THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 66/2016

In the matter between:

SOUTH AFRICAN NATIONAL ROADS AGENCY

LIMITED **APPELLANT**

and

CITY OF CAPE TOWN **RESPONDENT**

Neutral Citation: *SANRAL v City of Cape Town* (66/2016) [2016] ZASCA 122 (22 September 2016)

Coram: Navsa, Cachalia, Wallis, Petse & Mocumie JJA

Heard: 16 August 2016

Delivered: 22 September 2016

Summary: The South African National Roads Agency Limited and National

Roads Act 7 of 1998 : Declaration of national road as toll road in terms of s 27 of the Act : Application to review and set aside a) an application by South African National Roads Agency Limited (SANRAL) to Minister of Transport (Minister) for approval of declaration of toll road; and b) decision by the Minister to approve declaration as toll road : delay in bringing review : delay unreasonable but interests of justice nevertheless requiring that condonation be granted : SANRAL's board had not in fact taken decision to seek Minister's approval : later attempt to rectify omission invalid : Minister misconstruing function in approving declaration : approval set aside : cross-appeal : claim for interdict in relation to possible future contract : application premature.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Binns-Ward and Boqwana JJ sitting as court of first instance), reported *sub nom* as *Cape Town City v South African National Roads Agency Ltd & others* 2015 (6) SA 535 (WCC).

1. The application for leave to appeal against the refusal to admit further affidavits is dismissed with costs, including the costs of two counsel.
2. The appeal is dismissed with costs, including the costs of two counsel.
3. The cross-appeal is upheld with costs, including the costs of two counsel, to the following limited extent:

3.1 Paragraph f) of the order of the court below is amended to read as follows:

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

3.2 The order of the court below is supplemented with the following:

'j) The round robin resolution by the first respondent's board to declare as toll roads portions of the N1 (R300 interchange to Sandhills) and the N2 (R300 interchange to Botriver) and the subsequent ratification thereof at the first respondent's board meeting of 3 June 2014 as more fully reflected in annexure NA1 to the affidavit of Nazir Alli ("the 2014 declaration decision") is declared to be invalid and of no force and effect.

k) The 2014 declaration decision is reviewed and set aside.'

JUDGMENT

Navsa JA (Cachalia, Wallis, Petse & Mocumie JJA concurring)

Introduction

[1] The tolling of national roads has become a burning issue in public and political debate and has received judicial attention at the highest level. This case concerns the correctness of a decision of the Western Cape Division of the High Court, Cape Town (Binns-Ward and Boqwana JJ), to review and set aside a purported decision by the appellant, to propose that portions of two national roads be declared toll roads, and the subsequent decision of the Minister of Transport (the Transport Minister) to approve that proposal. The appellant is the South African National Roads Agency Ltd (SANRAL), a statutorily established entity.[1] The review application, said to be in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), had been brought by the respondent, the City of Cape Town (the City), a metropolitan municipality established in terms of the Local Government: Municipal Structures Act 117 of 1998. The national roads in question are the N1 and N2 leading into and forming part of Cape Town, referred to as the N1-N2 Winelands Toll Highway Project (the Project). It is uncontested that these national highways, which form part of the national roads system, are of importance to the City, the Province and the country.

[2] The court below, in dealing with the review application that was brought four years after the impugned decisions had been made, resorted to s 9 of PAJA, and extended the period of 180 days within which a review, in terms of that Act, is required to be brought.[2] Pursuant to the setting aside of the abovementioned

[1] Established in terms of s 2 of The South African National Roads Agency Limited and National Roads Act 7 of 1998 (the Act).

[2] The relevant part of s 7 of PAJA provides that proceedings for judicial review brought in terms of s 6 – a section in terms of which administrative action may be reviewed, inter alia, for lack of compliance with statutory authority or which was procedurally unfair, or where relevant considerations were not taken into account – 'must be instituted without unreasonable delay and not later than 180 days after the date' of the administrative action. Section 9(1) provides that the 180 day period may be extended

decisions, the court remitted SANRAL's proposal to the Transport Minister for further consideration:

'in accordance with the findings in the judgment, subject to the direction that, should it be decided to proceed with the Project, the process in terms of s 27(4) of the SANRAL Act must be undertaken afresh, *ab initio*, in proper compliance with the prescripts of the provisions and the requirements of just administrative action'.

[3] SANRAL was ordered to pay 70 per cent of the City's costs, including the costs of three counsel. The court below ordered SANRAL to pay, in full, the costs incurred by the City in respect of the qualifying fees of specified expert witnesses. For present purposes, it is not necessary to consider the other incidental costs orders.

[4] With the leave of the court below, SANRAL appeals against the following: (a) the decision to grant the City an extension of the 180 day time period, prescribed by s 7 of PAJA, (b) the decision on the merits of the review application; (c) the refusal to admit further supplementary affidavits; and (d) the costs order, on the ground that the parties are all state entities and that in those circumstances a costs order should not have been made.

[5] The City, on the other hand, with the leave of the court below, cross-appeals against the refusal by that court to make any order in respect of the validity of a round-robin resolution, adopted in 2014 by the board of SANRAL, as well as against its refusal of an interdict sought by it, to preclude SANRAL from entering into an agreement, the envisaged particulars of which will be dealt with in due course. There is also a conditional cross-appeal by the City against the court a quo's refusal to admit further affidavits by members of SANRAL's board, both in respect of a purported earlier decision and in relation to the 2014 resolution, the application for leave to appeal in relation thereto having been referred for oral argument by this court.

'by agreement between the parties or, failing such agreement, by a court or tribunal on application by the person or administrator concerned'. Section 9(2) of PAJA reads as follows:
'The court . . . may grant an application in terms of subsection (1) where the interests of justice so require.'

[6] The present Transport Minister, unlike her predecessor, who opposed the City's application in the court below, does not oppose the appeal. The detailed background to the appeal is set out later. The court below found that the Transport Minister had failed to follow statutory prescripts. Taking that into account, and considering that in terms of the Act SANRAL is statutorily enjoined to interact with the Transport Minister, to follow government policy in relation to national roads,[3] and compelled to report annually to the Transport Minister about its business operations, projects, finances, transactions and activities, we are perplexed by the apparent failure by SANRAL and the Transport Minister to make common cause, one way or the other.

[7] It is necessary to state, right at the outset, that this case is not about the power of the legislative and executive arms of government to formulate policy, fund state projects and allocate state resources. It is eminently within their power and prerogative to formulate and implement policy on how to embark on, and finance, public projects. It is no different when decisions are to be made concerning how national roads ought to be constructed and financed. Such issues inevitably call for policy-laden and polycentric decision-making. The Constitutional Court, in *National Treasury & others v Opposition to Urban Tolling Alliance & others* [2012] ZACC 18; 2012 (6) SA 223 (CC) (*OUTA*), in dealing with the legality of the tolling of national roads, reiterated the importance of courts recognising the rightful and exclusive terrain of the executive or legislative branches of government.[4] The Constitutional Court has repeatedly reminded us that the doctrine of the separation of powers must be honoured.

[8] However, in *OUTA*, the Constitutional Court was equally clear that an organ of state is not necessarily immunised from judicial review on account of that doctrine. It repeated what we now accept as elementary, namely, that the exercise of all public

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[3] Section 39(3) provides:
'The Agency must determine its business and financial plan and strategic plan and the standards and criteria for road design and construction and for road safety within the framework of the national roads policy as determined by the Government and published in terms of subsection (1).'
See also *National Treasury & others v Opposition to Urban Tolling Alliance & others* [2012] ZACC 18; 2012 (6) SA 223 (CC) para 2.

[4] Paragraphs 65 – 68 and 94 of the concurring judgment by Froneman J.

power is subject to constitutional control.[5] The principle of legality is therefore at the heart of this appeal. The central question in this case is whether SANRAL and the Transport Minister, in arriving at the decisions referred to at the beginning of this judgment, complied with statutory prescripts. Because of a considerable lapse of time between the relevant decisions being made and the application for review being brought, the question arises whether the delay ought to be judicially condoned. That question, as will be demonstrated, is inextricably connected to the nature and consequence of the decision as well as with the degree, if any, of non-compliance with statutory prescripts.

[9] Before turning to the interpretation and application of the pertinent statutory provisions and considering whether the delay in the launching of the review application was rightly condoned, it is necessary to set out in some detail the background culminating in the present appeal. The background that follows includes relevant timelines, commencing with the conceptualisation of the Project and all the processes leading up to the launching of the review application in the court below as well as the reasoning, conclusions and orders of that court.

The unsolicited bid

[10] More than 18 years ago, during March 1998, a consortium comprising Basil Read (SA), Concor (SA), Group Five (SA) and Bouygues Travaux Publics SA (France) (the Consortium)[6] submitted an unsolicited bid to SANRAL 'to develop a proposal to upgrade, construct, maintain, operate and toll sections of the N1 and N2 national routes in the Western Cape'.

[11] SANRAL, in dealing with the unsolicited bid, followed its own policy directives. The process for the submission of the bid leading up to the consortium being awarded 'scheme developer' status in April 2000, took slightly more than two years.

The environmental authorisation process – a brief overview

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[5] Paragraph 64.

[6] It must be noted that the consortium which initially submitted the unsolicited bid differs slightly from the Protea Parkways Consortium which appeared as the sixth respondent in the court below. In particular, it seems that Concor (SA) was no longer a member by that stage. However, nothing turns on this.

[12] On 3 May 2000, at a time when the Environment Conservation Act 73 of 1989 (ECA), regulated listed activities, including the building of highways, SANRAL and the Consortium applied to the Department of Environmental Affairs and Tourism (DEAT) for environmental authorisation for the Project.[7] Section 22(2) of the ECA states that such authorisation shall only be issued after consideration of reports concerning the impact of the proposed activity. The initial scheme development phase commenced as a partnership between SANRAL and the Consortium. The Consortium later withdrew and SANRAL remained as the sole applicant for authorisation.[8]

[13] SANRAL procured an environmental impact study and during May and August 2000 there was interaction with the public, followed by comments from interested parties. The City voiced concerns about the impact of the Project on the metropolitan, spatial, transportation, environmental, economic and social development aspects, especially as it considered the absence of a framework for envisaged toll charges to be problematic.

[14] During the environmental impact assessment (EIA) process only the biophysical impacts of the Project were considered and the fee structures and socio-economic aspects flowing from tolling were left to be dealt with by the Transport Minister in a subsequent phase, dealt with later in this judgment. The DEAT and the then Minister of Environmental Affairs and Tourism, the predecessor of the Minister of Water and Environmental Affairs, the third respondent in the court below, took the view that there were no toll tariffs available on which to base the assessment of economic impacts and that they were assessed on a range of possible tariffs from a low to a high toll with a preferred toll being assumed to be intermediate. The DEAT apparently accepted that because of SANRAL's tender requirements, specific recommendations regarding frequent user discounts could not be provided as part of

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[7] Section 21(1) provides:
'The [Environment] Minister may by notice in the *Gazette* identify those activities which in his opinion may have a substantial detrimental effect on the environment, whether in general or in respect of certain areas.'
Once such an activity has been identified, it is prohibited except where the Environment Minister has given written authorisation in terms of s 22.

[8] The withdrawal of the Consortium was a practical measure to obviate difficulties that might ensue in the event of the later withdrawal by the Consortium from the Project if the subsequent tender was awarded to someone else.

the EIA study. The City adopted the attitude then, as it did later in the court below, that a number of poor communities would be captive to the Project and would have no alternative but to use the toll road. On 21 October 2002 the City sent a letter to the DEAT stating that it believed that the failure to consider the socio-economic impacts of tolling was a fatal flaw in the EIA process.

[15] The final Environmental Impact Assessment Report (EIAR) was submitted to the DEAT for approval on 22 December 2002. On 30 September 2003 environmental authorisation for the construction and upgrading of the highways was granted. The authorisation was valid for a period of two years. On 30 October 2003 the City Manager lodged an appeal to the Environment Minister against that decision. Almost two years later, on 20 October 2005, the Environment Minister dismissed the City's appeal.

[16] In summary, the City's primary objections to the environmental authorisation process were set out in the following two paragraphs of its founding affidavit in the court below:

'The approach adopted by both the DDG and the Environmental Minister resulted in the decisions taken by them, and the conditions of approval, overlooking the impact of the activities which they authorised on poor and disadvantaged communities. The City's submissions should have been taken into account by the decision-makers as part of the EIA process. They clearly were not.

It is also apparent that the decision-makers were brought under the erroneous impression that the Project would not divert large volumes of traffic to the surrounding provincial and City road networks, and that the impact on City roads would be insignificant. In this regard I refer to the report of John Spotten which shows this to be wrong. A copy of his report is attached to his affidavit filed herewith.'

The intent to toll process[9]

[17] More than eight years ago, on 25 March 2008,[10] following on the environmental authorisation, SANRAL informed the City of its intention to toll the highways. The City was provided with an opportunity to comment within 60 days. On

[9] The 'intent to toll process' was the expression adopted by all the parties to describe the process provided for in terms of s 27(4) of the Act. See *Cape Town City v SANRAL & others* 2015 (6) SA 535 (WCC) para 38 fn 35.

[10] After the bid was submitted to SANRAL. See para 10 above.

28 March 2008, SANRAL published a notice of intent in the *Government Gazette* in relation to the Project.[11]

[18] During May 2008 the Western Cape Provincial Transport Minister[12] objected to the proposed declaration of the toll roads, as did the Cape Winelands District Municipality. The latter's objection was based on its view that local economic growth would be negatively affected and that alternative routes already congested would become even more over-utilised by diverted traffic.

[19] During May and June 2008 there was an exchange of correspondence between the City and SANRAL. The City indicated that it was against the imposition of tolls and that in its view the most efficient means of collecting user charges would be in the form of a fuel levy or a 'shadow toll'. The City suggested that within Cape Town, route-specific tolling should be used. SANRAL's response was that the City ought to have invited it to discuss the role of toll roads as an instrument for the delivery of road infrastructure, more particularly, in relation to the roads under discussion. It took the view that this would have led to a better understanding on the part of the City of the need for and importance of toll roads.

[20] On 2 September 2008 SANRAL submitted a report on the Project to the Transport Minister and provided comments and recommendations. On the same day, the Transport Minister approved SANRAL's proposal that the highways be declared toll roads.

[21] On 15 September 2008 SANRAL published in the *Government Gazette* a declaration of the highways as toll roads.[13] The notice reads as follows:

'SOUTH AFRICAN NATIONAL ROADS AGENCY LIMITED

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[11] Proposed N1-N2 Winelands Toll Highway: National Road N1, Belville (R300 Interchange) to Sandhills and National Road N2, Swartklip (R300 Interchange) to Bot River: Notice of the Intent to Declare Portions of the National Roads as Continuous Toll Roads, GN 348, *GG* 30911, 28 March 2008.

[12] Technically, this title is incorrect. The Constitution reserves the title 'Minister' for national government office bearers. This official is therefore more accurately referred to as a Member of the Executive Council (or MEC). Nevertheless, for consistency, the titles used by the parties will be used in this judgment.

[13] Declaration of N1-N2 Winelands Toll Highway: National Road N1, Bellville (R300 Interchange) to Sandhills and National Road N2, Swartklip (R300 Interchange) to Bot River as Toll Roads, GN 978, *GG* 31422, 15 September 2008.

DECLARATION OF N1-N2 WINELANDS TOLL HIGHWAY: NATIONAL ROAD N1, BELLVILLE (R300 INTERCHANGE) TO SANDHILLS AND NATIONAL ROAD N2, SWARTKLIP (R300 INTERCHANGE) TO BOT RIVER AS TOLL ROADS

In terms of Section 27(1)(a)(i) of the South African National Roads Agency Limited and National Roads Act (Act No. 7 of 1998), the Agency hereby declares:

(a) Portions of existing National Road N1: Section 1 and Section 3 as well as the whole of Section 2 of the national road known as National Road 1 Section 1, Section 2 and Section 3, from the Old Oak Interchange (Section 1, km 18.69) up to a point 810 meters to the east of the Sandhills intersection (Section 3, km 20.54), as declared as a National Road in terms of Government Notice 319 of 25 March 2008 excluding the Huguenot Toll Road that is already declared a Toll Road under Government Notice 2877 of 31 December 1987; and

(b) Portions of existing National Road N2 . . . as Toll Roads.'

Events subsequent to the intent to toll process

[22] No further concrete steps were taken by SANRAL in respect of the Project until 16 March 2010, when it issued an invitation for a tender for the construction and operation of the toll roads. It is common cause that SANRAL received tenders from three bidders.

[23] On 19 April 2011, the City wrote to SANRAL, reiterating its aforementioned stance and its opposition to the tolling of the roads. It urged SANRAL to engage with it 'in order to find a mutually beneficial resolution'.

[24] On 21 April 2011, SANRAL selected two of the bidders to proceed to a 'Best and Final Offer' stage, at which they were called upon to present their final offer for consideration. SANRAL indicated that the preferred bidder would be selected and that it would negotiate and finalise an agreement with that bidder. During May and July 2011, the impasse between the City and SANRAL continued despite an exchange of correspondence. The respective attitudes became even further entrenched.

[25] It is common cause that in a letter dated 18 July 2011, the City declared a formal intergovernmental dispute with SANRAL in terms of s 41(1) of the Intergovernmental Relations Framework Act 13 of 2005 (IRFA).

[26] During September 2011, SANRAL appointed the Consortium as the preferred bidder. Negotiations of the terms and conditions of the concession contract between SANRAL and the preferred bidder, as well as a 'debt funding competition' to determine the pricing of a loan, were still to take place. During 2011 there were reports in the media that the Minister of Transport had placed a moratorium on all further road project processes relating to the tolling of national roads, including the Project.

[27] The IRFA process did not result in a resolution of the dispute. On 16 March 2012, the Facilitator of that process submitted his report in which he stated that the IRFA process had come to an end.

[28] At the end of March 2012, the City launched an application to review the decisions set out above and sought an order in the following terms:

'1. The following decision are reviewed and set aside –

1.1 The decision of the Acting Deputy Director-General: Environmental Quality and Protection of the then Department of Environmental Affairs and Tourism in terms of section 22 of the Environment Conservation Act 73 of 1989 ("the ECA") on 30 September 2003 ("the 2003 environmental authorisation") to grant an environmental authorisation for the N1-N2 Winelands Toll Highway Project ("the Project");

1.2 The decision of the [Environment Minister] in terms of section 35 of the ECA on 10 October 2005 to dismiss the appeals against the grant of the environmental authorisation and to grant environmental authorisation for the roads and associated infrastructure to be constructed as described in the 2003 environmental authorisation;

1.3 The decision of the [Environment Minister] in terms of section 22(3) of the ECA on 28 February 2008 to grant an environmental authorisation for the Project read together with the revised environmental authorisation and record of decision dated 7 April 2008 issued under cover of a letter dated 9 April 2008;

1.4 The decision of the second respondent ("the Transport Minister") in terms of section 27 of the South African National Roads Agency Limited and National Roads Act 7 of 1998 ("the SANRAL Act") on 2 September 2008 to approve the declaration of

specified portions of the N1 N2 Winelands Highways ("the Highways") as toll roads for purposes of the SANRAL Act;

1.5 The purported decision of the chief executive officer of [SANRAL], alternatively [SANRAL], to declare the Highways as toll roads in terms of section 27 of the SANRAL Act, together with the publication of the purported declaration in Government Notice 978, *Government Gazette* 31422, 15 September 2008 ("the Declaration").'

It is not necessary to deal with the alternative relief sought by the City.

[29] In its answering affidavit in the court below, SANRAL estimated that the cost of implementing the Project, since the appointment of a scheme developer in 2000, excluding the construction work, has been approximately R136 million. The sentence preceding the estimate reads as follows:

'The lengthy and extensive process of obtaining the necessary authorisations, the consultations which took place, the appeal procedure and ultimately the call for tenders, their submission and evaluation all come to considerable cost, not only to SANRAL and the decision makers concerned but also to the tenderers.'

[30] For completeness it is necessary to record that the City, in launching its application, cited ten respondents, which included in addition to those already mentioned, the Minister of Transport and Public Works, Western Cape Province; the Minister of Finance, Economic Development and Tourism, Western Cape Province; two Consortia; a 'Crisis Committee' and two affected municipalities. The contestation in the court below was limited to the City on the one side, and SANRAL and the Transport Minister on the other.

The court below

[31] In dealing with the challenges brought by the City against the environmental authorisation granted following SANRAL's proposal to toll, as well as the Transport Minister's approval thereof, the court below took the view that it was dealing with administrative action that fell squarely within the ambit of PAJA.[14] It dealt with the decisions in relation to the environmental authorisation and the intent to toll process compartmentally. In relation to the environmental authorisation, Binns-Ward and

[14] See inter alia para 61 of the judgment.

Boqwana JJ took into account that the then Environmental Minister, Mr Marthinus van Schalkwyk, had announced his decision in respect of the appeals brought by the City during October 2005. The judges noted that the Environment Minister had proceeded on the premise that tolling and the structuring of toll fees were matters that were beyond his remit and that the socio-economic impact of the Project had to be considered during the intent to toll process. [15]

[32] Binns-Ward and Boqwana JJ held that where an intended activity or development of a nature that might significantly affect the environment involves authorisation from more than one government authority, the principles of integrated environmental management provided for by NEMA should have applied and that would necessarily have meant the involvement of SANRAL, the City and the Transport Minister, on that aspect in the intent to toll process.[16] The court took the view that the potential socio-economic impact of tolling could be dealt with during that phase, and that the failure to deal with it in the EIA process was not a fatal flaw.[17] This led it to conclude that the application for the review of the environmental authorisation could not succeed.

[33] However, taking extra care, the court went on to state that even if it was wrong in that conclusion, the inordinate delay in applying for a review of the environmental authorisation weighed against holding that it was in the interest of justice to extend the 180 day period provided for in PAJA, and for that reason too the review application had to fail. In reaching that conclusion, it was persuaded by the factors set out hereafter.[18] Section 36 of the ECA required promptitude. In terms thereof an aggrieved person is entitled to approach the high court with an application for a review of a decision within 30 days of being furnished with the reasons therefor. The City had failed to resort to the provisions of the IRFA to resolve the dispute between it and the environmental authority. Even though there was a lengthy period of three years between the date of the record of decision in relation to the environmental authorisation and the final determination of the appeal, followed by a further period of over two years before a revised record of decision was issued, there

[15] Paragraph 41 of the judgment.
[16] Paragraph 56 of the judgment.
[17] Paragraph 54 of the judgment.
[18] See paras 58 - 74 of the judgment.

was, nevertheless, a further inordinate delay from 2008 onwards until the review application was launched in March 2012. The court below held that one could deduce from the history of the matter that the City had acquiesced in the idea that socio-economic impacts would be considered in the subsequent intent to toll process. It did not think it necessary to resolve the dispute as to whether the environmental authorisations, which are time bound, were still effective.[19] For the reasons set out above the relief sought by the City in paras 1.1 – 1.3 of its Notice of Motion was refused.

[34] The court did not consider that its reasoning and conclusions, referred to in the preceding paragraphs, precluded it from considering the legality of the relevant parts of the intent to toll process. The question of delay in relation to the City's challenge on that aspect would, of course, have to be brought into consideration, but it left the question of whether the delay ought to be condoned for last, preferring to deal first, with the merits of the City's challenge to the intent to toll process. Turning to the legality of the impugned decisions in relation to the intent to toll process, the court below had regard to s 27 of the Act,[20] in terms of which the decisions were purportedly made. The relevant parts of these provisions are either reproduced, or summarised hereunder. Section 27(1)*(a)* provides:

'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.'

[35] Section 27(1)*(b)* provides that the amount to be collected as a toll has to be determined and made known in terms of s 27(3) of the Act. Section 27(1)*(c)* makes provision for the grant of exemptions from the payment of a toll on a particular road in respect of categories of vehicles determined by SANRAL and specified in a notice in terms of s 27(2). It also provides for exemptions to a category of users of the road,

[19] Paragraph 73 of the judgment.
[20] See paras 76 – 77 of the judgment.

irrespective of the class of vehicle driven or used. There are other provisions dealing with restrictions and suspensions of tolls which, for present purposes, it is not necessary to consider.

[36] Section 27(3) states that the amount of the toll that may be levied under the preceding subsection, any rebate thereon and any increase or reduction thereof is determined by the Transport Minister, on the recommendation of SANRAL and may differ in respect of different roads, vehicles or categories of vehicles or in relation to time periods and categories of road users. The Transport Minister on the recommendation of SANRAL also determines the means of payment, and the date from which the toll is payable. It is further specially provided that the amount of toll has to be made known by the head of the Department of Transport by notice in the *Gazette*.

[37] Section 27(4) is of importance and sequentially applies before the approval process in s 27(1) can be triggered. Its provisions read as follows:

'(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.'

[38] Section 39 of the Act, entitled 'National Roads Policy' was also considered by the court below.[21] Section 39(1) provides that the Government's policy with regard to national roads must be made known by the Transport Minister by notice in the *Gazette*, setting out the goals that the Government wanted to achieve and the policy objectives to be followed to attain those goals. Significantly, s 39(2) provides that whenever any proposals relevant to determining or amending that policy are to be considered and decided by Government, the Minister by notice in the *Gazette*, must make known those proposals and, in that notice, invite any interested persons and the public to comment and make representations in regard thereto. Section 39(3) states that SANRAL 'must determine its business and financial plan and strategic plan and the standards and criteria for road design and construction and for road safety within the framework of the national roads policy as determined by Government'.

[39] Despite the passage of almost two decades since the Act came into operation, the Transport Minister had not published Government's policy in relation to national roads.[22] SANRAL and the Minister relied on the 1996 *White Paper on National Transport Policy* and the Department of Transport's *National Land Transport Strategic Framework*,[23] published in terms of s 29(1) of the National Land

[21] See paras 79 – 80 of the judgment.
[22] Paragraph 79 of the judgment.
[23] National Land Transport Strategic Framework, GN 1468 of 2006, *GG* 29307, 27 October 2006.

Transport Transition Act 22 of 2000, as documents on which national roads policy was based. The import is that a national road network may include toll roads where they are financially and socially viable and where tolls can contribute significantly to funding the roads.

[40] A memorandum was submitted to the SANRAL board in 2004 by its Chief Executive Officer in order to inform it of particular issues and concerns regarding the Project.[24] That memorandum estimated the value of the initial construction works to be in the order of R1,9 billion, which excluded the work to be done in respect of commissioning the second bore of the Huguenot Tunnel.[25] The memorandum to the Board included a reference to the City of Cape Town's opposition to tolling and its preference for alternative funding mechanisms. The memorandum contained a recommendation that the Project should proceed with the completion of tender documents and the acquisition of the necessary land. The memorandum ended with the following sentence:

'Further reports will be submitted regarding the projects and the Intent to Toll process as and when required.'

However, there was no evidence of any further written reports on the Project being submitted to the Board between 2004 and the date of the declaration of the roads as toll roads in 2008.[26] The minutes of the Board meeting held on 20 January 2004, reflect that the Board, having had sight of the memorandum by the Chief Executive Officer, merely noted the 'contents of [the] report and advices on the way forward'.

[41] The court below was alive to the fact that no documentation had been produced by SANRAL or the Transport Minister to show that the Board had formally considered and settled on a proposal to be submitted to the Transport Minister for approval in terms of s 27(1)*(a)*(i) of the Act.[27]

[42] Binns-Ward and Boqwana JJ observed that the period between 2004 and 2005, insofar as the intent to toll process was concerned, overlapped with the ECA

[24] Paragraphs 86 – 90 of the judgment.
[25] It must be noted that this estimate has increased in the intervening years. The City in its founding affidavit suggests that 'more recent figures' discussed in the media put the cost at closer to R10 billion.
[26] Paragraph 89 of the judgment.
[27] Paragraph 92 of the judgment.

processes referred to earlier.[28] There were extensive and protracted exchanges between the City and SANRAL, with each asserting their entrenched positions in relation to the Project. There was a dispute about whether SANRAL had indeed produced a report concerning socio-economic impact and whether that report was more limited than SANRAL suggested. In 2008 already the City had threatened to launch a legal challenge against the environmental decisions and, in the event that SANRAL persisted, against the decision to have the roads in question declared toll roads. The court below also took note of the fact that the application to the Transport Minister, in terms of s 27 of the Act, comprised 1560 pages of documentation, including a 63 page report by SANRAL together with copies of comments and objections by interested parties.[29] The court below observed that the Transport Minister 'signified his unqualified approval of SANRAL's proposal to declare the roads as toll roads on the same day that he received the application and voluminous supporting documents'.[30] This approval occurred without the assistance of a departmental memorandum. However, Binns-Ward and Boqwana JJ recorded the acceptance by the City that it could not go behind the Transport Minister's averments under oath that he had been familiar with the Project by reason of his history of previous interaction with SANRAL on the subject and that he had therefore been able to get through the papers in such a short time.[31]

[43] Despite the voluminous documentation and the extensive allegations and counter-assertions, the court below took the view that the City's challenge to the Transport Minister's approval of SANRAL's proposal to toll the roads in question, fell within a narrow compass. Binns-Ward and Boqwana JJ stated the following (para 135):

'For the purpose of deciding whether there is merit in the City's challenge to the Minister's decision it is necessary only to consider the question whether the Minister misconceived his powers and functions in terms of s 27(1) read with s 27(4).'

[44] The court considered the material parts of the answering affidavit on behalf of the Transport Minister, from which it was clear that he took the view that the

[28] Paragraph 93 of the judgment.
[29] Paragraph 103 of the judgment.
[30] Paragraph 109 of the judgment.
[31] Ibid.

declaration of roads as toll roads was primarily the responsibility of SANRAL.[32] It was postulated on behalf of the Transport Minister that he only had an oversight role. The general suggestion in the answering affidavit appeared to be that the Transport Minister merely had to have regard to whether the provisions of ss 27(4)*(a)* – *(d)* had been complied with and, if he concludes that there had been compliance with these requirements, he could then, without more, move on to declare the roads toll roads. Apart from ensuring compliance with those requirements it was said that the Minister was not entitled to exercise any independent judgment on whether the proposal was desirable. That was a decision that was for SANRAL to make.

[45] In oral argument before the court below, counsel on behalf of the Transport Minister, even though accepting that the Transport Minister was not obliged to approve SANRAL's recommendation merely because the requirements of s 27(4)*(a)* – *(d)* had been met, nevertheless submitted that in terms of s 27(1) his role was restricted to that of assessing the proposal to see if it was in conformity with government policy.[33]

[46] Binns-Ward and Boqwana JJ rejected the submission that s 27(4) was a provision in terms of which the Transport Minister merely had an oversight role. They said the following (paras 139 – 140):

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

140. The facts of this case and, indeed, also those documented in the judgments in the OUTA litigation concerning the urban toll roads in Gauteng, illustrate that the construction and upgrading of national roads for use as toll roads can have significant fiscal implications, even, it would seem, when large multi-billion rand projects are involved, to the extent of potential impact on the country's credit rating. Furthermore, certain of the City's concerns in the current matter about the potential effect of tolling on the road system for which it is

[32] Paragraph 132 of the judgment.
[33] See para 133 of the judgment.

responsible – which echo those which moved the Johannesburg City Council to litigate in the *South African Roads Board* case supra – illustrate that the declaration of roads as toll roads can also have adverse effects on the constitutional ideal of a relationship of comity between the national government and the other two spheres of government. That tolling urban roads can have political, as well as social and economic, implications is also manifest. It is thus unsurprising to find provision made in the SANRAL Act for the responsible member of the Cabinet to maintain a measure of direct control over tolling, at least to the extent of having the final say over any proposals by SANRAL in that regard. These are objective considerations that, irrespective of the effect of the contextual indicators in the other provisions of the statute – to which we shall refer presently – make the respondents' construction of the Minister's powers and functions in terms of s 27 unpersuasive. It is unlikely that Parliament would have restricted the role it unambiguously decided to give the Minister to consider approving such proposals to the limited administrative, indeed almost clerical, function for which the respondents (albeit in the case of the [Environment Minister], somewhat equivocally) contended.'

[47] In arriving at those conclusions, the court below considered itself bolstered by what it described as a 'contextual' assessment of the nature of the Transport Minister's authority over SANRAL, within the framework of the Act.[34] It is the Transport Minister in whom the State's rights as the only member and shareholder in SANRAL are invested. The following part of paragraph 142 of the judgment is relevant:

'As mentioned, SANRAL is required to fulfil its functions within the framework of government policy and in accordance with its business and financial plan. The Minister is responsible for making Government policy known and is the functionary responsible for receiving any representations on the determination or amendment of such policy. SANRAL's business and financial plans, as well as its strategic plans, require approval by the Minister annually. The Agency is only able to use its funds in accordance with a business and financial plan approved by the Minister, and it may only raise loans from the State through the Minister, or from any other source with the written permission of the Minister. The Minister, on the recommendation of the Agency, determines the amount of toll that SANRAL or a concessionaire may levy and collect for the driving or use of a vehicle on the toll road. This is not an exhaustive analysis of the Minister's role under the Act, but it is sufficient to illustrate the extent to which, for reasons which to us appear obvious, the scheme of the statute provides for a significant measure of operational supervision and control of the Agency by

[34] Paragraph 142 of the judgment.

the Minister. The requirement which the language of s 27(1) read with s 27(4) appears to impose that SANRAL may declare a road as a toll road only after the Minister's approval obtained after a substantive consideration of the proposal is wholly conformable with the scheme of the Act.' (Footnotes omitted.)

[48] As to the factors that the Transport Minister might have regard to in arriving at a decision whether to approve the proposal by SANRAL, the judgment continues (para 144):

'The Act is not prescriptive of the considerations to which the Minister will have regard in considering the merits of the proposal. In the context of the other provisions to which we have referred it might be expected, however, that the Minister would, amongst other matters, consider (i) how the proposal fitted within the framework of government policy, which, by reason of its current formulation, would include assessing whether the proposed tolling was socially and financially viable and (ii) the conformity of the proposal to the Agency's approved business and financial plan, including the indications the statute requires to be given therein concerning the cost of the project, the manner in which it is proposed to finance it and the planned performance indicators applicable to it. (. . . A socio-economic assessment is necessary to provide the information that SANRAL and the Minister would need to be able to conscientiously assess how the proposals conformed to government policy that tolling be used to fund roads when it is socially and financially viable to do so. A traffic impact assessment is also an integrally necessary component of any such assessment for a number of quite obvious reasons: its results are necessary to inform the proper assessment of the financial viability of the proposals and their socio-economic impacts . . .)' (Footnote omitted.)

[49] The court below was absolutely certain that the Transport Minister's decision to approve SANRAL's proposal qualified as administrative action within the meaning of that expression in PAJA.[35] It arrived at this conclusion, first by reasoning that the Transport Minister, in considering SANRAL's proposal, was exercising a statutory function and, second, to the extent that the exercise of his discretionary powers included 'overtones of policy' it would be in the 'narrower sense'.[36] Having regard to the definition of administrative action in s 1 of PAJA,[37] the court below took the view

[35] Paragraph 148 of the judgment.
[36] Ibid.
[37] The relevant part of s 1 of PAJA reads:
'"**administrative action"** means any decision taken, or any failure to take a decision, by –
(a) An organ of state, when –

that in approving SANRAL's proposal, the Transport Minister's decision had a direct external effect in that SANRAL could proceed to declare the roads as toll roads and effectively conclude a contract of the nature contemplated by s 28 of the Act,[38] the material provisions of which will be dealt with in due course.

[50] Having arrived at the conclusion that the Transport Minister did not act as required by s 27(1) of the Act, the court below stated, subject to the question of condonation for the delay in bringing the application, that if the application for review was to be entertained, it would be upheld.[39] Binns-Ward and Boqwana JJ thought it meet 'if only for the future guidance of the parties, to also express [themselves] on the City's allegations about the shortcomings in the public participation process in relation to the Minister's decision-making in terms of s 27(4) of the SANRAL Act'.[40] The court rejected the City's contention that the Transport Minister's decision whether to approve SANRAL's proposal, had to be preceded by a discrete process of public consultation, over and above that which SANRAL had to undertake in terms of s 27(4) of the Act.[41] However, the learned judges held that a fair procedural process in the circumstances would have been for SANRAL to have furnished a copy of its report to the Transport Minister and to have afforded persons who had responded to its notices for comment to make further submissions to the Transport Minister in reaction to the report if so advised.[42] That report had, in fact, not been supplied to interested parties.

(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 –

(aa) the executive powers or functions of the National Executive, including the powers or functions referred to in sections 79(1) and (4), 84(2)*(a)*, *(b)*, *(c)*, *(d)*, *(f)*, (g), (h), (i) and (k), 85(2)(b), (c), (d) and (e), 91(2), (3), (4) and (5), 92(3), 93, 97, 98, 99 and 100 of the Constitution;

(bb) the executive powers or functions of the Provincial Executive, including the powers or functions referred to in sections 121(1) and (2), 125(2)(d), (e) and (f), 126, 127(2), 132(2), 133(3)(b), 137, 138, 139 and 145(1) of the Constitution;

(cc) . . .'

[38] Paragraph 149 of the judgment.
[39] Paragraph 152 of the judgment.
[40] Ibid.
[41] Paragraph 153 of the judgment.
[42] Paragraph 154 of the judgment.

[51] Having dealt with the City's challenge to the Transport Minister's decision in terms of s 27(1), the court proceeded to consider the City's challenge to SANRAL's purported decision to seek the Transport Minister's approval to declare the roads toll roads, the main ground of objection being that the SANRAL board had not, in fact, resolved to apply to the Transport Minister for the approval of the proposal. Even though not thinking it strictly necessary to deal with that ground of attack, the court below nevertheless considered it appropriate to do so. [43]

[52] The court below had regard to the following part of the answering affidavit of Mr Nazir Alli, the Chief Executive Officer of SANRAL:

'Insofar as the decision of the Board is concerned I confirm that before SANRAL submitted its application to the Minister of Transport requesting the approval contemplated by section 27 of SANRAL Act, the Board took a decision (i) to apply for the Minister of Transport's approval and (ii) that in the event of the Minister of Transport providing such approval, to declare the national road concerned a toll road. At the time the Board was properly apprised of the Project, including the intent to toll process and the application to the Minister of Transport, and the Board had regard to all relevant consideration in this regard. Following the Minister of Transport's approval pursuant to the instructions of the Board I accordingly arranged for the publication of Government Notice 978. SANRAL has been unable to find documents specifically recording this Board decision. Accordingly in order to prevent any uncertainty in this regard a resolution was passed by the Board in May 2014, a copy of which is attached . . . .'

[53] The court also took into account that in 2014 Mr Alli had submitted an explanatory memorandum to members of a newly constituted Board, seeking their signature to a round-robin resolution, directed at 'confirming' the declaration of the roads as toll roads and curing, so he thought, the absence of a documented record of the decision to seek the Transport Minister's approval.[44] The court below went on to explore Mr Alli's three-and-a-half page memorandum. It took into account Mr Alli's averments in the memorandum that 'despite the absence of such a resolution, the board was kept fully informed of the various steps undertaken in connection with the Project'. The learned judges noted that the memorandum contained a potted history

[43] Paragraph 157 of the judgment.
[44] Paragraph 160 of the judgment.

of the Project.[45] The court below recorded that the last indication of any direct consideration of the Project by the Board was 20 January 2004.[46] Binns-Ward & Boqwana JJ held that the gravamen of Mr Alli's evidence, considered contextually, was that a decision by the Board was in fact made, but that a documentary record of the minutes could not be found.[47]

[54] Binns-Ward and Boqwana JJ considered it extraordinary for there to be no minute of such an important decision involving a multi-billion rand project.[48] In para 171 of the judgment the following appears:

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

[55] The court below concluded that, if it were to condone the City's delay, the Board's failure to take a decision with due regard to all the relevant facts would be yet another reason to set aside the declaration of the toll road.[49]

[56] The court also dealt with an eleventh hour application by SANRAL to have admitted, a number of supplementary answering affidavits by persons who were members of the Board at the time that the proposal was submitted to the Transport Minister, and by others who were directors in 2014, when the draft round-robin resolution to which Mr Alli's explanatory memorandum was attached was circulated.[50] The court refused to admit the affidavits. It did so, first, on the basis that notice was given of the application on 17 July 2015, less than one month before the

[45] Paragraph 162 of the judgment.
[46] Ibid.
[47] Paragraph 164 of the judgment.
[48] Paragraph 169 of the judgment.
[49] Paragraph 177 of the judgment.
[50] Paragraphs 178 – 189 of the judgment.

hearing of the principal case was due to commence.[51] It was envisaged that application would be made on the commencement of proceedings on 11 August 2015. Second, it held that the supplementary affidavits added nothing of significance to the evidence already before it.[52] Two of the affidavits, those deposed to by Messrs Donaldson and Macozoma, related to the issue of whether the Board had resolved to apply for the approval of the Transport Minister, the contents of which added nothing of factual substance to what had already been averred in paragraph 16 of SANRAL's principal answering affidavit deposed to by Mr Alli on 22 October 2014.

[57] The judgment went on to say the following about the affidavits of Donaldson and Macozoma (para 185):

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

The court took the view that the evidence in the affidavits by current Board members also added nothing of substance to the evidence already before the court.

[58] Having dealt with the issues set out above, the court below turned to the question of condonation and considered whether the interests of justice weighed in favour of the City. The factors that the court took into account are set out in paras 204 *et seq* of the judgment. The court thought it significant that the provisions of the Act had been ignored, or misapplied in a number of material respects. It said the following (para 205):

'The resultant breaches of the principle of legality are stark, especially when they are considered cumulatively. It is of special concern that the nature of the unlawful conduct that

[51] Paragraph 179 of the judgment.
[52] Paragraphs 185 and 189 of the judgment.

has been identified in these proceedings goes in material part to a failure to give proper effect to the right of public participation. That is something that is fundamental to the effective expression of everyone's right to administrative action that is lawful, reasonable and procedurally fair. It also a feature of the decision-making that puts it strikingly at odds with the founding values of accountability, responsiveness and openness, which are meant to underpin democratic government in this country and critically distinguish it from the authoritarian system that prevailed in the pre-Constitutional era.'

[59] Equally important, in the view of the court, was that the administration of the Act potentially affects a wide range of rights and interests of a broad section of the national community and that it was in the public interest that the Act be lawfully administered and implemented, in faithful compliance with constitutional values. The court below was astute not to overlook the prejudicial effect of the City's delay on SANRAL's interests.[53] It accepted that a considerable amount of money had been expended in the tender process. It took into account the prejudice that the Consortium might suffer if the Project was ended. It went on to conclude as follows (para 207):

'In our judgment, however, these considerations do not weigh heavily enough to displace the requirements of the interests of justice that we have identified. The fact that the determination of the challenge to the declaration of the roads as toll roads will require SANRAL and the Minister to repeat the process in terms of s 27(4) of the SANRAL in proper compliance with the requirements of those provisions if they wish to continue with the project does not mean that the tender process undertaken to date will necessarily be redundant. The time that would be involved in a fresh process in terms of s 27(4), if it were efficiently undertaken, would also not unduly delay the desirable construction and upgrading of the roads, if it were to be lawfully decided at the conclusion of such a process to proceed with the tolling project.'

[60] Penultimately, the court below turned to deal with the interdict sought by the City, prohibiting SANRAL from entering into a concession agreement based on a draft that formed part of the tender process. The City's concerns are set out below as contemplated in s 28(1)*(b)* of the SANRAL Act.[54]

[53] Paragraph 207 of the judgment.
[54] Paragraphs 230 – 273 of the judgment.

[61] Binns-Ward and Boqwana JJ had regard to the material provisions of s 28(1) of the Act which read as follows:

'(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.'

Section 28(2) provides that an authorised person will be entitled, subject to subsection (3) and (4), to levy and collect a toll on behalf of SANRAL or for its own account. Section 28(4) provides:

'(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.'

[62] It was the City's case that, even though SANRAL and the Consortium had not yet signed a concession contract, the scope for negotiating terms had been progressively reduced by the time the prepared tenderer was selected because of the manner in which the tender process was designed. The City contended that virtually all the provisions of the contemplated concession contract had been determined during the tender process.

[63] A major concern for the City was an envisaged reimbursement clause, triggered in the event that the tariffs determined by the Transport Minister in terms of s 27(3) of the Act were lower than the base toll tariffs or adjusted toll tariffs, provided for in the draft contract. In terms of the draft contract, so it was contended, SANRAL would have to pay the Consortium or any other concessionaire an amount sufficient to place it in the financial position it would have been in, but for the lower tariff determination. The City complained that the effect of the reimbursement clause, or its equivalent, would be to unlawfully fetter the discretion that SANRAL is required to exercise in determining toll tariffs in terms of s 27(3) of the Act. SANRAL's response

was that the base toll tariffs are still open for negotiation at its instance and it still has the option to withdraw from the Project, if the proposed tolls were found to be unaffordable. Furthermore, in terms of the Public Finance Management Act 1 of 1999 (the PFMA) the approvals of the Transport Minister and the Minister of Finance have to be obtained before the contract can be concluded. Simply put, SANRAL contended that the interdictory relief sought by the City was premature.

[64] The court below was unwilling to assume that the Transport Minister and SANRAL, in moving forward to make the contemplated statutory based decisions, would act unlawfully.[55]

[65] The court considered the contention on behalf of the City, that the draft concession contract did not in fact provide that it was subject to the consent of the Transport Minister and the Minister of Finance.[56] In this regard the City placed reliance on the resolutive conditions contained in the draft contract which did not include a provision relating to such consent. Of further concern to the City was a draft deed of suretyship, which provided for SANRAL to bind itself to lenders as surety and co-principal debtor for payment by the debtor to the concessionaires. Provision was made for the Transport Minister to sign the deed on behalf of SANRAL in concurrence with the Minister of Finance. The City was of the view that the provisions of the PFMA had no application and it did not contemplate that every time SANRAL entered into a contract it would have to be done in concurrence with the Transport Minister and the Minister of Finance. The court below took a contrary view. It stated that the endorsement of the reimbursement clause by the Minister of Finance would serve as an indication of acceptance by the National Treasury of the risk of reimbursement when the eventuality set out above materialised.[57] The court took the view that the recent experience in relation to *OUTA* would conduce to an especially critical scrutiny of the contract before it was endorsed by the Minister of Finance.[58]

[55] Paragraph 259 of the judgment.
[56] Paragraph 268 of the judgment.
[57] Paragraph 272 of the judgment.
[58] Ibid.

[66] For all the reasons set out above the City's application for interdictory relief was dismissed.

[67] Finally, the court dealt with the application by the City that the Board's 2014 decision be reviewed and set aside.[59] Accepting that the decision was not remotely statutorily compliant, the court below was not persuaded that the decision constituted administrative action and was unwilling to exercise the court's power of judicial review in relation thereto. It took the view that the City's concerns that SANRAL might take advantage of the failure to make such a declaration were misplaced. It said the following (para 274):

'It will be clear enough from the form of consequential relief to be granted upon the review and setting aside of the tolling decisions that if the roads are to be declared as toll roads, this may occur only after the provisions of s 27(4) have been complied with pursuant to a fresh process to be commenced *ab initio*. No order will be made in respect of the relief sought in terms of paragraph 3B of the notice of motion.'

Conclusions

[68] It has to be borne in mind that SANRAL's primary attack was against the decision of the court below condoning the unreasonable delay in bringing the application for review of the impugned decisions in relation to the intent to toll process. The attack against the merits of the decision was secondary. In the present case, considering that the critical challenge to the decision of the Board and the decisions of the Transport Minister is one of legality, the singular importance of PAJA is in relation to the 180 day time-bar period provided, for in s 7 and the power given to the reviewing court, in terms of s 9,[60] to extend that period.

[69] With reference to this court's judgment in O*pposition to Urban Tolling Alliance v South African National Roads Agency Limited* [2013] ZASCA 148; [2013] 4 All SA

[59] Paragraph 274 of the judgment.
[60] Section 9 of PAJA provides:
'(1) The period of –
(a) 90 days referred to in section 5 may be reduced; or
(b) 90 days or 180 days referred to in sections 5 and 7 may be extended for a fixed period,
by agreement between the parties or, failing such agreement, by a court or tribunal on application by the person or administrator concerned.
(2) The court or tribunal may grant an application in terms of subsection (1) where the interests of justice so require.'

639 (SCA) (*OUTA SCA*), it was submitted on behalf of SANRAL that sequentially the question of delay must be dealt with before the merits of a review can be entertained. Unless an extension is granted, so it was contended, a court is precluded from embarking upon the merits of a review application. It was contended by SANRAL that the delay of more than three years, from the date of the Transport Minister's approval of SANRAL's proposal to the date that the review application was launched, was unexplained, unreasonable and in the light of all the circumstances ought not to have been condoned. Insofar as the merits of the review were concerned, SANRAL's argument was uncomplicated. First, it was adamant that SANRAL's Board, after considering all relevant material, had in fact taken a decision to seek the Transport Minister's approval for its proposal. It insisted that the decision had been taken before the proposal was submitted to the Transport Minister. Second, it provided the following summary in written heads of argument in relation to the 'reviewability' of the Transport Minister's decision to approve its proposal:

> 'The Transport Minister considered the application for approval placed before him and verified that SANRAL had complied with the SANRAL Act. His actions are not reviewable.'

[70] A convenient starting point, in addressing SANRAL's contentions presented in the preceding paragraphs, is the certain and emphatic manner in which the court below categorised the Transport Minister's decisions, purportedly taken in terms of ss 27(4) and (1) of the Act, as 'administrative action', which was subject to judicial review in terms of the provisions of PAJA, including the 180 day time-bar provision referred to above.

[71] I am rather less sanguine concerning the nature of the Transport Minister's powers in making the decisions. In *Grey's Marine Hout Bay (Pty) Ltd & others v Minister of Public Works & others* [2005] ZASCA 43; 2005 (6) SA 313 (SCA), Nugent JA, stated that the question as to 'what' constitutes administrative action – the exercise of the administrative powers of the State – has always eluded complete definition.

[72] Having regard to the definition in PAJA, Nugent JA said the following (para 22):

'At the core of the definition of administrative action is the idea of action (a decision) "of an administrative nature" taken by a public body or functionary. Some pointers to what that encompasses are to be had from the various qualifications that surround the definition but it also falls to be construed consistently, wherever possible, with the meaning that has been attributed to administrative action as the terms is used in s 33 of the Constitution (from which PAJA originates) so as to avoid constitutional invalidity.' (Footnote omitted.)

The centrality of the decision having to be of 'an administrative nature' was endorsed by the Constitutional Court in *Minister of Defence and Military Veterans v Motau & others* [2014] ZACC 18; 2014 (5) SA 69 (CC) para 33.

[73] In *Grey's Marine*, this court held that whether particular conduct constituted administrative action depended primarily on the nature of the power rather than upon the identity of the person exercising such power.[61] In *President of the Republic of South Africa & others v South African Rugby Football Union & others* [1999] ZACC 11; 2000 (1) SA 1 (CC) (*SARFU*), the Constitutional Court succinctly put it thus (para 141):

'What matters is not so much the functionary as the function.'

In that case the Constitutional Court recognised that '[d]etermining whether an action should be characterised as the implementation of legislation or the formulation of policy may be difficult'.[62]

That court went on to say the following (para 143):

'It will, as we have said above, depend primarily upon the nature of the powers. A series of considerations may be relevant to deciding on which side of the line a particular action falls. The source of the power, though not necessarily decisive, is a relevant factor. So, too, is the nature of the power, its subject-matter, whether it involves the exercise of a public duty and how closely it is related on the one hand to policy matters, which are not administrative, and on the other to the implementation of legislation, which is. While the subject-matter of a power is not relevant to determine whether constitutional review is appropriate, it is relevant to determine whether the exercise of the power constitutes administrative action for the purposes of s 33. Difficult boundaries may have to be drawn in deciding what should and what should not be characterised as administrative action for the purposes of s 33. These will need to be drawn carefully in the light of the provisions of the Constitution and the overall constitutional purposes of an efficient, equitable and ethical public administration. This can best be done on a case by case basis.' (Footnotes omitted.)

[61] Paragraph 24.
[62] Paragraph 143.

[74] The Transport Minister is a member of the Executive, responsible for executing government policy and deciding, as a member of the Executive, whether to approve the tolling of specified national roads. The Transport Minister has to decide on categories of vehicles and classes of persons which, or who, should be subject to paying tolls and which, or who, should qualify for exemptions. In terms of s 27(3) the amount of the toll is ultimately decided upon by the Transport Minister. The Transport Minister, in scrutinising the application for the declaration of a toll road received from SANRAL, is exercising a control function as a member of the Executive over an organ of State which is statutorily and politically accountable to her. It can rightly be said that, in exercising his powers and performing her functions in terms of the Act the Transport Minister is developing and implementing national policy and/or co-ordinating the functions of state departments and administrations.[63] Such actions are excluded from review under PAJA.[64]

[75] In my view, it is thus not entirely clear that the Transport Minister in acting in terms of s 27, is performing actions of an administrative nature. What is clear, however, is that the Transport Minister is constrained to make decisions in accordance with statutory prescripts. As stated above, it is now accepted as elementary that the exercise of public power is subject to constitutional control and is clearly constrained by the principle of legality. A repository of power may not exercise any power or perform any function beyond that conferred upon it by law and must not misconstrue the nature and ambit of the power.[65]

[76] Turning to the nature of the Board's decisions, it is necessary, first, to have regard to the long title of the Act, which states that the Act was brought into being to make provision for SANRAL to 'manage and control the Republic's national road systems and take charge, amongst others, of the development, maintenance and

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[63] Section 85(2) of the Constitution sets out the executive authority of the Republic which is vested in the President together with other members of the Cabinet who exercise that authority by, inter alia:
(a) . . .
(b) developing and implementing national policy;
(c) co-ordinating the functions of state departments and administrations;
. . . .'

[64] See exclusion *(aa)* in the definition of 'administrative action' in PAJA.

[65] See eg *Fedsure Life Assurance Ltd & others v Greater Johannesburg Transitional Metropolitan Council & others* [1998] ZACC 17; 1999 (1) SA 374, paras 56 – 58 and *SARFU*, para 148.

rehabilitation of national roads within the framework of national government policy'.[66] This seems to indicate that when SANRAL exercises powers in terms of the Act it does engage in administrative action as contemplated in PAJA.

[77] The material parts of s 25(1) of the Act, which read as follows, appear to support that conclusion:

'(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, ...'

[78] Although my inclination, insofar as to whether the Minister and SANRAL's Board were engaged in administrative action, is the converse of that of the court below, I do not find it necessary to express a definitive conclusion on this question. Because the challenges to the Board's decision and the decisions of the Transport Minister in terms of s 27 of the Act are based on the principle of legality, it does not, for practical purposes, matter whether condonation for the delay in launching the application is approached in terms of the provisions of PAJA or otherwise. As will be demonstrated below, in both instances, ultimately the decision whether to condone the delay is based on whether the interests of justice so require.

[79] Before the advent of PAJA, it was recognised by our courts that an undue and unreasonable delay on the part of an aggrieved party in initiating review proceedings might cause prejudice to other parties to the proceedings and that, therefore, in such

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[66] The full long title reads:
'To make provisions 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.'

cases the Court should have the power to refuse to entertain the review. An associated rationale for what became known as the 'delay rule' was the public interest element in the finality of decisions by repositories of State power, whatever their nature. In this regard see *Harnaker v Minister of the Interior* 1965 (1) SA 372 (C), at 376H-377D and 380; *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) at 41D-F; and *Oudekraal Estates (Pty) Ltd v City of Cape Town & others* [2009] ZASCA 85; 2010 (1) SA 333 (SCA) (*Oudekraal 2*) para 33. This court, in *Wolgroeiers* (at 39B-D), held that in the event of a complaint that there was an unreasonable delay in initiating review proceedings, the following had to be decided; (a) whether an unreasonable time has passed and, (b) if so, whether the unreasonable delay ought to be condoned. It held, in relation to the last mentioned enquiry that a court exercises a judicial discretion with regard to all the relevant circumstances. At common law this rule applied also in relation to what we now describe as challenges based on the principle of legality.

[80] In *Tasima (Pty) Ltd v Department of Transport* [2015] ZASCA 200; [2016] 1 All SA 465 (SCA) paras 29-30, this court observed that in considering whether to extend the 180 day period in terms of s 9, a court would be guided by what the interests of justice dictate. In order to determine that question, regard should be had to all the facts and circumstances.[67] This equates with how the judicial discretion on whether to condone a delay was exercised before the advent of PAJA. There is no maximum period provided for in PAJA and the cases in which the 180 day period was extended are diverse in relation to the period of delay.[68] Simply put, whether one is considering condoning a delay either under the provisions of PAJA or beyond it, the same determining criterion applies, namely, the interests of justice. Viewed thus, a definitive classification of the nature of the impugned decisions is not strictly necessary, particularly if regard is had to the challenge essentially being one of legality.

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[67] See *Camps Bay Ratepayers' and Residents' Association v Harrison* [2010] ZASCA 3; [2010] 2 All SA 519 (SCA), at 57.

[68] See eg *JH v Health Professions Council of South Africa & others* 2016 (2) SA 93 (WCC) paras 7-10 (three weeks late); *Beekmans NO & others v Mobile Telephone Networks (Pty) Ltd & another* [2015] ZAWCHC 79 paras 40-46 (approximately one and a half months late); *Matlapeng v Minister of Justice and Constitutional Development & another* [2015] ZAGPPHC 9 paras 18-19 (six months late); *Mhlontlo Local Municipality v Jikijela & another* [2012] ZAECMHC 16 paras 17-29 (eleven months late).

[81] As set out in para 69 above, it was submitted by SANRAL, with reference to *OUTA SCA*, that the question of delay must be dealt with before the merits of the review can be entertained. That suggests that, parts (a) and (b) of the enquiry set out in para 79 above, have to be dealt with before the merits of the review application can be considered. It is true that in *OUTA SCA*, this court considered it important to settle the court's jurisdiction to entertain the merits of the matter by first having regard to the question of delay. However, it cannot be read to signal a clinical excision of the merits of the impugned decision, which must be a critical factor when a court embarks on a consideration of all the circumstances of a case in order to determine whether the interests of justice dictates that the delay should be condoned. It would have to include a consideration of whether the non-compliance with statutory prescripts was egregious.[69] I did not understand counsel on behalf of SANRAL to suggest otherwise.

[82] I turn to consider, first, whether the delay was unreasonable. The City, in its founding and replying affidavits, provided an extensive explanation for its delay in launching the review proceedings. It insisted that it did not deliberately refrain from instituting proceedings, nor did it adopt a position of indifference. It contended that, at worst, it could be accused of being indecisive. The City asserted that it had held out the hope that discussion and engagement would resolve the impasse. It did, however, accept that it might have been unwise in doing so. The City contended that it was reassured by SANRAL's assertions that its concerns were being addressed. The City was of the view that SANRAL's inertia between the publication in the *Government Gazette* of the declaration of the roads as toll roads up until the invitation to tender in March 2010 lulled it into a false sense of complacency. The City also relied on the IRFA process which ran from 18 July 2011 until 16 March 2012.

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[69] In *Khumalo v MEC for Education* [2013] ZACC 49; 2014 (5) SA 579 (CC), the Constitutional Court said the following (para 57):
'An additional consideration in overlooking an unreasonable delay lies in the nature of the impugned decision. In my view this requires analysing the impugned decision within the legal challenge made against it and considering the merits of that challenge.' (Footnote omitted.)

[83] It must have been clear to the City, very early on, that SANRAL had adopted an intractable position about how the Project was to be funded. It is true that the City struggled to obtain documentation in substantiation of its review application. However, it had mechanisms at its disposal to compel production of the necessary information which it could have resorted to much earlier. The City's explanation that it continued engaging with SANRAL in an attempt to persuade it to its point of view and to correct what it saw as flaws in the decision making processes has to be viewed against the parties' entrenched positions. It is true there are some ameliorating features that arise out of the City's explanation referred to in the preceding paragraph. However, before us, it was conceded on behalf of the City that the delay of some three years was unreasonable. Given the considerable lapse of time, that concession was rightly made.

[84] I now turn to consider the totality of circumstances to determine whether the court below rightly condoned the delay. That exercise will involve, inter alia, a consideration of the merits of the review application. Prejudice to SANRAL and the public interest undoubtedly also have to feature in the decision whether to condone the delay.

[85] I start with the merits of the review. Rather than start with the Transport Minister's decision, as did the court below, sequentially it is more appropriate to begin with whether there was a proper decision by the Board to seek the Transport Minister's approval in terms of s 27(1) of the Act.

[86] In this regard it is necessary to examine the relevant statutory provisions dealing with the Board's objects, powers, functions and governance. As stated above, SANRAL was established in terms of s 2 of the Act to take 'charge of the financing, management, control, planning, development, maintenance and rehabilitation of the South African national roads system'.[70]

[87] Chapter 2 of the Act is entitled 'Governance and staffing of Agency'. Section 12(1) provides:

[70] See also the long title of the Act referred to in fn 66 above.

'(1) The Agency is governed and controlled, in accordance with this Act, by a Board of Directors. The Board of Directors represents the Agency, and all acts of or under the authority of that Board will be the acts of the Agency.'

[88] Significantly, s 15 specifically provides a procedure for decisions to be taken by SANRAL's Board. It reads as follows:

'(1) Any meeting of the Board will be held at the place and time determined by the Board.

(2) A quorum for any meeting of the Board will be five members.

(3) The decision of the majority of the members present at any meeting of the Board will be the decision of the Board, provided there is a quorum. Where there is an equality of votes, the chairperson who has a casting vote in addition to a deliberative vote, must exercise that casting vote so as to break the deadlock in decision making.

(4) Except as provided by this section, the Board determines the procedure applicable at its meetings.'

[89] Importantly, s 17 of the Act compels the SANRAL Board and its committees to keep minutes of proceedings of meetings and requires the copies to be circulated to members. Section 18 does provide for delegation and assignment of certain powers, functions or duties of the Board by special resolution. However, s 18(5)*(d)* prohibits the delegation of the powers, functions and duties of the Board to declare a road a toll road. In those circumstances there was rightly no reliance on this section and it need detain us no further.

[90] Section 25 of the Act is entitled 'Main functions of Agency'. Section 25(1) provides:

'(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 . . . .,'

[91] It is in fulfilling that function that SANRAL purported to make a proposal to the Transport Minister for the tolling of the roads in question. His approval was sought in

terms of s 27 of the Act. In order to make that proposal and critically, in order to fulfil the conditions for the Transport Minister's approval set out in s 27(4) of the Act, what was required was a Board decision reached at a properly constituted meeting, following on a consideration of all the relevant information.

[92] It will be recalled that Binns-Ward and Boqwana JJ took into account that SANRAL had produced no documentary proof of a decision by the Board, despite proceedings to compel the production of relevant information.

[93] The court below also observed that s 242 of the Companies Act 61 of 1973 obliged SANRAL to keep minutes of Board meetings in a bound minute book. Non-compliance carried with it the threat of criminal sanction. This obligation relating to minutes is in addition to the requirements of s 17 of the Act discussed at para 89 above. The failure is inexplicable, particularly if regard is had to the manner in which SANRAL otherwise operates, by preparing agendas and complying with procedures to ensure that meetings are conducted lawfully.

[94] Binns-Ward and Boqwana JJ stated that, even if the minute could not be produced or had been misplaced, one would have expected it to have been reflected as an agenda item for a scheduled meeting.[71] No Board member produced an entry in a diary or could link a meeting at which such a decision was taken with any payment received or travel arrangements made in relation thereto. The learned judges, having regard to the provisions of s 27(4) reasoned that one would have expected there to have been a meeting of SANRAL's directors for them to apply their minds to the responses to notices contemplated in ss 27(4)*(a)* and *(b)*.[72] One would have expected documentation in relation to associated meetings.

[95] The high-water mark of SANRAL's case in relation to the Board having taken a decision to apply for ministerial approval appears in that part of Mr Alli's affidavit set out in para 52 above. However, there was no documentary or other corroboration for his assertion that the Board had made a decision and it appears that his statement that the Board was kept apprised of the Project and the application to the

[71] Paragraph 185 of the judgment.
[72] Paragraphs 172 – 174 of the judgment.

Transport Minister was deliberately obfuscatory. Why, one might ask, was it necessary to insert that statement if an informed decision had been taken by the Board?

[96] The City rightly submitted that there is no evidence of any consideration by the Board of the recommendation to the Transport Minister, let alone a decision by it in that regard. In the City's application in 2013 for an interdict against SANRAL it alleged that there was no evidence of a Board decision. That allegation was left unanswered. The court below recorded that the last minuted consideration by the Board of the Project was in January 2004.[73]

[97] Faced with the City's persistent challenge to the lack of a decision (resolution) by the Board to seek the Transport Minister's approval, Mr Alli, as recorded at para 53 above, wrote a memorandum to a newly installed Board to seek a round-robin resolution, agreeing to seek the Transport Minister's approval for the declaration of the roads as toll roads. The relevant part of that memorandum reads as follows:

'The purpose of this memorandum is to ask the Board to resolve that the national road N1, Belville (R300 interchange) to Sandhills and national road N2, Swartklip (R300 Interchange) to Botrivier be declared as toll roads. *This element in the procedures to declare a road as a toll road was inadvertently omitted in the process to declare the above roads as toll roads.*'(My emphasis.)

[98] That memorandum, far from indicating an insubstantial inadvertent omission, confirms the suspicion that there had indeed been no prior Board consideration or resolution. The court below, in para 175 of its judgment, therefore correctly stated that it was suggestive of an appreciation by Mr Alli that the City had uncovered a fatal flaw in the process and a sense of desperation on his part to try to recover the situation.

[99] This attempt to recover the situation by way of the round-robin resolution merely compounded the problem. The memorandum, addressed to the 2014 Board by Mr Alli, attempted to telescope into three pages the history leading up to the approval of the Transport Minister. Even if it is true that the Board, as previously

[73] Paragraph 92 of the judgment.

constituted, was 'kept apprised' of the various steps, it can hardly be argued that this was sufficient to enable the differently constituted Board in 2014 to apply its mind to all the relevant considerations, including those set out in s 27(4) of the Act. And since it has already been demonstrated that the prior Board had not in fact made a decision with regard to all the relevant circumstances, the subsequent round-robin resolution had no value. For the same reasons, a subsequent attempt to ratify that round-robin resolution at a board meeting held in June 2014 was equally ineffective. This was disorder made worse than before – confusion worse confounded.

[100] The court below cannot be faulted for concluding that the assertion by Mr Alli, that the Board had made a decision, did not create a genuine dispute of fact and, on the basis of what is set out above, could summarily be rejected on the papers.[74] It went on to hold that Board did not make a decision to seek approval. Having arrived at that conclusion, the court said the following in para 177:

'For this reason too, the declaration of the roads as toll roads would fall to be set aside if this court were to condone the City's delay and entertain the application for the relief described [17.5] above.'

[101] The failure by the Board to make a decision to seek approval for the tolling of the roads was a fundamental and egregious flaw. The Project was one of national importance involving costs that run into billions of Rands. It implicates national policy and impacts on the National Treasury and industry and the citizens of the province and the country. It required serious and informed deliberation which, as demonstrated above, was sorely lacking.

[102] I now turn to deal with the failure of the court below to set aside the 2014 resolution. I have difficulty with the finding by the court below that the 2014 resolution by the Board is beyond review. I recognise that the court below held that the resolution was not reviewable on the basis that it was not administrative action that fell within the confines of PAJA. As stated above, even that conclusion is questionable. However, whatever its nature, the resolution cannot be beyond judicial scrutiny. In order for a national road to be lawfully declared a toll road in terms of the Act and in order for a lawful decision to be made concerning the amount of the toll

[74] Paragraph 176 of the judgment.

and the categories of persons to which it will apply, the statutory prescripts have to be followed. Simply put, neither the Board nor the Transport Minister can act outside of the confines of the Act. And there can be no doubt as to the invalidity of the 2014 resolution.

[103] Leaving aside momentarily, the question whether condonation should be granted, the conclusion set out above in relation to the lack of a decision on the part of the Board, ought to be decisive of the appeal. In the absence of a valid decision to seek the approval of the Transport Minister, the jurisdictional basis for the exercise of his powers and functions in terms of ss 27(4) and (1) of the Act would be lacking and his decisions were therefore, on that basis liable to be set aside. It would also mean that the Board should be required, in accordance with the constitutional principles of effective, transparent, accountable and coherent governance,[75] to consider all relevant factors in complying with its statutory mandate. It would therefore have to make the decision that it has failed to make in the last eight years, in accordance with statutory prescripts, including complying with the preconditions for the Transport Minister's approval in terms of s 27(1) of the Act, set in s 27(4).

[104] In the event of condonation being granted, the relief sought by the City in this regard ought to follow.

[105] Even though a decision on the lack of a Board decision is decisive (assuming that condonation is granted), I nevertheless consider it necessary to address in brief the reasoning and the conclusions by the court below in relation to the Transport Minister's decision, purportedly made in terms of s 27(1) of the Act. As set out in para 44 above, the attitude adopted by the Transport Minister and SANRAL was that the Transport Minister had an oversight role and that his primary function was to see to it that the provisions of ss 27(4)*(a)–(d)* had been complied with. In oral argument in the court below, that position evolved into a submission that, in addition, the Transport Minister's role was one of assessing SANRAL's proposal to see if it was in conformity with government policy. In my view the court below cannot be faulted for its reasoning and conclusion set out in para 46 above, that the Transport Minister's

[75] See s 41 of the Constitution.

role could not be reduced to one that is clerical. The national importance of the Project, including all the implications referred to above, required the Transport Minister, in his role as a member of the Executive, to make an independent decision, weighing up all the relevant considerations, including but not limited to financial considerations and the public interest. The Transport Minister was required to bring an independent mind to bear when deciding whether to approve the proposal. Furthermore, the court below, in my view, cannot be faulted for stating that SANRAL's report ought to be provided to interested parties.

[106] In addition, given the lack of a valid Board decision, there could hardly be compliance with s 27(4) of the Act and aside from the question of condonation, that decision was thus also liable to be set aside.

[107] I now turn to deal with whether condonation was correctly granted. In considering whether to condone the delay, the court below accepted that SANRAL had thus far spent a considerable sum of money in embarking on the Project.[76] The amount provided by SANRAL is approximately R136 million. No details were provided as to how this figure was constituted. The court below also had regard to the prejudice that the Consortium might suffer. However, it has to be borne in mind that the Consortium did not participate in the proceedings in the court below or before us. As against the prejudice to SANRAL and the Consortium, the court below considered, in addition to the egregious flaws in the process leading up to the Transport Minister's approval, the wide range of rights and interests of a broad cross-section of the national community.[77]

[108] There is of course the considerable financial burden to be borne by the public and the State. The public interest is a weighty factor. The principle of legality and the constitutional principles of transparent and accountable governance also intrude. A factor that also cannot be discounted is that the Transport Minister himself placed a moratorium on the Project in 2011. The circumstances of the present case are different to those in *OUTA*. The road works have not commenced. The amount already expended is relatively small in relation to the huge cost of the entire Project

[76] Paragraph 207 of the judgment.
[77] Paragraph 206 of the judgment.

and its implications, both for the public and the National Treasury. The Project has been in the making for almost two decades and its various phases were premised on information that must by now be dated. That too is a consideration that weighs in favour of the City. It was submitted on behalf of the City, with reference to what was stated by this court in *Oudekraal 2*, para 80, that whilst finality is a good thing, justice is better. [78] In my view the court below cannot be criticised for granting condonation.

[109] I now turn to deal with the interdict sought by the City in relation to the draft proposed concession contract for the Project. Having regard to the order made by the court below, it is clear that the question is left open as to whether the Project will be proceeded with. In the event of it not being proceeded with, then there can obviously be no contract for further judicial scrutiny. Conversely, should the Board decide to continue with the Project, there is no certainty as to the final form the proposal will take, or even whether the Minister will approve that final proposal, particularly having regard to the order of the court below directing that the s 27(4) processes will have to be restarted ab initio. There is thus no certainty about the final terms and conditions of an ultimately negotiated concession contract, which is contingent on the Project being proceeded with in such form as the Transport Minister might decide. In my view, therefore, the interdictory relief sought was rightly denied.

[110] In relation to SANRAL's appeal against the refusal to admit the further affidavits, I can do no better than to refer with approval, to the reasoning of the court below set out in paras 56 – 57 above. The affidavits sought to be admitted did not add anything of substance to the evidence already before the court. The application for leave to appeal, referred to oral argument, is thus liable to be refused.

[111] SANRAL contended that the court below erred in making the costs order referred to above. It was submitted on behalf of SANRAL that no costs order should have been made because the litigation was between two organs of state. I agree with the submissions on behalf of the City that there is no invariable rule that one organ of state cannot be ordered to pay the costs of another. SANRAL relied upon

[78] On the importance of considering constitutional values, the public interest and the principle of legality in this context, see *Oudekraal 2*, paras 75 – 81.

Minister of Police & others v Premier of the Western Cape & others [2013] ZACC 33; 2014 (1) SA 1 (CC), para 72, and *Minister of Defence and Military Veterans v Motau & others* 2014 (5) SA 69 (CC). However, these cases are distinguishable. In the first case both parties received the greater part of their funds from the National Revenue Fund. In the second, the parties were two organs of State in the same sphere of government. In the present case SANRAL's funds come mainly from allocations by National Treasury from the National Revenue Fund and the City's funds come mainly from rates and service charges by its residents. In addition, in *Cape Town City v South African National Roads Authority & others* [2015] ZASCA 58; 2015 (3) SA 386 (SCA), this court, in deciding an appeal related to the present matter involving the disclosure of court documents, had no difficulty in granting a costs order in favour of the City against SANRAL. I see no reason to interfere with the conclusion reached by the court below.

[112] As pointed out in para 3 above, the costs order against SANRAL in the court below included the costs of three counsel. Before us, the City sought a similar order. The issues raised are no doubt of national importance but not of great complexity. In my view, the circumstances do not warrant the employment of three counsel.[79]

[113] For all the reasons set out above, the following order is made:

1. The application for leave to appeal against the court below's refusal to admit further affidavits is dismissed with costs, including the costs of two counsel.

2. The appeal is dismissed with costs, including the costs of two counsel.

3. The cross-appeal is upheld with costs, including the costs of two counsel, to the following limited extent:

3.1 Paragraph f) of the order of the court below is amended to read as follows:

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

3.2 The order of the court below is supplemented with the following:

'j) The round robin resolution by the first respondent's board to declare as toll roads portions of the N1 (R300 interchange to Sandhills) and the N2 (R300 interchange to Botriver) and the subsequent ratification thereof at the first respondent's board

[79] See *Motsepe v Commissioner for Inland Revenue Services* [1997] ZACC 3; 1997 (2) SA 897 (CC) para 32.

meeting of 3 June 2014 as more fully reflected in annexure NA1 to the affidavit of Nazir Alli ("the 2014 declaration decision") is declared to be invalid and of no force and effect.

k) The 2014 declaration decision is reviewed and set aside.'

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M S Navsa

Judge of Appeal

Appearances:

Counsel for Appellant:	B E Leech SC (with him D Smith) (Heads of argument prepared by C D A Loxton SC, B E Leech SC and D Smith) Instructed by: Fasken Martineau, Sandton Webbers, Bloemfontein
Counsel for Respondent:	G M Budlender SC (with him N Bawa SC and R Paschke) Instructed by: Cullinan & Associates, Cape Town Rosendorff & Reitz Barry, Bloemfontein