IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 18392/13

In the matter between:

DEMOCRATIC ALLIANCE	**APPLICANT**

and

THE PRESIDENT OF SOUTH AFRICA	**FIRST RESPONDENT**
THE SPEAKER OF THE NATIONAL ASSEMBLY	**SECOND RESPONDENT**
THE CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES	**THIRD RESPONDENT**
THE MINISTER OF TRANSPORT	**FOURTH RESPONDENT**
THE SOUTH AFRICAN NATIONAL ROADS AGENCY	**FIFTH RESPONDENT**
NATIONAL TREASURY	**SIXTH RESPONDENT**

Coram: ROGERS J

Heard: **4 & 5 MARCH 2014**

Delivered: **13 MARCH 2014**

JUDGMENT

ROGERS J:

[1] The question in this case is whether the Transport Laws and Related Matters Amendment Act 3 of 2013 ('the Amendment Act') required, for its valid enactment, compliance with the procedure laid down in s 76 of the Constitution or whether, as occurred, enactment in accordance with s 75 sufficed.

[2] The Amendment Act was passed primarily so as to facilitate the electronic monitoring of traffic through toll plazas and the electronic collection of the tolls. The timing of its enactment was related to the publicly controversial introduction of electronic tolling as part of the Gauteng Freeway Improvement Project ('GFIP'). This controversy, in its legal aspects, led to the judgment of the Constitutional Court in *National Treasury & Others v Opposition to Urban Tolling Alliance & Others* 2012 (6) SA 223 (CC), where the Constitutional Court set aside an interim interdict granted by Prinsloo J prohibiting the implementation of electronic tolling pending the outcome of a review ([2012] ZAGPPHC 63); and the subsequent judgment of the Supreme Court of Appeal in *Opposition to Urban Tolling Alliance & Others v The South African National Roads Agency Limited & Others* [2013] ZASCA 148, where the Supreme Court of Appeal upheld the judgment of Vorster J dismissing the review contemplated in the proceedings before Prinsloo J ([2012] ZAGPHC 323). I shall refer to the aforesaid litigation as the *OUTA* case.

[3] The Transport Law and Related Matters Amendment Bill was published in the latter part of 2012 together with an explanatory memorandum which stated that the bill should be dealt with in accordance with the procedure laid down by s 75 of the Constitution. The resultant legislation (the Amendment Act) was approved by Parliament on 22 May 2013. The President assented to the Act on 21 September 2013. The Act was promulgated in the *Government Gazette* on 26 September 2013.

In terms of s 8 of the Amendment Act it was to be brought into operation on a date determined by the President by proclamation in the *Gazette.* By a proclamation published in the *Gazette* on 9 October 2013 (the date on which the Supreme Court of Appeal handed down its judgment in the *OUTA* case) the President fixed 9 October 2013 as the date on which the Amendment Act would come into operation except for ss 3(b) and 3(c) thereof. The latter sub-sections had not yet been brought into operation.

[4] On 6 November 2013 the applicant in the present case, the Democratic Alliance ('the DA'), launched an urgent application for a declaration that the Amendment Act is invalid for want of compliance with s 76 of the Constitution. The notice of motion stated that the application would be moved on 10 December 2013. The respondents cited in the notice of motion were the President, the Speaker of the National Assembly, the Chairperson of the National Council of Provinces ('NCOP'), the Minister of Transport and the South African National Roads Agency Limited ('SANRAL'). All these respondents have opposed the application. In addition, the National Treasury applied for leave to intervene as the 6th respondent, which intervention was not opposed. The Minister of Finance made the main affidavit on behalf of the National Treasury. On 9 December 2013 an order was made by agreement postponing the application for hearing on 4 and 5 March 2014, all issues of costs being reserved.

Sections 75 and 76 of the Constitution

[5] Section 75 of the Constitution deals, according to its heading, with 'Ordinary Bills not affecting provinces'. Section 76 by contrast deals with 'Ordinary Bills affecting provinces'. A bill is an 'ordinary bill' if it is not a bill amending the Constitution (governed by s 74). An ordinary bill may be a money bill, in which case the further provisions of s 77 apply.

[6] In terms of s 75(1), the provisions of that section apply where the National Assembly passes a bill other than a bill to which the procedures set out in s 74 or s 76 apply. In the case of s 75 bills, the NCOP has a role but it is more limited than in the case of bills governed by s 76. A s 75 bill must be referred to the NCOP which

must pass the bill, or pass it subject to amendments, or reject it. If the NCOP passes the bill without amendments, the bill must be submitted to the President for assent. If the NCOP rejects the bill or passes it subject to amendments, the National Assembly must reconsider the bill, taking into account any amendments proposed by the NCOP, and may then pass the bill again (either with or without amendments) or decide not to proceed with the bill. If the bill is again passed by the National Assembly, it must be submitted to the President for assent.

[7] Section 75(2) sets out the manner in which the NCOP votes on a bill referred to it in terms of s 75. Section 75(2) provides that the usual manner of voting in the NCOP as set out in s 65 does not apply. The usual manner of voting as laid down in s 65 is that each province has one vote, which is cast on behalf of the province by the head of its delegation; and that agreement is reached where at least five provinces vote in favour of the question. (Since there are nine provinces, this is a simple majority.) The varied procedure created by s 75(2) is the following: each delegate in a provincial delegation has one vote; at least one third of the delegates must be present before a vote may be taken on the question; and the question is decided by a majority of the votes cast, subject to the qualification that, if there is an equal number of votes on each side of the question, the presiding delegate must cast a deciding vote. (In terms of s 61 of the Constitution read with Schedule 3, each province is entitled to a delegation comprising ten delegates but opposition parties are entitled to representation in the delegation. It is thus notionally possible that a party with a majority in four out of nine provinces could, across all nine delegations, muster sufficient delegates to constitute a majority in terms of this special voting regime. Put differently, the procedure created by s 75(2) is more likely to result in a majority vote in the NCOP which accords with the majority in the National Assembly.)

[8] Sections 76(3), (4) and (5) specify various kinds of bills that must be dealt with in accordance with the special procedures laid down in ss 76(1) and (2). In the present matter we are concerned only with one of the kinds of bills specified in s 76(3), namely a bill which ‘falls within a functional area listed in Schedule 4’. Schedule 4 lists ‘functional areas of concurrent national and provincial legislative competence’. If a bill is of this kind, the procedure to be followed is the one

prescribed either in s 76(1) or in s 76(2), depending on whether the bill originates in the National Assembly or the NCOP. Where such a bill is passed by the National Assembly, s 76(1), like s 75(1), requires that the bill be referred to the NCOP. However, there are two important differences, namely [a] regarding the procedure to be followed where the bill is rejected by the NCOP or is amended by the NCOP in a manner which does not find favour with the National Assembly; and [b] regarding the manner of voting in the NCOP (see, in general *Ex Parte President of the Republic of South Africa: In Re Constitutionality of the Liquor Bill* 2000 (1) SA 732 (CC) para 25, hereafter referred to as *Liquor Bill*).

[9] As to the first of these differences, s 76(1) provides that, if the NCOP rejects the bill or if the National Assembly declines to pass the bill as amended by the NCOP, the bill (together with the amended bill, if applicable) must be referred to the Mediation Committee, being a committee created by s 78 of the Constitution. The Mediation Committee may agree on the bill as passed by the National Assembly or on the bill as amended by the NCOP or on another version of the bill. If the Mediation Committee cannot reach agreement on one of these courses within 30 days of the bill's referral to it, the bill lapses unless the National Assembly again passes the bill but this time with a supporting vote of at least two-thirds of its members.

[10] If the Mediation Committee agrees on the bill as passed by the National Assembly or as amended by the NCOP, the Committee must refer the bill or the amended bill (as the case may be) to the NCOP or the National Assembly (as the case may be). If the NCOP or National Assembly passes the bill or amended bill (as the case may be), it must be submitted to the President for assent.

[11] If the Mediation Committee agrees on a different version of the bill (ie different both from the form passed by the National Assembly and by the NCOP), the bill must be referred both to the National Assembly and to the NCOP. If they both pass the bill, it must be submitted to the President for assent. If, on re-referral to it in terms of this provision, the NCOP does not pass the bill, it lapses unless the National Assembly passes the bill with a supporting vote of at least two-thirds of its members. If, on re-referral to it in terms of this provision, the National Assembly

does not pass the bill, the bill lapses but the National Assembly may still pass the bill in original form provided it is supported by a vote of at least two-thirds of its members.

[12] As to the second difference, namely voting, s 76 does not establish a special voting regime. The result is that voting in the NCOP is in accordance with s 65, ie one vote per delegation. This means that a party with an overall national majority but with a provincial majority in only four out of nine provinces would not be able to carry the day in regard to a s 76 bill. If on this basis the bill were rejected by the NCOP and not resolved by the Mediation Committee, the National Assembly could not force the legislation through except with a two-thirds majority.

[13] In parliamentary language, the process for determining whether a bill must be passed in accordance with s 75 or s 76 is known as 'tagging'. The leading judgments of the Constitutional Court on tagging are *Liquor Bill supra* and *Tongoane & Others v National Minister for Agriculture and Land Affairs & Others* 2010 (6) SA 214 (CC). These cases considered the test for determining whether a bill should be regarded as one which 'falls within a functional area listed in Schedule 4' for purposes of s 76(3). In the *Liquor Bill* case it was said that any bill whose provisions 'in substantial measure' fall within a functional area listed in Schedule 4 must be dealt with in accordance with s 76. In *Tongoane* Ngcobo CJ, writing for a unanimous court, upheld this test. I shall need to deal in more detail with these cases in due course with a view to determining precisely what they say in regard to the appropriate test.

<u>The main Act: Act 7 of 1998</u>

[14] The provisions of the Amendment Act on which the DA relies for its s 76 tagging of the Amendment Act are those which amend the South African National Roads Agency Limited and National Roads Act 7 of 1998 ('the pre-existing Act') as it read immediately prior to the coming into force of the Amendment Act. In order to understand the arguments, it is necessary to refer to certain provisions of the pre-existing Act.

[15] The Act deals only with national roads, not provincial and municipal roads. A national road is road declared as such by the Minister in terms of s 40. If an existing road is to be declared a national road, this can only happen with the agreement of the Premiers of the provinces in which the road is situated. If it is proposed to construct a new road as a national road, there must be consultation with the relevant Premiers if the new road will have substantial impact on traffic flows in those provinces.

[16] Section 2 of the pre-existing Act makes provision for the establishment of SANRAL as a national roads agency for the Republic 'for the purpose of taking charge of the financing, management, control, planning, development, maintenance and rehabilitation of the South African national roads system'.

[17] The main functions of SANRAL are set out in s 25(1). In terms of that sub-section SANRAL, within the framework of government policy, is responsible for, and has been given power to perform, 'all strategic planning' with regard to the South African national roads system; all 'planning, design, construction, operation, management, control, maintenance and rehabilitation of national roads for the Republic'; and '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.

[18] Certain powers, additional to these main powers and functions, are conferred on SANRAL by s 26. Among these are (para (f))

'to operate any national road or part thereof as a toll road and levy a toll on the users of such a road as provided in this Chapter, and to collect the toll or have it collected by any authorised person, and for those purposes to provide, establish, direct, operate and maintain toll plazas on a national road, subject to section 27 or 28'.

[19] The expression 'toll road' is defined in s 1 as meaning 'any toll road declared under subsection (1)(a) of section 27, the declaration of which is effective in terms of subsection (2) of that section…'.

[20] The expression 'toll plaza' is defined in s 1 as meaning

'a structure on a toll road where toll is payable in terms of this Act, or any electrical, electronic or mechanical device on a toll road for recording the liability to pay toll, or any combination of such a structure and such a device, and includes a toll gate'.

[21] Section 27 deals with the levying of toll by SANRAL. In terms of ss 27(1) SANRAL may, with the approval of the Minister of Transport, declare any specified national road or portion thereof to be a toll road; may levy and collect a toll for the driving or use of any vehicle on such a toll road, provided the amount of the toll has been determined and made known in terms of ss 27(3); and may grant exemption from the payment of toll in respect of vehicles or users of a category determined by SANRAL. In terms of ss 27(2) a declaration or exemption only becomes effective 14 days after a notice to that effect by SANRAL has been published in the *Gazette.*

[22] Section 27(4) lays down the procedure which must be followed before the Minister may give his approval to the declaration of a national road as a toll road in terms of ss 27(1)(a). In summary the procedure is the following:

[a] SANRAL must, in the prescribed manner, give notice generally of the proposed declaration, with an indication of the approximate position of the toll plaza. The notice must invite interested persons to comment and make representations on the proposed declaration and position of the toll plaza, allowing at least 30 days for that purpose.

[b] SANRAL must in writing request the Premier in whose province the proposed toll road is situated to comment on the proposed declaration and any other matter with regard to the toll road, allowing at least 60 days for that purpose. A like opportunity must be given to every municipality in whose area that road is situated.

[c] SANRAL must then, when applying for the Minister's approval, forward its proposals in that regard together with a report on the comments and representations received. It must indicate the extent to which the matters raised in the comments and representations have been accommodated in its proposals.

[d] The Minister must, before giving approval, be satisfied that SANRAL has considered the comments and representations. (If SANRAL has failed to comply with these requirements or if the Minister is not satisfied that SANRAL has considered the comments and representations, he or she must refer the application and proposals back to SANRAL for proper compliance.)

[23] Section 27(3) of the pre-existing Act deals with the amount of toll that may be levied, any rebate thereon and any increase or reduction thereof. These matters are determined by the Minister on the recommendation of SANRAL (para (a)); may differ in respect of different toll roads, different vehicles or categories of vehicles, different times at which vehicles or categories of vehicles are driven, and in respect of different categories of road users (para (b)); must be made known by the head of the Department of Transport in the *Gazette* (para (c)); and become payable from the date and time determined by the Minister on the recommendation of SANRAL and as specified in the notice (para (d)).

[24] In terms of s 27(5) any person liable for toll who, at a toll plaza or other place for the payment of toll, refuses or fails to pay the amount due is guilty of an offence and is liable, apart from criminal punishment, to pay SANRAL a civil fine of R1 000 increasing as from 1999 with reference to the Consumer Price Index. Section 30 provides that SANRAL may institute legal proceedings to recover toll monies.

[25] Section 34 deals with SANRAL's funding. Among the manifold sources of revenue listed in that section is toll payable to SANRAL in terms of Chapter 3. Section 34(3) requires separate accounts to be kept of toll monies and interest earned on their investment. Such monies may be used only for the purposes specified in ss 34(3).

[26] Section 58(1) provides that the Minister, after consultation with SANRAL, may make regulations, not inconsistent with the Act, on the matters listed in that sub-section. There is nothing specific in the list that has to do with toll roads. There is, however, in para (e), the general power to make regulations 'with regard to anything which in terms of this Act may or must be prescribed, governed or determined by regulation or which, in terms of this Act, may or must be provided for by regulation'.

[27] The pre-existing Act does not contain a definition of the word ‘owner’ nor is that word used in the Act in relation to vehicles. Section 27(1)(b) provides that the toll will be payable by a person driving or using a vehicle on the toll road.

[28] It appears from the explanatory memorandum that accompanied the original 1998 bill that Act 7 of 1998 was passed in accordance with the procedure laid down in s 75 of the Constitution, not s 76. If the DA’s contentions in the present case are correct, it would appear that the original Act was not validly enacted though no relief in that regard is sought in these proceedings.

The Amendment Act

[29] The Amendment Act comprises eight sections. Section 1 brings about an amendment to the Cross-Border Road Transport Act 4 1998 and is not germane for present purposes. Although ss 6 to 8 of the Amendment Act amend the pre-existing Act, the DA does not contend that these provisions are relevant to the question whether the amendment bill should have been tagged as s 76 legislation. The provisions on which the DA relies are ss 3, 4 and 5.

[30] Section 3(a) of the Amendment Act amends ss 27(3) of the pre-existing Act. Section 27(3) of the pre-existing Act, it will be recalled, deals with the amount of toll that may be levied. In terms of the pre-existing Act, the amount of toll may differ in respect of different toll roads, different vehicles or categories of vehicles, different times at which vehicles or categories of vehicles are driven, and different categories of road users. The Amendment Act inserts, as further grounds of differentiation, ‘the means by which the passage of a vehicle beneath or through a toll plaza is identified and the liability to pay toll is recorded’ and ‘the means of payment, including pre-payment of toll liability’. (By way of illustration, in the case of the GFIP roads the tariff of 19 November 2013 as read with the e-tolling regulations of 9 October 2013 provides for differential tariffs, depending *inter alia* on whether the user is registered with SANRAL and has an e-tag affixed to his vehicle (‘a registered e-tag user’), a user who is not registered with SANRAL but has an e-tag affixed to his vehicle (‘a non-registered e-tag user’), a user who is registered with SANRAL but does not have an e-tag, instead electing to have his transactions recorded photographically

using his vehicle licence number ('a registered VLN user'), and any other user not falling into these categories ('an alternate user').)

[31] Sections 3(b) and (c) of the Amendment Act amend s 27(4) of the pre-existing Act. Section 27(4) deals with the procedure to be followed before the Minister may approve a toll road. The pre-existing Act requires (i) that SANRAL give notice to the relevant Premier and municipalities and invite their comments and (ii) to satisfy the Minister, when submitting its application for approval, that SANRAL has considered those comments and representations (though not necessarily acceded to them):

[a] In terms of the Amendment Act, the first of these duties remains but there has been added (by s 3(b) of the Amendment Act) an obligation on the part of SANRAL, in cooperation with the relevant municipalities and province, to perform 'a socio-economic and traffic impact assessment pertaining to the proposed toll road', to submit that assessment to the Minister when seeking his or her approval, and to publish a notice in the *Gazette* indicating the availability of such report.

[b] As to the second of these duties, SANRAL's duties when applying to the Minister for approval have been amplified (by way of an amended s 27(4)(c) inserted by s 3(c) of the Amendment Act) by requiring SANRAL also to indicate (i) the outcome of the socio-economic and traffic impact assessment and (ii) 'the steps proposed to mitigate against the impact or likely impact on alternative roads with regard to maintenance and traffic management that may result from' the proposed toll road declaration.

[32] Section 4 of the Amendment Act amends the Minister's regulation-making power in s 58 of the pre-existing Act and the procedure for making regulations:

[a] It is now stated that the regulations must be made 'by notice in the *Gazette*'. (This amendment appears to have been unnecessary. The matter is already governed by s 16 of the Interpretation Act 7 of 1959.)

[b] The list of matters on which regulations may be made has been amplified to include (i) 'providing for the terms and conditions applicable to the payment of toll and for the establishment of a system that permits the registration of persons liable to pay toll'; (ii) providing specifications for 'any tolling equipment, electrical, electronic or mechanical device or a combination thereof used for the identification of vehicles on toll roads in order to record the liability to pay toll', and providing specifications for 'the installation, maintenance and verification of' such devices and equipment; (iii) providing for 'the manner in which the liability to pay toll will be recorded, including the time and the manner in which such toll must be paid'; (iv) providing for 'the payment of toll in cash, electronically or by other method, which is subject to but not dependent on any conditions that [SANRAL] may determine under section 27(1)(b)'; (v) providing for 'the offences and penalties applicable to the owner or user or driver of a vehicle in the event of the non-payment of toll'; (vi) providing for 'the method of notifying the owner, driver or the user of the vehicle of his or her liability to pay toll'; and (vii) providing for the manner of recovering outstanding payment of toll.

[c] The Amendment Act provides that regulations on these additional matters (those specified in [c] above) 'may provide for the issuing of directions, conditions or requirements for matters connected there with'.

[d] The Amendment Act inserts certain procedural requirements to be followed before the Minister makes any regulations in terms of s 58(1): (i) He or she must submit a draft of the proposed regulations to Parliament for comment. (ii) He or she must publish a draft of the proposed regulations in the *Gazette* together with a notice calling on interested persons to comment in writing (within a period which cannot be less than four weeks), including any objections or representations which they would like to make with the Director-General for submission to the Minister. (The syntax of s 4(d) of the Amending Act is faulty. I have summarised what I take to be the true intent.)

[33] Section 5 of the Amendment Act inserts a new s 59A into the pre-existing Act. The new section introduces certain presumptions, namely (i) that where it is necessary to prove who was driving, operating or using a vehicle at the time when

the liability to pay toll was incurred, it shall be presumed in the absence of contrary evidence that the vehicle was driven, operated or used by its owner (this applies to criminal prosecution under the Act and to civil proceedings for recovery of toll monies); (ii) that where the owner is a juristic person, the person driving, operating or using the vehicle was an employee of the owner acting in the course and scope of the owner's business; (iii) that, in a prosecution under the Act, electronic evidence produced by a machine that has been checked for correct working and reading by a person trained in the operation thereof is, in the absence of evidence to the contrary, accurate and may be used to prove the alleged contravention; (iv) that, in a prosecution under the Act, a road shall be presumed, in the absence of evidence to the contrary, to be a toll road.

[34] Related to the latter provisions is the insertion, into s 1 of the pre-existing Act, of a definition of the word 'owner' in relation to a vehicle, namely the same meaning as is ascribed to that word in s 1 of The National Road Traffic Act 93 of 1996 and the Cross-Border Road Transport Act 4 of 1998.

The parties' contentions

[35] It is convenient, before reverting to the leading cases on tagging, to summarise briefly the principal contentions of the parties.

The Democratic Alliance

[36] The DA was represented at the hearing by Mr WRE Duminy SC leading Mr M Bishop.

[37] The DA does not rely on the provisions of the pre-existing Act in determining whether the Act as amended meets the 'substantial measure' test. Regardless of whether or not the original Act should have been passed in accordance with s 76, the DA accepts its terms as a given and relies only on the provisions introduced by the Amendment Act in support of its argument that the 'substantial measure' test required the Amendment Act to be tagged. In view of the fact that there is no challenge to the pre-existing Act, this approach is in my view correct. I do not think,

however, that I am obliged to assume, merely because the original Act was not passed in accordance with s 76, that its terms did not in truth meet the 'substantial measure' test. If I were required to approach the tagging of the Amendment Act on the basis that in law the pre-existing Act did not 'in substantial measure fall within a functional area listed in Schedule 4', there would be an end of the debate: if the pre-existing Act does not in law meet that test, the Amendment Act *a fortiori* would not do so. The correct approach, in my view, is to allow the possibility that in law the pre-existing Act should have been processed in accordance with s 76, even though I am not now asked to grant any relief in respect of the Act in that form.

[38] The DA argues that, although the pre-existing Act made provision for the tolling of national roads and permitted electronic tolling, it did not contain provisions which made open-road tolling by electronic means a practical possibility. In order to make this feasible, it was necessary to introduce, by way of s 3(a) of the Amendment Act, a power to differentiate, in the setting of the amount of tolls, between the means by which the passage of vehicles beneath or through toll plazas was identified, the means by which the liability to pay toll was recorded, and the means of payment. It was also necessary to create, by way of the new s 59A, a presumption that the 'owner' of the vehicle was the person who was driving or using it at the relevant time and thus liable for the toll. The DA contends that, if one has a conventional toll plaza where road users stop at a booth and have to pay the toll before being allowed to proceed, there is no need to make special provision for the way in which vehicles passing through the toll plaza are identified. Such provisions are only needed where vehicles using the toll road are not required physically to stop and pay toll. And for open-road tolling it is not enough to make distinctions based on the means by which the passage of a vehicle is identified and the liability to pay toll is recorded because these means do not necessarily identify the driver or user of the vehicle. A presumption is thus needed that the owner of the vehicle (a matter separately verifiable) was the driver or user and thus the person *prima facie* liable to pay the toll. No such presumption is needed where a vehicle stops and pays toll at a booth, because the user or driver in that situation presents himself physically at the toll plaza.

[39] The DA contends, further, that in order to make open-road tolling feasible it was necessary for the Minister to be empowered to make regulations on the further matters specified in s 4 of the Amendment Act.

[40] The DA says that there are national roads, particularly in urban areas, where a conventional toll plaza would not be practically feasible because it would lead to traffic congestion. The provisions introduced by the Amendment Act, which facilitate open-road tolling by electronic means, thus make it a real possibility, for the first time, that such roads can be made toll roads. The roads comprising the GFIP are, submits the DA, a prime example, and others may follow in its wake. (The DA makes reference, in this regard, to para 9 of the Supreme Court of Appeal's judgment in *OUTA*, where the court recorded that according to SANRAL the density of traffic on the GFIP roads was such that a conventional toll collection system through toll gates was not practically possible.)

[41] In support of its contention that the relevant provisions of the Amendment Act are necessary in order to make open-road tolling a practical possibility, the DA refers to statements in the explanatory memorandum which accompanied the bill. In the explanatory memorandum the drafters said that the bill had been 'necessitated' by the GFIP; that the bill was 'essential' to enable the appropriate implementation of an electronic toll collection system; and that the pre-existing Act was 'not broad enough' to cater for some aspects of electronic toll collection. This description of the bill's purpose was repeated and confirmed in the affidavit filed by the Speaker of the National Assembly (the 2nd respondent).

[42] The DA continues by contending that the declaration of busy national roads, such as those implicated in the GFIP, inevitably has effects on various functions for which provinces are responsible. The declaration of a national road as a toll road can be expected to cause some road users to select alternative routes in order to avoid the toll (the DA refers to this as the 'radiating impact'). These alternative routes would typically be or include provincial and municipal roads. So provincial and municipal roads may become more heavily used than before. This may require action from the province in regard to various matters falling within functional areas listed in Schedule 4 to the Constitution. Such matters include road traffic regulation

(because of the increased use of provincial and municipal roads), public transport (because tolls will induce some commuters to switch to public transport), environmental management and pollution control (because increased traffic comes with an increase in noise and air pollution). Changes in traffic patterns, brought about by the declaration of a national road as a toll road, may affect trade, regional planning and development, urban and rural development and population development (because changes in traffic patterns may cause particular areas – either because of increased or reduced traffic – to become more or less attractive for particular kinds of uses).

[43] In support of the contention that road tolling, broadly speaking, could be expected to have effects of this kind, the DA referred to passages in the affidavit of the Minister of Finance, filed on behalf of the National Treasury in the *OUTA* Constitutional Court proceedings and incorporated into the National Treasury's papers in the present case, in which he said that among government's reasons for including tolling as a source of finance were to moderate traffic growth on congested freeways, to encourage more efficient land use and to contribute to the prioritisation of public transport over the use of private vehicles.[1] Elsewhere the Minister said that tolling not only reduced congestion on major urban road systems but encouraged more efficient spatial development, lower environmental damage and less urban sprawl.[2] (Statements to similar effect were made by the National Treasury's Director-General, Mr L Fuzile, in the affidavit he filed in the review proceedings before Vorster J.)

[44] In relation to the tolling of busy urban national roads, these manifold effects, the DA says, are made possible only by virtue of the Amendment Act. They are effects on functions falling within Schedule 4. The effects are, in the DA's submission, substantial and thus meet the 'substantial measure' test laid down by the Constitutional Court. In other words, the Amendment Act, by clearing the way for the open-road tolling of busy urban national roads, is an enactment which 'in substantial measure falls within functional areas listed in 'schedule 4' (cf *Tongoane* para 58).

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[1] Para 27.4 at record 135. See also para 29.5.8 at record 142.
[2] Para 29.5.7 at record 142. See also paras 29.1 and 29.2 at record 136-137.

[45] In regard to the procedural requirements which ss 3(b) and (c) insert into s 27(4) of the pre-existing Act with regard to the preparation of an impact report, the DA conceded in oral argument that these provisions did not in themselves constitute provisions which met the 'substantial measure' test. The DA relies on them only as constituting legislative recognition of the substantial socio-economic and traffic effects which open-road tolling is calculated to have on the provinces and thus as supporting its contentions on the effects of ss 3(a), 4 and 5 of the Amendment Act. The fact that ss 3(b) and (c) have not yet been brought into force is, the DA submits, irrelevant because a constitutional challenge to the process by which an Act was passed can be brought as soon as the President has assented to the bill; it is not necessary to wait until the law is brought into force (*Doctors for Life International v Speaker of the National Assembly & Others* 2006 (6) SA 416 (CC) para 64).

The respondents

[46] The President, the Minister of Transport and the National Treasury were represented at the hearing by Mr JJ Gauntlett SC leading Mr F Pelser (in the case of the President and the National Treasury) and Mr Makka (in the case of the Minister of Transport). The Speaker of the National Assembly and the Chairperson of the NCOP were represented by Mr T Motau SC leading Mr B Makola. SANRAL was represented by Mr Unterhalter SC leading Mr L Sisilana, Ms KS Hofmeyr and Mr A Friedman. Despite some differences of emphasis and nuance, they effectively made common cause and I shall thus not distinguish between them in summarising the contentions.

[47] The respondents submitted that the pre-existing Act's provisions were sufficient to empower the Minister and SANRAL to institute electronic open-road tolling with differentiated tariffs of the kind now made explicit in the new provisions inserted into s 27(3) by s 3(a) of the Amendment Act. The grounds of differentiation in determining the amount of toll, as listed in s 27(3)(b) of the pre-existing Act, were merely permissive. The general power to determine the amount of toll and rebates, increases and reductions, as set out in the introductory part of s 27(3), was sufficient to permit any form of rational differentiation. Express grounds of differentiation are listed in para (b) merely out of caution and to indicate certain obvious forms of

rational differentiation. While the new grounds of differentiation inserted by s 3(a) of the Amendment Act are specifically tailored to deal with grounds of differentiation relevant to electronic open-road tolling, rational differentiation on such grounds would in any event have been permissible under the main empowering provision. It matters not that the drafters of the explanatory memorandum may have thought otherwise; the question is one of law. (Although the respondents did not mention the maxim *expressio unius exclusio alterius*, their argument on this point is in effect that the maxim should not be applied in construing s 27(3)(b). They might have cited the numerous authorities to the effect that the maxim is not a rigid rule of statutory construction and must at all times be applied with great caution – see *Administrator, Transvaal & Others v Zenzile & Others* 1991 (1) SA 21 (A) at 37G-H, where Hoexter JA referred to the maxim somewhat dismissively as 'that last refuge'.)

[48] In the alternative to this argument, and if it were found that differentiation on the new grounds introduced by s 3(a) is not permissible under the pre-existing Act, the respondents submitted that the absence of a power to differentiate on these additional grounds would not stand in the way of electronic open-road tolling as part of the GFIP or elsewhere. The absence of a power to differentiate on these additional grounds would merely mean that, while the amount of toll and rebates and exemptions could still differ in relation to different classes of vehicles and users, there would have to be a unitary tariff in respect of vehicles or users falling within the same class, ie vehicles and users falling within the same class could not be further differentiated depending on whether (for example) they had acquired e-tags or registered or made prepayments and the like.

[49] The respondents argued that, even if the relevant provisions of the Amendment Act increased the possibility of the introduction of electronic open-road tolling, a mere possibility was not sufficient. There needed to be real effects. The GFIP was an extraordinary project which was unlikely to be replicated. Even if further electronic open-road tolling were introduced on the strength of the Amendment Act, it could not be said that effects on functional areas of concurrent competence would be substantial. The DA had failed to state the exact nature of the impact on the concurrent functional areas which it claimed would be affected.

[50] As to the presumption created by s 59A, its effect in facilitating open-road tolling is, according to the respondents, modest. The pre-existing Act imposes the liability on the driver or user, and that liability remains. Although SANRAL is assisted by the new presumption in recovering toll and in prosecuting defaulters, SANRAL would in any event look in the first instance to the owner as the *prima facie* user. With or without the presumption, it would always be open to the owner to contend that he or she was not the driver or user of the vehicle. At least in civil proceedings, SANRAL as claimant could, even without the presumption, get past absolution on the basis that, in the absence of contrary evidence, the most plausible inference would be that owner of the vehicle was the one who was using or driving it on the relevant occasion.

[51] In regard to the amplified regulation-making powers of the Minister, introduced by s 4 of the Amendment Act, the respondents say that the additional matters on which the Minister may make regulations concern only the modalities of toll payment and collection. The power to levy and collect tolls is contained in the pre-existing Act, and the amendments introduced by s 4 are merely facilitative, working in aid of the unchallenged toll-collection power. The expanded regulation-making power has no effect, or at least no substantial effect, on the provinces.

[52] As already mentioned, the DA did not in oral argument place reliance on the amendments to the s 27(4) procedure, introduced by ss 3(b) and (c) of the Amending Act, as a self-standing basis for requiring the bill to have been tagged as a s 76 Bill. The respondents submitted that cooperation by the provinces in the compiling of impact reports could not be said to affect any functional area listed in Schedule 4.

The test for tagging

[53] The affidavits and the heads of argument filed on behalf of the various parties were, insofar as the merits concerned, devoted largely to the question whether ss 3(a), 4 and 5 of the Amendment Act make electronic open-road tolling feasible or more feasible, thus increasing the likelihood of such toll roads being declared; and whether the resultant introduction of such toll roads would have substantial effects

on one or more of the functional areas listed in Schedule 4. The DA did not contend that the pre-existing Act or the Amendment Act legislated on any matters on which the provinces themselves could have legislated in terms of s 104(1)(b)(i) of the Constitution read with Schedule 4. The DA's case was that the impugned legislation, assumed to be exclusively within the legislative competence of Parliament, would have social, economic, environmental and other impacts which would be relevant in the regulation of functional areas listed in Schedule 4 and on which provinces did indeed have concurrent legislative competence. For example, a significant change in traffic patterns and in resultant urban development and the like, caused by the introduction of electronic open-road tolling on a busy urban national road, might require a province to introduce or amend legislation on matters falling within its concurrent competence under Schedule 4 (road traffic regulation, regional planning and development, public transport and so forth). The respondents for their part appeared from their affidavits and written argument to be content to contest the case along these lines.

[54] The case was thus presented as turning on whether the Amendment Act, despite legislating on matters exclusively within Parliament's legislative competence, would have substantial knock-on effects into functional areas listed in Schedule 4. For convenience I shall refer to this approach to the 'substantial measure' test as the 'knock-on effects' approach.

[55] During the course of oral argument by Mr Gauntlett SC for the 1st, 4th and 6th respondents, I questioned the fundamental premise of this approach. I raised with all counsel for their consideration whether the test laid down in the Constitutional Court judgments was not concerned, rather, with the extent to which the impugned enactment legislated on matters falling within concurrent functional areas of legislative competence listed in Schedule 4; and that knock-on effects into functional areas listed in Schedule 4 were not in themselves relevant to the tagging of legislation. For convenience I shall refer to this approach to the ''substantial measure' test as the 'direct regulation' approach. By the time Mr Unterhalter SC for SANRAL addressed the court, the direct regulation approach had been adopted and put at the forefront of the argument for the respondents, with the other contentions as fall-back submissions.

[56] In my view, and for the reasons which follow, the ‘substantial measure’ test laid down in the Constitutional Court judgments must be applied with reference to the direct regulation approach, not the knock-on effects approach.

[57] In order to understand the true import of the ‘substantial measure’ test, it is necessary to have regard to certain other provisions of the Constitution which have not yet been mentioned and to the questions which actually arose for decision in *Liquor Bill* and *Tongoane*.

Legislative competence

[58] Legislative competence refers to the authority conferred by the Constitution on a legislature to pass legislation. The legislative competence of Parliament to pass national legislation is determined by s 44 of the Constitution while the legislative competence of the provincial legislatures is set out in s 104. At the national level, Parliament comprises the National Assembly and the NCOP (s 42(1)). As already observed, the role of the NCOP in the passing of national legislation depends on whether the legislation is of a kind specified in s 74, s 75 or s 76 as the case may be. The role of the NCOP in the passing of national legislation is not to be confused with the legislative competence of provincial legislatures to pass provincial legislation.

[59] There are certain functional areas in regard to which both Parliament and provincial legislatures may pass legislation. These are listed in Schedule 4 to the Constitution. In regard to such functional areas, there may thus be national and provincial legislation governing the same matter. The Constitution contains provisions to determine precedence where there is a conflict.

[60] The provinces have exclusive competence to legislate on the functional areas listed in Schedule 5, except where national legislation is justified by the circumstances specified in s 44(2).

[61] In regard to matters falling outside the functional areas listed in Schedules 4 and 5, legislative authority vests exclusively in Parliament. Such matters are not

listed in any Schedule to the Constitution; they are the residue of all matters and functions after excising those listed in Schedules 4 and 5. Such residual matters can thus be regulated only by national legislation (cf *Liquor Bill* paras 46-47). However, and because the NCOP invariably has a voice in regard to the passing of all national legislation pursuant to ss 74, 75 and 76 (though the extent and nature of that voice is affected by the legislation's tagging), the provinces' interests in relation to the proposed legislation can be voiced and to some extent safeguarded.

[62] In order to determine whether authority to enact a particular piece of legislation vests only in Parliament or concurrently in Parliament and the provincial legislatures, it is necessary to determine whether the legislation in question is 'legislation with regard to… a matter within a functional area listed in Schedule 4' (see s 42(1)(a)(ii) and s 104(1)(b)(i)). If all the provisions of the legislation regulate such matters, there is no difficulty. It may happen, however, that some but not all of the provisions of the proposed legislation fall (or ostensibly fall) within Schedule 4 functional areas. In the case of Parliament, this will only matter if the aspects which do not fall within Schedule 4 fall within schedule 5 (in regard to which Parliament's legislative authority is narrowly circumscribed), because for the rest the matters and functions on which Parliament may legislate are unlimited. In the case of provincial legislatures, by contrast, the question would arise whether a provincial legislature has the authority to enact the legislation, having regard to the inclusion of matters falling outside the scope of Schedules 4 and 5.

[63] In *Western Cape Provincial Government & Others: In re DVB Behuising (Pty) Ltd v North West Provincial Government & Another* 2001 (1) SA 500 (CC), which dealt with the interim Constitution (where Schedule 6 performed a similar function to Schedule 4 of the final Constitution), the Constitutional Court held that the manner of resolving this type of problem in relation to legislative authority is to characterise the legislation by applying what is sometimes called the 'pith and substance' test. This test requires 'the determination of the subject-matter or the substance of the legislation, its essence, or true purpose and effect, that is, what the [legislation] is about' (para 36). In footnote 53 of *DVD Behuising* the court referred to Indian authors who said that the doctrine of 'pith and substance' was one of the interpretive tools which is invoked whenever 'a law dealing with a subject in one list is also

touching on a subject in another list'.[3] As appears from paras 36-38 of *DVD Behuising* and the authorities there mentioned, the purpose of the legislation is at the forefront of this enquiry. Legislation may purport to deal with matters within Schedule 4 but its true purpose and effect may be found to have been directed at achieving a different goal falling outside the functional areas listed in Schedule 4.

[64] In *Liquor Bill* the Constitutional Court held that a Bill did not, for purposes of legislative competence, necessarily have a single characterisation, because a single statute might have more than once substantial character (para 62).

[65] In the case of national legislation, the application of the pith and substance test to legislative competence may lead to a conclusion that the bill's pith and substance place it wholly within Schedule 4 functional areas, even though certain provisions of the bill (which for this purpose would be viewed as ancillary or incidental) fall within Schedule 5 functional areas (an exclusive provincial competence in the absence of s 44(2) justification) or outside Schedules 4 and 5 altogether (an exclusive national competence). Conversely, and in the case of provincial legislation, the pith and substance test may lead to a conclusion that the bill's pith and substance place it wholly within Schedule 4 functions, even though certain provisions of the bill (again viewed for this purpose as ancillary or incidental) may fall outside both Schedules 4 and 5. A provincial legislature would be entitled to enact legislation of this kind because, in accordance with the pith and substance test, the legislation's characterisation as a whole would place it within Schedule 4.

[66] Although in practice national legislation is ordinarily passed in the National Assembly before being referred to the NCOP either in terms of s 75 or 76(1), national legislation may in certain circumstances be initiated in the NCOP, in which event s 76(2) requires the legislation to be referred to the National Assembly. In that regard, s 44(1)(b)(i) confers on the NCOP the power to pass, in accordance with s 76, legislation 'with regard to any matter within a functional area listed in Schedule 4'. This is a matter of legislative competence rather than tagging, and the pith and

[3] For a useful discussion of the Canadian origins of the 'pith and substance' test and its development in other jurisdictions, see Murray & Simeon *'Tagging' Bills in Parliament: Section 75 or Section 76?* (2006) 123 *SALJ* 232 at 245-249

substance test would thus determine whether the NCOP could initiate the legislation in question. So whereas the National Assembly could initiate legislation containing certain provisions falling within Schedule 4 even though the pith and substance of the legislation was outside the scope of both Schedules 4 and 5, the NCOP could not.

[67] Three aspects of potential relevance to tagging may be noted from this brief discussion of legal competence:

[a] In the case of national legislation which is initiated in the NCOP in terms of s 44(1)(b)(ii) read with s 76(2) there appears to be no scope for a distinction between the test for legislative competence on the one hand and tagging on the other. The NCOP can only initiate legislation within its constitutionally-conferred legislative competence. If such legislation, in its pith and substance, falls outside the scope of Schedule 4, the NCOP is not entitled to initiate it; if the legislation, in its pith and substance, falls within Schedule 4, the NCOP has legislative competence, and s 44(1)(b)(ii) requires the procedure in s 76 to be followed. (The same observation holds true in relation to national legislation passed on a Schedule 5 matter on the basis of the special grounds set out in s 44(2). If Parliament passes legislation 'with regard to a matter falling within a functional area listed in Schedule 5', ie legislation whose pith and substance place it within Schedule 5, s 44(2) requires Parliament to follow the s 76 procedure. Legislative competence and tagging thus coincide exactly in this instance.)

[b] In contrast to the NCOP, the National Assembly may initiate legislation whose pith and substance fall outside both Schedules 4 and 5. Such legislation may nevertheless contain provisions (viewed, from the perspective of legislative competence, as incidental) which regulate Schedule 4 functions. This possibility creates the potential for applying a different test for tagging under s 76(3) than for legislative competence.

[c] Finally, legislative competence concerns the constitutional authority of a national or provincial legislature to regulate a particular functional area. The phrase used in that regard in the relevant provisions of s 44 and 104 is 'legislation with regard to

any matter within a functional area listed in' Schedule 4 or Schedule 5 as the case may be or 'legislation with regard to any matter' in the case of the National Assembly. This is very similar to the language used in s 76(3) in relation to tagging.

The Liquor Bill case

[68] The *Liquor Bill* case dealt mainly with the characterisation of legislation for purposes of legislative competence though a preliminary issue of tagging also arose. The bill in that case, which had been passed by Parliament in accordance with s 76, regulated the whole of the liquor trade (production, wholesale and retail). Included in the bill were provisions relating to retail liquor licenses. The Western Cape Provincial Government ('WCPG') contended that the bill was invalid because it intruded on the exclusive provincial competence of 'Liquor licenses' in Schedule 5 and that such intrusion was not justified by the considerations contemplated in s 44(2). The Minister responded that the bill was not in character a liquor licensing measure and that its provisions on that subject were purely incidental. That raised the question of characterisation for purposes of determining legislative competence. However, and in reply to the Minister's characterisation of the bill, the WCPG contended that, if the Minister's characterisation were right, the bill should have been processed in accordance with s 75 rather than s 76 and was for that reason invalid. This raised a question of the test for tagging.

[69] In regard to the tagging question (treated as a procedural challenge), Cameron J, writing for a full court, said whatever the characterisation of the bill for purposes of determining legislative competence, the bill undoubtedly contained provisions which 'in substantial measure' fell within a functional area listed in Schedule 4', namely 'trade' and 'industrial promotion' (para 27). In terms of s 76(3) the bill had thus correctly been processed in terms of s 76 rather than s 75.

[70] In regard to the legislative competence question, Cameron J considered that the bill could not receive a single characterisation, and that its true substance was directed at three objectives (para 69). Parliament's legislative competence to pass the bill thus had to be assessed separately with reference to the provisions directed at these three objectives. In relation to the first two objectives, Cameron J concluded

that the provisions of the bill directed at those objectives could not be characterised as falling within Schedule 5. The provisions directed at the third objective, by contrast (which prescribed in some detail to the provincial legislatures what structures should be set up and how those structures should go about considering and awarding retail liquor licenses), regulated the Schedule 5 competence of 'Liquor licenses', and justification for intrusion by Parliament in terms of s 44(2) had not been demonstrated. The bill was thus declared unconstitutional to that extent.

[71] The analysis of tagging and legislative competence in *Liquor Bill* provides no support for the view that knock-on effects into Schedule 4 functional areas are of any relevance. The court was concerned with the functional areas which the provisions of the bill directly regulated. In regard to legislative competence, the bill's provisions on two of its three objectives directly regulated the functional areas of 'trade' and 'industrial promotion', Schedule 4 functional areas which were within Parliament's legislative competence. The bill's provisions on the third of the three objectives directly regulated the functional area of 'Liquor licenses', a Schedule 5 functional area which was outside Parliament's legislative competence in the absence of s 44(2) justification. In regard to tagging, the provisions of the bill, viewed as a whole, in substantial measure regulated 'trade' and 'industrial promotion' and the bill was thus correctly processed in accordance with s 76.

The Tongoane case

[72] Whereas in *Liquor Bill* the tagging question was peripheral to the main issue of legislative competence, in *Tongoane* it was the key issue (the Constitutional Court declined to decide the other issues which arose). Whereas in *Liquor Bill* a provincial government somewhat opportunistically contended that a bill should have been processed in accordance with s 75 rather than s 76 (ie in accordance with a procedure which gave provinces a less strong voice), in *Tongoane* the legislation in question, the Communal Land Rights Act 11 of 2004 ('CLARA'), had been processed in terms of s 75. The complaint from various communities was that it should have been processed in terms of s 76. This tagging challenge ultimately succeeded.

[73] In *Tongoane* Parliament contended that the tagging question should be tested in the same way as legislative competence, ie with reference to the pith and substance test. Parliament submitted that the pith and substance of CLARA was land tenure. Since this was not a functional area listed in Schedule 4 (or, for that matter, in Schedule 5), CLARA was not legislation which fell within a functional area listed in Schedule 4 within the meaning of s 76(3) of the Constitution (paras 56-57), even though the legislation contained provisions dealing with 'indigenous law and customary law' and 'traditional leadership', matters which indeed fell within Schedule 4.

[74] The communities, on the other hand, argued that *Liquor Bill* established a separate test for tagging, namely whether the provisions of the bill 'in substantial measure' fell within a functional area listed in Schedule 4. They argued that even if the legislation's character as a whole was land tenure, the provisions it contained on indigenous law, customary law and traditional leadership fell in substantial measure within those Schedule 4 functional areas (paras 58).

[75] Ngcobo CJ, writing for a unanimous court, accepted the communities' argument and the *Liquor Bill* test (para 58). He then proceeded to provide a more detailed justification than was offered in *Liquor Bill* for the adoption of separate tests for tagging and legislative competence. He did not decide, but appears to have been willing to assume for purposes of argument, that the characterisation of the legislation as a whole for purposes of determining legislative competence (which was not an issue in the case) was land tenure, an exclusively national competence. He nevertheless concluded that there were provisions in CLARA which in substantial measure dealt with indigenous law, customary law and traditional leadership.

[76] In explaining the justification for the 'substantial measure test', Ngcobo CJ said that the test for tagging has to be informed by its purpose. Tagging is not concerned with determining the sphere of government that has the competence to legislate on a matter nor is it concerned with preventing interference in the legislative competence of another sphere of government. Tagging is concerned with the extent of the voice that the provinces have on the content of legislation: 'The

more it affects the interests, concerns and capacities of the provinces, the more say the provinces should have on its content' ((para 60). His analysis in paras 61-72 was directed at supporting this view with reference to various other provisions of the Constitution.

[77] In applying the 'substantial measure' test to CLARA (paras 74-97), Ngcobo CJ examined the Act to determine to what extent its provisions regulated 'indigenous law' and 'traditional leadership'. He said (para 75) that, in the context of 'indigenous law and customary law' and 'traditional leadership', a bill would be found to deal with Schedule 4 matters 'if it repeals, replaces or amends indigenous law or the powers and functions of traditional councils' or if it 'requires indigenous law to be "recorded", codified or "registered" or, to use the words of CLARA, "converted, confirmed or cancelled"'. He noted that the field which CLARA sought to cover in relation to the administration of communal land was 'not unoccupied' because there was at present a system of law that regulated the use, occupation and administration of communal land and that regulated the powers and functions of traditional leaders in relation to communal land (para 79). Because CLARA sought to introduce a new regime in a field presently regulated to a large extent by indigenous law, it followed that CLARA in substantial measure dealt with indigenous law and traditional leadership (para 80). The Chief Justice illustrated this with reference to three particular features of CLARA (paras 82-94). He concluded as follows in paras 95-97:

'[95] Counsel for Parliament contended that any effect that the provisions have on indigenous law is indirect and incidental, and submitted that CLARA "could only conceivably have an impact on indigenous law and customary law to the extent that the latter do not secure land tenure". However, he made no attempt to analyse the extent to which indigenous law provided or did not provide secure communal land tenure. It seems to me that once it is accepted, as Parliament does, albeit in a faint tone, that the provisions of CLARA may have an impact on the indigenous law of communal land tenure, it must be accepted that the provisions of CLARA, in substantial measure, affect indigenous law and customary law.

[96] To sum up, therefore, CLARA replaces the living indigenous law regime which regulates the occupation, use and administration of communal land. It replaces both the institutions that regulated these matters and their corresponding rules. CLARA also gives traditional

councils new wide-ranging powers and functions. They include control over the occupation, use and administration of communal land.

[97] I conclude, therefore, that the provisions of CLARA in substantial measure affect "indigenous law and customary law" and "traditional leadership", functional areas listed in Schedule 4. It follows therefore that CLARA was incorrectly tagged as a s 75 Bill, that it should have been tagged as a s 76 Bill, and that the procedures set out in that section should have been followed…'

Evaluation

[78] In para 27 of *Liquor Bill* as approved in para 58 of *Tongoane* the test for tagging was stated to be 'whether the provisions of the bill in substantial measure fall within a functional area listed in Schedule 4. In the succeeding paragraphs of Ngcobo J's judgment in *Tongoane* in support of this test there are passages which, if they are not viewed within the appropriate constitutional and judicial setting, might be thought to justify a broader knock-on effects approach to testing whether legislation 'in substantial measure' falls within a Schedule 4 functional area. Mr Duminy in replying argument placed considerable emphasis on such passages. They include the extract I have already quoted from para 60. In para 62 Ngcobo CJ said that the key to tagging lay not in concurrent legislative competence but 'in those measures that substantially affect the provinces'. The reference to provisions which 'substantially affect the provinces' is repeated in paras 64, 66, 69 and 71.

[79] However, I am satisfied that the court in *Tongoane* was not intending to adopt, as a test for tagging, an enquiry into knock-on effects. In particular, the court was not intending to say that a bill whose provisions regulate matters falling within Parliament's exclusive legislative competence (ie matters outside of both Schedules 4 and 5) must be tagged in terms of s 76 if the implementation of that legislation will give rise to knock-on effects on matters which provinces can regulate in terms of Schedule 4. In context, the substantial effects contemplated in *Tongoane* have reference to the extent to which the provisions of the legislation actually regulate a functional area listed in Schedule 4.

[80] The first point to note, in this regard, is that a rejection of the knock-on effects approach and an acceptance of the direct regulation approach does not offend against the distinction drawn in *Tongoane* between the test for legislative competence and for tagging. Legislative competence and tagging are both concerned with the functions which the legislation actually regulates. The difference is that when testing legislative competence the function actually regulated is identified with reference to the pith and substance of the enactment as a whole, whereas when testing for tagging one allows for the possibility that provisions which are not sufficiently dominant to give the legislation as a whole a Schedule 4 character may nevertheless in substantial measure regulate a Schedule 4 functional area.

[81] The second point is that the test formulated in para 27 of *Liquor Bill* and adopted in para 58 of *Tongoane* is 'whether the provisions of the bill in substantial measure fall within a functional area listed in Schedule 4' (my emphasis). This formulation is directly linked to the language of the Constitution, which is what the courts were seeking to interpret. In relation to legislative competence, the Constitution in ss 44 and 104 refers to 'legislation … with regard to a matter within a functional area listed in Schedule 4'. In regard to tagging, s 76(3) refers to a bill which 'falls within a functional area listed in Schedule 4'. Neither *Liquor Bill* nor *Tongoane* suggests that the adoption of differing tests for legislative competence and tagging has anything to do with the slight difference in the wording of s 44 and 104 on the one hand and s 76(3) on the other. I cannot see that there is any difference, linguistically, between legislation 'with regard to a matter within [ie falling within] a functional area listed in Schedule 4' and legislation 'which falls within a functional area listed in Schedule 4'. Indeed, and as I have observed, in relation to national legislation initiated in the NCOP the two formulations must necessarily coincide because of the inextricable link which s 44(1)(b)(ii) and s 76 forge between legislative competence and procedure; and the same is true for national legislation on Schedule 5 matters passed on the basis set out in s 44(2).

[82] This justifies the conclusion that the language of the Constitution in ss 44, 76 and 104, where it refers to legislation on matters falling within Schedule 4, has in mind legislation which actually regulates Schedule 4 functions. Nevertheless, the

intensity of the test for determining whether legislation does or does not fall within Schedule 4 is influenced by the context and purpose of the immediate provisions within which the phraseology appears. Provisions which may be discounted as incidental for purposes of determining legislative competence may nevertheless come under the spotlight when it comes to tagging.

[83] It was this distinction which, in my view, Ngcobo CJ had in mind in paras 62 and 63 when he said that the key in tagging is not legislative competence but those measures that substantially affect the provinces. He said the following in that regard in para 63 (emphasis in the original):

'Indeed, as counsel for the communities pointed out, if the s 76 process were limited only to Bills involving subject-matter over which the provinces themselves had concurrent legislative competence, the need for a legislative process that took special account of their interests would hardly arise. This is because their concurrent legislative powers would enable them to enact their own preferred legislation in the same field, which would indeed enjoy some precedence, subject only to the national override provided for in s 44(2). Yet it is where matters substantially affect them *outside* their concurrent legislative competence that it is important for their views to be properly heard during the legislative process. This too shows that concurrent provincial legislative competence provides no conclusory guide to the rationale behind the s 76 process.'

Incidental provisions on Schedule 4 functions in national legislation whose pith and substance place it outside Schedule 4 affect the provinces outside their concurrent legislative competence, because on the pith and substance test a province could not enact such legislation. But where such incidental provisions nevertheless regulate a Schedule 4 function in substantial measure, it is important that the provinces should have the special voice contemplated in s 76.

[84] The next consideration is that in both *Liquor Bill* and *Tongoane* the arguments were directed at the functions actually regulated by the legislation under attack and not with knock-on effects. And the conclusions reached in those cases on tagging were related to the extent to which the provisions of the relevant legislation actually regulated functions falling within Schedule 4 or Schedule 5 as the case may be. In *Liquor Bill* the conclusion on tagging could hardly be controversial; many provisions of the bill directly regulated 'trade' and 'industrial promotion' and did so to

a substantial extent. In *Tongoane* the focus was again on the fact that CLARA actually regulated indigenous law, customary law and traditional leadership by introducing provisions which substantially altered the existing law on these matters. It does not seem to have been argued in either *Liquor Bill* or *Tongoane* that the court should concern itself with knock-on effects. It is unlikely, in the circumstances, that anything said in those cases, and in particular in *Tongoane*, was intended to support or approve a knock-on effects approach. The court in *Tongoane* took it for granted, I think, that the focus was on the functions actually regulated by the relevant provisions of the legislation.

[85] The true distinction which the Constitutional Court was making in *Tongoane* appears, in my view, from para 70, where Ngcobo CJ said the following (my emphasis and italicised insertion):

'To apply the "pith and substance" test to the tagging question, therefore, undermines the constitutional role of the provinces in legislation in which they should have a meaningful say, and disregards the breadth of the legislative provisions that s 76(3) requires to be enacted in accordance with the s 76 procedure. It does this because it focuses on the substance of a Bill and treats provisions which fall outside its main substance as merely incidental to it and consequently irrelevant to tagging. In so doing, it ignores the impact of those provisions [*ie the incidental provisions*] on the provinces. To ignore this impact is to ignore the role of the provinces in the enactment of legislation substantially affecting them. Therefore the test for determining how a Bill is to be tagged must be broader than that for determining legislative competence.'

[86] Then follows the Chief Justice's summary in para 72 (again my underlining):

'To summarise: any Bill whose provisions substantially affect the interests of the provinces must be enacted in accordance with the procedure stipulated in s 76. This naturally includes proposed legislation over which the provinces themselves have concurrent legislative power, but it goes further. It includes Bills providing for legislation envisaged in the further provisions set out in s 76(3)(a)-(f), over which the provinces have no legislative competence, as well as Bills, the main substance of which falls within the exclusive national competence, but the provisions which nevertheless substantially affect the provinces. What must be stressed, however, is that the procedure envisaged in s 75 remains relevant to Bills that do not, in substantial measure, affect the provinces. Whether a Bill is a s 76 Bill is determined in two ways. First, by the explicit list of legislative matters in s 76(3)(a)-(f); and

second by whether the provisions of a Bill in substantial measure fall within a concurrent provincial legislative competence.'

[87] The words I have underlined in these passages reflect that what the Constitutional Court was emphasising was that statutory provisions which regulate Schedule 4 matters but are incidental to the main substance of the bill (viewed from the perspective of legislative competence) might nevertheless regulate those Schedule 4 matters to an extent justifying the more significant role envisaged for the NCOP in s 76. The court took for granted (as appears from para 72) that, if the true substance of a bill placed it within Schedule 4 (when viewed from the perspective of legislative competence), the bill would have to be tagged in accordance with s 76 – not because of knock-on effects but because the whole bill actually regulated Schedule 4 matters. And conversely it was taken for granted, I think, that, if the provisions of a bill were wholly outside Schedules 4 (ie if there were not even incidental provisions regulating Schedule 4 matters), the bill would not need to be tagged in accordance with s 76. The court made no reference to the knock-on effects of provisions of a bill regulating functions falling outside Schedule 4. The court was concerned only with the impact of provisions which, though incidental for purposes of legislative competence, nevertheless affected the provinces (ie because they regulated Schedule 4 functions, matters of concurrent legislative competence). If it were otherwise, Ngcobo CJ would not have confined his remarks in para 70 to the impact of the incidental provisions. If he had knock-on effects in mind, the character of particular provisions as being main provisions or incidental provisions would be irrelevant. He would instead have spoken of knock-on effects of all the provisions of the bill, whether or not they were main provisions or incidental provisions.

[88] A further consideration in favour of the direct regulation approach is to be found in the parts of s 76(3) to which I have not as yet referred and in s 76(4). Tagging in terms of s 76 is required not only if the legislation 'falls within a functional area listed in Schedule 4' but also if it 'provides for legislation envisaged in' various other provisions of the Constitution. The sections listed in ss 76(3) and (4) are: ss 44(2), 65(2), 163, 182, 195(3) and (4), 196, 197, 220(3) and Chapter 13. In these instances there is no reason to doubt that tagging is only required if the legislation

actually regulates the matters contemplated in those provisions of the Constitution. There is no reason that it should be different in the case of the matters listed in Schedule 4.

[89] There are also powerful practical considerations in favour of rejecting a knock-on effects approach. The framers of the Constitution must have intended a reasonably workable system for determining whether legislation was to be tagged in terms of s 75 or s 76. Parliament itself needs to be able to determine this question so that the legislation can be correctly processed. The direct regulation approach to the 'substantial measure' test makes this possible, even though there may be difficult cases on the borderline. On the direct regulation approach, one examines the provisions of the bill to see what they actually regulate; if any of the provisions regulate Schedule 4 functional areas, a value judgement must be made as to whether they do so in substantial measure. If so, the bill follows the s 76 procedure. Although there may be scope for differences of opinion when it comes to the value judgement, pragmatically Parliament would usually be safe if it adopted a cautious approach and tagged borderline bills in accordance with s 76 rather than s 75 (cf *Liquor Bill* paras 26).

[90] Tagging becomes very much more difficult, if not impossible, if one adopts the knock-on effects approach to the 'substantial measure' test. The knock-on effects arguments in the present case provide an illustration. The pre-existing Act empowers SANRAL to declare national roads as toll roads. According to the DA, the Amendment Act increases the likelihood of such declarations in regard to busy urban national roads. But the knock-on effects on the provinces in regard (for example) to the environment, pollution control, population development, trade and so forth are unknown and unknowable. The effects, if any, will not be brought about directly by the Amendment Act but by the subsequent exercise from time to time by SANRAL and the Minister of the powers conferred on them in s 27. At the time a bill conferring such powers is proposed, one cannot know when and to what extent the powers will be exercised in the future. Those required to tag the bill could at best have regard to the policy of the government of the day and to the views of SANRAL's current management, to the extent that such policy and views are known to them. But future governments may have different policies and SANRAL's future

management might change their views. And if a power conferred in terms of the proposed legislation were in due course to be exercised, its knock-on effects would be influenced by the prevailing social, economic and other circumstances at the time of implementation, which could be very different from those prevailing at the time the legislation was passed.

[91] The knock-on-on effects approach would also, I think, result in virtually all legislation having to be tagged in terms of s 76. Everything that happens in South Africa happens in one or more provinces. National legislation falling outside the scope of Schedules 4 and 5 will usually have some knock-on effects into the wide-ranging functional areas listed in Schedule 4.

[92] A final consideration is that the test for tagging should sensibly have regard to effects on the provinces in general. When national legislation is passed which contains provisions which in substantial measure regulate a Schedule 4 function even though the legislation's character as a whole places it outside of Schedule 4 for purposes of legislative competence, the 'effect' on the provinces is uniform, in that the legislation operates throughout the country and thus in substantial measure affects the law in all of the provinces and does so on a matter which all of the provinces have the power to regulate in their own geographic areas. Knock-on effects are very different. The knock-on effects will generally be determined by when and to what extent the legislation is implemented over time and by the prevailing circumstances on each such occasion. The legislation may be implemented in a way which has effects for one province but not another. In the present case, for example, it is possible that the GFIP will be the only open-road tolling project depending for its feasibility (if one assumes the correctness of the DA's other arguments) on the Amendment Act. If so, the Amendment Act might have no knock-on effects outside of the Gauteng province. Assuming that this could be predicted as the most likely scenario, it does not make sense that the NCOP, which collects the voices of all nine provinces, should have an enhanced legislative role.

[93] The pre-existing Act and the Amendment Act contain provisions which require provinces (through their executive, including Premiers) to be consulted when roads are declared as national roads and when national roads are declared as toll

roads. On the direct regulation approach, the inclusion of such provisions does not support a view that the legislation in substantial measure falls within a Schedule 4 functional area. This is, in my opinion, as it should be. It is only when SANRAL or the Minister exercise a particular power in relation to a particular road that one can assess which province or provinces if any will be affected by the exercise of the power and the extent of such effect. This is correctly not a matter of tagging. But it is entirely consistent with constitutional values and cooperative governance that, where the implementation of legislation exclusively within a national competence may have knock-on effects for one or more provinces, provision should be made in the legislation for those provinces to be involved (by way of consultation or agreement) in the exercise of the power. Section 40 of the pre-existing Act recognises, by way of example, that the declaration of an existing road as a national road will affect the province in which the road falls; and that the declaration of a new road (still to be constructed) as a national road may affect the province in which the road is to be built if it will have a substantial impact on traffic flows. Similarly, the consultation for which the pre-existing s 27(4) and the amended s 27(4) provide in the declaration of a national road as a toll road is concerned only with the province in which the proposed toll road is located. As I have said, this is not appropriately dealt with by way of tagging, since at the stage the legislation is enacted it is impossible to say which provinces will be affected and if so when and in what way.

[94] The DA's counsel in written argument placed considerable reliance on the five questions suggested by Murray and Simeon at 256-259 of the article cited in footnote 1 *supra*. That article was written before the decision in *Tongoane*. It was mentioned in the *Tongoane* judgment in passing. Mr Duminy in oral argument accepted that, to the extent that the approach suggested by Murray and Simeon is in conflict with *Tongoane*, I am bound by the latter decision. I do not find it necessary to comment on the authors' discussion of the first three questions they pose as part of the test for tagging; those three questions all appear to be concerned with provisions of a bill which actually regulate a Schedule 4 matter. However, and to the extent that their fourth question indicates (as I think it does) an

approach which would require knock-on effects to be taken into account in tagging,[4] I respectfully part company from them for all the reasons I have given.

[95] I thus conclude that, in accordance with what I have called the direct regulation approach, the 'substantial measure' test for tagging laid down in *Liquor Bill* and *Tongoane* requires one to determine whether to a substantial extent the legislation under consideration actually regulates matters falling within Schedule 4. If it does, the bill must be tagged under s 76. If not, the bill is to be tagged under s 75, even though the implementation of the legislation on the matters falling outside Schedule 4 may affect the social, economic and other circumstances relevant to the regulation of the matters listed in Schedule 4.

Application of correct test to facts of this case

[96] As explained earlier, the DA's case was founded on the knock-on effects of the Amendment Act. It was not the DA's case that the pre-existing Act or the Amendment Act actually regulates the functional areas in Schedule 4 on which the DA relies, namely the environment, pollution control, public transport, regional planning and development, road traffic regulation, trade and urban and rural development. The DA's case was rather that the Amendment Act, when implemented in the future, would give rise to changed social, economic and other circumstances relevant to these listed functions.

[97] For the reasons I have explained, I do not think that those knock-on effects are relevant to tagging. The Amendment Act does not intrude upon the right of provinces to legislate in the future on any of the functional areas relied upon by the DA and does not constitute legislation on any of those matters. If the implementation of the pre-existing Act as amended by the Amendment Act does indeed significantly

[4] Their fourth question is 'Does the Bill have implications for any policy or law which provinces are already implementing or may implement? If so, the Bill should follow the s 76 procedure.' In discussing this question, the authors observe that national laws may affect provinces less directly than in the manner postulated by their earlier questions. As an example, they note that a national law concerning universities may have an impact on standards in high schools and thus an impact on 'Education at all levels, excluding tertiary education', which is a Schedule 4 functional area. They give, as another example, a national law dealing with children's courts (an exclusively national matter), which may impinge on social services in the provinces and thus warrant the engagement of provincial governments in the NCOP.

change traffic patterns, trade and urban development in a particular province, that province will be at liberty, if it regards this as desirable, to enact legislation to alter the law in that province regarding these functional areas, just as a province is free to do so if the change in circumstances is brought about in other ways (global financial conditions, the state of the domestic economy, climate change, population movements, laws passed by other provinces and so forth).

[98] In my view, the pre-existing Act and the Amendment Act do not, at least in the respects relevant to this case, regulate any functional area listed in Schedule 4. In terms of Schedule 5A and 5B respectively, 'Provincial roads and traffic' and 'Municipal roads' are an exclusive provincial competence. National roads are not listed in either Schedule 4 or Schedule 5. They thus constitute a residual matter falling exclusively within the legislative competence of Parliament in terms of s 44(1)(a)(i) ('legislation with regard to any matter').

[99] In terms of s 39(1) of the Act, the government must publish its policy with regard to national roads; and in terms of s 39(3) SANRAL must determine its business and financial plan and strategic plan and its standards and criteria for road design and construction and for road safety within the framework of the national roads policy determined by the government. National roads are declared by the Minister in terms of s 40 of the Act.

[100] Section 27 is concerned with the declaration of national roads as toll roads. The relevant provisions of the Amendment Act either amend s 27 or work in aid of that section by creating a presumption as to the use of vehicles and by giving the Minister additional regulation-making powers. The powers conferred by s 27 in connection with toll roads must be viewed in the context of the main functions of SANRAL as described in s 2 and s 25(1). SANRAL is responsible for and has been given the power to perform all strategic planning with regard to the South African national roads system as well as the planning, design, construction, operation, management, control, maintenance and rehabilitation of national roads and the financing of all those functions in accordance with its business and financial plan, all with a view to ensuring that the government's goals and policy objectives concerning national roads are achieved. It is to these ends that national roads may be declared

toll roads. In terms of s 33(3) SANRAL is required to keep separate accounts of all toll monies. Those monies may only be used to meet expenditure connected with the acquisition of land for toll roads, investigations and surveys with regard to toll roads, and the planning, designing and construction of, and any other work in connection with toll roads (including the erection of toll plazas), the maintenance and operation of toll roads and toll plazas, and paying off loans raised to finance toll roads.

[101] It is clear, to my mind, that provincial legislatures have no power to pass legislation of the foregoing kind aimed at meeting the purposes identified in the Act.

[102] In replying argument, Mr Duminy contended, somewhat faintly I think, that s 27 of the pre-existing Act and s 27 as amended by the Amendment Act regulate the functional area of 'Road traffic regulation'. He referred to statements by the Minister of Finance and others to the effect that the tolling of national roads can be used as a tool to relieve traffic congestion, and that it was inherent in such an approach that the aim was to influence significant numbers of drivers to use alternative provincial and municipal roads. I do not accept this argument. I am prepared to accept that the function of 'Road traffic regulation' in Schedule 4 entitles provinces (concurrently with Parliament) to pass legislation with a view to regulating road traffic *inter alia* on national roads. However, the tolling of a national road in terms of s 27 is not a traffic control regulation. The character of a power must be determined with reference to the legitimate purposes for which it can be exercised. SANRAL's purposes and functions are those mentioned in s 2 and s 25(1). SANRAL's function is in essence to plan, construct, operate, manage, control and maintain national roads. The control of traffic (as distinct from the infrastructure) is not one of SANRAL's functions. In regard to toll roads in particular, it is clear from s 33(3) that the purpose of declaring a national road a toll road is to raise money to plan, construct, maintain and operate the road in question, not to force a change in traffic patterns. The exercise of the power for those purposes may have incidental benefits of the kind mentioned by the Minister of Finance, but the power cannot be exercised in order to achieve those incidental benefits rather than the purposes authorised by the Act.

[103] It follows that in my view the Amendment Act does not contain provisions which fall within Schedule 4 at all. The question of 'substantial measure' does not even arise.

[104] In the light of this conclusion it is unnecessary to deal with the arguments which were advanced on the assumption that one must have regard to knock-on effects in answering the 'substantial measure' test for tagging. I simply note the following without expressing any final view:

[a] I think there is considerable merit in the respondents' submission that the grounds of differentiation listed in s 27(4)(a) of the pre-existing Act are illustrative and are not a closed list. Inherent in the power to determine the amount of toll and to provide for rebates, increases and reductions is the power to draw rational distinctions. On that basis, and regardless of what the drafters of the explanatory memorandum thought, the amendments brought about by s 3(a) of the Amendment Act do not effect a substantial change to the powers of the Minister in determining the amount of toll, though they have placed the matter beyond doubt and thus removed scope for a contrary argument.

[b] It might also be said, even if the grounds of differentiation listed in s 27(4)(a) were a closed list, that the list in the pre-existing Act is sufficient to permit the type of differentiation that has been introduced in the GFIP tariff (and thus the type of differentiation which might be thought necessary for any other open-road tolling projects). In terms of the pre-existing Act, differences in the amount of tariff can be based on differences in categories of vehicles and in categories of road users. While these grounds in s 27(3)(b) may not have been formulated with the distinctions of the GFIP tariff in mind, it is fairly arguable that vehicles or road users could be categorised *inter alia* with reference to whether or not an e-tag has been issued in respect of the vehicle, whether or not the user has registered with SANRAL and so forth. (I should add, though, that when I raised this with Mr Unterhalter for SANRAL he did not seem enthusiastic to embrace it.)

[c] I doubt whether the expansion of the Minister's regulation-making power by way of s 4(b) of the Amendment Act is as significant as the DA claims. Once the Minister

is empowered to make regulations on these additional matters, SANRAL would be obliged to operate within the constraints of any regulations promulgated thereunder. Absent any such regulations, the determination of matters such as the specifications for tolling equipment and the like would be a matter of administrative discretion. SANRAL already has the power to declare a national road a toll road, and the definition of 'toll plaza' makes clear that the liability to pay toll can be recorded by electrical, electronic or mechanical means. Unless SANRAL's hands are tied by regulations, SANRAL must necessarily have the power, in constructing the toll road or the toll plaza, to determine the nature of the equipment in its own discretion. In regard to the new regulation-making power to determine the terms and conditions applicable to the payment of toll, the pre-existing act already provides in s 27(3)(d) that toll is payable from the date and time determined by the Minister on the recommendation of SANRAL.

[d] The significance of the presumptions created by s 5 of the Amendment Act is more difficult to gauge. This amendment undoubtedly brings about a change to the pre-existing regime and I do not doubt that it is a very useful change from SANRAL's perspective. Whether its absence would cause SANRAL to abandon open-road tolling on busy national urban roads is not, I think, the sort of matter on which the Constitution intended either Parliament or the courts to have to speculate. Such speculation would be required by the knock-on effects approach but not on the direct regulation approach.

[105] It is also unnecessary, in the light of the conclusions I have reached, to discuss the question of remedy. I simply record that in argument the DA did not resist the suspension of any declaration of invalidity for a period of 18 months to afford Parliament the opportunity of reconsidering the Amendment Act in accordance with the s 76 procedure. In its heads of argument the DA submitted that the suspension should be qualified in two respects (namely that the state should not be allowed to rely on the new presumption in criminal prosecutions, and that provision should be made for the repayment of toll monies by SANRAL if the suspension lapsed and the declaration of invalidity became final). These qualifications were resisted by the respondents, *inter alia* on the basis that, because they had been raised by the DA for the first time in argument, the respondents had

not had the opportunity of adducing facts bearing on the question whether it would be just and equitable (as contemplated in s 172(1)(b) of the Constitution) to include these qualifications in an order.

Conclusion

[106] The application must thus be dismissed on its merits.

[107] Leaving aside the costs in respect of the initial scheduled hearing of 10 December 2013, I think the parties should bear their own costs in accordance with the principles laid down in *Biowatch Trust v Registrar, Genetic Resources & Others* 2009 (6) SA 232 (CC). In that case it was confirmed that as a general rule in constitutional litigation an unsuccessful litigant in proceedings against the state should not be ordered to pay costs. The general rule is concerned not with the characterisation of the parties but the nature of the issues. Equal protection under the law requires that costs awards should not depend on whether a party is acting in its own interests or in the public interest and should not be determined by whether the litigant is financially well-endowed or indigent or reliant on external funding. The critical question is whether the litigation has been undertaken to assert constitutional rights, whether the constitutional issues are genuine and substantive, and whether there has been impropriety in the manner in which the litigation has been undertaken (paras 16-25).

[108] The respondents submitted that the DA in instituting this application was seeking to boost its political profile in the run-up to a national election by attacking legislation concerned with e-tolling, a cause which the DA expected (in view of the widespread opposition to GPIF e-tolling) to carry popular support. However, the principles laid down in *Biowatch* indicate that this type of criticism is misplaced and is not in itself a basis for not applying the general rule. A litigant (including a political party) may attack the constitutionality of legislation for its own benefit or in the public interest. This is by the way. One must have regard to the character of the litigation itself. The present case raises genuine and substantive constitutional issues regarding the approach to tagging and the application of that approach to the

constitutional validity of the Amendment Act. The application is by no means 'frivolous or vexatious' or 'manifestly inappropriate' (*Biowatch* para 24).

[109] The respondents argued that even if the *Biowatch* rule were applied to the costs in general, the costs occasioned by the urgent set-down of the matter on 10 December 2013 should be for the DA's account. They submitted that there were no considerations of urgency which justified 'tumbling into court' as the DA supposedly did. Since the precise circumstances which gave rise to the agreed postponement in the order of Griesel J dated 9 December 2013 did not appear from the papers, the correspondence between the attorneys was placed before me by agreement.

[110] The President's assent to the bill was made known by publication in the *Gazette* on 26 September 2013. The DA launched its application on 6 November 2013, six weeks later. The notice of motion stated that the application would be made on 10 December 2013 (five weeks thereafter), and abridged periods for the filing of papers were specified in the notice of motion with a view to the matter being ripe for hearing on that date. The notice of motion called on the respondents to file their answering affidavits by 21 November 2013. The National Treasury delivered its intervention application (which also served as its opposing papers) on 15 November 2013. By 20 November 2013 the President, the Minister and SANRAL had delivered their opposing papers. Only the Speaker of the National Assembly and the Chairperson of the NCOP (whose papers were the shortest) filed their answering papers outside of the period specified in the notice of motion, on 28 November 2013. The notice of motion had specified 28 November 2013 as the date on which the DA would file its replying papers. In the event, the replying papers were filed on 2 December 2013. The notice of motion also specified that the parties should file their heads of argument by Friday 6 December 2013 in anticipation of the hearing on Tuesday 10 December 2013.

[111] The correspondence relating to the conduct of the matter reflects the following:

[a] SANRAL's attorneys wrote to the DA's attorneys on 11 November 2013 complaining that the application was not urgent and stating that if the DA declined to withdraw it SANRAL would seek a punitive costs order.

[b] As noted, SANRAL and the other respondents (apart from the Speaker and Chairperson) filed their affidavits on or before 20 November 2013. On that day the DA's attorneys wrote to the respondents proposing that by agreement the matter be placed on the semi-urgent roll on a date to be agreed, failing which on a date directed by the court on 10 December 2013, and that a timetable for further papers be agreed. It is unclear whether this letter was sent before or after the receipt by the DA's attorneys of the answering papers filed by the President, the Minister and SANRAL. I suspect that it was written before receipt, and that the DA's attorneys had in mind that the respondents should be given a longer period to file their answering papers than specified in the notice of motion.

[c] On 25 November 2013 the DA's attorneys wrote to the respondents' attorneys stating that they had been approached by the Speaker and Chairperson for an extension of time to file their answering papers; and that the DA had provisionally agreed to the extension, subject to the attitude of the other respondents.

[d] SANRAL's attitude was conveyed in a letter from their attorneys on the same day, in which they stated that they were not in a position to dictate time periods for the Speaker or Chairperson but that as far SANRAL was concerned they insisted that the DA comply with the time periods set out in the notice of motion and thus file their replying papers by 28 November 2013. It is unclear whether the attorneys for the President and Minister responded to the letter of 25 November 2013. There is a letter from the State Attorney on behalf of the National Treasury dated 26 November 2013 in which the National Treasury aligns itself with the letter 'by the second respondent' (the Speaker) but I suspect the intended reference was to the letter written on behalf of the 5th respondent (SANRAL).

[e] On 28 November 2013 the State Attorney wrote to the DA's attorneys, criticising the DA for having failed to consolidate its application with a similar application brought by the Tolhek Aksiegroep in Gauteng (an application which was launched

several days after the DA's application, in which *inter alia* an interim interdict was sought, and which in the event was struck from the roll for want of urgency) and submitting for various reasons that the DA was litigating irresponsibly, both in relation to the court and the other parties. The DA was asked to advise by 16h00 the following day whether it still intended to move its application on 10 December 2013.

[f] The following day, 29 November 2013, the State Attorney wrote to the registrar, stating that the DA had apparently selected the date 10 December 2013 without prior arrangement with the Judge-President; expressing the view that it was not responsible of the DA to press ahead with the hearing in this court a mere week after the enrolment of the same issue in the application brought in Gauteng; and requesting the Judge President to require the DA's attorneys to state by close of business *inter alia* whether the DA contended that the matter should proceed on 10 December 2014 notwithstanding the pending hearing in Gauteng. This letter was sent to the Judge-President's secretary at 14h25 on Friday 29 November 2013. (This was prior to the deadline of 16h00 which the State Attorney had set in the previous day's letter. The DA's attorneys did in fact reply to the State Attorney prior to the 16h00 deadline, as appears below.)

[g] The DA's attorneys replied to the State Attorney at 15h16 on 29 November 2013. Reference was made to the fact that SANRAL's attorneys had rebuffed the DA's proposal for a revised timetable and postponement of the case to the semi-urgent roll. They expressed the view that a referral to the semi-urgent roll still remained the most practical way forward though the letter indicates that the DA intended to be ready for the case to proceed on 10 December 2013 if that is what the other parties required.

[h] The DA's attorneys also wrote to the registrar on 29 November 2013, attaching a copy of their reply to the State Attorney; stating that the DA's counsel would be available for a meeting to discuss arrangements; and noting that their offer for the matter to be postponed to the semi-urgent roll stood.

[i] The DA filed its replying papers on Monday 2 December 2013. This was the same day on which the Tolhek matter was scheduled to be heard in Gauteng. In replying

affidavit the DA said that SANRAL's criticisms on urgency were ill-founded and that there was no indication that SANRAL had been prevented from placing everything it wished before the court. The DA referred to SANRAL's attorneys' letter in which they had rejected a proposed postponement and new timetable and had instead insisted that the DA adhere to the original timetable specified in the notice of motion. In the replying affidavit the DA also rejected the National Treasury's criticisms with regard to urgency. (In the event the Tolhek matter was struck from the roll in Gauteng for want of urgency.)

[h] On the same day (2 December 2013) the DA's attorneys filed the required practice note requesting an early allocation for 10 December 2013 and stating that the matter would take one or two days.

[i] Also on 2 December 2013, the Judge-President's secretary wrote to the attorneys, requesting an urgent meeting prior to 10 December 2013.

[j] On 3 December 2013, and apparently in response to a letter from the State Attorney of the same date, the DA's attorneys indicated that with a view to saving costs they were prepared to have the matter postponed on 10 December 2013 but not to a date 'in the first half of next year' (as the State Attorney had apparently proposed). The DA's attorneys said that they required the matter to be heard in the first term of 2014.

[k] Discussions then began between the legal teams. On Friday 6 December 2013 the DA's attorneys were informed that lead counsel for the President, the Minister and the National Treasury and for SANRAL had no concurrent availability earlier than 8-11 April 2014. However by early afternoon, and presumably after a rearrangement of diaries, the dates of 4 and 5 March 2014 had been agreed with costs to stand over. The terms of the draft order were finalised on Monday 9 December 2013 and made an order on the same day.

[l] Mr Duminy informed me from the bar that the DA would have been willing and ready to proceed with the matter on 10 December 2013 if the other parties had insisted on this.

[112] I do not think it was unreasonable for the DA to serve a modified notice of motion which made provision for an urgent hearing five weeks hence, with an abridged timetable to facilitate an urgent hearing. The constitutional validity of the Amendment Act was a question of substantial and pressing importance, having regard to the fact that on 9 October 2013 the *OUTA* review was dismissed in the Supreme Court of Appeal; that on the same day the President fixed 9 October 2013 as the date on which the Amendment Act would come into force; that on that date the e-tolling regulations made by the Minister were promulgated in the *Gazette*; and that on the same day SANRAL published for comment the revised tariffs relating to the GFIP toll roads. The respondents in their answering papers spoke of the serious consequences if the Amendment Act were found to be invalid (though these contentions were to some extent at odds with their counsel's submissions that the Amendment Act did not in truth add much to the pre-existing Act). The respondents, one would have expected, would have wanted the matter to be finalised with reasonable expedition.

[113] It was not unreasonable for the DA to think that five weeks' notice of the date on which the application would be moved would strike the right balance between [a] the interests of the respondents in filing papers and preparing themselves for the hearing and [b] the interests of the public (and the respondents themselves) in obtaining a prompt determination of the validity of the Amendment Act. In the event, all the respondents apart from the Speaker of the National Assembly and the Chairperson of the NCOP filed their answering affidavits before the date specified in the notice of motion. The affidavits filed by the respondents were lengthy and detailed. None of them found it necessary, after the postponement of 6 December 2013, to supplement their answering papers in any way.

[114] If the DA had insisted on the matter being heard on 10 December 2013, I do not take it as a given that an objection on the ground of urgency would have succeeded. The practice note in the court file indicates that the application was referred by the Judge-President to Griesel J as an early allocation with an estimate of one to two days, so a judge would probably have been available. The affidavits were, in the nature of things, largely argumentative in nature, and foreshadowed at some length all the arguments subsequently advanced before me. I do not see that

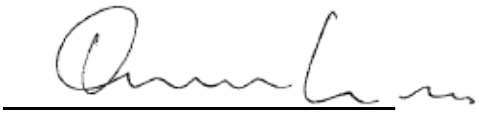
it would have been particularly difficult or prejudicial to the respondents for argument to take place on 10 December 2013.

[115] The fact that the parties agreed to a postponement does not, in the circumstances, show that the costs relating to the initial set down of 10 December 2013 were occasioned unreasonably. I thus do not think that those costs should be dealt with differently from the main costs.

[116] I make the following order:

[a] The application is dismissed.

[b] The parties shall bear their own costs.



ROGERS J

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