Republic of South Africa

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

Case No: 6165/2012

Before: The Hon. Mr Justice Binns-Ward

In the matter between:

CITY OF CAPE TOWN	Applicant
and	
SOUTH AFRICAN NATIONAL ROADS AGENCY LIMITED	First Respondent
MINISTER OF TRANSPORT	Second Respondent
MINISTER OF WATER AND ENVIRONMENTAL AFFAIRS	Third Respondent
MINISTER OF TRANSPORT AND PUBLIC WORKS (W.C.)	Fourth Respondent
MINISTER OF FINANCE, ECONOMIC DEVELOPMENT AND TOURISM (W.C.)	Fifth Respondent
PROTEA PARKWAYS CONSORTIUM	Sixth Respondent
N2/N1 CRISIS COMMITTEE	Seventh Respondent
THEEWATERKLOOF MUNICIPALITY	Eighth Respondent
BREEDE VALLEY LOCAL MUNICIPALITY	Ninth Respondent

JUDGMENT DELIVERED: 21 MAY 2013

BINNS-WARD J:

[1] There are three applications before the court for adjudication at this stage. Each of them bears on or is related to a pending application in which the City of Cape Town ('the City') seeks the judicial review and setting aside of a series of decisions by the South African National Roads Agency Limited('SANRAL' or 'the Agency') and the Ministers of Environmental Affairs and of Transport, respectively, directed at achieving the maintenance, upgrading and operation of certain sections of the national road system in the Western Cape

Province by means of a road tolling operation. The papers in the review application are far from complete. The review application will thus be determined at some as yet undetermined future date and the evidence before the court that deals with the review might well give amaterially different complexion to the case to that which is apparent on the papers before me at this stage. Although it has been necessary to some extent to consider the prospects of success that the City appears to have in the review application, it is appropriate to emphasise that this judgment should not be read as in any way pre-empting the judgment in the review application..

[2] The first application requiring determination at this stage concerns an application by the City to amend its notice of motion in the pending review application and for an order directing the disclosure, or discovery by the first, second and third respondents in those proceedings (SANRAL and the Ministers of Transport and of Environmental Affairs, respectively) of additional documentation. I shall hereinafter refer to the first application as 'the interlocutory application'. In the second application SANRAL seeks an order directing the City to file its supplementary founding papers, if any, in the review application within ten days. It is common ground that the second application will fall away automatically if the City is granted leave in the interlocutory application to amend its notice of motion in the review application. The third application is for an interim interdict *pendentelite* sought by the City to prohibit the undertaking of certain measures by the first respondent towards the implementation of a tolling operation on the affected sections of the national roads. That application will be referred to in this judgment as 'the interdict application'. It was agreed by counsel that I might have regard to the evidence in the applications holistically and collectively for the purposes of deciding any of them individually.In other words, I am permitted to have reference to the papers in the interlocutory application for the purposes of the interdict application and *vice versa*.

[3] SANRAL is the only party opposing the interlocutory and interdict applications. The Ministers, who have indicated their intention to oppose the review application, have given notice that they will abide the judgment of the court in the matters to be determined in this judgment.

[4] It is appropriate to begin by sketching the factual and statutory context in which the litigation has occurred. The history is a somewhat lengthy one; an outline will do.

[5] SANRAL is a juristic person incorporated as a company with a share capital in terms of the South African National Roads Agency Limited and National Roads Act, 7 of 1998 ('the SANRAL Act'). In terms of s 25 of the SANRAL Act, the Agency is 'within the framework of government policy, …responsible for, and [has the] 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'.

[6] Section 27 of the SANRAL Act[1] provides that SANRAL may, with the approval of the Minister of Transport, declare specified national roads, or portions thereof to be toll

---

[1]Section 27 provides (insofar as currently relevant):

'***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 in terms of subsection (2), or in respect of the vehicles of a category so determined and specified which are driven or used on the toll road at a time so determined and specified;

(ii) to all users of the road of a category determined by the Agency and specified in such a notice, irrespective of the vehicles driven or used by them on the toll road, or to users of the road of a category so determined and specified when driving or using any vehicles on the toll road at a time so determined and specified;

(d) may restrict the levying of toll on a particular toll road to the hours or other times determined by the Agency and specified in such a notice;

(e) may suspend the levying of toll on a particular toll road for any specified or unspecified period, whether in respect of all vehicles generally, or in respect of all vehicles of a category determined by the Agency and specified in such a notice, and resume the levying of toll after the suspension;

(f) may withdraw the following, namely-

(i) any exemption under paragraph (c);

(ii) any restriction under paragraph (d);

(iii) any suspension under paragraph (e).

(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;

roads. A toll road is one in respect of which a toll or fee is levied on the users for availing of the utility. Section 28 of the SANRAL Act[2] permits SANRAL to enter into agreements with

---

(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.
(5) …..
(6) …..'

[2]Section 28 provides:

'***Operation of toll roads and levying of toll by authorised persons***
(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 toll road specified in the agreement;
(ii) during the period so specified; and
(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), 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.'

third parties to (amongst other matters) design, construct, operate and maintain national roads or portions thereof which are existing toll roads, or are declared as such. Such third parties become contractually entitled, subject to certain provisions of the SANRAL Act, and depending on the terms of the applicable agreement, to levy and collect toll either as an agent of SANRAL, or for their own account.

[7] In 1998, SANRAL received a proposal from a development consortium which provided for the design, financing, construction and operation of certain portions of the N1 and N2 national roads in the vicinity of Cape Town in the Western Cape Province as toll roads. Implicit in the consortium's proposal, which was in the form of a 'build, operate and transfer' ('BOT') concept,[3] was the hope that SANRAL would ultimately conclude an agreement with it of the nature contemplated by s 28(1) of the SANRAL Act.

[8] The construction and upgrade measures inherent in the project entailed activities listed in terms of the Environment Conservation Act 73 of 1989 ('the ECA') as activities which may have a substantially detrimental effect on the environment. The undertaking of such activities was subject to authorisation in terms of s 22 of the ECA.[4] The functionary statutorily appointed to determine whether to grant the required authorisation was the Minister of Environmental Affairs, alternatively, the so-called 'competent authority' referred to in s 22(1) of the ECA. SANRAL was sufficiently interested by the terms of the consortium's proposal to make application for the required environmental authorisation.[5] The application was submitted in May 2000. By that stage the National Environmental Management Act 107 of 1998 ('NEMA') had come into operation. Section 2 of NEMA states a set of principles by which decisions by all organs of state which could have a significant impact on the environment have to be guided. Those principles thus applied to any decision determining an application for environmental authorisation under the ECA.

[9] The principles set out in s 2 of NEMA include the requirement that all development must be socially, environmentally and economically sustainable. Section 2(4) of NEMA

---

[3]The 'build, operate and transfer' concept entails that the third party contractor will construct the toll road and operate it for a period to recoup its expenditure and generate a profit, and then transfer the toll road as a going business to SANRAL at the end of the concessionary period.

[4] Environmental authorization of a like nature now falls to be dealt with in terms of s 24 of Act 107 of 1998 ('NEMA').

[5]The application for environmental authorization was originally submitted by SANRAL and the consortium parties jointly, but the consortium parties withdrew from the application, presumably because the applicants realized, having regard to procurement legislation, that, even if the project went ahead, any agreement of the nature contemplated by s 28 of the SANRAL Act, might well not be with the consortium parties.

states that determining whether any development is sustainable requires the consideration of all relevant factors including, amongst others, the following:

(i) 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;[6]

(ii) that the social, economic and environmental impacts of activities, including disadvantages and benefits, must be considered, assessed and evaluated, and decisions must be appropriate in the light of such consideration, evaluation and assessment;[7] and

(iii) that decisions must be taken in an open and transparent manner.[8]

[10] In terms of the then applicable regulations ('the EIA regulations')[9] the determination of an application for environmental authorisation fell to be pronounced in a document called a 'record of decision'. On 30 September 2003, the competent authority, being the Acting Deputy Director-General of the then existing national Department of Environmental Affairs and Tourism ('DEAT'),[10] published a record of decision granting SANRAL the environmental authorisation it needed to undertake much of the construction work entailed in the project. The record of decision was forwarded to SANRAL under cover of an evenly dated letter from the competent authority, which contained the following qualification: '*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.*' The basis for the qualification was to be found in a 'working agreement' allegedly concluded earlier between SANRAL and DEAT concerning the practical application of the EIA regulations to SANRAL's activities in respect of the construction and upgrading of roads generally. The agreement allegedly contained a clause providing ' *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]'.[11]

[6]Section 2(4)(a)(vii) of NEMA.
[7]Section 2(4)(i) of NEMA.
[8]Section 2(4)(k) of NEMA.
[9]The regulations were published in GNR 1183, dated 5 September 1997.
[10]The departments of environmental affairs and tourism, respectively, currently fall under separate Cabinet portfolios.
[11]The current chief executive officer of SANRAL states that 'to the best of [his] knowledge' no such agreement was concluded by SANRAL and denies that the independent consultant responsible for undertaking the EIA

[11] The applicable statutory framework allowed for an appeal to the Minister of Environmental Affairs and Tourism against the competent authority's determination of the application for environmental authorisation. A number of interested parties, including the municipality of the City of Cape Town ('the City'), availed of the right to appeal.

[12] In October 2005, the Minister announced his decision in respect of the appeals. The decision document recorded that the Minister 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 outside his remit. He stated '*Socio-economic considerations associated with tolling are adequately considered in "the intent to toll" process. Any attempt by* [DEAT] *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 stipulated certain remedial requirements and indicated his intention to issue a revised record of decision within 30 days of the receipt of certain documentation to be provided pursuant to his remedial requirements.

[13] Thereafter nearly two and a half years went by before, on 28 February 2008, the Minister of Environmental Affairs and Tourism issued a record of decision authorising 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…*'.[12]. At para 2.1 of the record of decision the Minister recorded that he had taken into consideration, amongst

---

assessment in respect of the project excluded any relevant or mandated investigations from the scope of the assessment. The aforegoing quotations from the record of decision do suggest, however, that the competent authority was influenced by the considerations reflected in the alleged working agreement, whether such agreement was ever concluded or not. (The legal consequencesof that approach, if any, are questions that the court seized of the judicial review application will have to determine.)

[12]Interestingly, the authorization in respect of the erection of toll plazas appears to have limited to the N1 on the portion of that national road between the R300 and Bot River.

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 that matters related to the tolling of the roads and the structuring of toll fees fell outside the ambit of the EIA regulations, and that they fell to be decided by the appropriate authority in terms of the SANRAL Act. (The February 2008 decision was amended in respects not material for present purposes in April 2008.)

[14] Six months later, on 2 September 2008, the Minister of Transport granted approval, under s 27(1)(a) of the SANRAL Act, for the declaration of the roads in question as toll roads. The ensuing declaration was published by SANRAL in the Government Gazette on 15 September 2008.

[15] On 16 March 2010, SANRAL issued an invitation to tender for the design, construction, finance, operation and maintenance of the declared toll roads under a concession contract. The invitation was open until 20 September 2010. Tenders from three bidders were submitted in response to the invitation. On 21 April 2011, SANRAL selected two of the bidders to proceed to a 'best and final offer' stage of the tender process.

[16] Various exchanges occurred between the City and SANRAL between April and November 2011 in which the City requested SANRAL to hold off awarding the tender in order to allow for negotiations between the parties regarding its objection to the tolling option. These exchanges did not give any result and SANRAL made it evident it was proceeding with the scheme.

[17] In July 2011, the City therefore formally declared a dispute with SANRAL in terms of the Intergovernmental Relations Framework Act 13 of 2005. During the latter part of the exchanges between the City and SANRAL, reports appeared in the press that the Minister of Transport had imposed a moratorium on all toll projects until the completion of a consultative process that he intended to undertake with interested and affected parties. Those reports appear to have borne some relationship to the public outcry that erupted at about that time concerning tolling in Gauteng. The City enquired of SANRAL as to the accuracy of the press reports. It received an equivocal response.

[18] In September 2011, SANRAL announced its choice of the sixth respondent as the preferred bidder in the tender process. In its annual report for 2012 this decision was described by SANRAL as the award of the tender to the sixth respondent.

[19] On 7 October 2011, the City instituted proceedings in this court for interim relief in which it sought a prohibitory temporary interdict in terms essentially similar to that sought in the interdict application currently before the court. That application was postponed indefinitely by an agreement reached between the parties in December 2011. The terms of the agreement posited that the City would not institute review proceedings until after the conclusion of the intergovernmental dispute resolution process then in train. The postponement agreement further provided that if the contemplated judicial review application had not been 'finalised' by 31 March 2012, and SANRAL thereafter intended to proceed with the project, it would afford the City at least 45 days notice of its intention to do so.

[20] On 16 March 2012, the facilitator in terms of the intergovernmental dispute resolution process reported, in terms of s 43(1)(b) of Act 13 of 2005, that the dispute resolution process had come to an end. The process did not resolve the dispute.

[21] When the endeavours to resolve the City's concerns in terms of the intergovernmental dispute resolving mechanism proved unsuccessful, the City instituted the review applicationon 28 March 2012. It seeks the judicial review and setting aside of the following decisions:

1. The decision of the competent authority to grant environmental authorisation for the project;
2. The decision of the Minister of Environmental Affairs and Tourism to effectively dismiss the appeals against the grant of environmental authorisation by the competent authority;
3. The decision of the Minister of Environmental Affairs and Tourism in February 2008 (as amended in April 2008) to grant a revised environmental authorisation for the project;
4. The decision of the Minister of Transport in terms of s 27(1) of the SANRAL Act to approve the declaration of the portions of the national roads in question as toll roads;
5. The decision of SANRAL to declare the affected roads as toll roads;

alternatively, to 1-5, above,

6. The decision of SANRAL to award the tender for the project to the Protea Parkways Consortium (this aspect of the review application is the subject of an

application to amend the notice of motion, which will be addressed later in this judgment); and

7. SANRAL's failure to make a decision, as provided for in s 27(1)(a)(ii) of the SANRAL Act, to withdraw the declaration to toll the affected roads. (Attendant on this head of relief the City also seeks orders directing SANRAL to consider and decide whether to withdraw the declaration and to notify the City of its determination in that regard and of the reasons therefor.)

The City has also applied conditionally in the review application for a declaration that s 27 of the SANRAL Act is inconsistent with the Constitution of the Republic of South Africa and accordingly invalid. The condition subject to which that declaration is sought is a finding by the court that determines the review application that the provision prevents the Minister of Transport from determining the amount of the toll that may be levied before or simultaneously with any related decision to approve the declaration of a toll road.[13]

[22] To the extent necessary, the City has also applied in the review application for an extension of the period of 180 days referred to in s 7(1) of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA') to the date when the review application was instituted, and, also to the extent necessary, condoning the City's delay in bringing the application.

[23] On 19 June 2012, approximately 3 months after the review application had been launched, SANRAL and the second and third respondents filed a 'consolidated' record of proceedings in purported compliance with rule 53(1) of the Uniform Rules of Court. The record was substantial and the City's attorneys consequently sought an extension of time (as contemplated in terms of rule 27) in order to consider and deal with it for the purpose of supplementing the City's founding papers in the manner contemplated in terms of rule 53(4). There was no response to the City's request for an extension of time. In October 2012, the City's attorneys indicated that in their opinion the record of proceedings provided by SANRAL and the Ministers was deficient in certain identified respects. Theyasked for the alleged deficiencies to be addressed.

[24] On 30 January 2013, SANRAL responded to the effect that all of the documents which had been made available to the respondent decision-makers had been included in the

[13] While it is not for me to purport to pre-empt any such possible finding, it would nonetheless turn only on a question of statutory interpretation; and of a provision with which I have had to engage closely in the determination of the matters before me. I am thus able to say that I should be surprised if the court seized of the review application were to make a finding that would satisfy the stated condition for the constitutional challenge to arise.

consolidated record, or their absence had been explained in the affidavits filed in support of the provision of that record. Two weeks later, SANRAL urged the City to either 'move on' with the review application, or to bring any application it might wish in respect of its complaints about the alleged deficiencies in the rule 53 record. On 22 February 2013, the State Attorney, representing the second and third respondents, advised that all the documents which had been before the respective Ministers when the impugned decisions were taken had been listed in the consolidated record of proceedings that had been delivered by SANRAL and the second and third respondents.

[25] A dispute also arose between SANRAL and the City as to whether the decision of SANRAL in September 2011 to declare the sixth respondent as the preferred bidder for the award of the contract to undertake the project fell within the terms of the relief sought by the City in the notice of motion in the review application. In an endeavour to address the dispute, the City gave notice, in terms of rule 28 of the Uniform Rules, of its intention to amend the relevant wording of its notice of motion. SANRAL opposed that amendment. An application by the City in terms of rule 28(4) therefore became necessary to effect the contemplated amendment.

[26] On 1 March 2013, the City instituted the interlocutory application for an order allowing the amendment to the notice of motion in the review application and directing that the provisions of rule 35 relating to discovery be made applicable to the review application to the extent necessary, and alsorequiring the production by the respondents of various documents described in paragraph 4 of the notice of application. The essential problem with the record produced was that it did not contain the documentation pertaining to the decision to choose the sixth respondent as the preferred bidder for the BOT tolling contract. This was due to SANRAL's understanding of the relief sought in terms of paragraph 2.1.1 of the notice of motion in the review application. As to be expected, all the parties cited as respondents in the review application were also cited as such in the interlocutory application.

[27] Five days after the institution of the interlocutory application, on 6 March 2013, SANRAL gave 45 days' notice of its intention to proceed with the project.

[28] On 27 March 2013, the City applied afresh for an interdict prohibiting the undertaking of any measures to advance the achievement of tolling the roads pending the final determination of the review application. This application is the interdict application for current purposes. The seven respondents cited in the interdict application are the same

parties as those cited as the first to seventh respondents in the review application.[14] The earlier interdict application, which had been postponed by agreement, was still pending in March 2013, but it has since been withdrawn.

[29] It is convenient to deal with the interlocutory application first.

The interlocutory application

[30] As mentioned, the City has applied in the interlocutory application to amend its notice of motion in the review application. The amendments which the City wants to effect are:

1. To seek additional declaratory relief by means of the insertion into the City's notice of motion of a paragraph to be numbered 2.1A reading as follows:

> '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. The amendment, by the insertion therein of the underlined words, of paragraph 2.1.1 of the notice of motion to read as follows:

> The decision of SANRAL <u>to select the sixth respondent as the Preferred Bidder in respect of the N1/N2 Winelands Concession Contract and/or</u>to award the tender for the N1/N2 Winelands Concession Contract ('the Tender") to the sixth respondent in or about September 2011.

[31] SANRAL objected to the proposed amendment. Its notice of objection in terms of uniform rule 28(3) set out the following grounds for the objection:

1. that the City's proposed amendment sought to introduce additional relief not supported by the City's founding affidavit, which if granted would result in the City's founding affidavit not making out a *prima facie* case for the relief claimed in the proposed amendment; and

2. that there had been no decision taken by SANRAL to 'award the tender' for the project and thatthe City thus sought by the amendment to introduce a further ground of review, namely, that relating to the selection of the sixth respondent as the preferred bidder. SANRAL contended that the selection of a preferred bidderdoes not constitute administrative action and is not susceptible

[14]The municipalities of Theewaterskloof and Breede Valley, which are the eighth and ninth respondents, respectively, in the review application, but are not taking an active role in those proceedings, were omitted from the parties joined in the interdict application.

to review as it has no direct external legal effect as far as the City is concerned.

[32] Notwithstanding jurisprudence to the effect that a party is limited to the grounds set out in its notice in terms of rule 28(3),[15] SANRAL has raised additional grounds in its affidavit opposing the application for amendment. The additional grounds of objection are (i) that the City does not have legal standing to seek the amended relief; (ii) prejudice related to the costs associated with producing an expanded record of the administrative decision and (iii) the City's failure to ask for an extension of the 180 day outer time limit in terms of s 7 of PAJA to the date of the effecting of the amendment. I have not found it necessary to decide whether SANRAL is indeed precluded on a proper application of rule 28 from raising additional grounds of objection in its opposing affidavit because, even if it were not, I can find no merit in any of the grounds of opposition which it has raised.

[33] The general approach to applications for amendment is well established. It is comprehensively discussed in Van Loggerenberg and Farlam (ed),*Erasmus, Superior Court Practice* at B1-178A – B1-184A. Suffice it to say that, certainly at an early stage of proceedings, such as in the current matter where answering papers in the review application have not yet been delivered, '…*the practical rule adopted* [is] *that amendments will always be allowed unless the application to amend is mala fide or unless such amendment would cause an injustice to the other side which cannot be compensated by costs, or in other words unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which it is sought to amend was filed*'; (per Watermeyer J in *Moolman v Estate Moolman* 1927 CPD 27, at 29). There is no suggestion that the amendments are being sought *mala fide.*

[34] The decision to choose the sixth respondent as the preferred bidder is clearly the decision that has from the outset been the subject to the challenge mounted in the City's founding papers in the review application. The amendments are sought really to address the distinction between the choice of a preferred bidder and the actual award of a tender contract. It is not in dispute that the tender contract has not been concluded. It is SANRAL that has attached importance to the distinction. Drawing on the distinction it has failed to produce an administrative record in respect of the decision to appoint the sixth respondent consortium as the preferred bidder.

[15]See *Squid Packers (Pty) Ltd v Robberg Trawlers (Pty) Ltd* 1999 (1) SA 1153, at 1157-8.

[35] SANRAL sought to contend that the distinction was of a substantive and material character. It advanced that contention in order to argue against the amendment on the basis that the City lacked standing to challenge on review the choice of a preferred bidder as opposed to the conclusion of a tender contract with the bidder. SANRAL sought support for its argument in the Supreme Court of Appeal's judgment in *Greys Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 (6) SA 313 (SCA). I shall address the argument based on lack of standing presently. Suffice it to say that in the context of the founding papers in the review application I am satisfied the distinction is a nice one, really nothing more than semantic in character. (As mentioned, there is evidence that SANRAL itself was inclined to describe the choice of the preferred bidder using language that suggested the award of the tender contract. In the directors' report included in SANRAL's annual report in respect of the financial year ended 31 March 2012, it was stated, under the subheading '*Principal Activities*', that '*The long awaited N1/N2 Winelands concession was awarded to* [the sixth respondent consortium] *during the year, but has also been suspended pending a court application*'.)The amendment sought by the City is directed at obtaining clarity and avoiding any ground for further confusion. Allowing it will not occasion the respondents in the review application any prejudice that cannot be addressed by an appropriate costs order. Certainly, if the evidence does not support the amended claim, that will not occasion SANRAL or any other respondent prejudice.

[36] The issue of the City's legal standing to claim the amended relief is not one which is appropriately gone into to determine whether its notice of motion should be amended or not. In this respect, because one is dealing with an application, the considerations that might lead to the refusal of an amendment to a pleading, if granting it would produce an excipiable summons or plea, do not arise. In any event, without deciding the question, which is for the review court to do, I am certainly not persuaded that SANRAL's contention, premised, as I have mentioned, on the Supreme Court of Appeal's judgment in *Greys Marine*, about the City's lack of standing is unarguably a good one. Standing is always a sensitively facts-peculiar issue (cf. *Jacobs en 'n Ander v Waks en Andere* 1992 (1) SA 521 (A), at 533J-534E). The facts in *Greys Marine* differed *totocaelo* from those in the review case. Therefore, as the Appellate Division noted in *Jacobs*, although previous judgments on standing can afford useful general guidance in certain respects, it is generally of little use to compare the facts of one case with those of another for the purpose of determining whether a party has standing. It is not appropriate, certainly at a stage when the founding papers in the review are not yet

complete, to refuse the amendment on the basis of determining that the City has no standing to impugn the choice of preferred bidder decision. The respondent suffers no irremediable prejudice on this approach. The lack of standing defence remains available to it before the court that will determine the review application. It is a defence that falls to be raised in the answering papers in the review application.

[37] The possibility that the administrative record may have to be supplemented consequentially upon the amendment of the City's notice of motion does not afford good reason to refuse the amendment. Any cognisable prejudice caused by the need to supplement the record can be addressed by an appropriate costs order by the review court. It seems to me in any event that SANRAL should have been able to compose the record with reference to the decision to appoint the sixth respondent as the preferred bidder because the founding papers in the review application suggested clearly enough that that is the decision (irrespective of the correctness of its characterisation) that the City regarded as the award of the tender. There is no reference in the founding papers to the executed conclusion of a contract between SANRAL and the sixth respondent.

[38] It is also not necessary to decide at this stage whether a decision to choose a tenderer as a preferred bidder constitutes 'administrative action' as defined in PAJA. SANRAL's argument that it does not (which is a separate contention from that which it advanced on standing) falls to be determined by the court seized of the review application. It is well established that decisions awarding public tenders constitute administrative action. The City contends that the selection of the sixth respondent as the preferred bidder as a result of the tender process plainly conferred rights on sixth respondent, to the exclusion of the other tenderers. It contends that the choice effectively determined the cost of the project and the tolling strategy (BOT) and therefore clearly had an external legal effect. I need not say more than that the City's contention is certainly arguable. I can imagine that the strength or weakness of the argument will be affected by the content of the tender documentation, of which the City has not yet obtained insight.

[39] Allowing the amendment will require SANRAL to provide the administrative record in respect of its decision to appoint the sixth respondent consortium as the preferred bidder.

[40] The City has also sought orders directing the first, second and third respondents in the review to provide additional documents. The Ministers have agreed to provide the documentation that the City has sought. The application is opposed only by SANRAL.

[41] The documentation sought in terms of paragraph 4.1 ofthe notice of application in the interlocutory application all pertains to the selection by SANRAL of the preferred bidder in the tender process undertaken for the purpose of concluding the contemplated BOT contract. The effect of granting the City's application to amend its notice of motion in the review application is to require SANRAL to make the administrative record pertaining to the selection of the preferred bidder available. As mentioned, it has undertaken to do so. I do not consider that it is appropriate to prescribe to SANRAL what the record should contain. If the record that is produced is identifiably deficient in any respect, the City can avail of appropriate remedies to address that at a later stage.

[42] In paragraphs 4.2 to 4.13 of its notice of application the City seeks an order directing SANRAL to provide the following documentation:

> 4.2 agendas, board packs, minutes, reports, documentation, recommendations, resolutions/decisions and reasons for such decisions of the [SANRAL] Board concerning or relating to the declaration of the N1/N2 Winelands Toll Highway as a toll road in terms of s 27 of the SANRAL Act (Government Notice 978, *Government Gazette* 31422, 15 September 2008) ("the declaration");
>
> 4.3 documentation showing any delegation or other authorisation by the Board in regard to the declaration;
>
> 4.4 the Toll Feasibility and Toll Strategy Report and the brief, instructions, documentation and reports provided to the compilers of the report;
>
> 4.5 the Financial Analysis Report prepared in August 2007 and the brief, instructions, documentation and reports provided to the compilers of the report (Rule 53 record v 18 p 5941 para 1);
>
> 4.6 the documentation reflecting the capital and operating cost projections for the Project provided by the Consortium (Rule 53 record v 18 p 5820 para 1.2);
>
> 4.7 the documentation detailing the Project design and cost details provided by the Project Engineers, Hawkins Hawkins and Osborne and VKE (Rule 53 record v 18 p 5820 para 1.2);
>
> 4.8 the updated traffic flow modelling data provided by ITS in Cape Town (Rule 53 record v 18 p 5820 para 1.3);
>
> 4.9 the data and results from the intensive traffic modelling (Rule 53 record v 13 p 4443 para 3);
>
> 4.10 the documentation reflecting the information used to calculate the financial viability of the Projects including the capital and operating costs of the project and the traffic projections (Rule 53 record v 6 p 2289 column 2 para 1);
>
> 4.11 the documentation detailing the Net Present Value of the Project, the internal rate of return and the year when cumulative cash flows become positive, details which were removed from the draft EIR at SANRAL's request (Rule 53 record v 6 p 2289 column 2 para 2);
>
> 4.12 the brief, instructions, documentation and reports provided to the Graduate School of Business, University of Cape Town and/or Professor Barry Standish and/or Strategic Economic Solutions CC and/or Antony Boting and/or Hugo van Zyl and/or Independent Economic Researchers for purposes of the compilation of the Economics Report relating to the Project and/or the Analysis of Local Toll tariffs Discounts for three local user groups for the Winelands Toll Road Projects in the Western Cape;
>
> 4.13 reports or other documentation containing SANRAL's evaluation of the Project.

In their heads of argument the City's counsel founded the City's entitlement to the relief in rule 53, rule 35 and the court's inherent jurisdiction to regulate its own process. It seems to me that it is appropriate and logical to deal with the application having regard to the bases upon which it is sought in the order that they have been described in the City's heads. Before embarking on that exercise, however, it might beuseful, so as to explain my approach to this part of the application, to discuss briefly the City's broadly expressed basis for the assertion of its alleged rights in this regard.

[43] The City's point of departure is the right of access to information in terms of s 32 of the Bill of Rights. The City accepts that, applying the subsidiarity principle, the ambit and basis for the availment of that right is defined by the provisions of the Promotion of Access to Information Act 2 of 2000 ('PAIA'). Section 11 of PAIA affords everyone a very wide right of access to recorded information held by any public body. SANRAL plainly falls within the defined meaning of 'public body'. However, s 7 of PAIA excludes the operation of the Act if the record is (a) requested for the purpose of criminal or civil proceedings;(b) so requested after the commencement of such criminal or civil proceedings, as the case may be; and(c) the production of or access to that record for the purpose referred to in (a) is provided for in any other law. The decisions of the Supreme Court of Appeal and the Constitutional Court in *Industrial Development Corporation of SA Ltd v PFE International Inc (BVI)* 2012 (2) SA 269 (SCA) and *PFE International and Others v Industrial Development Corporation of South Africa Ltd* 2013 (1) SA 1 (CC) have confirmed that the rules of court concerning access to documentation constitute provisions of other law within the meaning of s 7 of PAIA.

[44] The City accepts that the effect of s 7 of PAIA is to exclude its ability in the circumstances to rely on s 11 of the statute. It contends, however, that '[n]otwithstanding the fact that the City is unable to rely on the provisions of PAIA to access the records, on a proper approach to the relevant Rules, the result should be no different'.[16] Accepting that the rules of court fall, like all other legislation, to be construed and applied in the manner enjoined by s 39(2) of the Constitution, I do not accept that it inevitably follows that the 'other law' referred to in s 7 of PAIA falls to be construed to give the same extent of access to information as that provided in terms of PAIA. It all depends on the 'other law'. The 'other law' might well contain limitations on the access of information that are not contained in PAIA. There can be no objection to such greater limitations if they are reasonable and justifiable in the sense contemplated by s 36(1) of the Constitution. The anomaly to which

[16]Para 298 of the City's heads of argument.

this can give rise was recognised by Ngcobo J in *Ingledew v Financial Services Board: In re Financial Services Board v Van der Merwe and Another* 2003 (4) SA 584 (CC) at para 29, where the learned judge contrasted the extent of a litigant's right to access to information on the day before litigation commenced with that obtaining immediately thereafter because of the effect of s 7 of PAIA. In *Industrial Development Corporation,* at para 10, the Supreme Court of Appeal referred to this 'anomaly' as follows: '*This anomaly, that an applicant may be entitled to information the day before the commencement of proceedings but not the day thereafter, must be seen as a necessary consequence of the intention, on the part of the legislature, to protect the process of the court. Once proceedings are instituted then the parties should be governed by the applicable rules of court*'.

[45] The purpose of the rules of the court as being to facilitate the cost-effective, efficient and expeditious prosecution and determination of litigation has been authoritatively confirmed; see e.g. *PFE International*(CC) supra, atpara 27 and 30-31, approving the *dicta* of Corbett J in *Bladen and Another v Weston and Another* 1967 (4) SA 429 (C) at 431, that in matters bearing on the regulation oflitigious proceedingsit is not only the rights of individuals that are involved 'but also ..the convenient and expeditious disposal of actions before th[e] Court'. Thus whereas s 11 of PAIA might afford a sustainable basis for a so-called 'fishing expedition', the courts discourage such conduct in their application of the rules of procedure. The rules of court fall to be construed to assist a party to properly present its case; their purpose is not primarily to provide a party with the means to find a basis for a case. A party commencing litigation is generally expected to know and define its case in its founding documents. What may thereafter be accessed by way of documentation from other parties or witnesses is confined to what is relevant to the case that is being prosecuted. This is necessary if the aforementioned objects of the rules are to be achieved.

[46] Bearing the aforementioned general considerations in mind it is time to move onto the address the bases on which the City makes its application for relief in terms of para 4.2 -4.13 of the notice of motion.

[47] Rule 53, of course, is the provision that regulates the forms and procedures pertaining to applications for judicial review. Rule 53(1)(b) provides that the person or body whose decision is impugned on review is called on in terms of the notice of motion instituting the review to dispatch to the registrar a copy of the 'record of …proceedings'. What is comprehended by the term 'record of proceedings' is not amenable to finitely bounded definition; cf. e.g. *Johannesburg City Council v The Administrator, Transvaal, and*

*Another*1970 (2) SA 89 (T), at 91G-92C, *Pieters v Administrateur, Suidwes-Afrika, en 'n Ander* 1972 (2) SA 220 (SWA), at 226G-227C and*Afrisun Mpumalanga (Pty) Ltd v Kunene NO and Others* 1999 (2) SA 599 (T), at 613B-614C. In *Johannesburg City Council*loccit, Marais J expressed the position thus:

> *The words 'record of proceedings' cannot be otherwise construed, in my view, than as a loose description of the documents, evidence, arguments and other information before the tribunal relating to the matter under review, at the time of the making of the decision in question. It may be a formal record and dossier of what has happened before the tribunal, but it may also be a disjointed indication of the material that was at the tribunal's disposal. In the latter case it would, I venture to think, include every scrap of paper throwing light, however indirectly, on what the proceedings were, both procedurally and evidentially. A record of proceedings is analogous to the record of proceedings in a court of law which quite clearly does not include a record of the deliberations subsequent to the receiving of the evidence and preceding the announcement of the court's decision. Thus the deliberations of the Executive Committee are as little part of the record of proceedings as the private deliberations of the jury or of the Court in a case before it. It does, however, include all the documents before the Executive Committee as well as all documents which are by reference incorporated in the file before it.*

That the rule enjoins a generous rather than a restrictive construction as to what falls within a 'record of proceedings' follows, I think, from the provision that after the record has been made available it is for the applicant for review to make copies of those parts of it which it considers to be relevant for the purposes of its review application. Thus while relevance, to be determined with reference to the basis for the review made out in the founding papers, is one of the touchstones for deciding what must be included in a record of proceedings, the proper approach by a respondent decision-maker to the compilation of a record must be to adopt a generous approach to the ambit of relevance.

[48] I am unable, with respect, to associate myself completely with the remarks of Marais J in *Johannesburg City Council*. It seems to me that any record of the deliberations by the decision-maker would be relevant and susceptible to inclusion in the record. The fact that the deliberations may in a given case occur privately does not detract from their relevance as evidence of the matters considered in arriving at the impugned decision. The content of such deliberations can often be the clearest indication of what the decision-maker took into account and what it left out of account. I cannot conceive of anything more relevant than the content of a written record of such deliberations, if it exists, in a review predicated on the provisions of s 6(2)(e)(iii) of PAJA, that is that impugned decision was taken because

irrelevant considerations were taken into account or relevant considerations were not considered.

[49] The provision of a record of proceedings by the decision-maker is in essence,and for all practical purposes, the equivalent of discovery in terms of rule 35(1) by a litigant in action proceedings. The decision-maker is, on the basis discussed earlier, required to include everything that is relevant in the record. The first enquiry therefore in determining whether the documentation sought by the City is to be produced in terms of rule 53 is its relevance. Once it is determined to be relevant it does not seem to me important whether its production is directed by way of a ruling directing proper compliance with the duty on a respondent in terms of rule 53(1)(b), or one in terms of rule 35(11); the substance of the direction would be the same whichever means wereto be selected.

[50] The documentation referred to in paragraph 4.2 of the notice of application is very broadly and loosely described. SANRAL has stated on oath that all the documents before it have been included in the record that has been produced. The position is comparable with that which obtains when a litigant in action proceedings responds to a notice in terms of rule 35(3). A litigant's response to such a notice is ordinarily regarded as conclusive, and the courts are reluctant to go behind it. I am not persuaded, whether in terms of rule 53 or rule 35, to go behind SANRAL's claim in this respect that the record produced contains all the documentation that was before it as the decision maker or body responsible for seeking the Minister's approval for the declaration. I do, however, consider that SANRAL is bound to produce the minutes of the proceedings of its board of directors at which any decisions to seek approval for the declaration of the toll roads or to make the declaration were discussed or decided. Those minutes may not have been before the board of directors when the impugned decision was made, but they are nevertheless germane to the decision and relevant. The minutes may be suitably redacted to exclude material not bearing on those decisions. SANRAL's counsel sought to make something of the fact that the Agency's decision to seek the Minister's approval is not being impugned in the review application. In my view the distinction between SANRAL's decision to seek the approval and its subsequent declaration is contrived. The two decisions are integral parts of a single course of administrative action. It is not appropriate in my view to seek to distinguish them for the purposes of determining what should go into the record of proceedings, or what should fairly be disclosed by the Agency on grounds of relevance in the review proceedings.

[51] On the approach enunciated in the passage from *Johannesburg City Council*, quoted above, documentation showing the authorisation of a decision by SANRAL's Board would fall to be regarded as the decision rather than that of the proceedings leading to the decision, and thus arguably not properly part of the record. However, inasmuch as it is clear from the provisions of s 18(5)(d) of the SANRAL Act that a declaration in terms of s 27(1) of the Act is a non-delegable function of the Board, and inasmuch as s 17 of the Act requires the Board to keep a record of its proceedings, amongst other reasons, for use as evidence in any proceedings before a court of law, it seems axiomatic that any pertinent record of the board's proceedings in relation to the impugned declaration is relevant and should have been produced as part of the record of proceedings on the indicated generous approach to an interpretation of the term in rule 53. Rule 35(11) affords a convenient and effective means of achieving the required supplementation of the documentary record and I propose to make a suitable order in this regard with reference to that sub-rule. I do not propose to include any reference to documentation showing any delegation. Delegation of the function in terms of s 27(1) of the SANRAL Act is precluded by the statute and there is nothing in the evidence to suggest the existence of such documentation. If an incompetent delegation had in fact been made by the board, its existence should in any event appear from the documentation that will be ordered to be produced.

[52] The document sought in terms of paragraph 4.4 of the notice of application was a document that was referred to in the report submitted by SANRAL to the Minister for the purposes of obtaining approval for the intended declaration. The index to the report and the content of paragraph 6 thereof indicated that the document was an annexure to the report. It is evident, however, that a different document had in fact been annexed to the report. The fact that it was incorrectly annexed would have been discernible upon a comparison of the content of paragraph 6 of the report with that of the document that had been erroneously attached. In my view it is plain that the document that was not annexed, but should have been, should be disclosed for the purposes of the review. The documentation that SANRAL intended to put before the Minister, and presumably assumed at the time that it had placed before him for approval purposes, obviously must have been something of which it took account, not only in seeking the Minster's approval, but also, at least implicitly, in acting on that approval by making the declaration. It should have been included in the record. Even if I am wrong in this regard, it is a document in respect of which a direction for its production in

terms of rule 39(11) would be indicated because of its obvious relevance. An order will be issued accordingly.

[53] In my view the Financial Analysis Report produced in respect of the project in August 2007 and referred to in the introduction to the document produced at p. 5939 of the administrative record obviously should have formed part of the record. Any reader of the document produced as part of the record is expressly enjoined by the terms thereof to construe it with regard to the August 2007 report. It follows that it was relevant in the sense that SANRAL and the Minister were intended to have regard to it in making their respective decisions. An order will issue for its production. No case has been made out, however, for the disclosure of 'the brief, instructions, documentation and reports provided to the compilers of the report'.

[54] The documents sought in terms of paragraphs 4.6 to 4.8 of the record are documents that were listed as 'information sources' in a section of the Economic Report prepared by Barry Standish of the Graduate School of Business at the University of Cape Town. The Economic Report is part of the record and did form part of the material to be considered by SANRAL and the Minister for the purpose of making the impugned decisions. There is no indication in the evidence, however, that SANRAL or the Minister did, or should have had regard to the 'information sources' in their consideration of the Economics Report, or that it was at their, as distinct from Mr Standish's,disposal. I therefore do not consider that the documents are sufficiently relevant to require production in terms of the rule 53 or rule 35(11). Frankly, if regard is had to the 'Study Limitations' described (immediately below the 'Information sources') in the Economic Report, which bear centrally on the City's factual basis for attack in the review, one has to ask why the City would in any event consider the information source documentation might assist it in the review. The request for it bears all the hallmarks of a misdirected fishing expedition. Relief in terms of these paragraphs will therefore be refused.

[55] The 'intensive traffic modelling' referred to in paragraph 4.9 of the notice of application is referred to in a report by SANRAL to the Minister submitted for the purpose of obtaining the latter's approval for the toll road declaration. It is dealt with in a section of the report treating of the development of the toll roads on the parallel or supporting road network. The City's concern that no or inadequate regard was had to the impact of tolling on the road network under its jurisdiction forms an important part of its challenge to the legality of the environmental and declaration-related decisions. The report suggests that the 'intensive

traffic modelling' was something to which SANRAL had regard in seeking the Minister's approval, and thus presumably also in its decision to avail of the approval and make the declaration. In my view it is plainly relevant material in the context of the review and thus should have been included in the rule 53 record. An order for its production will be made.

[56] There is no indication that the documentation reflecting the financial viability of the project, including the capital and operating costs referred to in Crowther Campbell & Associates'response to comments on the environmental impact studies,was before the environmental authorisation decision-maker. On the contrary, the indications are that the information before decision-maker was confessedly of the limited nature apparent in Section 4.1 of the Study. In the circumstances I am not persuaded that the documentation fell to be produced as part of the record, or that it is sufficiently relevant to warrant an order for its production in terms of rule 35(11). Relief in terms of paragraph 4.10 of the notice of application will be refused.

[57] Similarly, it is evident that the information sought in terms of paragraph 4.11 of the notice of application was not before the environmental decision-maker, having been withdrawn at the instance of the 'project proponents'. There is thus no basis made out for its production, either in terms of rule 53 or rule 35. Even were discovery to be ordered in terms of rule 35(13), it would seem,*ex facie* the comment at para 2 in column 2 at p. 2289, that the documentation is not, and never was, in the possession of SANRAL, or indeed, the third respondent, or the competent authority in terms of the ECA. Relief in terms of paragraph 4.11 of the notice of application will therefore be refused.

[58] The relief sought in terms of paragraph 4.12 of the notice of application will be refused for the same reasons as those given in respect of the partial refusal of that sought in terms of paragraph 4.5. There is no reason to believe that the decision-makers had regard to,or were enjoined by the Report to have regard to, anything but the content of the Economic Report in making the declaration-related decisions. That SANRAL commissioned the report does not make the brief it provided to Mr Standish relevant material for the purposes of the review. I do not consider that the material properly fell to be included in the record of proceedings. I am also not persuaded that any proper basis has been laid for the court to exercise the discretion invested in it by rule 35(11) in favour of the City.

[59] Having regard to the information before me in respect of the record of proceedings produced by SANRAL in terms of rule 53, the relief sought in terms of paragraph 4.13 is too vaguely framed to merit the order sought. Relief in terms of that paragraph will be refused.

[60] The City's counsel indicated at the hearing that they did not persist in seeking relief in terms of paragraph 5 of the notice of motion. Costs of the interlocutory application were sought only against SANRAL, and not against the Ministers.

[61] For completeness I should perhaps mention that I was not persuaded to make the provisions of rule 35 apply generally in the review proceedings, as sought in terms of paragraph 3 of the notice of application.Notionally, such a ruling would be possible in terms of rule 35(13). Resort to rule 35(13) has been held on repeated occasions to be justified only in exceptional circumstances. Mr *Paschke*, who argued this part of the application for the City, emphasised that the sub-rule did not itself expressly import the requirement of 'special circumstances' and contended that the indications that discovery in motion proceedings should be exceptional was reflective of a pre-constitutional mindset that did not take into account sufficientlyeveryone's right of access to information in terms of s 32 of the Constitution. I have not found it necessary to pronounce on these arguments. I have been able to dispose of the City's disclosure requirements applying rules 53 and 35(11)using the touchstone of relevance. It is clear that a court may exercise its power in terms of rule 35(11) in motion proceedings without the need to invoke rule 35(13). SANRAL's counsel, quite correctly, did not argue to the contrary. In the context of the approach to the application that I was able to adopt, it was also unnecessary to reach the question of use of the court's inherent discretion to regulate its own procedure. (It does seem to me, however, that if a court were to be driven that far, the application of s 7 of PAIA might be questionable because a regulation of procedure devised by the court in the exercise of its inherent powers does not obviously qualify as 'other law'.)

The interdict application

[62] Turning now to the interdict application; the requirements that an applicant for interim interdictory relief must satisfy are well established. They are (a) the existence of a *prima facie* right, even if it is open to some doubt; (b) a reasonable apprehension by the applicant of irreparable and imminent harm to the right if an interdict is not granted; (c) the balance of convenience must favour the granting of the interdict and (d) the applicant must have no

other effective remedy.[17] Moreover, the remedy is discretionary. Thus even if an applicant satisfies all the requirements, it remains within the discretion of the court (obviously to be exercised judicially) to grant or decline an interim interdict.[18]The court assesses the evidence holistically to determine whether the requirements have been satisfied and, if they have, how to exercise its discretion.

[63] The aforementioned well-established requirements for an interim interdict were described recentlyby the Constitutional Court in *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC) ('*OUTA*')as '*initially fashioned for and .., ideally suited to interdicts between private parties*'. They were nonetheless endorsed in the majority judgment of the Court as sufficient to determine applications to restrain the exercise of statutory power *pendentelite*, provided that any court disposed to do so takes appropriate cognisance of the trenching effect the grant of such restraining order can have on the exclusive domain of another branch of government, and therefore proceeds sensitive to the constitutional role of the doctrine of the separation of powers in respect of any decision to make the order.

[64] There was some debate between the parties in argument as to the impact of the judgment in *OUTA* on the current application. In their written heads of argument counsel for SANRAL appeared to treat the effect of the judgment as having introduced something new. Mr *Budlender* SC who, together with Ms *Bawa* and Mr *Paschke*, appeared for the City, submitted that the judgment did no more than restate existing principle, including that courts must always be conscious of the limiting effect of the constitutional framework within which they exist and function. He pointed out that one had to have regard in interpreting the judgment in *OUTA* to the context in which it was given.

[65] The matter in issue in *OUTA* was an appeal against the granting of an interim interdict prohibiting the tolling of roads in Gauteng Province pending the determination of a pending review of the decisions to declare the roads as toll roads. Both the interdict and review applications in that matter were instituted at a stage when the roads in question had already been constructed, at a cost of over R20 billion. The consequences of interdicting the tolling of the roads would be enormous; so much so that even the country's sovereign credit rating

[17]Cf. *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC), at para 41, where Moseneke DCJ restated the requirements with reference to the *locusclassicus* decisions on point in *Setlogelo v Setlogelo* 1914 AD 221 and *Webster v Mitchell* 1948 (1) SA 1186 (W). (The latter judgment should, of course, be read with *Gool v Minister of Justice and Another* 1955 (2) SA 682 (C) at 688 - cf. e.g. *Simon NO v Air Operations of Europe AB* 1999 (1) SA 217 (SCA),at 228G-H.)
[18]Cf. Joubert et al (eds) *The Law of South Africa* (LAWSA) Second Edition at para 408.

would be susceptible to adverse effect. The monthly loss to SANRAL in having to cover the operation of the roads during the period that any interdict remained in force would be R670 million and special appropriations of funds by the National Treasury would be required to address the consequences. The extent of the trenching effect of an interim interdict on the domain of the executive was manifest and,in the circumstances,was a matter that the court of first instance should have weighed seriously in the exercise of its discretion. The trenchant terms in which the Constitutional Court expressed itself in the majority judgment were no doubt inspired by the fact that the court of first instance, in what, with respect, might be regarded as a rather readily idenitifiable misdirection, appeared to have had no regard whatsoever on the impact of the order it made in the face of very starkly apparent separation of powers considerations.

[66] In *OUTA*, the Constitutional Court held,at para 45, '*The Setlogelo test, as adapted by case law, continues to be a handy and ready guide to the bench and practitioners alike in the grant of interdicts in busy Magistrates' Courts and High Courts. However, now the test must be applied cognisant of the normative scheme and democratic principles that underpin our Constitution. This means that when a court considers whether to grant an interim interdict it must do so in a way that promotes the objects, spirit and purport of the Constitution.*' The Deputy Chief Justice, who wrote the majority judgment, proceeded, at para 47, '*The balance of convenience enquiry must now carefully probe whether and to which extent the restraining order will probably intrude into the exclusive terrain of another branch of Government. The enquiry must, alongside other relevant harm, have proper regard to what may be called separation of powers harm. A court must keep in mind that a temporary restraint against the exercise of statutory power well ahead of the final adjudication of a claimant's case may be granted only in the clearest of cases and after a careful consideration of separation of powers harm. It is neither prudent nor necessary to define "clearest of cases". However one important consideration would be whether the harm apprehended by the claimant amounts to a breach of one or more fundamental rights warranted by the Bill of Rights*' and further, at para 65, '*When it evaluates where the balance of convenience rests, a court must recognise that it is invited to restrain the exercise of statutory power within the exclusive terrain of the Executive or Legislative branches of Government. It must assess carefully how and to what extent its interdict will disrupt executive or legislative functions conferred by the law and thus whether its restraining order will implicate the tenet of division of powers. Whilst a court has the power to grant a restraining order of that kind, it does not readily do so except when*

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

[67] Those statements were illustrated with reference to earlier jurisprudence. It is useful to have regard to the examples given to properly understand what the Constitutional Court found necessary to reiterate in *OUTA*. The references to three earlier cases in particular are salient in the reasoning of the majority judgment. They are *Gool v Minister of Justice and Another* 1955 (2) SA 682 (C), *Molteno Bros. & Others v South African Railways and Harbours* 1936 AD 321 and *International Trade Administration Commission v SCAW SA (Pty) Ltd* 2012 (4) SA 618 (CC) ('ITAC').

[68] The three aforementioned judgments which the Constitutional Court used to illustrate its judgment each afforded quite discrete examples of circumstances in which a court had properly declined, or should have declined, to make orders restraining the exercise by organs of the executive branch of the state of their functions. In each case it did, or should have done, so having due regard to the exclusive terrain of another branch of government and the effect in that context of granting the interim interdictal relief sought by the applicant

[69] In *Gool* the applicant sought an interim interdict prohibiting the exercise by the relevant Minister of a power afforded in terms of s 5 of the Suppression of Communism Act 44 of 1950 to require her to resign as a city councillor consequent upon her listing, under another provision of the statute, as a member or supporter of the Communist Party. The right in issue was that to the removal of her name from the listof proscribed persons and the attendant protection of her elected position as a city councillor, and which she sought to assert in pending review proceedings[19] against the decision that had put it there. A very important consideration causing the full court to hold in *Gool*that a 'strong' case' had to be made out for interim relief, and that the court would exercise its discretion in favour of the applicant for such relief only 'in exceptional circumstances', was the effect of s 8 *bis*(1) of the Act, which provided:

> It shall in any prosecution under this Act or in any civil proceedings arising from the application of the provisions of this Act, be presumed, until the contrary is proved, that the name of any person appearing on any list compiled under sub-sec. 10 of sec. 4 or sub-section 2 of sec. 7 has been correctly included in that list.

[19]The peculiar provisions of the Suppression of Communism Act required proceedings directed at obtaining the removal of a person's name from the statutory list of proscribed persons to be instituted by way of action, but that did not detract from the essential nature of the remedy sought in the proceedings as being premised on the exercise of judicial review powers.

Furthermore, there was no contention that the Minister would have been acting unlawfully under the Act or with *mala fides* if, while Mrs Gool's name remained on the list, he required her to resign her seat on the council. The interim interdict sought would thus have prohibited the Minister from doing what it was common ground he might lawfully do on the facts of the case. It was thus clear that the interdict would trench on the Minister's ability to lawfully discharge one his functions.

[70] It was in that context that Ogilvie Thompson J, writing for the court, stated (at p. 688F- 689C):

> The present is however not an ordinary application for an interdict, In the first place, we are in the present case concerned with an application for an interdict restraining the exercise of statutory powers. In the absence of any allegation of *mala fides*, the Court does not readily grant such an interdict: that, I think, is clear from the judgments in *Molteno Bros. & Others v South African Railways and Harbours*, 1936 AD 321, relied upon by Mr.Rosenow. Furthermore, the governing statute in the present case contains provisions which strongly militate against the granting of the interdict sought. As has been pointed out earlier in this judgment, while a person's name remains on the list, the Minister's powers under sec. 5 of the Act continue in relation to that person. In terms of sec. 8 *bis* (3), proceedings for removal of such person's name from the list must be instituted by action: and, not only in such action, but also in 'any civil proceedings arising from the application of the provisions of this Act', it is in terms of sec. 8 *bis* (1) of the Act to be presumed, until the contrary is proved, that his name is correctly on the list. The presence of this presumption remains a constant and well-nigh insuperable obstacle in the path of an applicant for an interdict; for in any but the most exceptional type of case it will, in the very nature of things, be extremely difficult for an applicant, by means of affidavit, to displace this presumption to a degree sufficient to warrant the granting of an interdict restraining the Minister from exercising the statutory powers vested in him. The practical effect of granting an interdict restraining the Minister from exercising his powers under sec. 5 of the Act in relation to a person whose name is on the list is, virtually, to remove that name from the list on motion contrary both to the statutory presumption that the name is correctly on the list and to the provisions of sec. 8 *bis* (3) which require proceedings for removal to be by action.
>
> The various considerations which I have mentioned lead, in my opinion, irresistibly to the conclusion that the Court should only grant an interdict such as that sought by the applicant in the present instance upon a strong case being made out for that relief. I have already held that the Court has jurisdiction to entertain an application such as the present, but in my judgment that jurisdiction will, for the reasons I have indicated, only be exercised in exceptional circumstances and when a strong case is made out for relief.

The *dicta* of Ogilvie Thompson J cited in the Constitutional Court judgment were thus uttered in a narrow context-and-case specific context. They were not intended to have a generally constraining effect.

[71] The relevance of the judgment in *Gool*to the *ratio* of the Constitutional Court's judgment in *OUTA* was that it provided a factual example of a case where the grant of an interim interdict would prohibit the Minister from lawfully fulfilling a function that statutory law had invested in him. In other words, the facts demonstrated that a court order would trench materially upon the executive exclusive domain. It would have the effect of prohibiting the Minister from doing that which on the facts, as they were, he was lawfully

permitted to do. Furthermore it would do so in the face of a statutory presumption against the possibility that Mrs Gool's name had been wrongly placed on the list of proscribed persons. The judgment in *Gool* exemplified an appreciation by the court that it is not permissible for a court to do that unless rule of law considerations are sufficiently powerful factors in the peculiar circumstances of the given case to warrant the exceptional measure of interim prohibitoryinterdictal relief. Such could only happen in the strongest of cases and in exceptional circumstances such as, for example, a strong indication of the tainting presence of fraud or *mala fides.*

[72] In *Molteno Bros.*, the Appellate Division dismissed an appeal against a judgment by this court refusing the appellant a *mandamus* and an interdict against a statutory body. The *mandamus* that had been sought would have directed the statutory body how to reduce the temperature at which the appellant's deciduous fruit was to be stored during export procedures to a prescribed level. The appellant had not been able to prove a failure by the statutory body to comply with the applicable regulations, which vested a discretionary power in the body how to achieve the prescribed reduction of temperature in the storage chambers. The Appellate Division held that in the circumstances it was not for the court to prescribe to the statutory body how to exercise its function and, that in the absence of any indication of *mala fides* by the body in the exercise of its discretion, the court had no power to intervene in its functioning. The part of the judgment that referred to the court's refusal to intervene save where there was proof of *mala fides* was thus in the section dealing with the *mandamus*, not that dealing with the application for an interdict. The interdict sought in *Molteno Bros.* was moreover a mandatory interdict of an expressly final character, not an interim prohibitory interdict *pendentelite*. The *dicta* in *Molteno* do, however, illustrate that it is not permissible for courts to trench on the domain of the other branches of government in the absence of a proper legal basis for doing so, and thus do afford an indication of what the Constitutional Court meant by 'proper' in the expression 'strong and proper case'.

[73] In the review case the City will contend that the disjunctive approach to the provisions of s 27(1) and (3) of the SANRAL Act by SANRAL and the Minister of Transport rendered the decision to declare the roads as toll roads unlawful and will have a vitiating effect on any forthcoming decision in terms of s 27(3) to determine the tolls. Implicit in the City's approach is that the Minister is therefore currently not lawfully empowered to make a determination of the toll rates in terms of s 27(3) and that SANRAL is not lawfully entitled to implement measures to give effect to the declaration of the roads as toll roads. The City's

argument postulates a position quite distinguishable from that which obtained in *Molteno*. The City contends that, properly construed and rationally applied, s 27 prescribes a process for the declaration of toll roads, which was not followed by the SANRAL and the Minister, thus rendering as unlawful both what those parties have done in respect of making the declaration, and what they intend to do to give it effect.

[74] *ITAC* concerned a matter in which the court of first instance, by failing to take into account separation of powers considerations, led itself into granting an ostensibly interim interdict that had the effect of finally deciding an issue exclusively reserved by legislation to the relevant member of the Cabinet – something which, especially having regard to the policy-laden and polycentric nature of the decision entailed, it should not have done, save in appropriate circumstances. As in *Gool*'s case, the circumstances in which such an intervention by the court into the exclusive of domain of another branch of the state could notionally have been appropriate would be exceptional in the context of the statutory dispensation and its attendant polycentric and heavily policy-laden decision-making regime.

[75] I have concluded that the intention in the reasoning of the majority judgment in *OUTA*was to reiterate, as a matter of established constitutional principle, that courts seized of applications for interim interdictory relief *pendentelite*in matters where the functions and powers of the executive or the legislature are susceptible to being restrainedmust be consciously sensitive to the impact on the constitutionally ordained separation of powers of any order they might be inclined to consider making restraining the use of executive or legislative power. Where, on such an assessment, the impact of the restraining order (what the Constitutional Court labelled for convenience as 'balance of power harm') looks to be significant, a court will incline against making the order unless a strong case for the relief has been made out, and only in the clearest of cases. A strong case would be one in which the right at issue although established only *prima facie*and open to a measure of doubt, nevertheless appears to enjoy good prospects of being established in the main proceedings[20]and also one in which the need for the intervention of an interim interdict is clearly shown if irreparable harm to the applicant is to be averted – in other words, a case in which the balance of convenience clearly militates in favour of the granting of the remedy.

[20]Cf. Van Loggerenberg (ed) *Erasmus, Superior Court Practice* [Service 39, 2012] E8-9, distinguishing the approach adopted by the House of Lords in *American Cynamid Co v Ethicon Co* [1975] 1 All ER 504 (HL), in which the relevance of the 'strength of case' test generally favoured in South African jurisprudence (*sed contraFerreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others*1995 (2) SA 813 (W) at 825A-B) was deprecated in favour of the balance of convenience being the core element in determining whether interim injunctive relief is indicated or not.

Such a construction would give effect, in my view, to the evident intention in the Constitutional Court judgment (i) to confirm the application of the well-established requirements of the interim interdict remedy in such cases and (ii) to explain how they should be applied in a manner consistent with respect by the courts for the constitutional scheme of a separation of powers where the remedy would restrain the exercise of executive or legislative power. The greater the impact of the impinging effect of the postulated restraining order on the domain of the executive or the legislative branches the more circumspect, and demanding of the applicant's case, the court will be before deciding that it is appropriate to grant it. The principle that a court does not lightly grant an interim interdict pending the review of executive action even if all the requirements for an interdict have been established is nothing new.[21] The Constitutional Court judgment in *OUTA* has fleshed out the articulation of the principle.

[76] I certainly do not discern anything in *OUTA* that would imply a reversion to the approach exemplified in *Coalcor (Cape) (Pty) Ltd and Others v Boiler Efficiency Services CC and Others* 1990 (4) SA 349 (C).[22] It is also clear that the judgment in *OUTA* does not enjoin a culture of undiscriminating deference by the courts in general, or when seized of applications for interim interdictalrelief in particular, to executive conduct. The judgment does not abjure the courts' constitutional duty to uphold the rule of law and to ensure, as far as possible, the achievement of effective remedies for breaches of fundamental rights, including the right to lawful, reasonable and procedurally fair administrative action.

[77] In a matter like the current case, in which the interim relief is sought *pendentelite*, the right in question is bound up in the substantive remedy sought in the principal proceedings, which, as counsel were agreed, is not to be confused with the mere right to approach the court for substantive relief in the principal proceedings. Thus the existence of the *prima facie* right, and the extent to which its certainty is open to doubt, fall to be determined with reference to the applicant's prospects of success in the principal proceedings - as far as it is possible at this stage to assess them.[23]The mere existence of the right falls to be determined

---

[21]See e.g. *Transnet Bpk h/a Coach Express en 'n Ander v Voorsitter, NasionaleVervoerkommissie en Andere* 1995 (3) SA 844 (T) at 848B, where De Villiers J remarked '*n Tussentydsegebiedendeinterdik, hangendehersiening van 'n administratiewehandeling, behoortnatuurliknieligteliktoegestaante word nie. Selfs al is die vereistesvir die verlening van 'n tussentydseinterdikaanvoldoen, behou die Hof steeds 'n diskresieomtussentydseregshulpteweier.'*

[22]Cf. e.g. the discussion on *Coalcor*, and why the approach articulated in that judgment should not be followed, by Davis J in *Van der Westhuizen v Butler* 2009 (6) SA 174 (C) at 181E - 184E.

[23] Cf. e.g. *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others*supra, at 832I-833B; *Ladychin Investments (Pty) Ltd v South African National Roads Agency Ltd and Others*, 2001(3) SA 344 (N) at

by considering the facts as set out by the applicant together with any facts set out by the respondent which the applicant cannot dispute, and deciding whether, with regard to the inherent probabilities, the applicant should on those facts obtain final relief in the main case.[24]The degree to which the existence of the right is open to doubt falls to be weighed by the court with the considerations affecting the balance of convenience in exercising its discretion whether to grant or refuse interim relief; the more certain the prospects of success (i.e. the stronger the case), the more inclined the court will be to grant the interim remedy; the less certain, the greater the weight that will be attached to the balance of convenience – an approach that has as its logical conclusion that if the right is certain the balance of convenience becomes irrelevant and an entitlement to final relief is established.

[78] Correctly identifying the right in issue as something distinct from the right to approach a court to vindicate it on judicial review is not to say that the right to an effective review remedy is not a relevant consideration. On the contrary, the Constitution contemplates that effective remedies should be available for breaches of constitutional rights, including, of course, the fundamental right to lawful, reasonable and procedurally fair administrative action. It is trite that the implementation of unlawful administrative decisions can sometimes lead to practical results that can render the remedy of judicial review so ineffectual that a court will decline to grant it; cf*Chairperson, Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others* 2008 (2) SA 638 (SCA). Thus evidence that the obtaining of an effective remedy will be thwarted if interim relief is not forthcoming is a relevant consideration under the concepts of irreparable harm and the balance of convenience.

[79] Having established the basis in principle upon which I consider that the determination of the interim interdict application must be undertaken, it is time to look at the content of the application. In paragraphs 2 and 3 of its notice of motion in the interdict application the City sought orders formulated as follows:

> 2. Pending the final determination of the review application instituted on 28 March 2012 by the City under vase no 6165/2012 ('the pending review application'), interdicting the first respondent ('SANRAL') from taking or permitting any steps to be taken to implement or advance the N1-N2 Winelands Toll Highway Project ('the Project'), including but not limited

---

357C-E; *Van der Westhuizen and Others v Butler and Others*supra, at 182C-E; *Camps Bay Residents Ratepayers Association and Others v Augoustides and Others* 2009 (6) SA 190 (WCC) at para 10 and *Capstone 556 (Pty) Ltd v Commissioner, South African Revenue Services and Another, Kluh Investments (Pty) Ltd v Commissioner, South African Revenue Services and Another*2011 (6) SA 65 (WCC) at para 53.

[24]Joubert et al (eds) *LAWSA* Second Edition at para 404.

to (i) the conclusion of any contract, (ii) the commencement or undertaking of any construction activity in furtherance of the Project, or (iii) any other acting such as will give rise to a claim that the decisions impugned ought not to be set aside because of such action.

3. Declaring that notwithstanding the order in paragraph 2 above, SANRAL shall be entitled to carry out directly or through its agents, work to preserve and/or extend the life of the pavement of the portions of the N1 and N2 intended to form part of the Project, including storm water drainage, and to take all steps as may be necessary to secure the safety of the public, and to keep the road in safe condition, in accordance with its statutory mandate, provided that such maintenance work will not amount to the advancement of implementation of the Project and will not be held against the City in the pending review application.

[80] SANRAL argued that it is apparent on the evidence that theCity's objection is to the method of funding the work to be carried out on the roads, and not to the workitself. It also arguedthat the relief sought in paragraphs 2 and 3 of the City's notice of motion in the interdict application is impracticable and in material respects unintelligible. With reference to paragraph 2 of the notice of motion, SANRAL argued that the City seeks to interdict it from taking any steps to *'implement or advance'* the project, including any action *'such as will give rise to a claim that the decisions impugned ought not to be set aside because of such action'*. It complained that what might constitute an action '*such as will give rise*' to such a claim is not explained by the City. It asked rhetorically how it was to be expected to know whether any particular activity will give rise to a claim that the impugned decisions ought not to be set aside. It raised similar complaints against the proviso in the third paragraph of the notice of motion.

[81] I agree that the wording of paragraphs 2 and 3 of the notice of motion in the interdict application is problematic. Nonetheless the nature of the protection that the City seeks by way of interim interdict is clear enough on the papers. It wants to avoid steps being taken to facilitate the introduction of a tolling scheme before its review challenge is decided. It seemed to me that the City's apparent object in seeking interim relief could be achieved simply by an order prohibiting the conclusion of a BOT tender contract pending the determination of the review application. I put this proposition to Mr *Budlender*, and after taking time to ponder on it, he agreed that an order in those terms would suffice if the court were inclined to grant an interdict.

[82] Mr *Loxton*SC, who together with Mr *Chohan* and Mr *Smith*, appeared for SANRAL argued that that there is 'is a complete misalignment between the relief sought [in the interdict application], the harm alleged, and the subject of the review proceedings'. This

argument faithfully echoed the wording used at para 51 of the Constitutional Court's judgment in *OUTA* to point out a misalignment between the relief sought in that case, which was an order prohibiting tolling, and the administrative decision the applicants sought to impugn, which was not one which, directly at least,allowed for tolling. There is, however, a relevant difference between the applicant's case on review in *OUTA* and that in the current case. In the review application in the current case there is a contention that on a proper interpretation of s 27 of the SANRAL Act the decisions to declare a toll road and (at least the initial) decision to determine toll fees are integral, in the sense that a decision to declare a toll road cannot rationally be taken if the decision-maker has no or insufficient idea what the financial and socio-economic impacts of tolling are likely to be. According to the City's construction of s 27, a decision cannot lawfully be made in terms of s 27(1) to approve or declare a national road as a toll road without the decision-maker first having formed an informed idea of what the tolls to be imposed in terms of s 27(3) are likely to be. Inherent in the City's case therefore is the contention that it is not competent for an initial decision in terms of s 27(3) to be made in the circumstances of this case because of the of the vitiating ignorance that attended the decision made in terms of s 27(1). No such case would appear to have been advanced by the applicant in the *OUTA* case.[25] Furthermore, and even more to the point, in the current case the declaration of the roads as toll roads, which is the decision the City seeks to impugn in the review application, is a necessary antecedent to the conclusion and execution of the imminently anticipated BOT contract, which the City identifies as the apprehended harmful future conduct that will impinge adversely on its ability to achieve an effective remedy on review.

[83] While on the subject of the alleged 'misalignment' of the relief sought by the City with the decisions it seeks to impugn on review, I also disagree with Mr *Loxton*'s endeavour to construe s 28(1)(b) of the SANRAL Act to the effect that a declaration of a road as a toll

[25] It is apparent from the grounds of review described at para 7 of the judgment determining the judicial review application in the *OUTA* case (*Opposition to Urban Tolling Alliance and Others v The South African National Roads Agency Limited and Others* [2012] ZAGPPHC 323 (13 December 2012), which is accessible on the SAFLII website), that they did not include an attack based on an alleged non-compliance with the decision-making scheme of s 27 as is advanced by the City in the current case. The City's review challenge in the current case raises the question whether the declaration of the roads as toll roads gave effect to valid law or was a manifestation of its misapplication. It attacks SANRAL and the Minister of Transport's decisions on the basis of an allegation that they are inconsistent with the applicable law. To paraphrase Froneman J, at para 93 of his minority judgment in *OUTA* in the Constitutional Court, the playing field for the contestation of the decision-making scheme of s 27 of the SANRAL Act ground of review in the current case is statutory compliance, not government policy; the question falls to be answered judicially, not politically. That does not avoid the duty of the court to consider the effect of interim relief on the executive's wish to exercise the functions that the statute vests in it before the contested construction of the statute is determined by the court that will be seized of the review application.

road is not a necessary precursor to the conclusion of a BOT agreement with a third party to construct and operate a toll road. The construction was contended for not only to show a misalignment of relief, but also to seek to demonstrate that the conclusion of such an agreement in the circumstances was not a necessary indicator that the road would in fact be tolled, or that that the declaration of the roads as toll roads was bound up in an acceptance or predisposition by the decision-maker that the costs of the development to be undertaken in terms of the contract would be recouped primarily by tolling. The latter aspect to the argument was advanced to seek to highlight what SANRAL contended was the wholly discrete nature of a decision in terms of s 27(3) of the Act from any decision in terms of s 27(1). This was an argument advanced with some success before the Constitutional Court in the very different context of the *OUTA* case. It is quite clear in my view, however, that the words '*such a national road*' in paragraph (b) of s 28(1) relate to the words '*national road or portion thereof which is a toll road in terms of section 27*' in paragraph (a) of the subsection.

[84] On the basis of the City's contentions, I do not find any misalignment in the current matter between the relief sought in the review case to set aside the decision made in terms of s 27(1) of the SANRAL Act and its apprehension of harm if the tolling project is advanced in a manner that will make it a *fait accompli* of such proportions or effect that a court determining the review application somewhere down the road into the future would be reluctant, because of the practical implications of the decision, to afford the City an order reviewing and setting aside the decision to declare the roads as toll roads. Accepting that a setting aside of the decision in terms of s 27(1) would negate any contemporaneous or subsequent determination in terms of s 27(3) of toll fees and the legality of the collection of tolls, the City is concerned that once the works, which it is common ground will require to be undertaken before tolling can commence, have been completed or significantly advanced, its right to substantive relief on judicial review concerning its application to impugn the decision taken in terms of s 27(1) will have been undermined or negated.

[85] For the purposes of determining the interdict application I have found it convenient to restrict my consideration of the nature and strength of the right asserted by the City with reference to its challenge in the review application to the decisions concerning the declaration of the affected portions of the N1 and N2 national roads as toll roads. I have found it unnecessary to consider the challenges to the environmental authorisation decisions. Whatever the merits of the challenges in that respect might be, they do not bear centrally on the tolling question, which is the real issue in the litigation. The environmental decisions

were directed at confirming the environmental sustainability of the contemplated construction and upgrading of the roads. The City supports the concept of upgrading the roads and providing for an increase in their capacity. It does not raise any serious concerns about the environmental impact. It is debatable whether or not socio-economic impacts of the undertaking of a listed activity that are not related to the biophysical environmental impacts, as distinct from a situation in which the value of socio-economic benefits falls to be weighed against the cost of adverse biophysical impacts (as for example manifested on the facts 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)), are within the scope of environmental impact assessment in terms of the applicable legislation.

[86] The actual concern of the City appears to go the socio-economic impact of the method of financing the undertaking of the activity, rather than a concern whether the activity should be undertaken because of its adverse impact on the environment within the meaning of s 24 of the Constitution, or as defined in NEMA. The extent to which socio-economic considerations were investigated and considered in the EIA process and whether such investigation as was undertaken fell short of the statutory requirements is also unclear. In its founding papers in the review application the City does allege that the environmental impact assessment that informed the environmental authorisations did not deal sufficiently or at all with the effect of 'diversionary traffic' resulting from the polling of the roads. This attack touches on issues such as cumulative impact and integrated and informed decision-making and could well conceivably give rise to a valid basis to impugn the environmental decisions. However, they are also environmental issues that might arise only in the context of the tolling of the roads, rather than if their upgrading and capacity improvements were financed by other means. The interlinkage between the City's complaints about the environmental decisions and those which pertain directly to the declaration of the toll roads, making the former stepping stones in a sense towards the latter, is no doubt something that the review court will have to consider when considering whether the delay in instituting review proceedings in respect of the environmental decisions should be condoned.

[87] It is not necessary, in my view, for the court to grapple with those questions in the current proceedings. Suffice it to say that I am satisfied that the applicant has made out a *prima facie* right in the relevant sense. However, it does not appear that the City would be opposed to the physical undertaking of the roadworks, its concern in the interdict application

appears more to protect its position in respect of an effective remedy against the decision declaring the roads as toll roads. In the context of the nature of the City's concern I consider it appropriate to concentrate on its challenge to the declaration of the toll road for the purposes of assessing whether interim relief should be granted. That that is indicated is confirmed by the reformulated terms[26] in which Mr *Budlender*informed me during argument that the City was content to accept interim relief.

[88] The legality of the declaration of the roads as toll roads is (or will be) challenged by the City on a number of grounds in the review application. I shall describe them in the order in which they are described in the City's heads of argument. They are (i) that the decision by SANRAL was taken by an unauthorised functionary without the required prior approval of the Agency's board of directors; (ii) that 'an inevitable consequence' of the decision is that a substantial part of the poorest and most vulnerable residents of the municipality will be disproportionately adversely affected, in breach of their fundamental constitutional right to equality; and (iii) that the manner in which SANRAL and the Minister of Transport made the impugned decisions was inconsistent with the pertinent decision-making scheme of the SANRAL Act and thus rendered the declaration unlawful.

[89] The absence of any record of a decision by SANRAL's board that the roads should be declared to be toll roads is not yet a ground advanced in the City's application in the review papers. The first of the aforementioned grounds relied on by the City has been taken after its consideration of the administrative record made available in terms of uniform rule 53, and apparently will be added to the review grounds in the supplementary founding papers contemplated in terms of rule 53(4). Assuming in favour of the City that its point is a good one, I am nonetheless not persuaded that it affords a proper basis for the interim interdict it seeks. The Agency is statutorily incorporated in terms of the SANRAL Act as a public company with a share capital. To all intents and purposes its manner of operation is indistinguishable from that of any other company. As noted, the exercise of the powers, functions and duties of SANRAL in connection with the declaration of a national road as a toll road in terms of s 27(1) of the SANRAL Act is non-delegable by its board of directors; see s 18(5)(d) of the Act. However, I do not consider it to be self-evident that s 18(5)(d) of the SANRAL Act precludes effective ratification by the board of an unauthorised act or decision, purportedly in terms of s 27(1), by its chief executive officer or other employee. The fact that the review and interim interdict applications are being opposed by SANRAL -

[26]See para [81] above.

and there is no suggestion that the opposition has not been authorised – indicates that it is probable that, if not already ratified by conduct, express ratification by SANRAL's board would be forthcoming if required. There is nothing in the papers to suggest that in the circumstances of a subsequent ratification by SANRAL's board, an approval by the Minister of the decision, unwitting that it had been unauthorised at the time, would be regarded, without more, as sufficiently material to justify a setting aside of the declaration on review.

[90] Mr *Budlender* advanced a number of arguments why ratification was not a viable option in the particular circumstances. I do not find it necessary to canvas these for present purposes. I agree with Mr *Loxton*that, assuming ratification becomes an issue in the review, its determination is not something that can be anticipated with any confidence or certainty on the evidence currently before me. I thus find myself unable to hold on the inherent probabilities,as far as they can be assessed at this stage,that the City should (as distinct from could) succeed on this ground in the review application.

[91] I am also not persuaded that interim relief is justified on the grounds of the City's reliance on the alleged impact of the impugned decision to declare the roads as toll roads on the fundamental right to equality on the members of the poor, predominantly black, communities who currently use or require access to the routes. Whatever cogency the point might or might not have, there is nothing in the evidence to show what the effect of tolling on the communities identified by the Cityactually would be. No decision has been taken on the structure of the toll, or the extent to which the financing of the project might require to be supplemented by monies appropriated for the purpose by Parliament. Whether this situation of uncertainty should obtain after the declaration of a toll road, and whether it is indicative of decision-making inconsistent with the scheme of the SANRAL Act are separate questions, which will be considered later in the judgment under the appropriate head of the City's challenges. For the purposes of rejecting this ground of attack in the review application as a basis for interim interdictal relief it is sufficient to record that s 27 of the SANRAL Act allows for differential tolling.[27] So, for example, public transport vehicles and minibus taxis might be exempted from tolling altogether. One just does not know. There is therefore not a sound enough basis for the City to say that if the project construction work is proceeded with pursuant to the impugned declaration in the interim the apprehended harm based on the infringement of the constitutional right to equality of a section of the City's population will probably or necessarily occur. There is furthermore no indication that tolling is imminent in

[27]See ss 27(1)(c) and 27(3)(b).

the sense that there is a probability that it might be introduced before the determination of the review proceedings. I am not satisfied in the circumstances that the applicant has succeeded on this ground of its application in establishing the requirement of a reasonable apprehension of real and imminent harm if interim relief is not established.

[92] Turning then to the review ground premised on the allegation that the manner in which SANRAL and the Minister of Transport made the impugned decisions was inconsistent with the pertinent decision-making scheme of the SANRAL Act. The City contends that the manner in which the impugned decisions was made evinces a misconception by the decision makers of the scheme of s 27 of the Act and resulted in an irrationality of process with a likelihood of an irrationality of outcome.

[93] The factual bases for the contentions are that the Minister of Transport approved the declaration of the affected portions of the N1 and N2 as toll roads under s 27 of the SANRAL Act in September 2008 without knowing the cost of the project or what the toll fees would be, and without considering whether the toll fees would be affordable, or whether tolling would afford a financially or socio-economically appropriate or sustainable means of achieving the work needed on the road routes in issue. SANRAL has admitted in its answering affidavit in the interdict application that *'the affordability of the toll tariffs was not the subject of any of the decisions which are the subject of the review'*. It also points out (at para 81 of its answering affidavit in the interdict application) that it currently has no means of recommending a toll fee in respect of the use of the roads until the conclusion of a concession contract and the settling of the arrangements regarding the funding of the project. SANRAL nonetheless has indicated that it intends proceeding to endeavour to achieve the conclusion of a contract of the nature contemplated by s 28 of the SANRAL Act with the preferred bidder identified in terms of the tender process, alternatively, with the identified reserve bidder, within a matter of weeks of 20 April 2013. The contemplated contract will '*will provide that the concessionaire is entitled to levy and collect tolls as contemplated by section 28 of the SANRAL Act*'.[28] Furthermore, the costs of the execution of the necessary worksentailed in project, which as far as may be gauged appear to exceed R10 billion, have not been budgeted for by Government; it apparently being considered that they will be funded externally and recouped through tolling. SANRAL in fact avers that subsequent to the declaration of the roads as toll roads the Agency has not been entitled to call on Government to fund even the maintenance work on the roads that has been necessary in the period since 2008.

[28]The quotation is from para 96.2 of SANRAL's answering affidavit in the interdict application.

[94] The City also contends that the Minister approved the declaration of the toll roads on the basis of a report submitted by SANRAL in purported compliance with s 27(4)(c) of the SANRAL Act, which failed to accurately or fairly reflect the comments and representations made by interested and affected person in response to the invitation to comment issued by SANRAL in terms of s 27(4)(a) and (b) of the Act. The evidence in support of this leg of the challenge on the papers as the currently stand in the review application is premised on the assessment of the relevant documentation by an attorney acting for the City undertaken in what seem to be less than ideal circumstances. I have not been able to form an opinion of the strength or otherwise of the City's case on review in this connection.

[95] The City furthermore complains that SANRAL had improperly excluded from its report to the Minister correspondence received from the then executive mayor of the City a short time after the closure of the notice period contemplated in terms of s 27(4)(b)(ii) of the SANRAL Act. There is, however, no application to impugn SANRAL's failure or refusal to extend the minimum 60 day period afforded to the City in which to make its representations and comments; see s 56(1) of the Act.

[96] The City contends therefore that should the implementation of the project not be interdicted, as it seeks, costs will be incurred and expenditure contractually committed to which will leave the Minister of Transport no option but to set the toll fees which he is to be asked to determine so as to cover those costs reactively, and without appropriate account of their socio-economic impact. Moreover, the work having been completed, the ability of interested parties to make effective representations about the financial and socio-economic unsustainability of the tolling option would have been rendered nugatory. This would give rise to a process and a result that would be irrational, and also at odds with the requirements of lawful, reasonable and procedurally fair administrative action in terms of s 33 of the Constitution.

[97] The City also contends that the process followed by the Minister of Transport and SANRAL is irrational and liable to produce an irrational result. In order to grasp the import of the City's argument in this respect it is necessary to understand that it is common ground that the construction, upgrading, maintenance and operation of roads by means of a tolling system is materially more expensive than by direct government funding. There is admittedly a rational basis for choosing to use tolling. The advantages that the more expensive option can bring include the freeing up of government funds for other more pressing demands and the acceleration of the provision of transport benefits by allowing for the building of such

road facilities by concessionaires earlier in time than would have been the case had the projects been required to wait in the queue for direct funding. The SANRAL Act moreover expressly affords a lawful basis for the power to address road maintenance and related issues by tolling. Determining on tolling rather than the cheaper option of direct funding entails a policy decision. It is not suggested by the City that a *bona fide* policy decision by SANRAL and national government to address the maintenance and upgrading of the N1 and N2 by means of tolling would be susceptible to impugnment on grounds that a different policy might be considered preferable or more sensible. Although the City clearly nurtures a policy preference for direct funding, its challenge is founded in law; not only on what it contends is a proper construction of s 27 of the SANRAL Act, but also, assuming its statutory construction is wrong, on allegations of irrationality.

[98] The exercise of any public power – and the approval and declaration of a national road as a toll road in terms of s 27 of the SANRAL Act is undisputedly the exercise of public power – must be rational in order to be lawful.In *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others*2000 (2) SA 674 (CC)[29]the Constitutional Court held that'[r]*ationality … is a minimum threshold requirement applicable to the exercise of all public power by members of the executive and other functionaries. Action that fails to pass this threshold is inconsistent with the requirements of our Constitution, and therefore unlawful.*' The Constitutional Court's judgments in *Albutt v Centre for the Study of Violence and Reconciliation and Others*2006 (3) SA 247 (CC) and *Democratic Alliance v President of the Republic of South Africa*2013 (1) SA 248 (CC) afford well-known examples of matters in which executive action by the President of the Republic has been impugned on the grounds of irrationality. Rationality review is, in essence, the evaluation of the relationship between means and ends. Addressing an argument on whether just the end decision needs to be rational, or whether the process resulting in it should also have been rational, for an executive decision to standup to constitutional scrutiny,Yacoob ADCJ observed, in para 36 of his judgment in the latter case, that '*The conclusion that the process must also be rational in that it must be rationally related to the achievement of the purpose for which the power is conferred, is inescapable and an inevitable consequence of the understanding that rationality review is an evaluation of the relationship between means and ends. The*

[29]At para 78.

means for achieving the purpose for which the power was conferred must include everything that is done to achieve the purpose. Not only the decision employed to achieve the purpose, but also everything done in the process of taking that decision, constitutes means towards the attainment of the purpose for which the power was conferred.'

[99] It is not in contention in the current matter that the Minister of Transport and SANRAL adopted the following decision-making scheme in respect of the declaration of the roads as toll roads:

1. The Minister approved the declaration without knowing the cost of the project or what the range of the toll fees would likely be, and without considering whether the tollwould be affordable or whether the project would be financially viable. SANRAL made the declaration under a similar disability.(An economic assessment that was included in the information placed before the Minister by SANRAL for the purposes of obtaining his approval for the proposed declaration of the toll roads dealt with the tolls using figures arrived at on the basis of averaging tolls recovered on existing toll roads for illustrative purposes. It was not argued by SANRAL's counsel, correctly so in my view, that this afforded any reliable means of estimating the tolls that would probably have to be levied to recoup the cost of the anticipated BOT contract in the current matter. Mr *Budlender*handed in a Traffic and Toll Feasibility Study report that apparently preceded the decision to declare the roads that were subject of the OUTA case as toll roads. I have not studied its content in any detail, but it does show that in that case there had been some investigation into and assessment of the affordability of the toll and the extent to which tolling would fund the required expenditure. Thus, for example, it is evident from the report that what was labelled in the report as 'the original open toll strategy' would 'not be able to support the magnitude of the funding now required'.)

2. SANRAL has proceeded on the basis of the declaration made in the aforementioned circumstances to put the BOT contract out to tender

and to select a preferred bidder with which it intends imminently to conclude a contract.

3. SANRAL intendsto ask the Minister to determine the toll fees for the roads only once construction has been completed.

[100] The affordability of the tolls to be levied for the use of the roads seems to me to be a self-evidently material consideration if the tolling concept is to be viable. Affordability bears centrally on the tolling option justifying the added expense it admittedly entails. If the tolls cannot viably be fixed in a range that will result in the costs of the execution of the anticipated BOT contract being recouped some other form of funding will be required to subsidise the project. That would only add to the expense.It is thus no surprise to find the following statement in a government policy document devised in terms of s 21 of the National Land Transport Transition Act 22 of 2000 (subsequently repealed and replaced by the National Land Transport Act 5 of 2009): ''*The network may include toll roads <u>where they are financially and socially viable</u> and <u>where the tolls can contribute significantly to funding these roads</u>*' (emphasis supplied). The statement was made in the context of indicating government's intention to identify a strategic countrywide road network policy. This was to be done in consultation with all three spheres of government, and with a 'a view to providing effective mobility and access'. The declared object of the policy document was to embody 'the overarching national five-year (2006 to 2011) land transport strategy, which gives guidance on transport planning and land transport delivery by national government, provinces and municipalities for this five year period'.[30]It follows inexorably that the announced government policy is that toll roads will form part of the countrywide road network 'where they are financially and socially viable' and 'where tolls can contribute significantly to funding these roads'. These then, on this basis too, are considerations which it would appear should inform any decision to declare a national road, or part thereof as a toll road. The legislatively intended purpose of an act of declaration in terms of s 27(1) of the SANRAL Act

[30]Section 39(1) of the SANRAL Act requires the Minister of Transport to make known government's policy with regard to national roads in the Government Gazette. No such notice in terms of s 39(1) was made available to me. It appears uncertain if one has ever been published. Nevertheless, it is inherently improbable that the policy published under Act 22 of 2000 would be inconsistent with any published government policy on nation roads contemplated by the SANRAL Act. The prescribed object of the policy document under Act 22 of 20000 was intended to reflect an overarching land transport policy. It would therefore be expected to be embracive of, rather than in conflict with, more detailed policy components such as government policy on national roads.

appears to me to indicate a commitment to tolling, not an intention to allow for a consideration by SANRAL and the Ministerat some later stage, when measures such as the conclusion and execution of contract in terms of s 28(1) may have intervened, whether tolling is financially and socially viable.

[101] It is evident in the current case that the intention of both SANRAL and the Minister as representative of national government is that tolling should, by and large, fund the works that need to be undertaken to implement the project. The City's argument is that the facts summarised above show that the process whereby the Minister and SANRAL have committed themselves to the tolling of the roads leaves it entirely uncertain that they will achieve the intended outcome and that, in the result, there is a distinct possibility that in an *ex post facto* consideration of how to deal with meeting costs already incurred the Minister will find himself under pressure to impose undesirably high tolls when the time comes for him to make a decision in terms of s 27(3), with adverse socio-economic consequences for the City and its population. The process and the potential result of the course taken by the Minister and SANRAL are argued by the City to be irrational because of the apparent disconnect between the means and the acceptable achievement of the intended end.

[102] It was in part to meet that argument that Mr *Loxton* advanced the construction of s 27 of the SANRAL Act referred to earlier that would give a completely discrete (or 'hermetically sealed', as Mr *Budlender* described it) nature to the three salient decisions involved in the process, namely, the declaration of the road in terms of s 27(1), the conclusion of a contract as envisaged in s 28(1)(b) and the determination of tolls by the Minister in terms of s 27(3). I have already identified what I consider to be a fatal flaw in Mr *Loxton*'sconstruction of the provisions. The City contends that the provisions of s 27 fall to be construed in a manner that would produce a rational process conducive to a rational result. That requires an integrated reading and application of the provisions of subsections 27(1) and (3) and s 28(1)(b). Such a construction, they argue, is obviously to be preferred because the construction contended for by SANRAL would give rise to unconstitutionality.

[103] The City appears to me to make out a cogent argument for the proper construction of the provision for which it contends. It is an argument which, on the facts, would give rise to a viable basis for the review challenge to the declaration decisions in terms of PAJA. It also makes out what I consider, without so finding, to

be an equally cogent argument that the process in terms of which the decision to declare the roads was taken was irrational in a vitiating sense. I thus find that the City has, insofar as the right it seeks to assert is concerned, made out a strong case for the purposes of obtaining interim relief.

[104] But SANRAL contends that in the current matter, even if the City's prospects of success are rated as strong on the merits, any advantage the City may derive from that has been negated by the delay in the institution of the review application.The implication in this argument is that the review court will find itself barred by the provisions of s 7(1) of PAJA from entertaining the review. Mr *Loxton* contended that the question of delay and its effect was something that should be addressed four square in the determination of the City's application for interim relief and was not one that should just be deferred for the attention of the review court.

[105] I agree that the issue of delay, while it is something to be decided determinatively only by the review court, is nevertheless one to be weighed in the balance in the interdict application. If I were to be of the view that the delay was such that it was improbable that the review court would entertain the main application that would be a consideration weighing heavily against the appropriateness of interim relief. This would be so because necessarily inherent in such a view would be a finding that the City was unlikely to succeed on review – its prospects of success would accordingly fall to be rated poorly.

[106] As mentioned, the City will apply in the review proceedings, to the extent necessary, for an extension of the 180 period referred to in s 7 of PAJA. In terms of s 9(2) of PAJA the review court may grant such an application if it considers that the interests of justice so require. The issues to be weighed in determining what the interests of justice require within the meaning of s 9 of PAJA are essentially the same as those which would have fallen to be weighed in the second leg of the common law delay rule test. That entails that the court exercises a broad discretion in the light of all the relevant facts in deciding whether or not to condone an unreasonable delay (see *Oudekraal Estates (Pty) Ltd v The City of Cape Town and Others* 2010 (1) SA 333 (SCA), at para. 57).

[107] In my judgment it is axiomatic that the commitment by the state to an undertaking that will entail the expenditure of more than R10 billion is a matter of

significant public interest. In a situation where the applicant is assessed to enjoy good prospects of success in establishing that an undertaking of that significance is being proceeded with on an unlawful basis I considerthat a court would not lightly exercise its discretion against dealing with the review because of the delay, especially if nothing effective had by then been done to implement the decision. I venture that the public interest in the finality of decisions, which is the underpinning rationale of the delay rule, would weigh less in the scales in the peculiar context than the public interest against the unlawful commitment to a large scale construction contract that might impact significantly and adversely on the public purse and, according to the City, on the socio-economic environment of the City of Cape Town. I therefore consider that that there is a reasonable prospect that the review court would be inclined in the circumstances to regard it as being in the interests of justice to grant relief in terms of s 9(2) of PAJA.

[108] SANRAL has indicated that it would like to conclude the BOT contract with the preferred bidder, or failing that, with the reserve bidder by the beginning of June, or as soon as possible thereafter. There will thereafter be a process to raise funding for the undertaking of the works. It is not altogether clear at this stage what the fund raising process will entail, but a mixture of what is called debt (i.e. borrowings) and equity (i.e. the raising of capital by the sale of shares in the consortium) is envisaged. Thereafter the works will commence. SANRAL says that some of the work on the roads is urgently needed, and thus one may reasonably expect that the works might be expected to commence quite expeditiously after the conclusion of the contract. It is not clear at this stage when the review application is likely to be heard. The result of the amendment application is that an additional record must be produced. When I suggested to counsel that they might agree on a timetable to facilitate the expeditious hearing of the review I was subsequently informed that having considered my request both sides agreed that the way forward was not that easy. SANRAL says that it will need much longer than the period afforded in terms of the rules to produce the additional record. The record, so I am advised by counsel, will contain material in respect of which various parties, including the bidders, will probably wish to assert the right to confidentiality. Directions from the court will foreseeably be required to address these and other issues,; so much so that counsel suggested that it might be appropriate for the review application to be allocated to a judicial case manager. Thus

whereas I would have hoped that a timetable could have been put in place to achieve the hearing of the review in the last term of this year, the reality is that this would seem overly ambitious.

[109] In the result, if the contract were to be concluded at the beginning of June, or soon thereafter, much might happen towards the implementation of the project between now and the initial determination of the review, and much more between now and the determination of any appeal from that judgment.Mr *Loxton* argued that the City has failed to provide evidence as to what is likely to happen in respect of the implementation of the project between now and the determination of the review. He suggested that this was a fatal flaw because a situation had not been demonstrated where the contract work would be so far advanced when the review is determined as to afford a reasonable foundation for the City's apprehension that if interim interdictal relief is not afforded it will be denied an effective remedy on review. The argument is not convincing in my view. Having regard to the respective protagonists' ability to adduce evidence on this sort of detail, I would have expected SANRAL to show that little effective would be done between now and the likely determination of the review application. SANRAL is possessed of the evidential material to be able to have provided particulars in this respect to negate the City's apprehension of irreparable harm. It did not employ it. All it did was to give an undertaking not rely to on the implementation of the BOT contract as a ground to contend that the City was entitled to relief on review.

[110] I agree with the contention of the City's counsel that SANRAL's undertaking offers little comfort in the circumstances. There are other respondent parties to the review (including the Minister of transport and the preferred bidder and anticipated party to the BOT contract) who have not given any such undertaking and might well adopt a contrary position to that of SANRAL in respect of the effect of the implementation of the declaration. The National Treasury, which is currently not a party to the proceedings, could conceivably apply for leave to intervene, as it did in *OUTA*.[31] The reason that National Treasury intervened before the court of first instance in *OUTA* was because the consequences of expenditure already incurred in respect of the construction of the toll at the time of the proceedings impacted on the

[31]See the judgment of the court of first instance in the interim interdict application in *OUTA* (*Opposition to Urban Tolling Alliance and Others v The South African National Roads Agency Limited and Others* [2012] ZAGPPHC 63 (28 April 2012)), which is accessible on the SAFLII website.

fiscus. It is not far-fetched, having regard to the basis upon which SANRAL intends to proceed with the award of the BOT contract before the sustainability of toll funding has been established, that National Treasury could assert an interest after construction has commenced that they have no reason to assert now. SANRAL has notably refrainedfrom indicating where the funding for the work to which it will be contractually committed will come from in the event that the review court sets aside the declaration of the roads as toll roads. The City's apprehension that it might then find itself in an *OUTA* situation, with an attendant adverse effect on its being able to obtain an effective remedy on review regardless of the strength of its case on legality, is by no means unreasonable.

[111] SANRAL contends that work is urgently needed on portions of the roads. Its contentions in this respect are contradicted by expert opinion evidence adduced by the City and also by the content of some of its own road-condition reporting documentation. It is evident in any event that SANRAL has not been prevented by the absence of a BOT contract from attending to some work on sections of the road subsequent to their declaration as toll roads. It would appear that this work has been funded from the funds that SANRAL is required to maintain separately in terms of s 34(3) of the SANRAL Act.[32] There appears to be an apprehension by SANRAL that consequent upon the declaration of the roads as toll roads it is limited to funding work on the roads by using monies collected from tolling or raised in the manner contemplated in terms of s 28(1) of the SANRAL Act. As Mr *Budlender* pointed out, correctly, such apprehension rests on an incorrect interpretation of the relevant provisions of the SANRAL Act. There is no limitation of SANRAL using any funds at its disposal for the allegedly necessary work. Should any adjustments to the Agency's financial plan be required by an interim interdict it is within SANRAL's powers and functions under the Act to achieve them. An interim interdict will not

[32]Section 34(3) of the SANRAL Act provides:
The Agency must keep separate accounts of all moneys received as toll or otherwise in connection with toll roads and of the interest earned on the investment of those moneys. Those moneys may be used only for-
(a) meeting expenditure connected with the acquisition of land for toll roads, any investigations and surveys with regard to toll roads and the planning, designing and construction of, and any other work in connection with, toll roads, including the erection of toll plazas and any facilities in connection therewith;
(b) the maintenance and operation of toll roads and toll plazas and any facilities connected with toll roads and toll plazas;
(c) paying off any loan mentioned in section 61 (5) (a) or raised in terms of section 33 to finance toll roads, and the payment of interest on such a loan.

have the effect of preventing SANRAL from performing essential functions in respect of the maintenance of the roads. The evidence is that SANRAL currently has R9,2 billion in funds in call accounts at its disposal.(The allegedly urgent work will apparently cost less than R1 billion.) I cannot conceive of any reason why any funds applied now could not eventually be recouped under the intended tolling scheme should the declaration of the toll roads survive judicial review and appropriate provisions are included in any subsequently concluded agreement with a third party in terms of s 28(1) of the SANRAL Act.

[112] I am therefore satisfied that the 'separation of powers harm' to which this court must have regard in exercising its discretion with regard to the balance of convenience in the case is not of a nature that enjoins a refusal of an interdict in the face of the apparent strength of the City's case on review and the solid basis of its apprehension that if it does not obtain interim relief its ability to obtain the enforcement of its right to lawful administrative action will be irremediably harmed. Framing the character of the interdictal relief so as to prohibit only the conclusion of any contract as contemplated in s 28 of the SANRAL Act for the financing, planning, design, construction, maintenance, or rehabilitationof the declared toll roadsor providing for their operation, management and control as a toll road will allow SANRAL to continue with all steps necessary to bring about a situation in which, immediately upon the determination of the review proceedings favourably to it, it will be able to conclude and implement the contemplated contract. Framing interim relief for the City in that manner will also leave SANRAL's powers to manage the relevant sections of the national roads in the interim otherwise unfettered.

[113] I have therefore concluded for all the aforegoing reasons to exercise my discretion in favour of granting interim interdictal relief.

Costs

[114] The usual approach to costs in respect of application for amendments is that as the applicant seeks an indulgence it should pay the costs of such an application and that an unsuccessful opponent to the application should be mulcted in costs only if its opposition is unreasonable. I find no reason to depart from that approach in the current matter. The City has enjoyed sufficiently substantial success in the disclosure part of the interlocutory application to warrant a costs order against SANRAL in its

favour. For the benefit of the taxing master I estimate that about one and a half hours of the combined proceedings was given over by each of protagonists to the argument of the interlocutory application, with that time being equally divided between the amendment and disclosure sections of the application. It was agreed that the costs of three counsel were justified. In view of the interlinked nature of all the applications, the urgency with which the work had to be undertaken and the volume of material involved, I have been persuaded to give that agreement my *imprimatur*. The parties were agreed that in the event of the City succeeding in the interdict application the costs of that application should be determined in the review application.

Orders

[115] The following orders are made in the interlocutory application:

1. To the extent that remains necessary, the City's non-compliance with the ordinary forms, rules of service, requirements for notice and time periods is condoned in terms of rule 6(12) of the Uniform Rules.

2. The City of Cape Town is granted leave to amend its notice of motion in the pending review application in case no. 6165/12 in the respects set forth in paragraph 2 of the Applicant's Notice of Application for Leave to Amend and to Compel Disclosure, dated 1 March 2013.

3. The City is directed to pay the first respondent's costs of suit in respect of the application for amendment on the basis of an unopposed application. The City and the first respondent shall bear their own costs in respect of the costs occasioned by and in the opposition to the application for amendment.

4. An order is made in terms of rule 35(11) of the Uniform Rules directing the first respondent to produce all such 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. Save as aforesaid, the relief sought in terms of paragraphs 4.2 and 4.3 of the Notice of Application is refused.

5. The first respondent is similarly directed to produce the Toll Feasibility and Toll Strategy Report referred to in paragraph 4.4 of the Notice of Application and the Financial Analysis Report produced in August 2007 referred to in paragraph 4.5 of the Notice of Application, as well as the documentation comprising the 'intensive traffic modelling' referred to in paragraph 4.9 of the Notice of Application.

6. Save as provided in paragraphs 4 and 5, above, the relief sought in terms of paragraph 4 of the Notice of Application is refused.

7. The first respondent is directed to pay the City's costs of suit in the disclosure section of the interlocutory application; such costs to include the costs of three counsel where such were employed.

[116] The following orders are made in the interdict application:

1. To the extent that remains necessary, the City's non-compliance with the ordinary forms, rules of service, requirements for notice and time periods is condoned in terms of rule 6(12) of the Uniform Rules.

2. Pending the final determination of the pending review in case no. 6165/12, the first respondent is prohibited from concluding any agreement of the nature contemplated by s 28(1) of the South African National Roads Agency Limited and National Roads Act, 7 of 1998, pursuant to the declaration of portions of the N1 and N2 national roads as toll roads in terms of the notice published in Government Notice 978, dated 15 September 2008.

3. The costs of the application shall stand over for determination in the review application.

A.G. BINNS-WARD

Judge of the High Court

JUDGMENT	:	The Honourable Justice A.G. Binns-Ward
FOR THE APPLICANT	:	Adv. G. BUDLENDER SC Adv. N. BAWA Adv. R. PASCHKE
INSTRUCTED BY	:	Cullinan& Associates
FOR THE 1st RESPONDENT	:	Adv. C. LOXTON SC Adv. M.A. CHOHAN
INSTRUCTED BY	:	Fasken Martineau
FOR THE 5TH RESPONDENTS	:	STATE ATTORNEY (JOHANN BENKENSTEIN)
INSTRUCTED BY	:	State Attorney
FOR THE 2nd& 3rd RESPONDENTS	:	Adv. J.C. HEUNIS SC Adv. E. VAN HUYSSTEEN
INSTRUCTED BY	:	STATE ATTORNEY
FOR THE 6th RESPONDENT	:	NO APPEARANCE
FOR THE 7th RESPONDENT	:	Adv. N.M. ARENDSE SC
INSTRUCTED BY	:	A J Tappenden& Co
DATE OF HEARING	:	16 & 17 May 2013
DATE OF JUDGMENT	:	21 May 2013