THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 297/2024

In the matter between:

CASPER DANIEL KASSELMAN N O	**FIRST APPELLANT**
GERTRUIDA SUSANNA KASSELMAN N O	**SECOND APPELLANT**
BDV ADMINISTRATION OF STATES (PTY) LTD	**THIRD APPELLANT**
LOXODONTA (PTY) LTD	**FOURTH APPELLANT**

and

THE SOUTH AFRICAN NATIONAL ROAD AGENCY SOC LTD	**FIRST RESPONDENT**
THE MINISTER, DEPARTMENT OF TRANSPORT	**SECOND RESPONDENT**
THE MINISTER, DEPARTMENT OF MINERAL RESOURCES AND ENERGY	**THIRD RESPONDENT**

Neutral citation: *Kasselman and Others v The South African National Road Agency SOC Ltd (SANRAL) and Others* (297/2024) [2026] ZASCA 02 (12 January 2026)

Coram: ZONDI DP, NICHOLLS and COPPIN JJA, STEYN and TOLMAY AJJA

Heard: 7 May 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for the handing down of the judgment are deemed to be 11:00 on 12 January 2026.

Summary: Administrative Law – The South African National Roads Agency Limited and National Roads Act 7 of 1998 (SANRAL Act) – ss 7(1) and 7(2) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) – whether the impugned decision to adopt a new roads policy for increased levy percentages and its retrospective application is an administrative action as defined in terms of s 1 of PAJA and is therefore susceptible to judicial review in terms of s 6 of PAJA, alternatively the principal of legality – whether there was an undue delay in instituting review proceedings – whether the fact that the decision was not published in the Gazette and that public participation was not sought in accordance with the provisions of the SANRAL Act constitute grounds for review under s 6 of PAJA – whether the appellant was obliged to exhaust internal remedies as contained in s 57 of the SANRAL Act before approaching the court for relief.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Francis-Subbiah J sitting as court of first instance):

1 The appeal is upheld and the first respondent is ordered to pay the costs of the appellant, which costs will include the costs of two counsel, where so employed.

2 The order of the high court is set aside and substituted with the following:

'(a) The first respondent's decision to increase the financial compensation payable to it by developers of service and rest areas alongside national roads (class 3 facilities), from 0.5% of the gross turnover value (excluding VAT) of the petroleum products sold on the property and 1% of the gross turnover value (excluding VAT) of all other sales on the property to 2,5% and 6% respectively, is reviewed and set aside;

(b) The policy titled 'Policy for Rest and Service Facilities on National Roads' that the first respondent adopted on an unknown date is declared unlawful and of no force and effect;

(c) The matter is remitted to the first respondent for reconsideration and compliance with the SANRAL Act;

(d) The first respondent is ordered to pay the costs of the appellants, including the costs of two counsel.'

JUDGMENT

Tolmay AJA (Zondi DP, Nicholls and Coppin JJA, Steyn AJA concurring)

Introduction

[1] This is an appeal from the Gauteng Division of the High Court, Pretoria (the high court) with leave to appeal granted by this Court. The high court dismissed the application of the appellants (collectively referred to as the Trust) to review and set aside a decision of the first respondent, the South African National Road Agency SOC Ltd (SANRAL), to adopt and retrospectively apply a new roads policy with increased levy percentages for permission to obtain access to and egress from national roads.

[2] The high court concluded that although SANRAL performs a public function, the terms of the contract, particularly the levy percentages, were negotiated in a manner comparable to a commercial contract. These negotiations, the high court said, have no direct, external effect on the public, and it could therefore not find that SANRAL acted irrationally when it adjusted the levy percentages or adopted the new policy in terms of which it made such adjustment.

[3] The main question before this Court is whether the decisionsby SANRAL to adopt the new policy and retrospectively apply the increased levy percentages in a proposed agreement is reviewable under the Promotion of Administrative Justice Act 3 of 2000 (PAJA) or the principle of legality. The issues flowing from this main question are: (a) whether there was an undue delay in instituting the review

proceedings and if so, whether the delay should be condoned; (b) whether SANRAL exercised a public power, and in particular, whether the impugned decisions constituted administrative action as defined in PAJA; (c) if it is found that SANRAL exercised a public power and the decisions were indeed administrative action, whether the Trust was obliged to first exhaust the internal remedies provided for in s 57 of the South African National Road Agency Limited and National Roads Act 7 of 1998 (the SANRAL Act) before bringing a review in terms of PAJA; and (d) if the first three issues are determined in favour of the Trust, whether the impugned decisions ought to be reviewed in terms of PAJA, alternatively the principle of legality.

[4] The Trust argues that the decision to increase the levy percentages constitutes administrative action which is reviewable under PAJA or the principle of legality, and that it should be reviewed and set aside due to non-compliance with the SANRAL Act and PAJA. SANRAL, on the other hand, argues that in adjusting the levy percentages it was acting as a contracting party and that its position is no different from that of a private individual or institution. This would imply that the negotiation of the contractual terms did not constitute the exercise of public power or the performance of public functions. As a result, neither PAJA nor the principles of legality would apply. If, however, the decision is found to be an administrative action, then SANRAL argues that the Trust failed to first exhaust internal remedies, and that there was an undue delay in launching the review proceedings.

Facts

[5] The Trust wants to construct and operate a filling station and rest facilities on the road between Klerksdorp and Wolmaransstad. For this purpose, it started negotiations with SANRAL during 2016. SANRAL is the registered servitude

holder of the road reserve next to national roads, including the N12, where the Trust wants to erect its filling station and rest facility. At the time and in terms of a SANRAL policy that applied in 2016 (the 2016 policy), a fee structure was in place, according to which SANRAL could levy 0.5% on the gross sale of petroleum products and 1% on the gross sale of all other products on the property.

[6] The process to obtain permission to construct the filling station went through three stages. All the requirements were met and the parties were at the point of finalising the agreement at the end of 2020. During January 2021 SANRAL sent a draft agreement to the Trust for purposes of signature. This agreement however included increased levy percentages of 2.5% on petroleum products and 6% on all other products. These levy percentages, SANRAL said, were in accordance with a new fee structure adopted by its Board and set out in the new policy guidelines (the 2021 policy). The 2021 policy was the result of the so-called Horizon 2030 strategy, which was adopted and published during May 2017. One of the strategy's objectives was to '[maximise] the return of SANRAL's assets to generate alternative funding sources and explore opportunities to commercialise its services. . .'.

[7] SANRAL explained, during a meeting held with the Trust on 13 April 2021, that the reasons for the increase of the levies were that the previous percentages were determined in 1998, and were outdated, and that the Board had already decided in 2013 to review the percentages. It further explained that the Board appointed consultants to conduct a study and propose an increase. The increase of the levies as set out in the agreement emanated from that study. During the meeting the Trust undertook to obtain a feasibility study to determine the effect the increase would have and to make representations to SANRAL based on the feasibility study.

[8] The feasibility study was obtained by the Trust and it revealed that, if the revised levy percentages were implemented, the filling station would not be commercially viable. Such an increase would also have a far-reaching effect on the fuel retailing sector. It also pointed out that the increase did not consider the Regulatory Accounting System (RAS) distribution matrix.[1]

[9] In a letter dated 25 May 2021 SANRAL explained that its Board reviewed the levies and circulated it within SANRAL on 26 February 2021. It also expressed a willingness to further negotiate with the Trust.

[10] On 7 July 2021 the attorneys for the Trust in correspondence indicated that the Trust disagreed that SANRAL was entitled to review and implement the levy percentages in its sole discretion. The letter further pointed out that: (a) any revision of policy must be done in line with fair administrative process based on rational considerations with the input of stakeholders; (b) no publication of the revised policy or an invitation to stakeholders and affected parties to provide input could be found; (c) the revised decision was only circulated within SANRAL after the Trust was notified of the revision; and (d) the grounds upon which and considerations in terms of which the Board decided to implement the increase were unknown. It was also pointed out that SANRAL is governed by the SANRAL Act and is obliged to follow a fair administrative process. It concluded by pointing out that the feasibility study conducted on behalf of the Trust indicated that the increase of the levy percentages was irrational.

[1] The petroleum sector uses the RAS to determine appropriate margins for petroleum at wholesale, retail, secondary storage and distribution level. It seeks to introduce transparency in the market, root out inefficiencies, cross-subsidisation and uncontrolled costs.

[11] In a letter dated 22 July 2021 SANRAL stated that it was still considering the matter and the concerns raised by the Trust. The Trust was later advised in an email that SANRAL was struggling to appoint attorneys and it was recommended that the matter be escalated to the CEO of SANRAL. On 20 September 2021 the availability of the CEO was confirmed for a meeting on 5 October 2021, but the meeting however only took place on 18 October 2021. During this meeting SANRAL expressed the opinion that it must 'sweat its assets' and that the increase in levy percentages was justifiable. It was concluded that the Trust must propose a solution that would make business sense to all the parties.

[12] On 10 November 2021 GMI Attorneys confirmed that they were appointed to represent SANRAL but would not be able to attend a meeting scheduled for 12 November 2021. A meeting was however held and an updated feasibility study was proposed to consider a possible counter proposal. The report, which was furnished to SANRAL on 19 January 2022, confirmed that the project would not be viable if the increased levies are applied.

[13] Settlement discussions proceeded until 28 February 2022 when the attorneys on behalf of SANRAL indicated that the settlement proposal was not acceptable. It was recorded by SANRAL's attorneys that: (a) migrating to the RAS would not be feasible or practical for SANRAL; (b) SANRAL would need an opportunity to evaluate the Department of Mineral Resources and Energy (DMRE) model; (c) regulations around fuel prices and engagement with the DMRE is not within SANRAL's parameters; (d) the collection of levies was in line with the strategic initiative behind the Horizon 2030 long term strategy; and (e) SANRAL still wanted to find an amicable solution.

[14] The Trust, which was at this stage unaware whether the 2021 policy and revised levies had been published, did not request such documents. Nor were those documents furnished by SANRAL. The Trust then engaged with Mr Loubser, a representative from Engen, who was reportedly knowledgeable in the field. Mr Loubser opined that the levies were ultra vires and agreed to consult with the legal representatives of the Trust.

[15] On 10 March 2022 junior counsel was instructed. The founding affidavit set out in detail the interaction between the Trust and counsel. On 12 April 2022, after instructions were obtained from the trustees, senior counsel was appointed due to the complexity of the matter. There were delays because of the long history of the matter, which started in 2016. The application to the Petroleum Controller for a site licence could not be submitted without SANRAL's permission. The Trust set out in detail the steps that were taken to finalise the site licence application until it was finally submitted on 2 June 2022.

[16] Some difficulty was experienced in obtaining all the information necessary to prepare and finalise the site licence application. It was eventually established that an advertisement of the increased levy percentages was published in the Rapport newspaper of 18 July 2021 and the 2021 policy document was uploaded on SANRAL's website after this date. On 21 April, after having received documents from Mr Loubser and a search of SANRAL's website, it was established that: (a) a rate card with the new levies was uploaded on 8 June 2021, (b) a media release was uploaded on 23 June 2021, and (c) the 2021 policy document was uploaded on 4 August 2021. Against this complex factual background, I turn to consider the issues flowing from the main question in this case.

Was the increase to the levy percentages and its application on the Trust 'administrative action' as defined in PAJA?

[17] The main question in this matter is whether the decisions by SANRAL to adopt the 2021 policy and apply the increased levy percentages in its proposed agreement with the Trust are reviewable under PAJA, alternatively under the principle of legality. This depends on whether the impugned decisions of SANRAL constitute administrative action as defined in PAJA. Section 1 of PAJA defines an administrative action in relevant part as follows:

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

(a) an organ of state, when-

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

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

(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect, but does not include . . .'

[18] The question of whether the impugned decisions are administrative action should be answered by looking at the function and nature of the power exercised by the Board of SANRAL when it took the impugned decisions. In *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*[2] the Constitutional Court explained that '[w]hat matters is not so much the functionary as the function. The question is whether the task itself is administrative or not.'[3] It continued by explaining that '[t]he focus of the enquiry as to whether conduct is "administrative action" is not on the arm of government to which the relevant actor belongs, but on the nature of the power he or she is exercising. . . '[4].

[2] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC).
[3] Ibid para 141.
[4] Ibid.

[19] In adopting the 2021 policy SANRAL was clearly purporting to exercise a public power or public function in terms of ss 34 and 35 of the SANRAL Act empowering it to adopt a policy concerning, inter alia, the levies or fees that are chargeable and payable in terms of the SANRAL Act. That the exercise of such power may have an adverse effect on the rights of persons and have a direct, external legal effect is also without question. In terms of the SANRAL Act, notice of the proposed policy must be given to the public and they have the right to comment thereon and make proposals in that regard. It should follow as a matter of course that the application of the policy, including a fee or levy, to any person would also be administrative action, unless it otherwise falls within one of the exclusions listed in the definition. The fees and levies are part of the financial plan of SANRAL. The mere fact that it is contained in a policy, does not exclude it from the range of actions or decisions that are reviewable in terms of PAJA.

[20] For its conclusion that in this instance the decision to require from the Trust the increased levy in terms of the 2021 policy, is not an administrative action and therefore not subject to review, the high court relied inter alia on *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others* (*Cape Metro*).[5] In that matter this Court held that the cancellation of a contract between a municipality and a private firm was not an administrative action. The reasoning was that the cancellation involved common-law contractual powers rather than public power, as the ground for cancellation was fraud and not legislation.[6]

[5] *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others* 2001 (3) SA 1013 (SCA); 2001 (10) BCLR 1026 (A) (*Cape Metro*).
[6] Ibid para 20.

[21] In *Logbro Properties CC v Bedderson NO and Others,*[7] where a provincial tender board's decision not to award a tender, but to call for a new tender was in issue, this Court explained that the court in *Cape Metro* did not 'purport to provide a general answer to the question whether a public authority in exercising powers derived from a contract is in all circumstances subject to a public duty to act fairly. That question was left open.'[8] It is incontrovertible that whether an action constitutes administrative action can only be determined within the factual matrix of each case.

[22] There are important distinctions between the facts in *Cape Metro* and this matter. First, the decision to increase the levy percentages is based on legislation. The levies and therefore the impugned decision, apply not only to the specific contract negotiated between SANRAL and the Trust, but also to other entities in the industry that meet with certain requirements. Second, the SANRAL Act requires the publication in the Gazette of, and public participation in, policy decisions. The decision is, on SANRAL's own version, a policy decision.

[23] SANRAL is a State-Owned Entity (SOE) and as such has a unique character. Hoexter[9] defines a state-owned entity as state-owned companies or other state-owned enterprises established by, or in terms of legislation. The State is the sole shareholder of SOEs, in this instance represented by the Minister of Transport. The core functions of SOEs are embodied in the fact that they are established, owned and controlled by the State. They perform public functions that are in the public interest and are therefore organs of state as defined in the Constitution.[10] SANRAL

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[7] *Logbro Properties CC v Bedderson NO and Others* 2003 (2) SA 460 (SCA); [2003] 1 All SA 424 (SCA).
[8] Ibid para 9.
[9] C Hoexter and G Pennfold *Administrative Law in South Africa* Third Edition, at 276 footnote 439.
[10] Section 239 of the Constitution in relevant part reads as follows: 'organ of state' means-
(a) any department of state or administration in the national, provincial or local sphere of government; or
(b) any other functionary or institution-
(i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or

is both a regulatory and service-delivery agency and as such engages in public functions.[11]

[24] The fact that SANRAL is an SOE is significant. SOEs occupy a hybrid position in South African law. Although often incorporated as companies (SOC Ltd) under the Companies Act 71 of 2008, they are creatures of statute and perform public functions. The boards of SOEs must be held accountable to the public due to the performance of these public functions. In *Transnet Ltd v Goodman Brothers (Pty) Ltd*,[12] this Court explained that Transnet (which is also an SOE) is a company incorporated in terms of s 2 of the Legal Succession to the South African Transport Services Act 9 of 1989. It is wholly owned by the State and is controlled by the Minister of Public Enterprises. In terms of its articles of association its main object is to conduct and manage any business formerly carried on by the South African Transport Services, and to do so in terms of sound business principles. It was recognised that SOEs, like Transnet, may be companies in form, but are subject to public law when exercising public powers.

[25] The Constitutional Court reaffirmed that all exercises of public power, irrespective of the identity of the actor, are governed by the Constitution and must conform to its normative standards.[13] A failure to recognise the public power and constitutional obligations of boards of SOEs open the door to abuse and mismanagement, which in turn impacts on the obligations of the state and its

(ii) exercising a public power or performing a public function in terms of any legislation but does not include a court or a judicial officer. See *Hoffmann v South African Airways* 2001 (1) SA 1 (CC); 2000 (11) BCLR 1235 (CC) para 23.

[11] See *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others* 2014 (4) SA 179 (CC) para 52; *National Gambling Board v Premier, KwaZulu-Natal, and Others* 2002 (2) SA 715 (CC) para 19.

[12] *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 (1) SA 853 (SCA); 2001 (2) BCLR 176 (SCA) para 37.

[13] *Affordable Medicines Trust an Others v Minister of Health and Others* 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) paras 49 and 73.

obligations towards citizens. Some of these SOEs' failure to deliver on their constitutional duty and the impact thereof on our society have been amply illustrated in our recent history.

[26] In *Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the RSA*,[14] the Constitutional Court held that the exercise of all public power is subject to the principle of legality, which requires that power be exercised rationally and lawfully. This principle was reinforced in *AllPay Consolidated Investment Holdings (Pty) Ltd v CEO of SASSA*,[15] where the Constitutional Court held that even entities engaging in commercial activities under a public mandate are required to act fairly and transparently. There can thus be no doubt that, despite counsel for SANRAL's insistence to the contrary, that SANRAL is an organ of state and performs public functions, and its decisions will generally be subject to review under PAJA or the principle of legality.

[27] Boards of SOEs must act fairly, transparently and in accordance with the principles of public law. The obligations of the boards of SOEs have been considered by academics. De Visser and Waterhouse,[16] relying on the work of Steytler[17] and in particular the notion of South Africa's 'Financial Constitution',[18] point out that for

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[14] *Pharmaceutical Manufacturers Association of SA and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) paras 83 – 85.
[15] *All Pay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency; and Others* [2013] ZACC 42; 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC).
[16] J De Visser and S Waterhouse *SOE Boards and Democracy* 2020. This is a document compiled by the Dullah Omar Institute at the University of the Western Cape, available at https://dullahomarinstitute.org.za/women-and-democracy/board-members-of-state-owned-enterprises-towards-transparent-appointments/reports/soe-boards-and-democracy-final-pdf-version-12-feb-2020.pdf.
[17] N Steytler 'The "financial constitution" and the prevention and combatting of corruption: a comparative study of Nigeria, South Africa and Kenya' paper delivered at the 5th *SASCA Conference Corruption and constitutionalism in Africa: Revisiting control measures and strategies* STIAS, September 2017.
[18] De Visser and Waterhouse explain, at 7, the notion of South Africa's 'Financial Constitution' as follows: 'It is a concept that sets out how the Constitution and statutes regulate public money, i.e. money that belongs to and must serve the citizens of that country. It involves the constitutional architecture for the state's raising and spending of public money. Much of its origins can be traced back to British constitutionalism as set out by one of the earliest and

SOEs the rules are different as their corporatisation creates critical exceptions to the constitutional architecture. These exceptions are inter alia, that many raise revenue from citizens without using the tax collection interface, the revenue collected is not deposited into the National Revenue Fund, many of them may borrow without the direct involvement of Parliament, an SOE's expenditure plan is not approved by Parliament. Parliament does not directly oversee the legality and appropriateness of spending, and this is done by the Board and the Minister.

[28] Because of these exceptions, the authors, in my view correctly, argue that the accountability deficit created should be filled to safeguard the public interest, by placing emphasis on the boards of these SOEs and good corporate governance.[19] This is directly relevant to how the boards of SOEs should exercise their discretion. That discretion should be exercised with due regard to the place of SOEs within the constitutional framework and applicable legislation and can neither be unfettered or unlimited. It should always be exercised in the public interest.

[29] An interpretive exercise is required to establish the powers accorded to SANRAL's Board, as well as the procedural requirements that should be followed. The established principles set out in *Natal Joint Municipal Pension Fund v Endumeni Municipality* (*Endumeni*)[20] and followed in a line of subsequent cases should be applied in this exercise.[21] In *Endumeni* this Court explained that the

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most influential British scholars of constitutionalism, Dicey. Even though it has undergone significant changes, British constitutionalism undeniably influences many constitutions in Anglophone Africa.'

[19] De Visser and Waterhouse at 13.

[20] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA); [2012] 2 All SA 262 (SCA).

[21] *Minister of Police v Miya* [2024] ZASCA 71; 2025 (3) SA 130 (SCA); *Christoffel Hendrik Wiese and Others v CSARS* [2024] ZASCA 111; 2025 (1) SA 127 (SCA); 87 SATC 14; [2024] 4 All SA 108 (SCA); *Minmetals Logistics Zhejiang Co Ltd v The Owners and Underwriters of the MV Smart and Another* [2024] ZASCA 129; 2025 (1) SA 392 (SCA); [2025] 1 All SA 60 (SCA)*; Prudential Authority v Dlamini and Another* [2024] ZASCA 133; 2025 (1) SA 365 (SCA); [2025] 1 All SA 76 (SCA); *Thistle Trust v Commissioner for the South Africa Revenue Service* [2024] ZACC 19; 2025 (1) SA 70 (CC); 2024 (12) BCLR 1563 (CC).

process of interpretation is a unitary and objective exercise that regards the text, context and purpose of the document or instruments being interpreted.[22] In *Cool Ideas 1186 CC v Hubbard and Another (Cool ideas)*[23] the Constitutional Court held that the purposive approach involves the interpretation of legal texts, such as statutes or contracts, in a manner that gives effect to the underlying purpose or intention behind the text.

[30] The interpretive process requires a holistic approach. The starting point in this case is the preamble of the SANRAL Act that sets out the purpose, duties and role of SANRAL. It in essence entails to take charge of national roads and related aspects to it.[24] In terms of s 12(1) SANRAL is governed and controlled by a Board of directors in accordance with the SANRAL Act which is appointed by the Minister.[25] Chapter 3 of the SANRAL Act is headed 'Functions, Powers and Responsibilities of Agency'. Section 25(1)[26] sets out the powers of SANRAL and grants SANRAL control over the national road system within the framework of government policy.

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[22] *Endumeni* paras 18 and 19.

[23] *Cool Ideas 1186 CC v Hubbard and Another* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) para 28.

[24] The preamble to the Act reads as follows: To make provision for a national roads agency for the Republic to manage and control the Republic's national roads system and take charge, amongst others, of the development, maintenance and rehabilitation of national roads within the framework of government policy; for that purpose to provide for the establishment of The South African National Roads Agency Limited, a public company wholly owned by the State; to provide for the governance and management of that company ('the Agency') by a board of directors and a chief executive officer, respectively, and to define the Agency's powers and functions and financial and operational accountability, and regulate its functioning; to prescribe measures and requirements with regard to the Government's policy concerning national roads, the declaration of national roads by the Minister of Transport and the use and protection of national roads; to repeal or amend the provisions of certain laws relating to or relevant to national roads; and to provide for incidental matters.

[25] Section12(3)*(a).*

[26] Section 25(1) reads as follows:

'25 Main functions of Agency

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

SANRAL in taking charge of national roads is endowed with a public duty and should exercise it in accordance with government policy.

[31] In terms of s 26*(g)* of the SANRAL Act, SANRAL has the right to charge a levy, fee, or rent for any authority or permission that may be granted.[27] It was argued on behalf of SANRAL that the Board is legislatively accorded a discretion which is exercised in terms of its 2021 policy document and the levy rate is determined at the sole discretion of the Board. The high court agreed with this argument and held that the aim of the 2021 policy is to generate revenue for SANRAL and the rate of the levy is determined at the sole discretion of the Board.[28] That the Board has a discretion is undoubtedly so, but as explained above, that discretion cannot be unfettered as the Board is duty bound to exercise its discretion within the frameworks of the Constitution, PAJA and the SANRAL Act.

[32] Section 34(2) of the SANRAL Act is a constraining provision that determines that SANRAL's funds will be used in accordance with SANRAL's business and financial plan as approved by the Minister. Section 35(5) provides that SANRAL must make known any business, financial and strategic plan by having it published in the Gazette. The Minister may order any further publication of the plan in one or more national newspapers. Section 39(1) requires that the Government's policy with regard to national roads must be made known by the Minister by notice in the Gazette. Section 39(2) requires public participation and stipulates that the proposals

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[27] Section 26*(g)* reads as follows:
'26 Additional powers of Agency
In addition to the Agency's main powers and functions under section 25, the Agency is competent-
(g) to charge a levy, fee or rent for any authorisation, approval or permission that may be granted or given by the Agency to any person from time to time in terms of section 44, 48, 50 or 52 for the provision, construction, erection, establishment, carrying on or operation on, over or underneath any national road, of anything provided for in the section concerned. . .'

[28] High Court judgment *Kasselman N.O. and Others v South African National Road Agency SOC Limited ("SANRAL") and Others* [2023] ZAGPPHC 1786 para 11.

relevant to determining or amending the national roads policy must be made known by notice published in the Gazette and interested persons and the public must be invited to comment on the proposals and make recommendations.

[33] It is evident that the Board is constrained to act within the framework of the provisions of the SANRAL Act. Considering that the impugned decisions are administrative action, there should have been compliance with PAJA. SANRAL was obliged to have followed mandatory procedural requirements and public participation processes before the impugned decisions could have been taken. There is no indication that the Minister was consulted or informed of the impugned decisions. There is no proof that there was compliance with the notice and comment provisions in the SANRAL Act before SANRAL adopted and purported to apply the increased fees as per the 2021 policy on the Trust. Further, the impugned decision is out of the realm of private parties negotiating a contract and within the framework of public power being exercised by a state organ with all the obligations that go with it. The conclusion is therefore ineluctable that the decision to adopt the new policy and increase the levies is an administrative action. Therefore, the impugned decisions may be reviewed in terms of PAJA.

Was there an undue delay in instituting the review proceedings?

[34] The next issue to be determined, is whether there was an undue delay in launching the review proceedings. The Trust contends that the review proceedings, brought on 2 June 2022, were instituted within the 180 days and without unreasonable delay as envisaged by s 7(1) of PAJA.[29] If this Court however finds

[29] Section 7 of PAJA determines as follows:
Procedure for judicial review
(1) Any proceedings for judicial review in terms of section 6 (1) must be instituted without unreasonable delay and not later than 180 days after the date-

that the period was exceeded, the Trust seeks condonation. The date that the Trust relies on as the date that the 180-day period started running is 28 February 2022, when it received the letter, which rejected their proposed settlement, from SANRAL. SANRAL on the other hand, contends that the calculation of the period should start on 12 January 2021, the date that the Trust received the draft agreement containing the increased levies, or at the latest on 25 May 2021, when the Trust was advised that the applicable levies were revised in accordance with SANRAL's discretionary powers in terms of ss 44 and 48 of the SANRAL Act.

[35] The 180-day period referred to in s 7(1) of PAJA is calculated from the date on which any internal remedy provided for in any other law has been exhausted. If no such internal remedy exists, the calculation begins on the date on which the affected party became or ought to have become aware of the administrative action and the reasons for it. SANRAL relied on *Opposition to Urban Tolling Alliance v South African National Roads Agency Limited*.[30] This case addresses the issue of delay in review proceedings under PAJA. This Court held that a delay exceeding 180 days is deemed 'unreasonable per se' by the legislature.[31] Consequently, after the 180-day period, the court is only empowered to entertain the review application if the interests of justice dictate an extension under s 9 of PAJA.

[36] However, even if the delay is deemed unreasonable, the court may on application in the exercise of its discretion, condone it, if the interests of justice so

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(a) subject to subsection (2) (c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2) (a) have been concluded; or
(b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.

[30] *Opposition to Urban Tolling Alliance v South African National Roads Agency Limited* [2013] ZASCA 148; 2013 JDR 2297 (SCA); [2013] 4 All SA 639 (SCA).

[31] Ibid para 26.

require, considering factors such as the explanation for the delay, the extent of the delay, and the merits of the review application.[32]

[37] The facts illustrate that it was only on 28 February 2022 that the Trust became aware of the reasons for the decision. The period should therefore be calculated from that date.

[38] The draft agreement sent on 21 January 2021 containing the altered levies did not give any reasons for the decision. An analysis of the events before that date indicate overwhelmingly that the parties were interacting to find a mutually acceptable solution to the impasse between them. The review was instituted within the 180 days, on 2 June 2022. It can also not be said that there was an unreasonable delay in the launching of the review given the factual matrix of this matter. There were continuous negotiations between the parties to come to an amicable solution. The matter was complex and had a long history.

Was the Trust obliged to first exhaust an internal remedy?

[39] Section 7(2)[33] of PAJA requires that all internal remedies be exhausted unless exceptional circumstances exist and the person concerned brings an application to be exempted from the requirement. The courts have consistently confirmed the

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[32] *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* [2019] ZACC 15; 2019 (4) SA 331 (CC) 2019 (6) BCLR 661 (CC) paras 52 – 55.

[33] It reads as follows:

7 Procedure for judicial review

(2)*(a)* Subject to paragraph *(c)*, no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.

(b) Subject to paragraph *(c)*, a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph *(a)* has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.

(c) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice.

importance of complying with this requirement.[34] Under PAJA, an internal remedy refers to a mechanism provided by law that allows an aggrieved party to seek redress or review of an administrative decision within the administrative hierarchy before approaching a court for judicial review.

[40] The internal remedy relied on by SANRAL is contained in s 57 of the SANRAL Act. It reads as follows:

'(1) Where the Agency has refused a person's application for an approval or permission contemplated in section 48 or 49 *or has granted a limited or conditional approval or permission*, the person may appeal to the Minister against the refusal, limitation or condition in question, and the Minister may dismiss the appeal or allow it in whole or in part, or take any other decision that the Agency could have taken with regard to the application.

(2) Any approval, permission, limitation or condition which on appeal has been granted or imposed by the Minister, will be regarded and treated for the purposes of this Act as if it were granted or imposed by the Agency.

(3) *An appeal in terms of subsection (1) must be lodged with the Minister in the manner and form and within the period as prescribed.'*(Emphasis added)

[41] The Trust argued that s 57 did not apply, because the permission was not conditional. This argument has no merit. SANRAL's permission to the Trust was not an outright permission. It was conditional, because it was subject to the Trust agreeing to pay the amounts levied by SANRAL.

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[34] *Koyabe & others v Minister for Home Affairs & others (Lawyers for Human Rights as amicus curiae* [2009] ZACC 23; 2010 (4) SA 327; 2009 (12) BCLR 1192 (CC*), (Koyabe) Basson v Hugo and others* [2018] ZASCA 1; 2018 (3) SA 46 (SCA); [2018] 1 All SA 621 (SCA); *(Basson) Member of the Executive Council for Local Government, Environmental Affairs and Development Planning, Western Cape and another v Plotz NO and another* [2017] ZASCA 175; 2017 JDR 1964 (SCA); 2017 [2018] JOL 39535 (SCA); *Pine Glow Investments (Pty) Ltd v Minister of Energy and Others* [2025] ZASCA 75; 2025 (6) SA 474 (SCA); [2025] 3 All SA 314 (SCA).

[43] Neither of the parties referred to s 57(3) that states that the appeal must be lodged in the manner, form and time limit determined by the Minister. The respondents in their heads of argument do not propose the form of a s 57 appeal, nor do they refer to anything apart from the section itself to argue that this is an internal remedy. They cite the case of *Basson v Hugo and Others* (*Basson*)[35] as authority that the Minister has wide powers and may take any other decision that SANRAL could have taken. However, it is not the extent of the Minister's powers that is in contention here. There exists a more substantial problem with effectively pursuing the appeal contemplated in s 57. A perusal of the principal and subordinate legislation reveals that the Minister has not prescribed the manner, nor the form, nor the time period in which such an appeal should have been lodged.

[43] In *Koyabe & others v Minister for Home Affairs* (*Koyabe*)[36] it was explained that the remedy available must be effective. It was held that:

'In a constitutional democracy like ours, where the substantive enjoyment of rights has a high premium, it is important that any existing administrative remedy be an effective one. A remedy will be effective if it is objectively implemented, taking into account the relevant principles and values of administrative justice present in the Constitution and our law. An internal remedy must also be readily available and it must be possible to pursue without any obstruction, whether systemic or arising from unwarranted administrative conduct. Factors such as these will be taken into account when a court determines whether exceptional circumstances exist, making it in the interests of justice to intervene.'[37]

[44] Although this was said in the context of determination of exceptional circumstances, the same approach should apply when there is a failure by the Legislature to put in place the forms and procedures to enable an aggrieved party to

[35] *Basson v Hugo and Others* [2018] ZASCA 1; 2018 (3) SA 46 (SCA); [2018] 1 All SA 621 (SCA).
[36] *Koyabe & others v Minister for Home Affairs & others (Lawyers for Human Rights as amicus curiae* [2009] ZACC 23; 2010 (4) SA 327; 2009 (12) BCLR 1192 (CC).
[37] *Koyabe* para 44.

effectively avail itself of an internal remedy. In a separate concurring judgment in *Basson* Swain JA explained:

'In *Koyabe* the Constitutional Court at fn 41 in dealing with possible exceptions to the duty to exhaust an internal remedy, referred to the decision of Justice Blackmun in *McCarthy v Madigan* 503 US 140 (1992) at 144 – 148, in the following terms:

"Justice Blackmun further recognised exceptions to the exhaustion requirement, where the interests of the individual in obtaining judicial intervention outweigh the institutional interest in exhaustion: *(a)* where it may prejudice subsequent court action (for example, an unreasonable or indefinite time frame for administrative action); *(b)* where there is doubt whether the agency can grant effective relief; and *(c)* where the administrative body is biased or has predetermined the issue." These exceptions may also be regarded as examples of the absence of an effective and adequate internal remedy for the particular complaint.'[38]

[45] The remedy, in the absence of compliance by the Minister with s 57(3), is not readily available, nor can it be pursued without obstruction. There was simply no effective internal remedy available for the Trust to pursue. It cannot be in our constitutional dispensation that it could be required of a party to show on application that exceptional circumstances exist, where the failure of the legislature to comply with its duties, renders it impossible to exhaust the internal remedies. Therefore, it may be concluded that no effective internal remedy existed that could have been exhausted.

Are the impugned decisions reviewable in terms of any of the grounds in PAJA?

[46] In *South African National Roads Agency Limited v Cape Town City*[39] which primarily dealt with the legality of the City of Cape Town's opposition to the SANRAL tolling project, this Court examined whether SANRAL had complied with

[38] *Basson* para 47.
[39] *South African National Roads Agency Limited v Cape Town City* [2016] ZASCA 122; 2017 (1) SA 468 (SCA); [2016] 4 All SA 332 (SCA).

the procedural and substantive requirements under the relevant legislation, including PAJA, when declaring certain roads as toll roads. This Court found that SANRAL had failed to adhere to the procedural requirements mandated by PAJA, particularly in relation to public participation and consultation. The City of Cape Town successfully argued that SANRAL's decision to declare the roads as toll roads was procedurally unfair and lacked transparency. This Court upheld the high court's decision to set aside SANRAL's declaration of the toll roads, emphasising the importance of administrative bodies adhering to statutory requirements to ensure fairness and accountability in decision-making processes. The Court emphasised the importance of acting within the confines of the SANRAL Act, it explained that 'neither the Board nor the Transport Minister can act outside the confines of the Act.'[40] The same principle applies in this case.

[47] It is common cause that the public participation process, as required by ss 34(2), 35(5) and 39 was not followed. SANRAL also did not comply with s 3(2)*(b)*(i) to (v) of PAJA, which require the administrative action which adversely affects the rights of others to be procedurally fair.[41] Its action or conduct falls to be reviewed under ss 6(2)*(a)*(i) and (ii), 6(2)*(b)*, 6(2)*(e)*(ii) and (iii), and 6(2)*(f)*(ii)(cc) of PAJA.[42] The decision to adopt the new policy and to increase the levy percentages should therefore be reviewed and set aside.

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[40] Ibid para 102.
[41] Section 3 of PAJA reads as follows:
3 Procedurally fair administrative action affecting any person
(1) Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.
(2)*(a)* A fair administrative procedure depends on the circumstances of each case.
(b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1)-
(i) adequate notice of the nature and purpose of the proposed administrative action;
(ii) a reasonable opportunity to make representations;
(iii) a clear statement of the administrative action;
(iv) adequate notice of any right of review or internal appeal, where applicable; and
(v) adequate notice of the right to request reasons in terms of section 5.
[42] Section 6 of PAJA reads in relevant part as follows: . . .

Conclusion

[48] The Trust implored us to direct that the levy percentages set out in the 2016 policy should apply. The appropriate remedy is to remit the matter to the original decision-maker for reconsideration. This approach respects the principle of separation of powers, as it allows the administrative body to exercise its expertise and discretion. There are no exceptional circumstances in this case that would allow this Court to determine the appropriate levies to be charged. Therefore, the matter should be remitted to SANRAL to comply with the provisions of the SANRAL Act.

[49 The following order is made:

1 The appeal is upheld and the first respondent is ordered to pay the costs of the appellant, which costs will include the costs of two counsel, where so employed.

2 The order of the high court is set aside and substituted with the following:

'(a) The first respondent's decision to increase the financial compensation payable to it by developers of service and rest areas alongside national roads (class3 facilities), from 0,5% of the gross turnover value (excluding VAT) of the petroleum products sold on the property and 1% of the gross turnover value (excluding VAT) of all other sales on the property to 2,5% and 6% respectively, is reviewed and set aside;

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6 Judicial review of administrative action . . .
(2) A court or tribunal has the power to judicially review an administrative action if-
(a) the administrator who took it-
(i) was not authorised to do so by the empowering provision;
(ii) acted under a delegation of power which was not authorised by the empowering provision; or . . .
(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with; . . .
(e) the action was taken- . . .
(ii) for an ulterior purpose or motive;
(iii) because irrelevant considerations were taken into account or relevant considerations were not considered; . . .
(f) the action itself- . . .
(ii) is not rationally connected to- . . .
(cc) the information before the administrator; or . . .

(b) The policy titled ‘Policy for Rest and Service Facilities on National Roads’ that the first respondent adopted on an unknown date is declared unlawful and of no force and effect;

(c) The matter is remitted to the first respondent for reconsideration and compliance with the SANRAL Act;

(d) The first respondent is ordered to pay the costs of the appellants, including the costs of two counsel.’

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R TOLMAY

ACTING JUDGE OF APPEAL

Appearances

For appellant(s):	H G A Snyman SC (with J D Matthee)
Instructed by:	Laufs Attorneys, Potchefstroom
	Honey & Partners Inc, Bloemfontein
For respondent(s):	L Kutumela (with J Mabuza)
Instructed by:	Gildenhuys Malatji Inc, Pretoria
	Webbers Attorneys, Bloemfontein.