

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No.

In the matter between:

NATIONAL TREASURY

First Applicant

**THE SOUTH AFRICAN NATIONAL
ROADS AGENCY LTD**

Second Applicant

**THE MINISTER, DEPARTMENT OF
TRANSPORT REPUBLIC OF SOUTH AFRICA**

Third Applicant

**THE MEC, DEPARTMENT OF ROADS
AND TRANSPORT, GAUTENG**

Fourth Applicant

**THE MINISTER, DEPARTMENT OF WATER
AND ENVIRONMENTAL AFFAIRS**

Fifth Applicant

**THE DIRECTOR-GENERAL, DEPARTMENT OF
WATER AND ENVIRONMENTAL AFFAIRS**

Sixth Applicant

and

OPPOSITION TO URBAN TOLLING ALLIANCE

First Respondent

**SOUTH AFRICAN VEHICLE RENTING
AND LEASING ASSOCIATION**

Second Respondent

**QUADPARA ASSOCIATION
OF SOUTH AFRICA**

Third Respondent

**SOUTH AFRICAN NATIONAL
CONSUMER UNION**

Fourth Respondent

NATIONAL CONSUMER COMMISSION

Fifth Respondent

SUPPORTING AFFIDAVIT

I, the undersigned

NAZIR ALLI

do hereby make oath and state:

- 1 I am the Chief Executive Officer of the South African National Roads Agency Limited (*SANRAL*), duly employed as such at 48 Tambotie Avenue, Val de Grace, Pretoria.
- 2 The facts contained in this affidavit are within my own knowledge and are, to the best of my belief, both true and correct.
- 3 Where I depose to allegations of a legal nature I rely on the advice of *SANRAL*'s legal representatives.
- 4 I am duly authorised to depose to this affidavit on behalf of *SANRAL*.
This affidavit is filed in support of the affidavit deposed to by the Minister of Finance in support of the application for leave to appeal to

the Constitutional Court against the decision of Prinsloo J handed down on 28 April 2012.

5 I have read the affidavit deposed to by the Minister of Finance and confirm the correctness of the contents thereof insofar as it applies to SANRAL.

6 In deposing to this affidavit, I adopt and make use of the same abbreviations and definitions as are contained in the affidavit of the Minister of Finance.

7 This affidavit addresses three issues:

7.1 First, it provides further detail of the irreparable harm which is being suffered by SANRAL as a result of the interdict.

7.2 Secondly, it deals with further aspects of Prinsloo J's judgment which are not addressed in the main affidavit.

7.3 Thirdly, it deals with the proper limits of the courts' powers in interim interdict applications.

Irreparable harm

8 At the outset, I wish to deal with the impact that the interim interdict has on SANRAL and the effect which it will continue to have on SANRAL until such time as it has been set aside.

8.1 In paragraphs 37—44 and 48—50 of the Minister of Finance's founding affidavit the Minister sets out the immediate aftermath of the judgment on SANRAL's credit rating and the knock-on effects for SANRAL.

8.2 In addition to the R270 million which is referred to in the main affidavit and which SANRAL will incur on a monthly basis in respect of the interest and repayment of the R20 billion it borrowed for the capital expenditure on the GFIP, there are further costs, including approximately R28 million per month payable on other contractual commitments associated with GFIP, including monies payable to the operator.

8.3 Moreover, for as long as the interdict is in place, SANRAL will not recover the costs of ongoing maintenance to the GFIP. These costs will also have to be funded by SANRAL without any income.

8.4 The Minister of Finance, in his annual budget, allocated R5.75 billion to SANRAL, which was to be used as a balloon payment to reduce the capital liability on GFIP and thereby also reduce the amount of toll that was payable. It was as a result of this capital contribution that significant savings in the form of a monthly cap on toll fees became possible, as well as the lowering of the toll rate.

8.5 As is set out in the main affidavit, SANRAL is now using this capital contribution to fund ongoing monthly costs associated with the GFIP. The utilisation of these monies to offset the impact of the interdict has the inevitable result that, in the long run, motorists will be required to pay more for the upgrade to the freeway system than they would have had to pay if the interdict had not been granted, tolls could have been collected, and the balloon payment from government could have been utilised to reduce SANRAL's overall capital liability.

8.6 I point out too, that for so long as the interdict remains in place and uncertainty persists around e-tolling and SANRAL's future generally, it is practically impossible for SANRAL to borrow any

further money in the market. That is, SANRAL cannot raise any further funding through its bond programme to tide it over in the short or medium term. This, in turn, means that when current reserves are exhausted, SANRAL will not be able to operate as a going concern.

- 8.7 In addition and perhaps even more troubling for SANRAL and for the Republic of South Africa generally, is that all other capital infrastructure projects, including greenfield developments and upgrades, improvement and maintenance projects on the existing network must be postponed indefinitely. SANRAL cannot commit to new projects unless it is in a position to secure funding. This means that future growth of the road network and planning and projects must be delayed. Delays of this kind are inimical to economic growth generally—a priority for our Government's employment initiatives and poverty alleviation programme.

Prima facie right

9 I have been advised that it is also necessary for me to give some consideration to the grounds of review that were relied on by the first to fourth respondents in support of the application for interim relief in order to establish the applicants' prospects of success in the appeal.

9.1 These review grounds, to be relied on in Part B of the Notice of Motion, were set out as disclosing the basis on which it was contended that the decisions to declare the roads as toll roads should be reviewed and set aside.

9.2 In this regard, it is important to note that the first to fourth respondents have never sought to challenge the decision to upgrade the highways of Gauteng as proposed and implemented under the GFIP. The review application is confined solely to the decision—made in 2008—to declare the roads as toll roads and the environmental authorisations which preceded that decision.

9.3 Moreover, the question before Prinsloo J of whether or not these decisions *prima facie* fell to be reviewed and set aside by a court hearing the review application, was unrelated to the cost of tolling. At the time that the application for interim relief and review had been launched, the amount of toll that would be

levied was—on the first to fourth respondents’ version—not known to them because the toll tariff determination of 13 April 2012 had not yet been published.

9.4 The merits or demerits of the decisions to declare the roads as toll roads was therefore to be adjudged solely on the basis of the information that was before SANRAL and the Minister of Transport *at the time* that the decisions were taken.

9.5 Regrettably, this was not the basis on which the matter was ultimately determined.

10 In the judgment (at pages 22—25), Prinsloo J dealt with the main review ground relied on by the first to fourth respondents: that the decision to implement open-road tolling on the GFIP was so unreasonable that no reasonable decision-maker could have arrived at this decision.

11 In particular, Prinsloo J was concerned first, that the costs of collecting toll, over a twenty-year period, equated to the cost of upgrading the GFIP and, secondly, that there would be high rates of default that rendered the system practically unworkable. These two

considerations weighed heavily in Prinsloo J's decision to grant the interdict.

- 12 I have been advised that Prinsloo J's approach in this regard was, with respect, premised on an incorrect understanding of and appreciation for the relevant principles of law pertaining to review and therefore fundamentally flawed. His findings cannot stand scrutiny on appeal for the following reasons:

12.1 At all times, it was common cause between parties arguing the application for interim relief that it was necessary for the roads and highways around Gauteng to be upgraded and for the congestion that was being experienced to be addressed.

12.2 It was also common cause—and, it has to be said, is a matter of common knowledge—that the costs of the upgrades are extensive. SANRAL did not have R20 billion to finance the capital outlay, necessitating that the money be borrowed—as is the case with most major capital infrastructure projects. This money is repayable and the use of the money in the interim necessarily entails a cost.

12.3 Against this background, the capital cost of the project is not—as Prinsloo J, with respect, rather simplistically put it—the R20 billion initial outlay. The cost of the project is the R20 billion, together with the financial cost of raising that R20 billion in the form, mainly, of interest, as well as the ongoing maintenance and repair and upgrade costs of the GFIP for the duration of the project. These costs are reflected on the table annexed hereto marked “NA1”. I return to this table below.

12.4 As the Minister of Finance has stressed in his founding affidavit, therefore, the question is ultimately not one of whether or not the GFIP should be paid for, rather it is a question of how it should be paid for. The decision on the part of SANRAL—taken in conjunction with the Minister of Transport and with the knowledge and approval of Cabinet in 2007—was therefore a decision as to how the GFIP should be funded and the outcome was that it would be funded through tolling.

12.5 At the time that the decision to implement open road tolling on GFIP was being contemplated, during the period 2006 to 2008, SANRAL undertook an extensive inquiry into open road tolling,

including as to its costs, benefits and risks. These inquiries formed part of a reasoned and informed process that was undertaken not only by SANRAL and its employees but by consultants employed on behalf of SANRAL.

12.6 I must immediately point out that a significant portion of the documents that informed these inquiries or which were generated during the process were in the possession of the first to fourth respondents prior to the launching of their application, formed annexures to their application, and were commented on by them in the founding affidavit and replying affidavit. These documents therefore served before the High Court and were debated in argument.

12.7 As part of these inquiries, estimates were made as to the costs of tolling and the overall costs as compared with the capital costs. The estimates that were made at the time were that the average costs of collection and recovery would be approximately R447 million (in 2007 Rand) per annum over the life of the project which includes the costs associated with the transaction clearing house, open road tolling back office, maintenance of the

toll system and the violation processing centre. SANRAL also undertook studies of default rates applicable to comparative international experiences of open-road tolling. Studies at the time indicated that a default rate of between 5% and 10% could be anticipated.

12.8 At no stage have the first to fourth respondents challenged the veracity of these inquiries or their outcome in relation to these issues of costs of tolling and anticipated default rates. Hence, it can be accepted by this Court that the figures that SANRAL arrived upon were the correct figures at that time.

12.9 SANRAL applied its mind to this consideration and, additionally, the information was put before the Minister of Transport in the form of the initial proposal and was considered by him. The decision at the time, on the basis of this informed approach, was that the cost per annum was not unreasonable and that tolling was therefore justified and justifiable. Moreover, it was considered that the anticipated default rate was an acceptable risk and that mitigatory measures would also be available to minimise this risk as far as possible.

12.10 Special consideration was given to the additional benefits to be derived from tolling as a means of funding GFIP, including numerous socio-economic advantages and the opportunities that it presented to encourage road use patterns. These advantages were perceived to significantly compensate for any disadvantages and risks associated with open-road tolling.

12.11 On the strength of this information that was available during 2007 and 2008, it was decided that open road tolling, in the form of e-tolling, should be implemented on the GFIP. At the time this decision taken, it was reasoned, rational and fully justifiable. The reasons why this decision was taken—why the benefits of e-tolling were perceived to outweigh all of the risks and adverse consequences associated therewith—were spelt out in detail in the answering affidavit filed on behalf of SANRAL in the interim interdict application and in the lengthy annexures attached to that answering affidavit.

12.12 I have been advised that in assessing the *prima facie* prospects of success of the review application it was incumbent on Prinsloo J to confine his consideration of the merits of the decision to the

information that was before SANRAL and the Minister of Transport *at the time* that the decision was taken. Had he done so, his Lordship would have seen that the decisions were, on the strength of the information properly before SANRAL and the Minister of Transport, fully reasoned, rational and justifiable. Far from the decisions being such that no reasonable decision-maker could have taken them, the decisions were precisely what a reasonable decision-maker should have taken.

12.13 This is not what happened. Instead, the first to fourth respondents put before the High Court a toll collection figure of R20 billion, which Prinsloo J used as the yardstick to measure the reasonableness of e-tolling. This figure of R20 billion, which assumes a default rate of 60%, was first calculated during the course of a steering committee process conducted *in 2011*. The figure bore no relationship to the information before SANRAL and the Minister in 2007 and 2008 when the relevant decisions were taken. Moreover, the default rate of 60% underpinning that figure was also wholly out of keeping with the information before the decision-makers in 2007/2008.

12.14 Put simply, the R20 billion point was irrelevant to the issues in dispute before Prinsloo J. Despite this, he based a substantial aspect of his judgment on this figure.

12.15 Had Prinsloo J properly approached the matter with reference to the information before the decision-makers at the time, he could never have arrived at the conclusion that there were *prima facie* prospects of the review succeeding on the grounds that the decisions sought to be set aside were so unreasonable that they could never have been taken by a reasonable decision-maker.

12.16 I turn now back to the table “NA1” hereto, which reflects current figures. The table reflects that the total expenditure over 24 years is nearly R90 billion, of which approximately R18.4 billion would be toll operating costs. These operating costs are based on an assumed default rate of close to 30% in the initial years of the project and then stabilises to 7%—a generous figure for the first two years of operation and 7% thereafter, that is not in keeping with international norms. Given all of the enormous advantages to be garnered through collecting the cost of GFIP through tolling and the corresponding reasons why a ring-fenced

fuel levy is not a viable option, it can hardly be contended, even using current figures, that the cost of collection as a proportion of the overall costs is so unreasonable that no reasonable decision-maker could have decided in favour of open-road tolling.

12.17 I point out, finally, that insofar as Prinsloo J found that there was merit in the argument that enforcement of tolling would be practically impossible, he elevated unlawfulness as to a barrier to future administrative conduct.

12.17.1 It can never be said that Government or parastatals should not implement a vital and necessary programme because of the potential for unlawfulness.

12.17.2 If this were the case, then the risk of default on the part of consumers would paralyse all future development and growth: Eskom could not build new power stations if it were not assured that electricity consumers across the country would pay for the electricity; the SABC should not provide new broadcast services because of the non-payment of television licenses; and the traffic authorities should

abandon law enforcement because of a high incident of non-payment of traffic fines by errant motorists.

12.17.3 These examples only need to be cited to realise that the reasoning is unsound.

12.18 The premise on which the judgment is based is in any event logically flawed. SANRAL would not need to issue 70 000 summonses per day or 2.1 million summonses per year. It need only issue one summons every three years per defaulter, recovering in one action, the cost of all of the instances of non-payment of toll by that commuter in the preceding period. Moreover, there are other enforcement mechanisms that SANRAL can, if so advised, seek to implement.

12.19 Finally, as SANRAL's answering affidavit and the annexures to it showed, SANRAL and the Minister had considered this aspect at the time that the decisions were taken and, on the basis of an international average for default, were nonetheless satisfied that the benefits of e-tolling outweighed the consequences of not undertaking GFIP at all.

- 13 The learned Judge accepted that there were two other grounds of review that were *prima facie* established. I deal briefly with each of these in turn.
- 14 The first that I will deal with (the third ground considered in the judgment—at page 25) related to the alleged failure on the part of SANRAL to give proper notice as required by section 27(4)(a) of the SANRAL Act.
- 14.1 Insofar as Prinsloo J seemed to accept the argument that the notice was inadequate because it did not disclose that open-road tolling was contemplated and did not disclose the amount of the toll that would be payable, he similarly erred: the process of declaring a toll road as such under section 27(1) read with section 27(4) is a distinct statutory function—carried on by SANRAL—from the determination of the toll that is payable under section 27(3)—a statutory function of the Minister.
- 14.2 In the circumstances, this review ground is also lacking in merit and Prinsloo J, with respect, wrongly perceived it to give rise to a *prima facie* case.

15 The final review ground dealt with in the judgment is the question of whether or not the Minister of Transport was misled by SANRAL in relation to the availability of public transport (judgment at pages 25—26).

15.1 At the start, it must be mentioned that this is a particularly damning accusation to make of and about SANRAL. It is all the more startling an accusation to make given that the Minister himself did not contend that he had been misled, SANRAL denied that the Minister had been misled, and the evidence which was relied on for this finding was flimsy at best.

15.2 The report referred to by the learned Judge at page 25 paragraph 4 of his judgment was one amongst a myriad of reports and papers that lay before SANRAL at the time that it was considering tolling. It was not the only report that dealt with the question of availability of public transport as a factor in determining whether or not tolling should be adopted so as to pay for the cost of GFIP. Indeed, the report in question was not even primarily directed at the question of whether or not

adequate public transport was a necessary precondition to tolling being implemented.

- 15.3 Yet other reports and recommendations proposed tolling as a means of encouraging commuters to look to public transport, thereby providing the necessary push towards public transport and promoting opportunities for the development of a more extensive public transport network.
- 15.4 All of these competing considerations were considered and the Minister at the time was under no illusions as to the relative merits and demerits of the arguments for and against.
- 15.5 In the circumstances, the finding that the Minister was misled is simply not borne out by the papers that lay before the High Court—not on a *prima facie* basis or at all.
- 16 In the result, the review application as presented for purposes of the interim relief application was entirely lacking in merit. Given the irreparable harm that SANRAL stood to suffer, the fact that the interim interdict would be final in effect, the delays associated with the bringing of the application, and the overwhelming balance of

convenience in favour of SANRAL, I respectfully submit that the High Court erred in finding that the prospects of success in the review application warranted the grant of the interim order.

- 17 In the light of the above, the applicants enjoy very good prospects of success on appeal and of persuading the Court that the decision of the High Court falls to be set aside.

The limits to the courts' task

- 18 The Court below, in its assessment of the grounds of review and in determining whether an interdict should be granted, failed to have regard to the appropriate remit of the courts in these circumstances. The decisions brought under review and the interdict sought bear upon the fiscal policies and decisions of the state and its agencies. The Courts should proceed, I am informed, with considerable circumspection when exercising their powers in this terrain for two reasons.

- 18.1 First, decisions that concern how public projects are to be funded inevitably involve judgments that Courts should not readily revisit.
- 18.2 Secondly, the fiscal consequences of an interdict of the kind sought and granted by the Court below are far-reaching and a Court should not run these risks, save in cases of the most exceptional and imminent harm. The Court below, by granting the interdict, trespassed upon the separation of powers and assessed the case for the interdict without proper regard for the limitations appropriate to the exercise of the Court's powers upon this terrain of fiscal judgment and consequence. These are constitutional issues of importance that should, in the interests of justice, be entertained by this Court.

NAZIR ALLI

I certify that this affidavit was signed and sworn to before me at _____ on this the _____ day of May 2012 by the deponent who acknowledged that she knew and understood the contents of this affidavit, had no objection to taking this oath, considered this oath to be binding on her conscience and uttered the following words: 'I swear that the contents of this affidavit are both true and correct, so help me God.'

COMMISSIONER OF OATHS

Name:

Address:

Capacity