative to the relief sought in terms of paragraph 1 of the notice of motion, the City sought:

1. An order declaring that SANRAL's decision to select PPC as a preferred bidder/tenderer and/or to award the tender to PPC in respect of the N1 and N2 Winelands Concession Contract is unlawful, invalid and of no force or effect (para 2.1A of the notice of motion).

2. An order reviewing and setting aside SANRAL's decision to select PPC as a preferred tenderer and/or award a tender to PPC and SANRAL's failure to make a decision to withdraw the 2008 Declaration in terms of s 27(1)(a)(ii) of the SANRAL Act (para 2.1.1 and 2.1.2 of the notice of motion).

   and

3. An order directing SANRAL to consider and decide whether to withdraw the Declaration and to notify the City of its decision in this regard within ten days of making such a decision and if it decides not to withdraw the Declaration, of the reasons for such decision (para 2.2. of the notice of motion).

[211] The manner in which the relief sought by the City in terms of paragraph 2 of the amended notice of motion has been formulated suggests a confused and untenable conflation of two quite separate concepts; viz. the selection of PPC as preferred bidder, on the one hand, and the failure by SANRAL to withdraw the declaration of the roads as toll roads, on the other. In oral argument, probably because they had become astute to this, the City's counsel submitted that the applicant was not objecting to the selection of PPC *per se* as preferred bidder, but rather that it was challenging SANRAL's selection of any preferred bidder at all. It thus became clear in the course of the oral

argument that what the City was challenging was the lawfulness of SANRAL proceeding with the process of appointing a concessionaire in the face of considerations, which, according to the City, should have been impelling it to withdraw the declaration. It appeared from the oral argument advanced to us on behalf of the City that only the relief set out in paragraphs 2.1.2 and 2.2 of the notice of motion remained relevant if the court were to refuse to review and set aside the declaration in terms of paragraph 1 thereof. Obviously, if SANRAL were to reconsider and, with the Minister's approval, decide to withdraw the declaration, the selection of PPC (or any other tenderer) as preferred bidder would be rendered academic.

[212] The City did not, however, move to amend the notice of motion to correspond with the position articulated by counsel in oral argument, so it is perhaps desirable for us, as we are dealing with this aspect contingently, to dispose of the relief sought in terms of paragraph 2 of the notice of motion in the form it was pleaded.

[213] SANRAL disputed that the selection of PPC as preferred bidder constituted 'administrative action' in terms of PAJA. It also contended that even it were, the challenge was in any event premature because it was by no means certain that the selection would result in the conclusion of a binding contract with PPC, either on the terms contemplated in the marked up draft contract which formed part of the tender documentation, or on different terms.

[214] Assuming, without deciding, in favour of the City that the selection of PPC did constitute administrative action, there is nothing in the evidence to show that the selection was unlawful. In review proceedings in procurement matters a court is not concerned with the merits of the decision to select the preferred tenderer, but rather with whether the decision was made lawfully. The inquiry therefore is not about whether SANRAL's decision to select the preferred tenderer instead of calling for revised bids or withdrawing from the project was good or bad, or wise or foolish.[119]

[215] As observed in *South African National Roads Agency v The Toll Collect Consortium* 2013 (6) SA 356 (SCA), at para 20, *'the evaluation of many tenders is a complex process involving the consideration and weighing of a number of diverse factors. The assessment of the relative importance of these requires skill, expertise and the exercise of judgment on the part of the person or body undertaking the evaluation.*

[119] Cf. *Joubert Galpin Searle Inc and Others v Road Accident Fund and Others*2014 (4) SA 148 (ECP) at para 59 (Plasket J).

That cannot be a mechanical process. The evaluator must decide how to weigh each factor and determine its significance in arriving at an appropriate decision. Where that occurs it does not mean that the evaluation is not objective. Provided the evaluator can identify the relevant criteria by which the evaluation was undertaken and the judgment that was made on the relative importance and weight attached to each, the process is objective and the procurement process is fair'; and, at para 27, '*The court is only concerned with the legality of the tender process and not with its outcome*'.

[216] In this instance, SANRAL devised criteria and factors that had to be taken into account in the appointment of the preferred tenderer. These were set out in the invitation to tender. The decision-makers in this process were the evaluation teams and the contracts committee. The evaluation teams assessed and scored each tender according to the disciplines determined. The contracts committee appointed the best tenderer based on the report by the project manager. The courts have emphasised repeatedly that the evaluation of tenders must be left to the evaluators. It is not a function of the court, but that of the experts who over a period of many months assessed the tenders based on criteria prescribed by SANRAL and on the methodologies that each evaluation team developed, to select the successful bidder.

[217] The bid process was structured in two evaluation phases.

[218] During the first phase, three consortiums, namely, Overberg Consortium, GTIMV Consortium and PPC, submitted tenders. Six evaluation teams, comprised of SANRAL project team members and expert consultants, assessed each of the respective tenders. Minimum requirements for compliant tenders were stated in the invitation to tender. All the bidders were assessed and scored in respect of six categories, namely, broad based black economic empowerment and socio-economic development, engineering, environmental, finance, legal and traffic and toll strategy. A total of 42 evaluation team members were involved, including experts in the respective six disciplines. Base cases were developed as benchmarks against which tenders could be assessed. Each evaluation committee further developed its own evaluation methodology prior to the receipt of tenders with the aim of ensuring that the project could be designed, constructed, maintained and operated safely, to foster private sector expertise development in transport infrastructure and to minimise the risk borne by the public sector. After each of the evaluation teams had assessed and scored the bids,

SANRAL's project manager compiled a tender evaluation report and submitted it to the contracts committee.

[219] The contracts committee was mandated by the Board to assess the evaluation report and select the successful tenderers. The committee included, amongst others, representatives of the Board. It assessed the tender evaluation report and approved the selection of Overberg Consortium and PPC, which had been recommended as the best two tenderers. The first evaluation phase was concluded during April 2011.

[220] The two best tenderers were selected for the second phase, known as the 'best and final offer' ('BAFO') phase. The same process followed in phase 1 was repeated during the assessment of the BAFO. The BAFO evaluation phase also entailed the furnishing of further clarification on aspects of the tenders and the submission of a best and final offer by each of the two tenderers still involved in the process. This phase was concluded in September 2011.

[221] On the basis of the BAFO evaluation, the contracts committee selected PPC and Overberg as the preferred tenderer and the reserve tenderer, respectively. That marked the end of the tender process, but, as presaged in the terms of the invitation to tender, it did not result in the award of the contract, but rather in the commencement of negotiations between SANRAL and the preferred bidder towards the conclusion of a BOT agreement. The invitation to tender made it clear, however, that SANRAL was not obliged to conclude a contract and had the right to withdraw from the process. We agree with SANRAL's argument that the inchoate nature of the procurement process makes the City's challenge to the selection of a preferred bidder a misdirectedly premature attack in the peculiar circumstances of the case.

[222] The City's attack on the selection of PPC as preferred bidder has been based in large measure on events that occurred after the submission and the evaluation of the tenders and on issues which bear more relevantly on the declaration of the roads as toll roads, rather than on the appointment of a concessionaire to upgrade them and run the tolling operation. No evidence has been adduced to support the notion that the invitation to tender and the tender evaluation process lacked transparency, or was unfair or uncompetitive. The requirements of s 217(1) of the Constitution are directed at establishing the principles under which the government procurement system has to

operate, not at regulating government decisions about what goods or services to procure, or what projects to undertake.

[223] The City's complaint that the procurement process was not cost-effective or objective because the costings for the project had been supplied from the outset by PPC as the scheme developer does not bear scrutiny, as the tender process was conducted by evaluation teams that were entirely independent of the scheme developer, and included expert consultants.

[224] For these reasons, had we been obliged to decide the matter, we would not have upheld the City's challenge of the selection decision of PPC as preferred tenderer, and would have declined to make orders in terms of paragraphs 2.1A and 2.1.1 of the notice of motion.

[225] We do not find it necessary to deal in any detail with the City's application to review SANRAL's failure or refusal to withdraw the declaration of the roads as toll roads. The application was made on the basis of an alleged failure by SANRAL to take proper account of what the City alleges to be relevant considerations. The considerations that the City claims SANRAL failed to take into account are: (i) the implications for the viability of the project to be derived from the widely publicised public disaffection with the GFIP; (ii) the efficacy of the proposed measures to mitigate socio-economic impacts; (iii) social issues and (iv) changed circumstances. Upon analysis it is apparent that the alternative challenge in terms of paragraphs 2.1.2 and 2.2 of the notice of motion is nothing more than a surrogate for the main challenge. The City is essentially contending that the financial and social considerations that it maintains should have convinced SANRAL not to declare the roads as toll roads in the first place should now require it, of its own accord, to retract the declaration. It seems that the alternative relief may well have been formulated as a gambit to try to circumvent the possible adverse consequences of the delay rule for the review relief sought in terms of paragraph 1 of the notice of motion.

[226] The difficulty with the second part of the alternative relief sought by the City is that if its review challenge to the declaration of the roads as toll roads had failed – which is the predicate upon which the alternative relief has been sought - it would follow that the declaration would have to be accepted to have been lawfully made. Thus the financial and social considerations that pertained when the declaration was made could

not afford a sound legal reason to compel the Agency to consider revoking the declaration. The City would have to demonstrate a material change in circumstances to provide a basis to approach a court to order SANRAL to revoke a decision that had, or was deemed to have been, made lawfully. It has signally failed to do so in any relevant respect.

[227] If the declaration of the roads as toll roads had been lawfully made, it would not be for the court to intervene in the manner sought by the City because SANRAL was in the process of negotiating a commercially unwise contract for the operation of the tolling system on the roads. That sort of oversight is the function of the Minister of Transport in terms of the SANRAL Act. The implications of the GFIP for the current project are that, as we have described earlier,[120] the experience there has highlighted the impact that a disparity between the revenue required to cover the cost of the project and that which can realistically be realised in terms of the tariffs fixed in terms of s 27(3) of the SANRAL Act can have on the National Treasury. In regard to the Western Cape tolling project, the draft concession contract which has been the basis for negotiation between SANRAL and PPC provides, as we shall discuss in greater detail below, for SANRAL to reimburse PPC for any shortfall between the so-called 'base toll tariff' to be agreed between the parties as reasonable and necessary to afford PPC - assuming the predicted traffic volumes were realised – the opportunity to generate sufficient revenue from the operation to cover its costs and to provide it with a profit, and that which would be generated by any tolls determined by the Minister at lower levels. In that context, for reasons we go into in some detail below,[121] the financial viability of the project is in any event likely to be reassessed by the Ministers of Transport and Finance before the project is proceeded with.

[228] The City also complained that the scope of the works contemplated in terms of the contract currently under negotiation differs materially from that evaluated by Professor Standish in the proposals submitted to the Minister. The changes are alleged to impact on the cost of proceeding with the project, requiring a reassessment of the costs to benefits ratio of undertaking it. In essence this is a financial and social viability issue. Whether it becomes a real issue, and if so to what extent, will depend on the terms of the contract that might ultimately be concluded. As noted, it is unlikely that

[120] At para [114], above.
[121] At para [261] ff.

any such contract could come into effect without further consideration by the Ministers of Transport and Finance of the viability of the project. Moreover, a debt funding competition is envisaged to establish the basis on which the party to whom the tender might be awarded will raise the finance to proceed with the project. The outcome of the competition will also afford SANRAL the opportunity to reconsider whether the contemplated project offers value for money and should be proceeded with.

[229] In the circumstances, had we had to decide the matter, we would not have been persuaded to grant the City relief in terms of paragraphs 2.1.2 and 2.2 of the notice of motion.

The interdicts sought by the City in terms of paragraphs 5 and 6 of the notice of motion

[230] Turning to the interdictal relief sought by the City in terms of paragraphs 5 and 6 of the notice of motion.[122] It will be recalled that the City seeks the prohibition of SANRAL from entering into an agreement with any person contemplated in s 28(1)(b) of the SANRAL Act in circumstances where such agreement -

1. would place an obligation on SANRAL or the State to provide such person with a guarantee or benefit, the provision of which is linked to either the amount of toll, any rebate thereon or any increase or reduction thereof which SANRAL, in terms of s 27(3) of the SANRAL Act, must recommend to the Minister of Transport; and which the Minister of Transport must determine;
2. prescribes to, or fetters either or both SANRAL's and the Minister of Transport's discretion in recommending and deciding the amount of a toll, any rebate thereon, or any increase or reduction thereof respectively; and
3. has the effect of predetermining the amount of a toll, any rebate thereon, or any increase or reduction thereof that must be determined in terms of s 27(3) of the SANRAL Act before an open, transparent and fair public participation process has taken place.

[231] SANRAL is empowered by s 28 of the SANRAL Act to enter into an agreement with any person for the operation and levying of tolls. That section provides that:

[122] See paragraph [122], above.

'28. (1) Despite section 27, the Agency may enter into an agreement with any person in terms of which that person, for the period and in accordance with the terms and conditions of the agreement, is authorised –

(a) to operate, manage, control and maintain a national road or portion thereof which is a toll road in terms of section 27 or to operate, manage and control a toll plaza at any toll road; or

(b) to finance, plan, design, construct, maintain, or rehabilitate such a national road or such a portion of a national road and to operate, manage and control it as a toll road.

(2) That person (in this section called the authorised person) will be entitled, subject to subsections (3) and (4) –

(a) to levy and collect toll on behalf of the Agency or for own account (as may be provided for in the agreement) –

(i) on the road specified in the agreement

(ii) during the period so specified

(iii) in accordance with the provisions of the agreement only; and

(b) in the circumstances mentioned in subsection (1) (b), to construct or erect, at own cost, a toll plaza and any facilities connected therewith for the purpose of levying and collecting toll.

(3) Where the agreement provides for any of the matters mentioned in section 27(1) (b), (c), (d), (e) and (f) (ii), the authorised person will be subject to the duties imposed on the Agency by that section in all respects as if the authorised person were the Agency.

(4) The amount of the toll that may be levied by an authorised person as well as any rebate on that amount or any increase or reduction thereof, will be determined in the manner provided for in section 27(3),[123] which section will apply, reading in the changes necessary in the context, and, if applicable, the changes necessitated by virtue of the agreement between the Agency and the authorised person.' (Underlining for emphasis)

[232] The City's challenge arises from the perceived effect of the provisions of the proposed concession contract, although the nature of the relief it seeks has been framed in the most general terms. Its contention is that although SANRAL and PPC have not signed a concession contract, the scope for negotiating the terms of the concession contract had been progressively reduced by the time the preferred tenderer was selected because of the manner in which the tender process is designed. According to the City, virtually all of the provisions of the contemplated concession contract have already been determined in the course of the tender process.

[123] To recap, in terms of s 27(3) of the SANRAL Act, the toll tariffs are determined by the Transport Minister on SANRAL's recommendation.

[233] The City has proceeded on the understanding that PPC's entitlement to negotiate the concession contract is limited to those portions of the draft concession contract in the tender documentation that it has marked up and that only such provisions can be amended. In this regard it relies on paragraph 5.16.2 of the Invitation to Tender, which stated that:

> Changes to the draft Concession Contract, the Initial D & C the Initial O & M Termsheet and/or Deed of Suretyship (including the annexures thereto) are discouraged, however, if a Tenderer is able to materially improve the terms of their Compliant Tender by changes to draft Concession Contract, the Initial D &C Contract O & M Termsheet and/or Deed of Suretyship (including the annexures thereto) pursuant to paragraph 5.8.1 above or submits a Variant Tender which necessitates amendments (if any) to any project document, as contemplated in paragraph 5.9.2 above, Tenderers are entitled to put forward such changes by way of comprehensive mark-up to the draft Concession Contract, the Initial D & C Contract O & M Termsheet and/or Deed of Suretyship (including the annexures thereto) to reflect the deletions and insertions required to support its Tender. SANRAL will not consider any further matters pertaining to the draft Concession Contract, the Initial D & C Contract O & M Termsheet and/or Deed of Suretyship (including the annexures thereto) which are not clearly marked-up in accordance with this paragraph 5.16. Documents that have not been marked-up with tracked changes will be considered by SANRAL to have been accepted by the Tenderer and no further negotiation in respect of these documents will be entertained by SANRAL. (Underlining for emphasis)

[234] The pertinent provisions are clause 10.4 (the so-called 're-imbursement clause') and those concerning the base toll tariffs and the recommendations to be made by SANRAL to the Transport Minister for the purposes of obtaining a determination of the toll tariffs in terms of s 27(3) of the SANRAL Act. The City's contention is that because those provisions were not marked up they will appear unchanged in the signed concession contract.

[235] The draft agreement provides, in clause 10.3, that, subject to the discounts that are to be agreed for the use of the road by certain users, the concessionaire '*shall apply the Toll Tariffs specified at the Toll Plaza for each of standard vehicle classifications…as specified in Annexure XV*'. The relevant toll tariffs and the applicable discounts fall to be set out in clause 4.2 of Annexure XV of the draft contract. Those are the tariffs (and discounts) that the contracting parties will have agreed should apply at the beginning of the operating phase of the tolling project. In the terminology of the draft agreement they are called the 'base toll tariffs'. The draft agreement makes provision for the periodic adjustment of the base toll tariffs in line with inflation

according to an arithmetical formula provided in terms of clause 5 of Annexure XV. Clause 5.6 requires the concessionaire to submit its adjustment calculations to SANRAL for confirmation at least 74 days before the applicable adjustment date.

[236] Clause 5.7 of Annexure XV to the draft contract provides:

> 5.7 **Publication of Toll Tariffs**
>
> Subject to the Concessionaire having complied with its obligations under clause 5.6, SANRAL shall comply with the statutory requirements with respect to setting Toll Tariffs and shall make representations to the Relevant Authority for publication of the Toll Tariffs in the relevant national circulation newspaper or official Government Gazette, or as may otherwise be required by law in order to give full legal effect to the Toll Tariffs, at least 14 (fourteen) days prior to the relevant Adjustment Date in the case of an adjustment made pursuant to clause 5.1 and as soon as reasonably possible in the case of an adjustment pursuant to clause 5.5' (Underlining for emphasis.)

The 'statutory requirements' referred to in this clause are plainly the tariff determination provisions in terms of s 27(3) of the SANRAL Act and the 'Relevant Authority' is the Minister of Transport.

[237] As mentioned earlier, the experts engaged by the City have calculated that it will be necessary to set the base toll tariffs for the light vehicle class at 74,8c per kilometre, which is nearly three times more than the currently applicable tariff for that class of vehicle on the tolled Gauteng freeways. Simply stated, the re-imbursement clause would be triggered in the event that the tariff determined by the Minister in terms of s 27(3) were lower than the base toll tariff or adjusted base toll tariff. It stipulates as follows:

> 10. 4 **Revisions to the Toll Tariffs**
>
> 10.4.1 The Toll Tariffs shall be adjusted in accordance with the provisions of Annexure XV. Subject to the Concessionaire complying with its obligations under Annexure XV, SANRAL shall use its reasonable endeavours to ensure that the Toll Tariffs are published at such time so as to enable the adjusted tolls to be charged with effect from the requisite date under this Concession Contract.
>
> 10.4.2 If there is any failure or refusal by the Minister of Transport to sanction, or any delay by the Minister of Transport in sanctioning, the Base Toll Tariffs or any adjustment in the Toll Tariffs required by the operation of this Concession Contract other than as a result of default or negligence on the part of the Concessionaire, SANRAL shall reimburse the Concessionaire by an amount that will place the Concessionaire in the same economic position that the

> Concessionaire would have been but for such failure, refusal or delay. (Underlining for emphasis)

[238] PPC submitted a marked up version of a draft concession contract as part of its bid dated 27 July 2011 as contemplated in terms of clause 5.16.2 of the Invitation to Tender, quoted above.[124] The reimbursement clause was not marked-up in PPC's bid. Thus, as the draft contract currently stands, if the Minister of Transport determines toll tariffs that are lower than the base toll tariffs agreed in the concession contract, SANRAL would have to pay the concessionaire an amount sufficient to place it in the financial position it would have been in, but for the lower tariff determination.

[239] The City contends that upon a proper construction of the express terms of the draft contract it is apparent that it includes a tacit term that when SANRAL makes recommendations to the Minister of Transport as to the amount of toll to be levied, any rebate thereon or any increase or reduction thereon, in terms of s 27(3) of the SANRAL Act, it will do so in line with the base toll tariffs, and any adjustments thereto, applicable in terms of the concession contract.

[240] The implications of the reimbursement provision, according to the City, are as follows: First, the fact that SANRAL has never considered or calculated the amount of its contingent liability resulting from the reimbursement provision demonstrates that it has assumed that the Minister of Transport will determine a tariff in accordance with the base toll tariff. The wording used in paragraph 10.4 reveals SANRAL's attitude: the notion of 'failing' or 'refusing' to sanction the base toll tariff by the Minister of Transport indicates the premise of the outcome which the Minister of Transport is expected to adopt. The City submits that SANRAL does not intend to give the Minister of Transport any real option, since it intends to ask her to determine the toll tariffs in terms of s 27 (3) only once the upgrades have been completed. Second, SANRAL will do far more than merely have regard to the base toll tariff when making recommendations to the Minister. According to the City, the express and tacit terms of the draft concession contract *require* SANRAL to make representations to the Minister for the publication of the agreed toll tariffs to give full legal effect to those tariffs as per clause 5.7 of Annexure XV to the contract. Given that SANRAL would not be in a financial position to reimburse PPC, it would be constrained to recommend that the

[124] At para [233].

tariff be in accordance with the base toll tariff. The Minister, being politically accountable for SANRAL, and its budget falling under her department, would similarly feel constrained to determine a toll amount in accordance with the base toll tariff.

[241] The effect of the aforegoing, so contends the City, is that any contract that includes the reimbursement clause, or something essentially equivalent thereto, will unlawfully fetter the discretion that SANRAL and the Minister are required to exercise in determining toll tariffs in terms of s 27(3) of the SANRAL Act. It is common cause that such determination, being 'administrative action' in terms of PAJA, must occur with due consideration of the inputs received in terms of a public participation exercise. In other words, the statutory provisions require SANRAL and the Minister to be able to apply an open mind in the exercise of the discretionary power, and not to be inhibited by contractual considerations in their regard to representations and comment received from interested parties.

[242] The City argues that it has a reasonable apprehension of harm in that the Minister of Transport would not be in a position in the face of a provision such as the reimbursement clause to freely assess SANRAL's recommendation, or to fairly consider representations made to her in the public comment process, because a toll fee less than the base toll tariff would be likely to impose an intolerable financial obligation on SANRAL. In such circumstances, so the City argued, the public consultation process preceding the determination of the toll would be a sham because SANRAL, especially by virtue of clause 5.7 in Annexure XV, would have already bound itself to a pre-determined recommendation.

[243] What the City seeks is an interdict prohibiting SANRAL from doing something that would be unlawful and liable to being set aside in terms of PAJA; that is entering into a concession contract that would have the effect of unlawfully fettering the discretion that falls to be exercised in terms of s 27(3) of the SANRAL Act. Subsection 27(3) provides for the Minister of Transport to determine the applicable toll tariff on the recommendation of SANRAL. In the context of a closely comparably worded provision in s 22G(2) of the Medicines and Related Substances Act 101 of 1965 concerning the making of regulations, the Constitutional Court, in *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (TAC and Another as amici curiae)* 2006 (2) SA 311 (CC), at paras 136 -142, 471 and 672, found it to be unsound to treat the two stage process of recommending and determining as unrelated,

separate and independent decisions, each having to be subject to PAJA. At paras 138 and 139, Chaskalson CJ held '*The Minister was not obliged to act on the Pricing Committee's recommendations. She had a discretion whether to do so. But ultimately there had to be one decision to which both the Pricing Committee and the Minister agreed. Neither had the power to take a binding decision without the concurrence of the other. It was only if and when agreement was reached, that regulations could be made....In such circumstances debate between the Pricing Committee and the Minister concerning the regulations to be made would not be inappropriate. Such debate would further the purpose of the legislation and facilitate the reaching of agreement. This is recognised in the General Regulations made in terms of section 35 of the Medicines Act (the General Regulations), which deal with the composition of the Pricing Committee...'* Ngcobo J, at paras 441 and 442, also found that the processes were interlinked and that one is incomplete without the other. It follows on the approach enunciated in comparable circumstances in *New Clicks* - which all parties to the current proceedings appeared to accept would be applicable - that the two-stage process of recommendation and determination provided in s 27(3) effectively culminates in a single joint decision by the recommending and determining parties. SANRAL and the Minister must act together when deciding on the amount of toll.

[244] In brief, SANRAL's contentions in response are as follows. The invitation to tender is clear that in terms of the draft concession contract only the preferred tenderer is prevented from re-opening negotiations on the paragraphs not marked up in the draft contract. Thus, all the provisions including the base toll tariffs are still open to negotiation *at SANRAL's instance* and could be negotiated downwards if the proposed tolls were found to be unaffordable. SANRAL might also decide to withdraw the Project. Approvals will in any event have to be sought from the Minister of Transport and the Minister of Finance in terms of the PFMA after the terms of the concession contract have been settled, but before the contract can effectively be concluded. SANRAL will consider prior to the conclusion of the contract whether the concession contract will meet the criteria of affordability and value for money, amongst others. SANRAL contends that when it makes recommendations to the Minister of Transport, it will certainly have regard to the provisions of the concession contract ultimately agreed, but asserts that it will act lawfully in accordance with the SANRAL Act, thereby

implying that due respect will be paid to the public participation process. SANRAL contends in conclusion that the City has not met the requirements of an interdict.

[245] The argument by SANRAL is effectively that the City's complaint is premature as it seeks to interdict future administrative action in circumstances where the terms of the final contract are not yet known and might well differ from those contained in the proposed concession contract. It also argues that clause 10.4 of the draft contract and clause 5.7 of Annexure XV thereto in any event do not prevent it from properly discharging its powers and responsibilities in terms of s 27(3) of the SANRAL Act.

Discussion on the interdicts sought by the City

[246] It is trite that in order to obtain a final interdict the City must establish that it has a clear right, that an unlawful interference with the right has actually taken place or is reasonably apprehended, and that there is no other satisfactory remedy available to it.[125] Even if those requirements are satisfied, the court may in the exercise of its discretion decline to grant an interdict.

Clear right

[247] The right that the City seeks to protect by way of interdictal proceedings is its right to just administrative action in terms of s 27(3). The City submits that although unlawful fettering of an administrative discretion is not listed separately as a ground in the PAJA, it fits comfortably under s 6(2)(e)(iii), dealing with irrelevant considerations; s 6(2)(f)(ii), which deals with the required rational connection between the decision and the purpose for which it was taken; and s 6(2)(i), which deals with action otherwise unlawful. Professor Hoexter remarks that *'fettering does not seem to be implied by any of the grounds listed*' in PAJA, nor does it fit easily with any of them[126]. She suggests that it was probably left out inadvertently, given it being a well-established ground of review under the common law. Her suggestion is that fettering can be covered under the catch-all ground of '*otherwise unconstitutional or unlawful*' in s 6(2)(i) of PAJA. This proposition is logical. We are thus willing to accept for the purpose of this part of the case that the City has established the existence of a right to the unfettered exercise by SANRAL and the Minister of the discretion conferred in terms of s 27(3) should the project proceed. The question is whether the conclusion of a contract including the

[125] *Setlogelo v Setlogelo* 1914 AD 221, at 227.
[126] Op cit supra, at 319.

provisions described above would infringe it. It could only do so if SANRAL's contracting on that basis would be unlawful. In that event the offending provisions would be invalid and unenforceable in any event.[127] This shows that the City is, in effect, seeking by means of interdictal relief to protect itself against what, on its own case, would be a nullity. Confirmation of such a nullity would most appropriately be established by obtaining declaratory relief after the agreement had been concluded. This is, by itself, an inherent indicator of the inappropriateness of the interdictal remedy sought by the City, but we shall nevertheless proceed to give its application further consideration, if only to show some other reasons why it should not succeed.

Are the relevant terms of the concession contract still open to negotiation with PPC?

[248] As noted, it was in dispute whether the relevant provisions of the contract remain open to amendment in further negotiation. We are willing for the purposes of the judgment to assume (without so deciding) in favour of the City's argument that the provisions are not amenable to amendment.

[249] The evidence suggests in any event that something in the nature of a guarantee in terms of clause 10.4 would be necessary as a standard provision in any such contract.[128] Commercial common sense would also support such a notion. It seems to us to be improbable that any private contractor would commit itself to constructing and upgrading stretches of national road at its own expense, on the basis of a contractual entitlement against SANRAL to recoup its outlay and make a profit over a multi-decade concession operating period, without securing itself against the potential that the tolls determined in terms of s 27(3) of the governing statute might at any stage during the operating period be set at levels below those necessary to realise the assumptions that would have informed its financial calculations when it entered into the contract. It also seems to us equally improbable that an aspirant concessionaire would find it possible to raise the funding from third party lenders or investors that would undoubtedly be

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[127] Referring to contractual restrictions Baxter, *Administrative Law* (Juta, 1984) notes (at p.419) that, '*As a general principle, public authorities cannot commit themselves in advance against exercising their discretionary powers to act for public good. This implies that public contracts which purport to do this are either invalid or may become so*. See also *Southern Metropolitan Substructure v Thompson and others* [1997] 1 All SA 571 (W) at 575g to 576b.

[128] Prof Floor and Ms Naude, who gave expert opinion evidence in support of the City's application, state that it is clause 10.4.2 that allows the tenderers to rely on the base toll tariffs in their internal financial assessments of the project before toll tariffs are determined by the Minister of Transport. They acknowledge that realistically a concessionaire would not accept the risk of concluding and performing in terms of the BOT concession contract if its revenue were dependent on uncertain toll tariffs and toll payments, without the reimbursement provision.

required to undertake a multi-billion rand project of this nature without some form of guarantee of the sort that would be provided in terms of a provision like clause 10.4.2 of the draft concession contract. In our view, these considerations would have been equally evident to the legislature when it enacted s 28 of the SANRAL Act.

Reimbursement provision and the no-fettering doctrine

[250] Phoebe Bolton points out that common sense should tell us that the no-fettering doctrine cannot be of wide and unlimited application. To say that any contract that in any way fetters administrative discretion is invalid would mean that organs of state would to a large extent be unable to conclude contracts at all because all contracts fetter discretion to some extent.[129]

[251] The observations of Mason J in *Ansett Transport Industries (Operations) Pty (Ltd) v Commonwealth of Australia and Others* (1977) 17 ALR 513 (HC), at 530, are apposite. Having noted the criticism of the remark by Rowlatt J in *Rederiaktiebolaget 'Amphitrite' v. The King* (1921) 3 KB 500, at 503, that '*it is not competent for the Government* [by commercial contract] *to fetter its future executive action, which must necessarily be determined by the needs of the community when the question arises. It cannot by contract hamper its freedom of action in matters which concern the welfare of the State*' as having been 'expressed too generally', the Australian judge stated that ' *'Public confidence in government dealings and contracts would be greatly disturbed if all contracts which affect public welfare or fetter future executive action were held not to be binding on the government or on public authorities. And it would be detrimental to the public interest to deny to the government or a public authority power to enter a valid contract merely because the contract affects the public welfare. Yet on the other hand the public interest requires that neither the government nor a public authority can by a contract disable itself or its officer from performing a statutory duty or from exercising a discretionary power conferred by or under a statute by binding itself or its officer not to perform the duty or to exercise the discretion in a particular way in the future.'*

[252] The subject of contractual fettering of discretion has received only sparse treatment in South African jurisprudence to date, but the reported judgments suggest

[129] Bolton **,** *The Law of Government Procurement in South Africa* (LexisNexis, 2007) at 88.

that our courts have adopted the English approach, which applies the incompatibility test in determining the validity of public contracts which contain fettering provisions.[130] In terms of that approach a contract will only be invalid if it is incompatible with the purpose of the power that it fetters.[131] In *President of the RSA v South African Rugby Football Union* supra,[132] at para 198, the Constitutional Court found that although some uncertainty existed '*as to the precise ambit of the principle that a public authority cannot, by contract, fetter the exercise of its own discretion, there is little doubt that a public authority cannot enter into a contract which is wholly incompatible with the discretion conferred upon it.'*

[253] The purpose of a statutory power is not the only factor taken into account when determining incompatibility. As observed by Bolton, the courts have tended to adopt a more 'contextual' approach by also taking into account other factors such as the interpretation of the statute in question, the nature and the importance of the powers and the functions of the statutory authority that are allegedly fettered, the subject matter or nature of the contract and the effect of the contract on the statutory power, the degree of the fetter and the likelihood or possibility of the fettering occurring. [133]

[254] In these circumstances, it is necessary to strike a balance between public and private competing rights i.e. the need for public authorities to contract, protecting those that contract with state bodies and ensuring that contracts do not impermissibly fetter discretion.[134] A court has to exercise a value judgment when determining the validity of the contract or contractual provision in issue by weighing up the public and private interests at stake.[135]

[255] SANRAL and the Minister must exercise the public power vested in them by statute lawfully and in accordance with fair procedure. Section 28(1) of the SANRAL

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[130] Baxter, *op cit* supra, at 419-423; Bolton, *Government Contracts and the fettering of discretion – a question of validity*, (2004) 19 SA Public Law 90, at 91.
[131] Bolton, ibid at 96 and 102.
[132] At note 89.
[133]*See Southern Metropolitan Substructure v Thompson* [1997] 1 All SA 571 (W), 1997 (2) SA 799, at 803 (SALR)*; President of the RSA and others v South African Rugby Football Union and others* supra, at para 198, and *Government of the Province of the Eastern Cape v Frontier Safaris (Pty) Ltd* [1997] 4 All SA 500 (A), 1998 (2) SA 19 (SCA), especially at 29-30 (SALR) and Bolton, *Government Contracts* (2004) 19 SA Public Law 91, at 106-07.
[134] Craig, *Administrative Law* 7ed (2012) at 552-555. See also Wade & Forsyth, *Administrative Law* 11th ed. (Oxon, 2014), at 278-281, where passing reference is made to the doctrine of *fait du prince* in French law, under which a contractor with an organ of state can claim 'an equitable adjustment' if the government, by use of its paramount powers, upsets the calculations on which the contract was made.
[135] Bolton, *Government Contracts* supra, at 107.

Act specifically makes provision for SANRAL to enter into an agreement with any person for the operation and levying of tolls. Section 28 (4) of the SANRAL Act provides that the amount of the toll to be applied by the authorised person will be determined in the manner provided in s 27(3), which section will apply, reading in the changes necessary in the context and those, if applicable, necessitated by the agreement. The SANRAL Act thus itself allows for the agreement to be taken into account in the exercise of determining the tolls. It has already been noted that provisions containing future contingent liabilities are standard in contracts of this nature and that it would be unlikely for an entity to agree to assume the kind of risk contemplated by the concession contract without the protection afforded by the 'reimbursement provision'. It is also relevant in this connection to note, as SANRAL's counsel were at pains to stress, that the reimbursement clause does not have the effect of making the concession contract a risk-free undertaking for the concessionaire. The concessionaire carries the risk of there being a shortfall in the anticipated revenue if the forecast traffic volumes are not realised, as well as the risks inherent in the maintenance of the roads and the running of the tolling operation for the duration of the concession, and also the scale of the cost of putting the roads in good order for return to SANRAL at the end of the thirty year concession period. The overall resulting balance seems to us entirely consistent with the sort of contract that is expressly contemplated in s 28.

[256] The City's counsel submitted, however, that the effects of the reimbursement clause read with clause 5.7 of annexure XV are wholly incompatible with the statutory power assigned to SANRAL and the Minister of Transport in s 27 (3) of the SANRAL Act. We do not agree. On the contrary, the provisions expressly acknowledge that the exercise of the statutory power may result in a disparity between the base toll tariff agreed in the contract and the periodically adjusted base toll tariffs to be calculated in terms of clause 5 of Annexure XV to the draft contract. Clause 10.4.2 is there to deal with the consequences of that eventuality; not to prevent it from occurring.

[257] The City highlighted the use of the words 'failure', 'refusal' 'to sanction' the base toll tariff by the Minister of Transport in clause 10.4.2 of the concession contract and argued that they conveyed an implied commitment by the Minister to determine the toll tariffs consistently with the toll tariff provisions of the contract. They argued

that SANRAL's obligations in terms of clause 5.7 of Annexure XV, quoted above,[136] underscore this.

[258] In our view, the City has misconstrued clause 5.7. Its purpose is to oblige SANRAL to set in train the process in terms of s 27(3) of the Act that will be necessary to implement the periodic adjustments to the tolls at the times that these are meant to occur in terms of the concession contract. The central object of the provision is to ensure that the adjustments are implemented timeously in accordance with the scheme of the concession contract. The extent of the contractually stipulated adjustments is a matter of arithmetical calculation, applying the equation set out in clause 5.1, in which the critical variable quotient is the consumer price index. It has nothing whatsoever to do with the amounts in which the toll fees are actually determined by the Minister in terms of s 27(3). Timing is the matter that is critical for the concessionaire; and it is to that that clause 5.7 is directed. It is a timeous decision by the Minister to make the adjustment, or to refuse to do so, that is material to the concessionaire. Whether an adjustment in line with the contract follows or not, or whether the Minister refuses to make an adjustment is of no monetary consequence to the concessionaire. All that matters is that a decision is made. If the toll determined by the Minister is below that calculated in terms of the contract, or if she refuses to make an adjustment, the reimbursement clause is triggered. The concessionaire has no need for a provision requiring SANRAL to commit itself to trying to persuade the Minister to determine the tariff at a level consistent with the adjusted base toll tariffs. It is covered by the reimbursement clause. The effect on SANRAL's financial position of the determination of toll tariffs, on the other hand, is a factor that will feature in any determination of tolls in terms of s 27(3). It would be a consideration even if there were no reimbursement clause, or indeed no concession contract at all.

[259] Acknowledging a connection between SANRAL's contingent obligation in terms of clause 10.4.2 and the exercise of the power in terms of s 27(3) of the SANRAL Act, does not justify the assumption that SANRAL and the Minister of Transport will act unlawfully when exercising their powers and responsibilities in terms of s 27(3). They are enjoined to act lawfully by the SANRAL Act, PAJA and the Constitution. They must have regard to the public participation process and do so meaningfully. The

[136] At para [236].

GFIP experience has shown that the relevant authorities acted responsively to the public's views by reducing toll fees even though there were other competing demands on the budget and the original concept of that Project had enjoined the toll fees to be set higher.

[260] The City seeks an order in general terms that would prevent SANRAL from ever entering into a contract with a reimbursement provision. That is a drastic form of relief that should not be granted in the absence of exceptional circumstances and a strong case made out on the papers. If SANRAL and the Transport Minister act unlawfully in terms of s 27(3), it will be open to the City or any other adversely affected party to challenge their decisions at that stage on particularised grounds.

The applicability of the Public Finance Management Act and the influence thereof on the City's application for interdictal relief

[261] It will be recalled that the incidence of the PFMA weighed with us when we indicated how we would have decided the alternative relief sought in terms of s 2 of the notice of motion had we not granted the principal review relief applied for in paragraph 1.4 and 1.5. In our view, the incidence of the Act also forms part of the contextual considerations bearing relevantly on the likelihood of the reimbursement clause unduly fettering the exercise by SANRAL and the Minister of Transport of their powers and responsibilities in terms of s 27(3) of the SANRAL Act.

[262] The relevant provisions of the PFMA are ss 66 and 70.

[263] Section 66(1) of the PFMA reads as follows:

> **66. Restrictions on borrowing, guarantees and other commitments.**
>
> (1) An institution to which this Act applies may not borrow money or issue a guarantee, indemnity or security, or enter into any other transaction that binds or may bind that institution or the Revenue Fund to any future financial commitment, unless such borrowing, guarantee, indemnity, security or other transaction—
>
> *(a)* is authorised by this Act; and
>
> *(b)* in the case of public entities, is also authorised by other legislation not in conflict with this Act; and
>
> *(c)* in the case of loans by a province or a provincial government business enterprise under the ownership control of a provincial executive, is within the limits as set in terms of the Borrowing Powers of Provincial Governments Act, 1996...

[264] Section 66(3)(c) of the PFMA, which pertains to SANRAL as a 'national public entity', provides that:

> Public entities may only through the following persons borrow money, or issue a guarantee, indemnity or security, or enter into any other transaction that binds or may bind that public entity to any future financial commitment:
>
> .....
>
> (c) …. The Minister [of Finance] or, in the case of the issue of a guarantee, indemnity or security, the Cabinet member who is the executive authority responsible for that public entity, acting with the concurrence of the Minister in terms of section 70.

[265] Section 70(1)(b) stipulates as follows:

> **Guarantees, indemnities and securities by Cabinet members.**
>
> (1) A Cabinet member, with the written concurrence of the Minister [of Finance] (given either specifically in each case or generally with regard to a category of cases and subject to any conditions approved by the Minister), may issue a guarantee, indemnity or security which binds –
>
> …
>
> *(b)* a national public entity referred to in section 66(3)(c) in respect of a financial commitment incurred or to be incurred by that public entity.

[266] It is clear from the provisions quoted above that an institution like SANRAL may only bind itself to future financial commitments of the nature contemplated in terms of the reimbursement clause through the Minister Transport acting in concurrence with the Minister of Finance in terms of s 70 of the PFMA.

[267] The City submits that the reliance by SANRAL in its answer on the issue of ministerial approval in terms of the PFMA is an 'afterthought' and opportunistic, in that it was not raised at the stage of the urgent application for an interim interdict brought by the City in 2013. According to the City, SANRAL had indicated in the interim interdict proceedings that it intended to conclude a contract within 2 weeks. At that stage, it alleged that the only processes that still needed to be undertaken were the final negotiation of the concession contract and the debt funding competition. The City alleges that the statement that the contract would have been concluded in two weeks suggests that there had never been an intention on the part of SANRAL to obtain Ministerial approval in terms of the PFMA, considering all the formalities that still had to take place. That could not be achieved in such a short time. The difficulty with that submission is that the papers filed in the interim interdict proceedings have not been incorporated in this application. The context in which such statements were made by

SANRAL is therefore missing. It would have been appropriate for the City to make those allegations clearly in its papers so as to afford SANRAL a fair opportunity to deal with them. It was not permissible merely to quote from the judgment in the interim interdict application in its heads of argument.

[268] A further contention made by the City is that the draft concession contract does not in fact provide that it is subject to the consent of the Minister of Transport and Minister of Finance. The City's counsel pointed out that the contract has a number of resolutive conditions, none of which impose the requirement of consent by the Ministers. The draft contract provides for signature by Mr Alli on behalf of SANRAL. The City pointed out that it makes no provision for the Ministers to sign. This, the City emphasised, is in contrast with the draft deed of suretyship, which is an annexure to the draft concession contract. The deed of suretyship provides for SANRAL to bind itself to the Lenders as surety and co-principal debtor for payment by the concessionaire to the Lenders. Provision is made for the Minister of Transport to sign the deed on behalf of SANRAL, and its wording records that this will be done with the concurrence of the Minister of Finance. The draft concession contract contains no such provision in respect of the reimbursement clause.

[269] The City's further submissions on the non-applicability of the PFMA were that the context of the word 'guarantee' in s 66(1) of the PMFA indicates that it cannot apply to every undertaking to make payment. If that were the case, argued the City's counsel, it would mean that every time SANRAL entered into a contract it would have to be done through the Minister of Transport with the concurrence of the Finance Minister. According to the City, the meaning in s 66(3) the PFMA of the words *'*[a]*ny future financial commitment'* is not easy to determine, but they cannot mean every transaction that commits the entity to make payment in the future, such as for instance, travel and accommodation bookings, salary contracts, hiring of premises. The City's counsel submitted that there must be something 'fiscally exceptional' about the financial commitment in order to bring it within the operation of provisions requiring approval by the relevant Ministers, and the relevant provisions of the draft concession contract are certainly not exceptional. They are simply the means of calculating the contract price.

[270] The concept of a 'guarantee', within the meaning of s 70 of the PFMA, was described by Fabricius J in *Comair Ltd v Minister of Public Enterprises and Others*

[2015] ZAGPPHC 361 (1 June 2015) at para 17.2, citing Forsyth and Pretorius, *Caney's The Law of Suretyship* 6th ed. (Juta, 2010) at p.34, as '*a means by which the guarantor undertakes to pay on the happening of a certain event but does not promise that that event will not happen*'. The learned judge held that it was clear that the essential nature of a guarantee within the meaning of s 70 of the PFMA was an undertaking which created a direct liability by the public entity concerned to pay upon the happening of a defined event. We respectfully agree. In our judgment, the reimbursement clause manifests such an undertaking.

[271] It follows that if the reimbursement clause is to be a commercially essential and unseverable provision of the BOT agreement, as would appear to be the case, the contract will be subject to the aforementioned provisions of the PFMA. That would be the case even in the absence of express mention in its wording of the need for ministerial approval in the contract. If a contract in terms of the draft were to be concluded without the required approval, it would fail unless the concessionaire were prepared to waive the reimbursement clause.

[272] The endorsement of the reimbursement clause by the Minister of Finance would serve as an indication of an acceptance by the National Treasury of the risk that the tolls set in terms of s 27(3) might be less than those to which the concessionaire might be entitled in terms of the contract, which would imply an appreciation of the need to make appropriate provision to deal with the eventuality should it arise. As noted, the recent experience in connection with the GFIP will no doubt conduce to an especially critical scrutiny of the contract before the Minister of Finance's endorsement will be forthcoming. That experience is proof of how the weight of public opinion and objective considerations related to the affordability of tolls for road users bear effectively on decision-making in terms of s 27(3) of the SANRAL Act. The likelihood that the contract will not be concluded without an acceptance by Treasury of the risks inherent in the reimbursement clause and appropriate provision therefor consequently being made in the budgeting process is a further reason why it would be inappropriate to interdict the conclusion of a contract including a provision like clause 10.4.2 of the draft concession agreement, and, even more so, to grant an interdict in the wider terms sought in terms of paragraphs 5 and 6 of the notice of motion because it reduces the prospect of the clause having the fettering effect that the City fears.

[273] In light of all these considerations, the City's application for interdictal relief will be dismissed.

2014 Board decision

[274] We turn, lastly, to the relief sought in terms of paragraph 3A and 3B of the notice of motion; viz. that '[th]e 2014 declaration decision is reviewed and set aside'. We described the circumstances in which the so-called 2014 declaration was made earlier in this judgment, with reference to the explanatory memorandum by Mr Alli attached as annexure NA1.[137] It is not in dispute that the decision was not remotely compliant with the requirements of s 27(4) of the SANRAL Act. Unsurprisingly, no declaration has been gazetted pursuant to the decision. We are not persuaded that the board decision constituted 'administrative action' within the meaning of PAJA and are therefore not willing to exercise the court's powers of judicial review in relation to it. The City's counsel, however, expressed anxiety that SANRAL might seek to make something of the decision in relation to any future determination of the project and pressed us to make some form of order to ward off the danger of possible future litigation. In our view the concern is misplaced. It will be clear enough from the form of consequential relief to be granted upon the review and setting aside of the tolling decisions that if the roads are to be declared as toll roads, this may occur only after the provisions of s 27(4) have been complied with pursuant to a fresh process to be commenced *ab initio*. No order will be made in respect of the relief sought in terms of paragraph 3B of the notice of motion.

Costs

[275] We suggested during the course of argument that it might be advisable, by reason of the multi-faceted character of the City's application, for argument on costs to stand over until after judgment had been pronounced on the substantive issues. Counsel indicated that they were amenable to this course. Argument on costs will therefore be heard on a date to be determined, and the judgment will be appropriately supplemented thereafter.

Concluding remarks

[137] At paragraphs [160]-[162].

[276] In conclusion, we should like to express our appreciation to each of the legal teams for their well-prepared and helpful argument and for conscientiously co-operating to limit the amount of reading that we had to do to just over half of the 7400 page record. We also express our gratitude for having been furnished with a copy of the record in electronic format on tablet devices especially provided to us for the purpose of the hearing and the preparation of the judgment. This afforded us very material logistical assistance and contributed markedly not only to a more efficient hearing, but also to our ability to deliver judgment with relative expedition.

Orders

[277] The following orders are made:

a) The applicant's application, in terms of s 9 of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'), for an extension of the period of 180 days referred to in s 7(1) of the Act in respect of the institution of proceedings for the relief set forth in paragraphs 1.1, 1.2 and 1.3 of the notice of motion, as finally amended, is refused.

b) Consequent upon the order made in terms of paragraph (a), above, the application in terms of paragraphs 1.1, 1.2 and 1.3 of the notice of motion for the review and setting aside of –

   i. the decision of the Acting Deputy Director-General: Environmental Quality and Protection of the then Department of Environmental Affairs and Tourism on 30 September 2003, in terms of s 22 of the Environment Conservation Act 73 of 1989 ('the ECA'), ('the 2003 environmental authorisation') to grant authorisation to the first respondent to undertake certain listed activities in respect of the construction and upgrading of sections of the N1 and N2 national roads for the N1-N2 Winelands Toll Highway Project ('the Project');

   ii. the decision of the third respondent on 10 October 2005, in terms of s 35 of the ECA, to dismiss the appeals against the 2003 environmental authorisation; and

   iii. the decision of the third respondent on 28 February 2008 (as amended on 7 April 2008), in terms of s 35 read with s 22(3) of the ECA, to grant a revised environmental authorisation to the first respondent to undertake the listed activities

is refused.

c) The applicant's application in terms of s 9 of PAJA for an extension of the period of 180 days referred to in s 7 of the Act in respect of the institution of proceedings for the relief set forth in paragraphs 1.4 and 1.5 is granted and the said period is extended until the date upon which the City's supplementary founding affidavits were delivered.

d) The application for the relief set forth in paragraphs 1.4 and 1.5 of the notice of motion is granted, and the decision made by the second respondent, in terms of s 27(4) of the South African National Roads Agency Limited and National Roads Act 7 of 1998 ('the SANRAL Act'), to approve the first respondent's application in respect of its proposal to declare sections of the N1 and N2 national roads as toll roads for the purpose of the Project, as well as the purported decision of the first respondent, in terms of s 27(1)(a)(i) of the SANRAL Act, to declare the said sections of the roads as toll roads are reviewed and set aside.

e) The first respondent's proposals to declare the said sections of the roads as toll roads are remitted to the first respondent for further consideration in accordance with the findings in this judgment, subject to the direction that, should it be decided to proceed with the Project, the process provided in terms of s 27(4) of the SANRAL Act must be undertaken afresh, *ab initio*, in proper compliance with the prescripts of the provision and the requirements of just administrative action.

f) No order is made in respect of the relief sought by the applicant in terms of paragraphs 3, 3A, 3B and 4 of the notice of motion.

g) The application for interdictal relief against the first respondent in terms of paragraphs 5 and 6 of the notice of motion is refused.

h) To the extent that remains necessary, the late delivery by the applicant of its supplementary founding papers is condoned.

i) The issues of costs, including those previously stood over in related proceedings for determination in these proceedings, shall stand over for determination after argument to be heard on a date to be agreed, or failing agreement within 5 days, to be determined by the court.

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A G BINNS-WARD

Judge of the High Court

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N P BOQWANA

Judge of the High Court

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