IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

Case No.: CC 280/04

In the matter between:

THE STATE

and

NICOLAAS MICHIEL SMIT

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/~~NO~~
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED ✓

26/06/2006 p.p.
DATE SIGNATURE

JUDGMENT

MOJAPELO DJP

Introduction

The refusal in protest by Mr Nicolaas Michiel Smit to pay tollgate fees when he went through the Nkomazi Toll Plaza between Nelspruit and Komatipoort on National Road Number 4 (N4) on twelve different occasions between 21 June 2000 and 18 February 2001, inclusive of both dates, gave rise to the present case. On each of those occasions Mr Smith was required to pay an amount of R23,40 (twenty three rand forty cents) but he refused and went through the tollgate without paying. In so doing he also went through a red traffic light which could only have been activated to green by a tollgate operator upon payment of the prescribed tollgate fee. The total amount which he refused or failed to pay is therefore an amount of R280,80. It is not so much the total amount that the accused refused to pay but rather the nature of the protest and the defences raised by Mr Smith which led to the accused being indicted in this court.

The case raises the validity of the declaration of the N4 toll road between Gauteng (near Pretoria) and the boarder of South Africa and Mozambique (at Komatipoort), which is the main road from Gauteng Province in South Africa to the harbour city of Maputo in the Republic of Mozambique, the validity of the concession Agreement between the RSA and the concessionaire, Trans Africa Concession (TRAC), as well as the constitutionality of the said toll road.

Indictment

The accused is charged with a total of 24 counts comprising two sets of offences: Counts 1 to 12 comprises 12 counts of contravention of section 27(5) (a) read with section 27(5) (b) and section 27 (6) of the South African National Road Agency Limited and National Roads Act, No. 7 of 1998 – the refusal or failure to pay tollgate fees. Counts 13 to 24 comprise the other 12 counts of contravention of section 58(1) of the National Road Traffic Act, No. 93 of 1996, read with sections 58 (2), 69, 73 and 89 of the same Act and Regulations 284 to 291 and Schedule 1 of the National Road Traffic Regulations – failure to comply with the direction of a road traffic sign, to wit, a steady red disc signal.

In regard to Counts 1 to 12 the State alleges in the indictment that on or about the dates listed under Column A and at or about the times listed in Column B of Appendix 1 to the indictment and at the Nkomazi Toll Plaza on the N4, a national road declared as a toll road, within the magisterial district of Barberton, the accused unlawfully and intentionally failed and refused to pay toll as per Column C of the same Appendix 1, despite the fact that the accused was liable for payment of toll. Column C of Appendix 1 lists the amounts of tollgate fees that were chargeable on each occasion for the class of vehicle used by the accused.

As to Counts 13 to 24 the State alleges that on or about the same dates and times specified in Appendix 1 (repeated in Appendix 2 for these counts) and at the place mentioned in respect of counts 1 to 12, the accused operated a motor vehicle with licence

registration BZZ 215 MP and wrongfully failed to comply with direction of a road traffic sign, to wit, a steady red disc signal.

Plea and Admissions

The accused pleaded not guilty to all the counts and reserved the basis of his defence. In the course of the trial and after two state witnesses had testified the accused made the following admissions in terms of section 220 of the Criminal Procedure Act No. 51 of 1977, that:

1. He admits that on the dates listed in column A of Appendix 1 and column A of appendix 2 to the indictment (dates of the offences) and at the times listed under column B of Appendix 2 to the indictment, he, whilst driving a white Ford Telstar motor vehicle with registration BZZ 215 MP, committed the following acts:

    1.1 He stopped his vehicle in a lane at Nkomazi Toll Plaza, on the road know as the N4, opposite a toll booth.

    1.2 He indicated that he declined to pay the toll amount then and there sought by the person in the toll booth in the sum of R23,40.

    1.3 He then drove along the toll lane and out of the Toll Plaza without paying the amount sought by the toll collector.

    1.4 At the time that he stopped at the toll booth there was a traffic signal consisting of a traffic light capable of either red disc light signal or a green disc light signal.

    1.5 At the time that he proceeded along the lane and through the Toll Plaza, the steady red disc light signal had not changed to green.

2. The accused further admitted that he committed all of the aforesaid acts intentionally.

By these admissions the accused relieved the state of the burden of proving the admitted facts. Thus the accused admitted and the state needed not prove that on the dates and at the times and at the place mentioned in the indictment he drove a motor vehicle and that he declined to pay the toll demanded in the said sum of R23,34 and that he drove along the toll lane and out of the toll plaza without having paid the amount demanded. The state also needed not to prove that in driving through the toll plaza the accused ignored a traffic signal (to wit, a red disc light) which was red and that in committing these acts the accused acted intentionally.

Defences:

In the course of the trial and during argument the accused disclosed and raised a number of defences and challenged the state to prove same. He argued at the end of the case that the state has not proved its case against him, particularly in the face of the defences which he raised expressly. The defences that the accused raised were summarised in argument by his legal representative as follows:

1. A general defence that the state failed to prove beyond reasonable doubts all the allegations necessary to convict the accused of contravention of the respective crimes.
2. The accused also launched, through cross-examination, an attack on the constitutionality of the charges based on chapter 2 of the Constitution of the Republic of South Africa Act 108 of 1996, that is, the bill of rights.

General Defences:

As regards the general defence the defence amplified that the state had to prove that:

(a) the Nkomazi Toll Plaza, on which the alleged offence was committed, is a toll road as defined in the National Roads Act No. 7 of 1998;

(b) that the accused was liable for the payment of toll in terms of section 27 of the said Act;

(c) that TRAC (Trans-Africa Concessions) was entitled to operate the said toll road and to levy toll in terms of section 28 of the said Act; and

(d) that TRAC was entitled to display a road traffic sign being a red disc light in terms of section 57 of Act 93 of 1996.

As it emerged the liability of the accused for payment of the toll was queried on the basis that the accused questioned the legal validity of the declaration of the N4 (on which the said toll plaza is situated) as a toll road. Paragraph (b) above is therefore closely linked to paragraph (a). It is thus convenient to deal with these together. Similarly the entitlement of TRAC as the concessionaire, to display the traffic sign was queried on the basis that it (TRAC) was not entitled to operate the toll road – the accused challenged the validity of the agreement between the government of RSA and the concessionaire which sought to grant to the concessionaire the right to operate the toll road. Paragraph (d) is therefore closely linked to paragraph (c) and the two are conveniently dealt with together.

I now proceed to examine each of these defences that form part of the general defence.

Statutory Provisions:

Section 27 of The South African National Roads Agency Limited and National Roads Act No. 7 of 1998 (the SANRA Act), which deals with the levying of toll by Agency, provides as follows:

"27. Levying of toll by Agency. –

(1) Subject to the provisions of this section, the Agency -

(a) with the Minister's approval –

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(b) that the accused was liable for the payment of toll in terms of section 27 of the said Act;

(c) that TRAC (Trans-Africa Concessions) was entitled to operate the said toll road and to levy toll in terms of section 28 of the said Act; and

(d) that TRAC was entitled to display a road traffic sign being a red disc light in terms of section 57 of Act 93 of 1996.

As it emerged the liability of the accused for payment of the toll was queried on the basis that the accused questioned the legal validity of the declaration of the N4 (on which the said toll plaza is situated) as a toll road. Paragraph (b) above is therefore closely linked to paragraph (a). It is thus convenient to deal with these together. Similarly the entitlement of TRAC as the concessionaire, to display the traffic sign was queried on the basis that it (TRAC) was not entitled to operate the toll road – the accused challenged the validity of the agreement between the government of RSA and the concessionaire which sought to grant to the concessionaire the right to operate the toll road. Paragraph (d) is therefore closely linked to paragraph (c) and the two are conveniently dealt with together.

I now proceed to examine each of these defences that form part of the general defence.

Statutory Provisions:

Section 27 of The South African National Roads Agency Limited and National Roads Act No. 7 of 1998 (the SANRA Act), which deals with the levying of toll by Agency, provides as follows:

"27. Levying of toll by Agency. –

(1) Subject to the provisions of this section, the Agency -

(a) with the Minister's approval –

(i) *may declare any specified national road or any specified portion thereof, including any bridge or tunnel on a national road, to be a toll road for the purposes of this Act; and*

(ii) *may amend or withdraw any declaration so made;*

(b) *for the driving or use of any vehicle on a toll road, may levy and collect a toll the amount of which has been determined and made known in terms of subsection (3), which will be payable at a toll plaza by the person so driving or using the vehicle, or at any other place subject to the conditions that the Agency may determine and so make known;*

(c) *may grant exemption from the payment of toll on a particular toll road –*

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

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

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

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

(f) *may withdraw the following, namely –*

(i) *any exemption under paragraph (c);*

(ii) *any restriction under paragraph (d);*

(iii) *any suspension under paragraph (e).*

(2) A declaration, amendment, withdrawal, exemption, restriction or suspension under subsection (1), will become effective only 14 days after a notice to that effect by the Agency has been published in the Gazette.

(3) The amount of toll that may be levied under subsection (1), any rebate thereon and any increase or reduction thereof –

(a) is determined by the Minister on the recommendation of the Agency;

(b) may differ in respect of –

(i) different toll roads;

(ii) different vehicles or different categories of vehicles driven or used on a toll road;

(iii) different times at which any vehicle or any vehicle of a particular category is driven or used on a toll road;

(iv) different categories of road users, irrespective of the vehicles driven or used by them;

(c) must be made known by the head of the Department by notice in the Gazette;

(d) will be payable from a date and time determined by the Minister on the recommendation of the Agency, and must be specified in that notice. However, that date may not be earlier than 14 days after the date on which that notice was published in the Gazette.

(4) The Minister will not give approval for the declaration of a toll road under subsection (1)(a), unless –

(a) the Agency, in the prescribed manner, has given notice, generally, of the proposed declaration, and in the notice –

(i) has given an indication of the approximate position of the toll plaza contemplated for the proposed toll road;

(ii) Has invited interested persons to comment and make representations on the proposed declaration and the position of the

toll plaza, and has directed them to furnish their written comments and representations to the Agency not later than the date mentioned in the notice. However, a period of at least 30 days must be allowed for that purpose;

(b) the Agency in writing -

(i) has requested the Premier in whose province the road proposed as a toll road is situated, to comment on the proposed declaration and any other matter with regard to the toll road (and particularly, as to the position of the toll plaza) within a specified period (which may not be shorter than 60 days); and

(ii) has given every municipality in whose area of jurisdiction that road is situated the same opportunity to so comment

(c) the Agency, in applying for the Minister's approval for the declaration, has forwarded its proposals in that regard to the Minister together with a report on the comments and representations that have been received (if any). In that report the Agency must indicate the extent to which any of the matters raised in those comments and representations have been accommodated in those proposals; and

(d) the Minister is satisfied that the Agency has considered those comments and representations.

Where the Agency has failed to comply with paragraph (a), (b) or (c), or if the Minister is not satisfied as required by paragraph (d), the Minister must refer the Agency's application and proposals back to it and order its proper compliance with the relevant paragraph or (as the case may be) its proper consideration of the comments and representations, before the application and the Agency's proposals will be considered for approval.

(5) Any person liable for toll who, at a toll plaza or other place for the payment of toll determined and made known in terms of subsection (1), refuses or fails to pay the amount of toll that is due -

(a) *is guilty of an offence and punishable on conviction with imprisonment for a period not longer than six months or a fine, or with both the term of imprisonment and the fine; ad*

(b) *is liable, in addition, to pay to the Agency a civil fine of R1 000.00. This amount may be increased in 1999 and annually thereafter in accordance with the increase in the official consumer price index for the relevant year as published in the Gazette.*

(6) *Any national road or portion of a national road (including any bridge or tunnel thereon) which under section 9 of the previous Act had been declared a toll road for the purposes of that Act and which immediately before the incorporation date exists and is operated as such under the previous Act, will be regarded as and treated for all purposes as if it had been declared a toll road under subsection (1) of this section.*

It is common cause that no declaration of the N4 toll road took place under the provisions of the 1998 SANRA Act. The state however has to prove that the place where the offence was committed is a toll road. The state relies on section 27 (6) of the SANRA Act, that is, on the fact that the declaration of the said toll road took place under section 9 of the previous Act, which is the National Roads Act, 1971(No 54 of 1971), the predecessor to the 1998 SANRA Act.

Section 9 of the 1971 Act reads as follows:

"9. Levying of toll on portion of national road. –

(1) The Board may:

(a) subject to subsection (3), declare a national road or any portion thereof, including any bridge or tunnel on a national road, as a toll road, for the purpose of this Act, and amend or withdraw any such declaration;

[Para. (a) substituted by s.7 (a) of Act No. 100 of 1992 and by s.10 of Act No. 24 of 1996.]

(b) in respect of the driving of any vehicle on a toll road, levy a toll the amount of which has been determined and made known in terms of subsection (4) and which shall be payable at a toll gate by the person so driving the vehicle, or at any other place subject to such conditions as the Board may determine;

[Para. (b) substituted by s.7 (a) of Act No. 100 of 1992 and by s.10 (a) of Act No. 24 of 1996.]

(c) .....

[Para. (c) deleted by s. 10(b) of Act No. 24 if 1996.]

(d) grant exemption from the payment of toll on a particular toll road-

(i) in respect of a vehicle of a category determined by the Board, or in respect of any such vehicle used on the toll road, at a time so determined; or

(ii) to a person of a category determined by the Board, irrespective of the vehicle used by such person on the toll road, or to any such person using a vehicle on the toll road at a time so determined, and withdraw any such exemption;

(e) restrict the levying of toll on a particular toll road to the hours or other times determined by the Board;

(f) suspend the levying of toll on a particular toll road for a specific or an unspecified period and in respect of all vehicles or in respect of vehicles of a category determined by the Board, and resume the levying after suspension.

(2) A declaration under subsection (1)(a) of a national road or any portion thereof as a toll road, together with a description of such road or portion, shall be made known by notice in the Gazette.

[Sub-s. (2) substituted by s. 7(b) of Act No. 100 of 1992.]

(3) The Board shall not declare a national road or any portion thereof under subsection (1) (a) as a toll road, unless -

(a) .....

(b) the Board has consulted with the Premier in question and with any local authority affected by the declaration of the proposed toll road; and

(c) the Board has invited, in the manner prescribed by regulation, interested parties to make written representations to it, which may include representations on the position of the toll gate, and has considered such representations, if any;

(d) the Board has in its consultation with any local authority and in its invitation contemplated in paragraph (c) given an indication of the approximate position of the proposed toll gate.

(3A) The Board may, after a national road or any portion thereof has been declared as a toll road, give parties, including any local authority contemplated in subsection (3) (b), the opportunity of submitting further written representations regarding the position of a toll gate on such road, and shall not take a final decision regarding the position of the toll gate in question before considering any such further representations received as well as the representations contemplated in subsection (3) (c).

(4) The amount of toll levied under subsection (1), any rebate thereon and any alteration thereof –

(a) shall be determined by the Minister on the recommendation of the Board;

(b) may differ in respect of –

(i) different toll roads;

(ii) different vehicles or different categories of vehicle driven on a toll road;

(iii) different times at which any vehicle or any vehicle of a particular category is driven on a toll road;

(iv) different persons or different categories of persons, irrespective of the vehicle driven by such persons;

(c) shall be made known by notice in the Gazette;

(d) shall be payable from a date and time determined by the Minister on the recommendation of the Board, which shall be mentioned in the notice whereby it is made known in terms of paragraph (c) and which shall not be a date earlier than 14 days after the date on which such notice appears in the Gazette.

(4A) Notwithstanding anything to the contrary in this Act contained –

(a) the Board may under the conditions and for the period it deems fit, with the approval of the Minister, and in terms of an agreement authorise any person to plan, design, construct and operate a national road or any portion thereof which has, in terms of this section, been declared to be a toll road, or any portion of a toll road so declared;

(b) the person referred to in paragraph (a) shall, subject to the provisions of paragraph (c), be entitled to levy toll, and collect moneys payable as toll on such toll road, or portion thereof, for his or her own account during the said period, and may for that purpose erect a toll gate or toll gates and facilities in connection therewith on a toll road, or portion of the toll road; and

(c) the person referred to in paragraph (a) shall only be entitled to levy toll in accordance with an agreement with the Board and provided that the amount of such toll has been approved by the Minister.

(5)

(a) Any person who refuses or fails to pay the amount of toll at a toll gate, or at any other place contemplated in paragraph (b) of subsection (1), for which he is liable in terms of this section, shall be guilty of an offence.

[Para. (a) substituted by s. 10(e) of Act No. 24 if 1996.]

(b) At any criminal proceedings at which a person is charge with a contravention under this section it shall be presumed, unless the contrary is proved, that the vehicle alleged to have been driven in committing such contravention, was driven by the registered owner thereof."

[S.9 repealed by s. 89 of Act No. 63 of 1975 and inserted by s. 4 of Act No. 79 of 1983. Sub-s. (5) substituted by s. 7 of Act No. 100 of 1992.]

As part of its onus to prove unlawfulness the state must therefore prove (a) that section 9 of the 1971 Act was complied with and that the road in question, the N4, was properly declared as a toll road for the purpose of the 1971 Act. In addition and in order to provide linkage to the 1998 SANRA Act, through section 27(6) of the latter Act, the state has to prove (b) that immediately prior to the incorporation date (i) the road existed as a toll road and (ii) was operated as such (a toll road) under the 1971 Act.

Compliance with the 1971 Act:

In order to determine whether the state has proved that the road in question was declared a toll road for the purposes of the 1971 Act, subsections 9 (1) (a), 9 (3) (b), 9 (3) (c), 9 (3) (d) and 9 (3A) are important.

Section 9 (1) (a) provides that the Board may subject to sub-section (3) declare a national road or any portion thereof, including any bridge or tunnel on a national road, as a toll road for the purposes of the Act, and amend or withdraw any such declaration.

Sub-section (3) prescribes the prerequisites for the declaration of a toll road. Paragraph (a) of sub-section (3) of section 9 (which previously provided for the availability of an alternative road to the toll road) was deleted by sec 10 (c) of Act No. 100 of 1996 with the result that the sub-section now has only three paragraphs, being (3) (b), (c) and (d). With effect from 1996 therefore the availability of an alternative road to a toll road is no more an essential prerequisite for the declaration or establishment of a toll road.

These prescripts of these paragraphs must be read together with subsection (3A), which was inserted by section 1 (c) of Act 27 of 1994.

Subsection 9 (3) quite clearly provides for a process of consultation with the Premier and local authorities affected by the declaration of a toll road (sec 9 (3) (b)) and for invitation to interested parties to make written representations (sec 9 (3) (c)). These are two separate/distinct processes prescribed and contemplated by the subsection. The one is *consultation* while the other is an *invitation to interested parties* to make representations.

Consultation is mandatory in terms of the section, as is the invitation to interested parties to make representations. However the making of representations is non-obligatory. It is something that may or may not happen, and depends entirely on the response, "if any", of the particular interested party invited to make representations. The section also makes it obligatory for the Board, when it consults or invites representations, to indicate the approximate position of the toll gate to the consulted and the invitees (sec 9 (3) (d)). That however is the end of the similarities.

The consultation process (with the Premier and local authorities) is not prescribed by regulation, nor is it defined. In contrast thereto the process of invitations to interested parties to make written representations to the Board is prescribed by Regulation 2263 published in Government Gazette No. 15190 of 30 December 1994. It is an important difference: The invitation to interested parties must be published in the government gazette as well as two newspapers; the representations of the interested parties must be submitted within 30 days from the date of the notice as published. On the other hand no time limit is placed on the consultation process nor is the manner and form of consultation prescribed.

Consultation with the Premier is not an issue in this case. Through evidence and in argument consultation with affected local authorities has become a real issue. I therefore propose considering the latter in some detail.

"Consultation" with local authorities:

Mr Bosman on behalf of the accused submits that the state has failed to prove that the Board did comply with the obligation placed on it by sec 9 (3) (b) of the 1971 Act to consult with local authorities affected by the declaration of the N4 as a toll road. Mr Hellens SC for the state on the other hand submits that the State did prove that the Board did in fact consult with the affected local authorities. While the evidence in this regard is fairly clear, it appears that the real difference between the two legal representatives lies in the interpretation of the word "consult" or "consultation" as used in the Act. It is therefore necessary before I deal with the evidence, to examine the meaning of that concept within the relevant provisions of the Act (the 1971 Act).

As I have already sated the 1971 Act does not define either of these words; nor does the 1998 Act.

The meaning of word "consultation" in the context of a local authority or a council was extensively considered and defined by Van Zyl J in *Hayes v Minister of Housing and Administration, Western Cape* 1999(4) SA 1229 (C) with reference to the dictionary meaning and decided cases. In this case I will examine the authorities on which Van Zyl J relied as well as others that I found.

Dictionary Meanings:

The Shorter Oxford English Dictionary defines "consult" as *inter alia*, "to take counsel together, deliberate, confer" while "consultation" is said to mean, *inter alia* "the action of consulting or taking counsel together; deliberation, conference".

The Concise Oxford Dictionary (10th edition) gives the meaning of "consult" as "seek information or advice from (someone, especially an expert or professional > seek permission or approval from".

Webster's New Unabridged Dictionary explains the meaning of the word as "1. a consultation. 2. a meeting of persons to discuss, decide, or explain something". It suggests that "consult" in the context means "to ask advice of, to seek opinion as a guide to one's own judgment".

Webster's Third New International Dictionary of the English Language Unabridged explain "consult" as "the act of consulting or deliberating"; and explains "consultation" as "1. a council or conference (as between two or more persons); "2. the act of consulting or conferring : deliberation of two or more persons on some matter eg (the two firms were in consultation over the construction of the new airplane)."

Along similar lines *Black's Law Dictionary (7th edition)* explains "consultation" as "1. the act of asking the advice or opinion of someone (such as a lawyer), 2. a meeting in which parties consult or confer."

In the *Readers Digest to Universal Dictionary* "consult" is rendered / explained, in such context, as "1. the act or procedure of consulting. 2. a conference at which advice is given or views are exchanged."

In *Wet's Legal Thesaurus / Dictionary* "consult" is explained as "1 To seek advice (consult a lawyer). Seek opinion of, confer with, take counsel, call in, discuss, seek guidance, refer to. 2. To talk over (two doctors consulted on the case over the phone). Deliberate together, compare notes, exchange views, meet, discuss."

In *Lexis Nexis (Butterworths) Dictionary of Legal Words and Phrases (July 2005)*, as compiled by the Honourable Justice R D Claasen, the meaning of the word "consult" is given with reference to two contexts and relevant case law as follows: In the one context the learned judge states that "consultation" does not mean agreement, but merely a full opportunity for views to be stated. See *R v Mbete 1954 (4) SA 491 (E)*, and see also *R v Ntlemeza 1955 (1) SA 212 (A)"*. In the other context the author states that "In sec 2 of

Administrative Authorities Act 37 of 1984 (Ck) it means adopting any reasonable procedure providing that any parties affected are allowed to consult with the President prior to issue of proclamation. *Maqoma v Sebe 1987 (1) SA 483 (Ck).*"

English Case Law:

In *Fletcher and Others v Minister of Town and Country Planning [1947] 2 All ER 496 (KB) at 500B-C* Morris J enunciated the following principle:

> *"The word 'consultation' is one that is in general use and that is well understood. No useful purpose would, in my view, be served by formulating words of definition. Nor would it be appropriate to seek to lay down the manner in which consultation must take place. The act does not prescribe any particular form of consultation. If a complaint is made of failure to consult, it will be for the Court to examine the facts and circumstances of a particular case and to decide whether consultation was, in fact, held. Consultation may often be a somewhat continuous process and the happenings at one meeting may form the background of a later one. In deciding whether consultation has taken place, regard must, in my judgment be had to the substance of the events."* (my emphasis).

In *Rallo v Minister of Town and Country Planning [1948] All E. R. 13, C.A,* Bucknill L J defined the word "consultation" in the phrase "consultation with any local authority" under the English statute, New Towns 1946 (c.16), sec 1 (1) as follows:

> *"Consultation means that, on the one side, the Minister must supply sufficient information to the local authority* to enable them to tender advice, *and, on the other, a* sufficient opportunity *must be given to the local authority to tender advice."* (my emphasis).

In *Sinfield and Others v London Transport Executive [1970] 2 All ER 264 (CA) at 269c-e*, Sachs LJ, went a step further when he described the importance of statutorily enjoined consultation in the following terms:

> *"It is apposite first to mention that counsel for the executive emphasized not once but several times that whatever be the true construction of section 23(3) and whatever order this Court might make, it was in the end the executive and no one else who would make the decision. If that was intended to intimate that the executive merely looked on consultations as an opportunity for those consulted to make ineffective representations, it would represent an approach that, to put it mildly, cannot be supported. Consultations can be of very real value in enabling points of view to be put forward which can be met by modifications of a scheme and sometimes even its withdrawal. I start accordingly from the point of view that any right to be consulted is indeed something that is valuable and should be implemented by giving those who have the right an opportunity to be heard at the formative stage of proposals before the mind of the executive becomes unduly fixed."* (my emphasis).

In *Agricultural Horticultural and Forestry Industry Training Board v Aylesbury Mushrooms Ltd* [1972] 2 All ER 280 (QC) at 284d-e, the Court held that the mere sending of a letter constituted "but an attempt to consult" and did not suffice. The Judge proceeded to say (at 284e-f):

> *"The essence of consultation is the communication of a genuine invitation, extended with a receptive mind, to give advice. ... If the invitation is once received, it matters not that it is accepted and no advice is proffered. Were it otherwise, organizations with a right to be consulted could, in effect, veto the making of any order by simply failing to respond to the invitation. But without communication and the consequent opportunity of responding, there can be no consultation."* (emphasis supplied).

Furthermore in *R v Secretary of State Social services, Ex parte Association of Metropolitan Authorities* [1986] 1 WLR 1 (QB) at 4F-H, the court observed:

> *"There is no general principle to be extracted as to what kind or amount of consultation is required before delegated legislation, of which consultation is a precondition, can validly be made. But in any context the essence of consultation is the communication of a genuine invitation to give advice and a genuine receipt of that advice. In my view, it must go without saying that to achieve consultation sufficient information must be supplied by the consulting to the consulted party to enable it to tender helpful advice. Sufficient time must be given by the consulting to the consulted party to enable it to do that, and sufficient time must be available for such advice to be considered by the consulting party."* (emphasis supplied).

South African Case Law:

In the case of *Magoma v Sebe N O and Another* 1987(1) SA 483(Ck), the court considered the meaning of "consultation" in the context of section 2 of the Administrative Authorities Act 37 of 1984 of the former Ciskei, which also did not provide a definition of the word. The court observed (per Pickard J at 490C-E):

> *"(I)t seems that 'consultation' in its normal sense, without reference to the context in which it is used, denotes the deliberate getting together of more than one person or party ...in a situation of conferring with each other where minds are applied to weigh and consider together the pros and cons of a matter by discussion or debate.*
>
> *The word consultation in itself does not suggest or presuppose a particular forum, procedure or duration for such discussion or debate. Nor does it imply that any particular formalities should be complied with. Nor does it draw any distinction between communications conveyed orally or in writing. What it does suggest is a communication of ideas on a reciprocal basis."* (emphasis supplied).

In the above case, the court accepted that the procedure to be adopted in order to comply with the section was in the discretion of the first respondent who was entitled to adopt any reasonable procedure that allowed him and those he consulted a reasonable opportunity to achieve the objects for which prior consultation was prescribed by the legislation.

The Appellate Division (as it then was) had an opportunity in *Huisman v Minister of Local Government, House and Works (House of Assembly) and Another* 1996 (1) SA 836 (A) at 846D-E to consider the effect of 'consultation' in section 44 (2) of the ordinance. However the Court (per Van den Heever JA did not venture to define the concept, but held that section 44 (2) did not stipulate how the consultation is to be effected. It likewise did not "limit it to a choice between either written or oral submissions made on a single occasion". The attitude adopted by the learned Judge of Appeal in this case is similar to that adopted by Morris J in the English case of *Fletcher and Others (supra)*.

Finally in *Hayes v Minister of Housing, Planning and Administration, Western Cape 1999 (4) SA 12229 (CPD),* the Court had to consider an alleged failure to consult as contemplated in section 44 (2) of the Land Planning Use Ordinance 15 of 1985 (Cape). The section required that the first respondent should determine an appeal "after consultation with the council concerned". The only communication between the first respondent and the second respondent (the council) was an invitation by the former to the latter to submit preliminary comments on appeal within a period of one month. The question was whether this constituted "consultation" for the purpose of the ordinance. Again no definition was given in the ordinance itself or its accompanying regulations. It appeared that the second respondent did receive the invitation and responded within the one month period and had at no stage objected to either the procedure followed by the first respondent or the reasonableness of the opportunity to respond to the invitation to submit comment on the appeal. Having considered the meaning attributed to "consultation" Van Zyl J pointed out (at 1242H – 1243A):

"In ordinary legal parlance, a consultation would usually be understood as a meeting or conference at which discussions take place, ideas are exchanged advice or guidance is sought or tendered. The parties or their representatives could be physically present at such meeting or conference, but not necessarily so. In these days of advanced communications technology, persons or parties can consult with one another in a variety of ways, such as by fax or e-mail or, in a somewhat less sophisticated way, by correspondence. Circumstances will dictate in what form the consultation should take place. As long as lines of communication are open and the parties are afforded a reasonable opportunity to put their cases or points of view to one another, the form of consultation will usually not be of great import. One would, of course, expect the initiative to be taken by one of the parties, without such party necessarily exercising discretion in regard to the consultation procedure to be followed thereafter as suggested by Pickard J in Maqoma case supra."

For the rest the learned Judge associated himself with South African and English authorities adverted to herein.

An important feature of the *Hayes* case, in my view, is that in that case there was evidence that the invitation from the consulting to the consulted to submit comments did reach the consulted and that the latter indeed responded thereto. The evidence therefore established that the invitation was communicated to the consulted. The receipt of such invitation by the latter was confirmed by its response to the invitation. It will in my view be quite a different matter where there is no such evidence of the invitation being actually communicated nor responded to. In the latter event, it would, in my respectful view be over-stretching a liberal approach to the requirement of consultation to hold that consultation did take place even where there is no evidence of communication between the consulting and the consulted. There can be no consultation without communication of ideas and the consequent opportunity to respond thereto.

Digestion of above authorities:

The following principles may be deduced from a digestion of the above authorities:

From the *Maqoma* case (*supra*) the principles that come out are:

1. Consultation entails a process in which more than one person confer in the sense of applying their minds together to consider the pros and cons of a matter.
2. It may be formal or informal.
3. It may further be oral or in writing.
4. The essence of consultation is a communication of ideas on a reciprocal basis.
5. The procedure is in the discretion of the person / party who has to consult.
6. The procedure must however allow reasonable opportunity to both sides (the consulting and the consulted parties) to communicate effectively and achieve the purpose for which prior consultation is prescribed.

In the *Fletcher* case (*supra*) the Judge was presented, as in the present case, with a case in which the Act under consideration did not define the word "consultation" nor the form or manner of consultation. The Judge took the attitude that "consultation" is a word which is well understood. Consultation may also be a continuous process.

There are two main principles that are distillable from the quotation from the case of *Sinfield and Others* (*supra*), and these are:

1. Consultation must be seen as more than mere opportunity that the executive gives to the consulted to make ineffective representations.
2. The right to be consulted is valuable and should be implemented:
    (a) by giving those who have the right to be consulted an opportunity to be heard, and

(b) must take place at the formative stage of proposals before the mind of the executive becomes unduly fixed.

The further complimentary principles that emerge from the decision in *Agricultural, Horticultural and Forestry Industry Training Board v Aylesbury Mushrooms Ltd* (*supra*) are that:

1. The mere sending of a letter constitutes but "an attempt to consult" and does not suffice.
2. The case also emphasized the need to communicate for consultation to take place: the essence of consultation, so the court held, is communication of an invitation communicated with a receptive mind, to give advice. The invitation must be received. However, once it is received, even if no advice or response is proffered, it does not matter and will thus not affect the question whether consultation has taken place or not. As the court emphasized "without communication and the consequent opportunity of responding, there can be no consultation."

Finally from a reading of the decision in *R v Secretary for State Social Services (supra)*, the following principles emerge:

1. The case once more emphasized that the "essence of consultation is the communication of a genuine invitation to give advice and a genuine receipt of that advice". This clearly demonstrated that it is an essential consideration in any consultation that the invitation to advice from the consulting party must in effect reach the consulted and that the advice, if any, from the consulted must similarly reach the consulting party. In other words communication must in fact be effective and genuine for consultation to take place. Where it is not, there is no consultation.

2. The decision also emphasized the critical role to be played by the supply of sufficient information and sufficient time. To achieve consultation:

   (a) Sufficient information must be supplied by the consulting to the consulted party to enable the latter to tender helpful advice.

   (b) Sufficient time must be given to the consulted to enable it/him/her to give the advice and sufficient time must be available to the consulting to consider the advice tendered.

While *R v Secretary for State Social Services (supra)* decision emphasized the need for the consulting party to give the consulted sufficient time to enable the latter to give the advice, the earlier decision of *Rallo (supra)* put an emphasis on the need for the consulted to be given sufficient information to enable the consulted to give the advice. The consulted thus needs to be given sufficient information and time to enable the giving of the advice.

It is clear from the aforegoing that consultation cannot be a mere formal process. It has to be a genuine and effective engagement of minds between the consulting and the consulted parties. A mere formalistic attempt to consult does not constitute consultation.

Evidence on Consultation:

The evidence for the state on consultation and the process followed in the declaration of the N4 toll road was given by **Johan Philip Nothnagel** (also known as Basie) while that for the defence were given through Andre Brand-Muller and Andre Johannes Lubbe.

Nothnagel testified that he is currently (at time of testifying 15 September 2004) on retirement, having retired from his professional life. He is now engaged in farming. He is a registered professional technologist. He qualified with a Higher National Diploma in Engineering and has 33 years experience in engineering road, construction and design.

He was employed in the national Department of Transport from 1976 until April 1998. From April 1998 he was in the employ of the Nation Road Agency Limited as regional manager for their northern region. For a period he was also attached to Cape Provincial Road Administration. In the national Department of Transport he occupied various positions at different stages including that of deputy director and senior director. It was with effect from 1 April 1998 with the commencement of the South African National Road Agency Limited and Nation Road Act No.7 of 1998 (the 1998 SANRA Act) that he fell under the South African Nation Road Agency Limited (SANRA). In the latter body, which is a statutory para-statal, he occupied the position of executive regional manager and was thus part of the executive management team of the Roads Agency.

As part of his duties in the Department of Transport he was involved with the declaration of the N4 national road as a toll road and was in the process overseeing various directorates and sub-directorates.

Process of Declaring a Toll Road (Generally):

He explained the process followed in the declaration of a toll road as follows:
The declaration of toll roads took place under two main Acts of parliament, the National Roads Act 54 of 1971 (with the significant amendment being by the National Roads Amendment Act 24 of 1996) and then also under the SANRA Act of 1998.
The authority of the Board to declare a toll road under the 1971 Act is regulated by section 9 of the Act and is subject to the process of consultation and representations prescribed in sec 9(3). Unless the Board complies with section 9(3) it shall not have declared a national road or part thereof as a toll road. Before declaring a toll road the Board is obliged to consult with the Premier concerned and with any local authority affected by the declaration (sec 9(3)(b)) and to invite, receive and consider written representations from interested parties (section 9(3)(c). In its consultation with local authorities the Board is obliged to give an indication of the approximate position of toll

gates. After the declaration of a toll road, the Board may still call for further representations from interested parties and local authorities (sec 9 (3A)).

Particular Process Followed On N4 Toll Road:

He described the particular process followed in the declaration of the N4 toll road. By then he was senior director and therefore had to oversee the work of various directors and sub-directors to ensure compliance with the legislative prescriptions.

The process of representations is regulated by Regulation No. R2267 of 30 December 1994 (published in Government Gazette No. 15190) (Appendix A1 to Exhibit "O").

The process that was followed to ensure compliance with Section 9(3) was the following:

1. They first found out details of premiers and local authorities, as well as details of contact persons and compiled a list thereof.

2. Then following the Regulations, the following steps were taken:

2.1 The intention of the Board to declare the toll road was published in Government Notice No. 121 of 26 January 1996 (Government Gazette No. 16956) (Exhibit. "O" Appendix B – for short Exhibit "OB") and interested parties were invited to submit representations in terms of section 9(3) (c). In terms of 9(3) (d) the notice also gave approximate location of the toll plazas. This was the initial declaration.

2.2 The road in question had to be a national road before it could be declared a toll road and the Act required that it be gazetted.

2.3 The notice of intention to declare the toll road also had to be published in newspapers to comply with Regulation 2 of the applicable Regulations. The newspapers

in which the notice was published with dates of publication are listed in Exhibit OB1 (nine newspapers listed – between 31 January 1996 and 4 February 1996).

2.4 Exhibits OB1 to OB14 are examples of letters which were addressed to various local authorities informing them "of the intention to declare a toll road between the Mpumalanga boundary and Komatipoort in Mpumalanga Province". The letter also enclosed the Government Gazette notice and requested the local authorities to "submit your reply before or on 4 March 1996". The letters were addressed by or from the office of the Director General – Transport. Exhibit OB5 is a similar letter addressed to the Regional Services Council ("RSC"). The RSC covers most areas in the lowveld and escarpment regions of Mpumalanga

3. Once received, the written comments were compiled together and submitted to the Board. After considering the comments the Board gave directions for the process of declaration of the toll road to proceed.

4. The Board then gave out a request for bidding which was published locally and internationally.

5. In Government Notice 969 of 7 June 1996 (Government Gazette No. 17243) (Exhibit OB13) the road in question was actually declared a toll road as contemplated in the notice published earlier (26 January 1996). This was the actual declaration of the road as intended.

6. On 05 May 1997 the concession contract was signed between the government of the Republic of South Africa, Republic of Mozambique and Trans Africa Concessions (TRAC) (Exhibit OB14).

7. The road as declared was however later amended (on 18 July 1997) by the repeal of Government Notice 969 of 7 June 1996 (by Gov Notice No. 991 of 18 July 1997 published in Government Gazette No.18159) (Exhibit OC) and the publication in the

newspapers is as listed in Exhibit OD. The precise effect of the amending Government Notice is that it withdrew the declaration of the toll road by G N 969 of 7 June 1997 and gave notice of the intention of the Board to "all interested parties" to declare a new toll road between the same end points. The main difference between the old and the new toll roads is that (a) all the three toll gates or plazas were repositioned and (b) the new toll road also included as an addition a new portion of the road between Machadodorp and Montrose west of Nelspruit (the so-called Schoemanskloof road) which was previously not part of the toll road as initially declared on 07 June 1996.

8. Explaining the reasons for the repeal of the Government Notice that initially declared the toll road (Government Notice 969 of 7 June 1996) and the simultaneous re-declaring of a toll road (by Government Notice 991 of 18 July 1997), he said that at first bidders had been invited to come with their own bids with suggestions of where they could improve on costs. There were 3 bids which were all examined against the bench mark. A preferred bidder then came to the fore with different ideas, viz, (a) instead of widening the Elandskloof tunnel road, the Schoemanskloof road should be added to the toll road at less costs; and (b) the toll gates had to be repositioned so as to catch more volume of traffic and thus bring down the toll fees. In terms of the initial toll road declared (June 1996) the toll gates or plazas were to be (i) Middelburg Plaza at Wonderfontein, east of Middelburg, (ii) Ngodwana Plaza at Ngodwana between Waterval Boven and Montrose, and; (iii) Komatipoort Plaza which was to be at the boarder gate (of the RSA with Mozambique) east of Komatipoort town. The Schoemanskloof road was then not part of the toll road. However, in terms of the new toll road (notice of which was published on 18 July 1997) the toll gates were repositioned as follows: (i) Middelburg Plaza positioned west of Middelburg between Middelburg and Witbank; (ii) Machadodorp Plaza positioned between Waterval Boven and Machadodorp (west of the junction of the Schoemanskloof road and the initial N4 (Elandskloof tunnel) road; and (iii) the Malelane Plaza located east of Kaapmuiden between Kaapmuiden and Malelane. The Malelane Plaza is the one which is also known as the Nkomazi Plaza.

9. The notice to declare the new intended toll road was also published in the newspapers as listed in Exhibit OD. Originals of the newspapers cuttings were available except items 11 (Lowvelder) and 15 (Middelburg Observer).

10. After publication of the notice repealing the declaration of the first or initial toll road and giving notice of intention to re-declare the new toll road (Government Gazette 991 of 18 July 1997), the Department went through the same process of sending letters to local authorities. Those letters are included in the bundle as Exhibits OE1 to OE35. The original letters (sent pursuant to the initial notice published) were used as drafts so that the second notice (to repeal and re-declare) was sent to the same local authorities. The contact details of the local authorities were rechecked when the new notices were sent. In preparing the Exhibits in the OE series (relating to the new toll rod), not all letters sent to the local authorities could be found. Nothnagel however assured the court that the process of preparation was done and all local authorities were notified by similar letters addressed to them. The letters read as follows:

"The Town Clerk
Town Council of XXX
(Name of town)

Attention: (Name of Person)

NATIONAL ROUTE 4, SECTION 3, 4, 5, 5X, 6X, 6Y, 7X AND 8X.
REPEAL OF GOVERNMENT NOTICE NO: 969 AND INTENTION TO RE-DECLARE A CONTINUOUS TOLL ROAD FROM THE GAUTENG BOUNDARY TO KOMATIPOORT TO BRING THE DESCRIPTION UP TO DATE AND TO INCLUDE SECTION 6Y OF THIS ROUTE, OVER SCHOEMANSKLOOF: PROVINCE OF MPUMALANGA.

The purpose of this letter is to inform you that Government Notice No: 969 of 1996 (Declaration of N4 Toll Road) is to be repealed. You are furthermore

informed of the intention of the South African Roads Board, to re-declare national route 4, section 3, 4, 5, 5X, 6X, 6Y, 7x and 8X, as toll road.

Please find attached a copy of the Government Gazette in this regard.

Yours faithfully

For DFIRECTOR-GENERAL: TRANSPORT "

The essential part of the Government Notice in question (GN 991 of 18 July 1997) reads as follows:

"*1.* *In terms of sec 9(1)(a) of the National Roads Act, 1971 (Act 54 of 1971) , the South African Roads Board hereby withdraws Government Notice No. 969 of 1996 and notifies all interested parties of the intention to declare, under section 9 of the National roads Act, 1971, the following sections of the National Route 4 to be a toll road: ...(*description of the road is the given).

2. *In terms of section ((3)(c) of the National Roads Act, 1971, all interested parties are hereby invited to make written representations, within 30 days from the date of this notice, to the South African Roads Board on the proposed redeclaration of the said sections of the National Route 4 as a continuous toll road. These representations must be submitted to the Chairman of the Board, P O Box 415, Pretoria, Gauteng, 0001.*

3. *In terms of section 9 (3) (d) of the National Roads Act, 1971, a schematic indication of the approximate position of the proposed toll gates is given in the Schedule.*

K Gordhan

Chairman: South African Roads Board"

11. The Premier of the province (Mpumalanga) was also notified of the second notice (as was the case in the case of the first intention). This had to be done particularly in view of the fact that the Schoemanskloof road which was to be added to the toll road was by then a provincial road which in its entirety fell under his jurisdiction. The letter to the Premier of Mpumalanga Province is Exhibit OE 36. The contents of the letter to the Premier are different from those addressed to the local authorities. It is more explanatory and reads as follows

"Dear Sir

The purpose of this letter is to inform you of "The Repeal of Government Notice No. 969 of 1996 and the intention to re-declare a continuous Toll Road from the Gauteng boundary to Komatipoort to bring the description up to date and to include section 6Y of the road through Schoemanskloof: Province Mpumalanga" and furthermore to obtain your support to the declaration of the toll road as per Annexure A.

It would be appreciated if you could, as soon as possible, indicate whether or not you agree with the declaration of the Toll Road as per attached Annexure A, as the matter is to be presented to the South African Roads Board for consideration at the meeting to be held on 16 October 1997.

As you are aware the position at the plazas have changed as well as the extent of the N4 toll road with the inclusion of the Schoemanskloof section, since the original declaration and therefore needs to be redeclared.

Should you have any queries please contact Mr Ketso Gordhan (012) 309 -3182).

Yours faithfully

For DIRECTOR GENERAL: TRANSPORT"

12. The date of the letters to local authorities in the OE series does not appear therefrom; but the print at the bottom thereof indicates 16 July 1997 (which was 2 days before the Notice in the Government Gazette – this may just indicate that the letters were prepared before the date of the gazette but they must have been sent later as they enclosed the gazette). The date of the letter to the Premier (in the same series of exhibits) is equally not clear but at the bottom a different date appears as 1 October 1997, which was almost 3 months after the letters to the local authorities and the publication of the notice in the government gazette.

13. Although the Premier was sent the same Government Gazette (Government Gazette No. 18159 of 18 July 1997 containing Government Notice 991) calling for representation within 30 days, in the letter the Premier was requested to indicate "as soon as possible" whether or not he concurred with the (new) declaration of the toll road, as the matter was to be presented to the South African Roads Board for consideration at its meeting to be held on 16 October 1997. [The Premier therefore had apparently only 15 days to reply to the letter – though the notice had been published in the gazette already 3 months earlier]. The Premier of Mpumalanga replied on 15 October 1997 stating that he supported the declaration of the new toll road (Exhibit OE44).

14. The letters (in the second or OE series), so Nothnagel testified, were sent not only to the local authorities and the premier; this time the letters were also sent to those parties who had commented in response to publication of the first notice to declare the toll road.

15. After receiving comments in response to publication of the intention to declare the second toll road, these were compiled into a report and sent with a memo to the Board 14 days before the meeting of the Board (presumably of 16 October 1997 referred to in 13 above) and the Board came back and authorized the decision to go ahead with the declaration of the second toll road.

16. On 07 November 1997 the S A Roads Board declared the second toll road (Government Notice No.1447 of 07 November 1997 – contained in Government Gazette No. 18401) (Exhibit OE45).

17. What appears in Exhibits OE37 to E44, so Nothnagel testified, is evidence of meetings which were arranged and held by the preferred bidder, Trans Africa Concessions (TRAC) with the public for the purposes of the environmental impact assessments (EIA). These were a consultation process of TRAC with communities. Nothnagel informed the court that these meetings were not part of the process of statutory "consultations" as required and prescribed by section 9(3) of the 1971 Act. Those meetings were however also attended by officials of the Board and of the Department of Transport. Exhibit OE38 is a standard "proposed agenda" of such meetings which were held with municipalities / local authorities along the route. It was issued by the Department under the hand of Nothnagel himself. Exhibit OE37 is the proposed dates of TRAC public meetings which were all scheduled to take place from 25 August to 27 August 1997. A consulting firm appointed by TRAC handled the publications for the meetings in the newspapers, at municipal offices, and at various other places. The TRAC meetings were to be held in Malelane, Nelspruit and Middelburg. The consulting firm (for TRAC) also had their own list of contact persons to whom they sent notices. Nothnagel also attended those meetings and he says at those meetings the public also asked about the location of toll gates. Exhibits OE39 and OE40 are notes of meetings held on 06 February 1997 and 20 April 1997 (before the repeal of the first toll road and which are therefore not strictly relevant). Exhibit OE43 is handwritten notes of further meeting of TRAC with the community at Schoemanskloof which could not be fitted in during the 25 -27 Aug 1997 meetings planned by TRAC. Exhibit OE44 is the premier's reply to the board in which he states that he supports the amended toll road.

18. Nothnagel testified further that in consequence of notices by the Board, some local authorities and individuals did submit comments. When TRAC conducted its meetings, the general public attended. Nothnagel does not know if political leaders

attended such meetings. He is certain however that certain officials from local authorities did attend the TRAC meetings.

I interpose here to observe that there is no minute (as far as I could see) of a meeting of the Department or the Board held at the critical time for consultation. The rest of documents after August 1997 seem to relate to meetings convened by TRAC and most of them were in any event held after the declaration of the toll road and were therefore not consultation which is obligatory in term of statute before a toll road is declared in terms of section 9(3) of the 1971 Act.

19. Nothnagel further informed the court that the documents placed before court, in series O-E37 – O-E44, are not exhaustive. He says there were other correspondence and verbal discussions about which there are no documents before court. He says if any municipality along the route was to come along and say they never knew about the intention to declare the toll road, he would be surprised.

20. Nothnagel informed the court further that after the final declaration of the toll road, the Middelburg Town Council did approach him for further discussions. He referred them to section 9(3A) of the Act 54 of 1971 (which was inserted by section 1(c) of Act 27 of 1994) and advised them to make use of that section to put their case before the Board. It is to be noted that the section in question is not one that provides for obligatory or compulsory consultation as section 9(3) does, but one which simply gives the Board the option, if it so chooses, to give interested parties, including local authorities, the opportunity to submit further written representations regarding the positions of toll gates.

21. Nothnagel finally referred the court to the following further documents in his bundle of documents (Exhibit O) , i.e.

21.1 Exhibit OF1, which is agenda of a meeting of 14 November 1997;

21.2 Exhibit OF2 : Letter of 20 February 1998 from Attorneys Brand Muller – Taljaard convening a meeting of 26 February 1998 to which the invitees included the Premier;

21.3 Exhibit O-F3: A Technical Task Team Report dated June 1998, which was compiled by one Dr Groenewald after conducting some studies at the request of the Middelburg Council. The report (apparently) reached the same conclusion with regard to the positioning of toll gates between Middelburg and Witbank. Nothnagel referred to this report to make the point that any local authority was free to request its own Technical Committee to investigate and compile a report for them which the council could then submit to or use for consultation with the Board;

21.4 Exhibit OG1 is the Agenda of a meeting which was to be held at the request of the mayor of Malelane, Councilor E. Zwane, on 4 March 1998. The Premier was also invited to that meeting;

21.5 Exhibit OG2 is Minutes of Meeting held with Community of Malelane on 10 March 1998. This meeting followed on the one which had been convened by the mayor of Malelane. This was part of the process of further investigation of location of the toll plaza now know as Nkomazi Plaza near Kaapmuiden. It appears from the minutes that there was clear unhappiness about the location of the plaza (to which Jackson replied that the N4 was legislated on the basis of user pay principle). There was also a feeling that the community was not consulted (paragraph 4.3.11) on the location of the plaza;

21.6 Exhibit OG3 is another typical agenda for TRAC meetings with the community held on 27 March 1998, with the minutes of the particular meeting. Of particular interest is the position taken in paragraph 4.3 of the minutes by Nothnagel that the financiers and not the Implementing Authority were to determine viability of alternative locations of toll gates;

21.7 Exhibit OH1 et seq. are notices publishing and gazetting toll fees.

22. It transpired from the meetings convened by TRAC that the final location of the plaza east of Kaapmuiden was the second and not the first choice viewed from the community's perspective.

Under cross-examination the following further evidence came out:

- Nothnagel confirmed that the provision of a compulsory alternative route to a toll road was a requirement of the law until April 1996 (the 1996 Amendment to the 1971 Act). The amendment came when there was already talk about the establishment of the N4 toll road which talk had started already as far back as 1995. The N4 toll road was however not the prompting force for the amendment. It was already under consideration for a long time. The *fiscus* could simply not afford the duplication.

- In the OE series of letters to local authorities, there is no copy of a letter that was sent to Marloth Park local authority. Nothnagel however insisted that they did sent letters to all local authorities who had been addressed in the first batch of letters (and this would have included Marloth Park).

- At a meeting held with the Witbank and Middelburg local authorities on 6 February 1997 (after the declaration of the first toll road and before its repeal and publication of notice to declare the second one), representatives of the local authorities did express concern about the possibility of locating the toll gate near Middelburg (as opposed to the initial location at Wonderfontein). The Department then undertook to inform Middelburg local authorities as soon as there was clarity on the position of the plaza (paragraph 7 on page 8 of Exhibit R, being minutes of the meeting). Indeed on 11 March 1997 the Department wrote to the local authority advising that the position of the plaza had by then not yet been finalized and that the public would be informed as soon as it is finalized (possibly within few months from then).

- Nothnagel also confirmed having received letter dated 13 June 1997 from Middelburg local authority (city engineer) enquiring further about the positioning of the toll gate

and mentioning that there was a rumour in the area that the positioning of the Middelburg plaza had been finalized (page 13 of Exhibit "R"). Nothnagel could not recall the precise response he gave to that letter. They did not then deem it necessary to inform the local authority that the Department had already entered into a concession agreement (on 5 May 1997) to declare a toll road with toll gate at a particular location (near Middelburg).

- Nothnagel did not attend the meeting of the Department with the local authorities of Middelburg and other interested bodies on 27 August 1997, at which meeting the local authority and other parties walked out on being informed that the position of the toll gate (at Middelburg) had already been determined and gazetted. In the view of those who walked out there had never been consultation and they understood that the purpose of the meeting was in fact to consult on the very same issue. In their view the purported consultation was not genuine as the Department had already made up its mind. At an earlier meeting on 3 July 1997 (16 days earlier) representatives of the local community had been told that the location of the toll gates had not been decided and that consultation thereon was forthcoming. The Middelburg local authority felt totally ignored in spite of its many pleas for consultation.

- Nothnagel conceded that it was critical and obligatory for the Department and the Board to consult after the repeal of earlier toll gate (18 July 1997) and before the re-declaring of the new one. He says however that the government gazette of 18 July 1997 (the repeal and intention to re-declare) and the letters to the municipalities were part of the consultation process.

- The displeasure of Middelburg local authority about lack of consultation was conveyed in their letter to the Department dated 1 September 1997 (Exhibit R – page 14).

- It appears that there were correspondence between Middelburg local authority on the one hand and the Board / Department on the other between the date of publication of

final intention (18 July 1997) and declaration of final toll road (7 November 1997) (See in Exhibit R). The Board / Department also considered the various representations received at its meeting of 16 October 1997 and took a decision to proceed (see Exhibit R page 19) and communicated this decision to Middelburg on 5 November 1997 before the final declaration on 7 November 1997.

- In the view of Nothnagel the comments which they invited the local authorities to submit were to be part of a consultation process.

- When asked specifically what the board did between date of publication of notice to declare (18 July 1997) and the date of actual declaration of toll road (7 November 1997), Nothnagel mentioned that (a) comments received from local authorities (including Middelburg TLC) were considered and (b) there were letters exchanged and (c) a memo was sent to the board and the board decided, after considering the memo and comments received that the proposed declaration of a toll road should proceed.

- Although the Department of Transport had informed Middelburg TLC on its specific inquiry (Exhibit R page 9 – dated 12 February 1997) that it (Department) would inform them once the position of the plazas had been determined, during April 1997 the Board (Department) and TRAC agreed on the proposed positioning of the toll plazas but did not inform the town council. (It also appears that they also did not inform the council in May 1997 after signing the agreement; nor id they do so in June 1997). They however did inform the TLC in July 1997 when they sent them the gazette (repealing the old and giving notice of the new proposed toll road with new locations). This was in the latter part of July 1997. The letter to Middelburg TLC appears to have been dated 24 July 1997 (Exhibit R, page 14). This was probably the same day on which other local authorities were addressed.

- After being notified of the new proposed location of plazas as advertised on 18 July 1997 by Government Notice 991), the Middelburg TLC specifically requested

consultation. This appears from the last two paragraphs of the letter of 01 September 1997 from the Town Clerk (Exhibit R, page 15). The purpose (subject matter of the letter) appears from the heading which reads *"NOTICE OF INTENTION TO DECLARE A TOLL ROAD: NATIONAL ROUTE 4: GOVERNMENT NOTICE NO.991 DATED 18 JULY 1997"* while the last 2 paragraphs requesting consultation reads:

"It is obvious that a toll plaza at or near Middelburg will have a profound influence on the town. It is therefore imperative that consultation with the Middelburg community and in particular the Middelburg Transitional Local Council has to take place.

Consequently the purpose of this letter is to plead with you and your Department to please start with a process of consultation with the Middelburg Transitional Local Council and the Middelburg community before any further decisions are taken or before any decisions that have already been taken are implemented."

- It appears from the contents of this letter that the earlier letter of 20 August 1997 (Exhibit R, page 16) from the TLC was possibly written prior to receipt of the letter of 24 July 1997 from the Department enclosing the gazette of 18 July 1997.

- Nothnagel testified that the only reply to the letter of 1 September 1997 by Department / Board was by the letter dated 5 November 1997 from the Department received by the TLC on 10 November 1997 (Exhibit R, page 19 -22) in which the TLC was informed effectively that the Board had decided to proceed with the declaration of the toll road as intended with the location of the plazas as published (18 July 1997). There was thus no consultation in response to the plea of the TLC contained in the last paragraph of their letter of 1 September 1997.

- By the time the TLC received the response on 10 November 1997 the Board had gone ahead to implement its decision by declaring the toll gate on 07 November 1997.

- The next thing that happened is that the Middelburg TLC apparently requested a meeting with the Board. By then however the toll road had been declared. The minutes of the meeting in question are not part of the documents submitted by Nothnagel.

- The Middelburg TLC then informed the Department / Board that the consultation process was improper or inadequate. Although the Board, so Nothnagel testified, did not concede that the consultation had short comings, they also did not deny that charge.

What is clear is that there was no meeting held by the Board or the Department with the Witbank-Middelburg Interest Group nor the Middelburg local authority, between the publication of intent to declare the final toll road (18 July 1997) and the date of declaration (07 Nov 1997). Most of the recorded meetings, as per exhibits, were held after the declaration of the final toll road with final toll gates (07 November 1997) and were apparently convened and held by TRAC and did not form part of the Road Board consultations in terms of section 9(3). Before the declaration of the toll road, there was only one meeting held with the Middelburg local authority (or the interest group) on 27 August 1997. This too was arranged by TRAC and was, according to the state evidence, not part of the statutory consultation process. It was at this meeting that the interest group walked out in protest after being told that the location of the plazas had been finally determined. On the facts so far, there was thus failure to consult at the request of the TLC and in the face of a plea for such consultation from the TLC. There was also failure to respond at all to such request. Part of the questions that will have to be considered is whether this amounts to failure to consult in terms of the Act. I will revert to this question fully when I evaluate all the evidence later in this judgment.

The first defence witness, **Andre Brand Muller,** is an attorney who practices in Middelburg town of Mpumalanga in his own firm from 1993. In his capacity as representative of the community and as vice president and later as president of the Middelburg Chamber of Commerce, he was involved with TRAC (the concessionaire) and with the Department of Transport in the process around the declaration of the N4 toll road.

With regard to the process for the declaration of the second and final toll road, there had been formed a body called the Witbank-Middelburg Interest Group which included the local authorities of Middelburg and Witbank as well as the business group and the local community. The body was the local voice in the interaction with the Department and TRAC. Brand-Muller sat on that body as representative of business. He was also the spokesperson of the Witbank-Middelburg Interest Group (WMIG) and chaired its meetings and did most of the talking for the group.

He subsequently, in consultation with other members of the interest group, became author of the document which is before court as Exhibit R. He is the one who put pen to paper in the creation of the document.

He is aware of the initial published notice of intention to declare the toll road (first toll road) which was published in June 1996, and its subsequent repeal by proclamation published in the government gazette on 18 July 1997, which also published the intention to declare the second toll road. He is also aware of the difference between the first and second toll roads.

The document (Exhibit "R") was prepared by himself. A portion of this document up to page 4 of the current one and including annexures up to annexure "G" (Exhibit "R" – page 18) was handed to the Board as part of the interest group's submissions. (From its introductory paragraphs it is clear that the memorandum was prepared after the declaration of the second and final toll road on 07 November 1997).

Following the gazetting of the intention to declare new toll road with new toll gates in July 1997, there was a public meeting attended by members of the group with representatives of the Board / Department on 27 August 1997. The minutes appear in Exhibit "R", pages 23-26. He received the minutes from a person (an employee of Columbus Steel) who was part of the group but did not walk out with the group and thus attended the whole meeting.

His observation is that the meeting was run by one representative from TRAC and one from the Department. Each of them made a presentation. Thereafter the chairman of the meeting, one Trevor Jackson, called for questions.

It was in response to the invitation for questions that Brand-Muller (on behalf of the group) asked two questions. The questions were:

a) Had the positioning of the plazas in the Witbank-Middelburg area been finally determined?

b) If not, would the community of Witbank-Middelburg group still have an opportunity to make representations?

To these questions Mr Nazir Ali gave somewhat long response which eventually came down to this: "No, you cannot talk to us any further, the positions are cast in stone". This response was not acceptable to the group which immediately walked out of the meeting. Approximately 15 people walked out. The meeting went on without the group and the group later released a press statement on the same day the full text of which reads as follows:

"PRESS STATEMENT : N4 TOLL ROAD : POSITIONING OF MIDDELBURG TOLL PLAZA

DATE : 27 August 1997

Representatives from the Middelburg Transitional Local Council, the Middelburg Chamber of Commerce, the Mhluzi Chamber of Commerce, the Afrikaanse Sakekamer, the Middelburg branch of the Maputo Corridor Steering Committee responded to an advertisement which appeared in the Middelburg Observer on 19 August 1997 by attending a meeting which was supposed to be a consultative meeting pertaining to issues regarding the proposed N4 toll road.

At this so called consultative meeting the question was asked whether the position of the toll gates or plazas had already been determined.

The reply from the representative of the Department of Transport was initially evasive but eventually he confirmed that the position of the toll gates had in fact been determined since it was 'gazetted' during July.

Thereupon all the representatives from the abovementioned organizations walked out of the meeting for the following reasons:

(i) *It is totally meaningless to invite the public to a consultative meeting if a crucial issue like the positioning of the toll gates has already been determined;*

(ii) *Secondly the Middelburg community, which will undoubtedly be affected by the positioning of the toll gate, has not been consulted;*

(iii) *At a similar meeting held on 3 July 1997 representatives from the local community were told that the positioning of the toll gates had at that stage not been decided but that consultation was forthcoming. However 16 days later the positioning of the toll gates are 'gazetted' and the matter is*

regarded as having been finalized without any prior consultation having taken place; and

(iv) *That in spite of many pleas for consultation since February 1997, the Middelburg Transitional Local Council has to date been totally ignored.*

The lack of transparency in dealing with this matter is condemned.

The Middelburg community insists that it be consulted on this extremely important issue and that it be given a proper opportunity to make meaningful inputs before any further decisions are taken or before any decisions that have already been taken are implemented.

Should such an opportunity not be forthcoming the Middelburg Community will have to consider its options which might include appropriate legal action.

This press statement is issued by the following persons on behalf of the organizations mentioned next to their names:

Clr B H Mokoena – Mayor – Middelburg Transitional Local Council;
Clr S Choma – Chairperson of the Executive Committee - Middelburg Transitional Local Council;
Clr M J Britz – Member of the Executive Committee - Middelburg Transitional Local Council;
Clr O P J Nel - Member of the Executive Committee - Middelburg Transitional Local Council;
Mr W D Fouche' - Town Clerk - Middelburg Transitional Local Council;
Mr A Meerkotter - President - Middelburg Chamber of Commerce;
Mr A P Brandmuller - Vice President - Middelburg Chamber of Commerce;
Mr L Cass - Member of Executive Committee - Middelburg Chamber of Commerce;

Mrs S Stehouer - Executive Officer - Middelburg Chamber of Commerce;
Mr T Arlow – Member of Executive Committee - Middelburg Chamber of Commerce;
Mr H du Preez - Member – Middelburg Afrikaanse Sakekamer;
Clr S Kunene - President – Mhluzi Chamber of Commerce;
Mr R Chetty - Chairman – Middelburg Branch of the Maputo Coridor steering Committee."

It was against this background that the Department finally declared the toll road with the plazas as advertised by them (on 18 July 1997) by proclamation on 7 November 1997. At that stage there was a letter from the Department which informed the group (the Transitional Local Council especially) that the Board had decided to proceed.

Subsequent to the declaration there was another meeting in Pretoria at the invitation of the National Roads Board (issued by Nothnagel). It was at this meeting that the Middelburg group presented the memorandum (then up to page 4).

At that meeting Brand-Muller was the spokesperson for the group and he raised certain issues. These were:

1. That the establishment of final positions of plazas without proper consultation especially with the Town Council of Middelburg was illegal. On behalf of the group, he asked them to withdraw the proclamation so that they could enter into consultation. The chairman of the meeting said they would consider the position.

2. When Brand-Muller presented documents which are appendices A-G (that is, pages 7-18) of Exhibit R, no one indicated that the documents were not what they purported to be. The attitude of Nazir Ali was that the group or town council could go to court on the matter if they so wished. However, the chairperson of the meeting was reconciliatory and prevailed otherwise.

3. There was no specific denial of the fact that there had been no consultation. Ali said that the publication of the notice in the gazette and news papers finalized the location of the plazas.

Later on, the Premier of Mpumalanga Province contacted Brand-Muller and a number of meetings were held which were convened by the Premier. There was an agreement that the interest group would do a feasibility study and if they could indicate or prove otherwise the government would consider same and pay for the study. The study then indicated that alternative location of the Middelburg plaza would give more or less similar income. However, the government was by then no more interested and TRAC had started clearing the ground for the establishment of the plaza where it had been proclaimed to be located.

However, later on it was once more arranged that the R555 road between Middelburg and Witbank would be upgraded at the same time with the toll road to serve as an effective alternative route. This was however never done, although it had been agreed. Ali came back later and effectively informed the group that it was not going to be done and that he was not going to argue about the matter any further.

Brand-Muller testified that he had been legal representative of the Middelburg town council for the past 10 years and was aware of the process that had to be followed for a matter referred to the council to be considered by the council and for the council to respond thereto. The council consisted of 24 members. Once an issue was referred to the council, the secretary had to generate a report to be circulated to members. Then there had to be submissions to the town clerk who would put the matter on the agenda of the council meeting. It would take at least one month before a report is considered by the council.

After publication of the notice to declare the second and final toll road on 18 July 1997, the letters to the local authorities were sent on 24 July 1997 enclosing the gazette of 18 July 1997 which called for representations within 30 days. The representations therefore

had to be submitted by 17 August 1997. The period was not enough for the town council of Middelburg to consider the matter and participate in the consultation process.

From 27 August 1997 (the aborted consultative meeting) to 7 November 1997 when the toll road was finally declared there were no attempts from the side of the Board or the Department to engage in consultation. The attempt by the Board to consult was after the final declaration of the toll road.

In cross-examination the following further evidence and clarification came from the testimony of Brand-Muller:

- The answer to the question which he raised on behalf of the interest group at the meeting of 27 August 1997 as recorded in the minutes (Exhibit "R" paragraph 25) is a soft fluffy response. It is not a response as was given by Ali on behalf of the Board and the Department and which made the interest group members to walk out.

- The only communication that there was between the Middelburg town council and the Board / Department, was a one way communication from the town council in the 30 days when the Department called for representations.

- Any suggestion that there was agreement on the position of the plaza in Middelburg is incorrect.

- The impression gained by the interest group is that the Department and the board never consulted genuinely with them. The group does not agree that the discussions, especially on the part of Ali, were genuine. Even when they did communicate the Board, according to Brand-Muller, was playing the group for time. They were listening to the group solely in order to keep the group at bay.

In summary, Brand-Muller asserts in his evidence that:

1. Within the 30 days when the Department and the Board called for representation, there was no consultation with the Middelburg council and the interest group.

2. In the meeting of 27 August 1997 the board, through the replies of Ali, shut the door in the face of the interest group (and the local authority) when it informed them that the plaza had been finally determined.

3. The Board only started consulting with the Witbank-Middelburg interest group after the declaration of the final toll road on 7 November 1997, but even then they did not do so in good faith in that:

    3.1 they started clearing the ground for location of the plaza while talking to the group;

    3.2 there was political pressure on the interest group;

    3.3 the board did not act in terms of the agreement reached with the group that if the study conducted by the group demonstrated that the proposal of the group for location of the plaza was viable then the proposal of the group would be implemented.

The last witness on consultation, who was called by the defence, is **Andre Johannes Lube.** He testified that he was the town clerk for Marloth Park from 1996 to December 2000. At that stage Marloth Park was an autonomous municipality. The area of this local authority had been proclaimed as a holiday resort with a population of approximately 4458. The town also had its own permanent residents who were about 700 in number.

The town is situated near the southern boarder of the Kruger National Park between Komatipoort and Hectorspruit (Mpumalanga). It boarders on the Kruger National

Park in such a way that the only access to and from the town to the rest of the Republic of South Africa is through the N4 road between Komatipoort and Nelspruit.

Most of the residents of the town do their major groceries and shopping in Nelspruit and in order to reach Nelspruit and Barberton they have to go through the Nkomazi Plaza (toll gate) near Kaapmuiden.

The municipality had a staff of approximately 18 people and the postal address for the Town Clerk and the municipality is P O Box 113, Komatipoort 1340. The administration of the municipality consisted of the usual departments that one finds in a local authority such as municipality engineers, nature conservations, finance, the secretarial departments as well as the town clerk section.

The declaration of the N4 toll road, particularly the establishment of the toll plaza at Nkomazi (Kaapmuiden) affected the residents of the town directly as most of them do their regular shopping in Nelspruit, which is the major business centre nearest to them. The residents of the town also have regular and active interaction with Nelspruit as the capital of the province.

The Marloth Park local authority never received an invitation from the South African National Road Agency or the Road Transportation Board inviting the local authority for consultation or to submit representations about the toll road. The town clerk would have been the one to receive such an invitation, if it came, and he in turn would have placed it before the town council or local authority.

He was referred to and took notice of the letters of invitation which were particularly addressed to the town clerk of Marloth Park at P O Box 300 Komatipoort 1340 and at P O Box 146, Komatipoort, 1340. The first letter was marked for the attention of A J Lubbe (which are his initials and surname) and the other for the attention of K H J Van Aswegen. The Marloth Park town council never received any of those letters and the postal addresses to which they were addressed also do not and did not belong

to the local authority. The letters were quite evidently sent to the wrong addresses and never came to the attention of the local authority. He knows K. H. J. Van Aswegen as the town clerk of Komatipoort but he never had anything to do with Marloth Park. If he (Lubbe), as the town clerk, had received the letters he would have tabled them before the council for its comments.

He is also not aware of any other invitation to comment or to make representations, about the toll road, which ever reached the council. For the matter to come before the council it would have come through him to be placed on the council agenda.

The letter form the Director General of the Department of Transport also never reached the council. The local authority was thus never consulted in connection with the declaration of the N4 toll road and the gates that affected it. If such an invitation had reached them it would not only have been placed before the council for comments but it would also have circulated to the residents through either the ordinary correspondence or the council's monthly news letter to property owners in the town.

The council has also never been informed of its right to be consulted about the toll road and toll gates. He, as town clerk, has also never seen the invitation for comments either in the press or in the government gazette.

The council did receive government gazettes regularly but never saw the invitation therein for representations or consultation about the toll road. There was a lady at the municipality who was tasked to look through the gazettes regularly. She however had instructions to look for or check information in three categories, i.e. national and provincial government notices about their particular municipality, their own notices and advertisements as well as their business license applications.

There were at the time no newspapers circulating in the area of the local municipality. The inhabitants only got newspapers if they happened to leave the area and go to one of the major towns such as Nelspruit or Barberton.

Although the local council was part of a regional service council, the municipality representative on the regional services council never reported to Marloth Park council about anything concerning the toll road.

As town clerk Lubbe was aware of all correspondences and notices that came to Marloth Park municipality. There was none about the toll road which ever reached them.

Evaluation of Evidence on Consultation:

On the version of the state, the best that the Board and the Department of Transport did was to invite representations, considered those received and took a decision to proceed with the declaration of a toll road. They therefore complied with sec 9 (3) (c) of the 1971 Act in relation to the interested parties as envisaged in that section. As regards "consultation", it appears that the Middelburg Transitional Local Council (TLC) may have been consulted prior to the repeal of the first toll road. That consultation is however of no direct relevance to the second and final declaration of the toll road. After the publication of notice of intention to declare the second toll road, they were invited to submit written representations. As part of that process they were also notified of the "proposed" position of plazas (by being sent copy of the gazette). They expected to be consulted and specifically asked for the process of consultation to begin. The Board and the department never specifically invited them to consult. The TLC expected consultation (as prescribed in sec 9 (3) (b)) and not just an invitation to submit representations (sec 9 (3) (c)).

The question to be considered is whether, having furnished the Middelburg TLC with information regarding the position of the toll gate, the Board and the Department did

consult with the TLC at all. The furnishing of information regarding the position of toll roads is not consultation, it is prescribed as something that has to be provided in the consultation process, just as it also has to be provided in the invitation for representations (sec 9 (3) (d)). The TLC thought that the TRAC meeting of 27 August 1997 was the intended consultation. On the state version however it was not. Thinking that it was, the TLC thus wanted to discuss the position of the plazas but were told that the decision in that regard had been made already. They thus walked out of that meeting. On the state version this meeting was not part of the consultation process prescribed in sec 9 (3) (b). It was a TRAC meeting held with the community as part of the environmental impact assessment. The TLC thereafter requested and pleaded for it and the community to be consulted. On the evidence before me there was no response to that request. The consultation envisaged therefore never took place.

The state therefore only relies on the fact that the Board called for representations (in terms of sec 9 (3) (c)) and received response from Middelburg TLC (dated 20 August 1997 – p 16 of Exhibit R) to prove that the Board consulted the said TLC. The real question is therefore whether compliance with section 9 (3) (c) – invitation for representations – constitutes consultation as prescribed by sec 9 (3) (b). In my view it does not. The 1971 Act prescribes two different processes. The Board complied with one and not the other. It may be that in certain circumstances compliance with sec 9 (3) (c) may lead to or converge with compliance with sec 9 (3) (b). However in the specific circumstances in *casu* the Board was made aware that the TLC expected and requested consultation before the final declaration of the toll road. They were never told that their response to the sec 9 (3) (c) invitation would be the only and final opportunity for them to be heard and that there would be no further opportunity for them to consult as envisaged in sec 9 (3) (b). The only time they thought there was an opportunity to consult (on 27 August 1997) they were told that a decision had already been made. On the evidence presented on this point, it appears that indeed the Board / department had already made up its mind finally at that stage. It appears thus that the Board did not keep an open mind at the time when it should have: the toll road had not been declared as yet and the TLC was entitled to the consultation it asked for.

On assessment, the evidence of the defence, through Brand-Muller, the legal representative for Middelburg TLC, who was also the spokesperson for the Witbank – Middelburg Interest Group, of which Middelburg TLC was a member, indicates that the TLC was aware of its right to be consulted. They therefore expected and requested to be consulted. They required the position of the toll gates to be furnished to them for the purpose of consultation – as provided for in sec 9 (3) (d). They were provided with the approximate position (when they got the invitation to make representations / submissions). They were however not consulted. The process of consultation that they were entitled to was never availed to them.

It is common cause that Middelburg TLC is a local authority that was affected by the declaration of the toll road. Failure to consult it constitutes failure to comply with sec 9 (3) (b) of the 1971 Act.

As regards Marloth Park, the state also does not contest that it was a local authority which was entitled to be consulted in terms of sec 9 (3) (b). Indeed it is one of those local authorities that the Board identified as an interested party and targeted to send it the invitation to submit representations. The evidence shows undisputedly that the invitation was sent to a wrong address and therefore never reached the town clerk and town council of Marloth Park. On the evidence before me, Marloth Park local authority was therefore not consulted. I have already found that an invitation to submit representations in terms of section 9 (3) (c) is not consultation as prescribed in sec 9 (3) (b). If the letter sending the invitation for representations was an attempt to consult, then it was an abortive attempt. The state therefore failed in its attempt to prove that Marloth Park local authority, which was entitled to be consulted, was consulted. This is yet another instance of failure to prove compliance with sec 9 (3) (b).

I do not accept the submission by the state that the mere publication of notice in terms of sec 9 (3) (c) in the government gazette and in some newspapers constitutes consultation with the affected local authorities. Publication serves to notify the general public and

interested parties. It is no substitute for consultation. Such publication may be adequate for the particular purposes of inviting interested parties to submit representations. It is indeed a prescribed manner in which the representations in terms of sec 9 (3) (c) are called for. The wording of the published notice also makes it clear that it is published in terms of the latter section. There is no reference in it to a consultation process or the provisions of sec 9 (3) (b). The notice addresses itself to and is directed at the general public which may be interest to respond thereto. The letters that were sent to the local authorities also made no reference to consultation nor to the provisions of the Act under which consultation was provided for.

It appears to me that, unless there are special circumstances justifying a different approach, an invitation to consult must be directed at a particular identified or identifiable person or group of persons to be consulted if it is to be effective. The addressee must be invited to submit or give advice on the subject matter about which sufficient information must be given to enable the addressee to advise. There must also be an open mind to receive the advice; and adequate time must also be allowed for the advice to be furnished and for it to be received and considered. The invitee must be left in no doubt that its/his/her advice is sought, that is, that it is invited to consult.

Marloth Park had been identified as a local authority affected by the declaration of the toll road and had to be consulted. There are no special circumstances that justified a reliance on publication as the only form of consultation. From the available evidence the only reason why Marloth Park local authority was not consulted, as it should have been, is the negligent failure to establish its correct address and contact details,

Although the state did not argue the point directly, I considered at some length, in relation to Middelburg TLC, the question whether, the letter of 24 July 1997 from the Department / Board to the TLC and the letter of 20 August 1997 from the TLC to the Department, do not constitute consultation between the TLC and the Board / Department. I reached the conclusion that they do not. The following are my reasons in brief: (a) The letter of 24 July 1997 enclosing the gazette, did not invite the addressee to consult: it

simply informed the addressee that the government notice declaring the toll road was to be repealed and that the SA Roads Board intended to declare a new toll road; (b) The letter of 20 August 1997 from the TLC was evidently written before the TLC received the letter from the Department. It was a comment by the TLC in response to a general invitation in the gazette to submit representations. It was thus representations by the TLC in terms of sec 9(3)(c). The only response by the TLC to the letter of 24 July 1997 was by letter of 01 September 1997 in which the TLC pleaded for consultation; (c) On the facts it is clear that over and above the right to make representations in terms of sec 9(3)(c), the TLC was aware of its right to be consulted (in terms of sec 9(3)(b)) and pleaded for that process to start. The Board and the department never gave them that opportunity; nor did they inform them that compliance with sec 9(3)(c) - representations - would be enough and that there would be no opportunity for the TLC to be heard as contemplated in sec 9(3)(b); (d) Consultation cannot take place by ambush: the consulted should never be left in a state of uncertainty as to whether it is going to be consulted as it is entitled to or not; (e) It is inimical to the clear intention of the legislature and nugatory to the provisions of sec 9 (3)(b) to hold that where sec 9(3)(c) – with regard to representations- is complied with fully then there is no need to comply with the specific provisions of sec 9(3)(b) – with regard to consultation.

The state argued that the sending of letters enclosing the gazette, must be accepted as part of the consultation process because the letters were not written in compliance with the regulations to enforce sec 9 (3)(c). That is however not so. The letters were sent to any person whose interest in the declaration of the toll road was known. Hence in the OE series letters were also sent to any person who had demonstrated an interest in the matter by responding to the previous government notice of January 1996. The intention was thus not to consult but to reach identified and identifiable "interested parties" as contemplated in sec 9(3)(c). Nothing in the conduct of the Board or the Department demonstrates that they intended to consult with the local authorities or that they had sec 9 (3) (b) in mind.

On the contrary the attention and actions of the Board and the Department seem to have focused only on sec 9 (3) (c) with which they complied fully. They thus seem to have allowed only 30 days to the Middelburg TLC to comment or communicate its views. Hence in his opening presentation at the meeting of 27 August 1997 under item 3.1 (of minutes at page 23 of Exhibit R), Nazir Ali is reported to have made the point that "The time for lodging objections/opinions have expired and the inputs are being analysed". It appears thus that the Department and the Board took the view that once the 30 days time for representations was over, they were no more open for consultation. They thus closed their mind to any advice. This is also consistent with the view taken by Nothnagel, in his evidence in chief, that the meeting of 27 August 1997 was not part of the statutory consultation. The Board and the Department (and not just Nothnagel) seem to have taken the view that they had already complied with the statutory prescripts that they had in mind. However, no time limit had ever been stipulated for consultation and thus none would have expired. With the view that it held the Department / the Board appear to have closed its mind to the process of consultation at a time when the consulted party sought to exercise their right to be consulted.

For reasons already stated I reach the conclusion that the state has failed, in the face of a challenge by the defence, to prove that the Middelburg and Marloth Park local authorities, which are affected, were properly consulted in terms of sec 9 (3) (b) of the 1971 Act.

The state has therefore failed to prove that a toll road was validly declared in terms of sec 9 (3) (a) of the 1971 Act.

In regard to consultation, the defence also argued that because the Board and the Department of Transport had already entered into an agreement with the concessionaire (TRAC) in May 1997, in terms whereof it undertook and bound itself to declare the toll road, with toll gates at particular location, any process of consultation in which the Board / Department purported to enter (after July 1997) with the local authorities, in which it (the Board / Department) did not disclose the existence of the agreement, was not

genuine consultation in that (a) the Board did not act *bona fide* in failing to disclose the agreement / or its existence and (b) the Board did not keep an open mind to receive and consider any advice it received in the process. This is another angle from which the defence launched an attack on the validity of the consultation process. In view of the decision I have already reached on whether consultation took place at all, I do not consider it necessary to examine this line of attack.

Omia praesumuntur rite acta esse:

Mr Hellens SC who appeared for the state, argued that the state relied primarily on the presumption, *omnia praesumuntur rite esse acta*, as expounded in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others 2004 (6) 222 (SCA)* amongst others, to prove consultation. In its ordinary and usual application this is a presumption as to regularity in terms of which it is recognised that that which regularly happens is likely to have happened. He argued that on the basis of this presumption, the Board must be presumed to have consulted and to have complied with all the legal requirements for the declaration of a toll road. If the accused wishes to upset the presumption, so the state argued, he must raise sufficient matter to upset the presumption. Mr Hellens argued that it is only if the accused upsets the presumption that the state has to prove its case (as to the legal validity of the declaration of the toll road) beyond reasonable doubt.

The basic principle in criminal matters is that the onus is on the state to prove all the elements of the offence, including the unlawfulness of the alleged conduct of the accused, beyond reasonable doubt. In this particular case the accused specifically challenged the alleged unlawfulness of his conduct and in particular pointed out that the Board had not consulted with the local authorities of both Middelburg and Marloth Park as it (the Board) was obliged to do before declaring the toll road; and consequently that the unlawfulness of his conduct could not be proved.

The onus was thus on the state to prove that the alleged toll road was lawfully and validly declared as a toll road and that it is accordingly a proper and lawful toll road as

contemplated in sec 9 (3) of the 1971 Act. I am satisfied, in any event, that the defence raised sufficient matter in regard to the consultation to put the state clearly on its duty to prove that consultation with the two local authorities, as required by legislation, did in fact take place. On failure to do so the state fails to establish that the toll road in question was lawfully declared as a toll road in terms of the 1971 Act (sec 9 (1) read with sec 9 (3)). In my view the state has failed to discharge that onus. Neither the evidence nor the presumption helps the state to prove the element of unlawfulness in the circumstances of this case.

It is perhaps necessary to state by way of clarification that, in regard to the requirement of consultation, it is not the legal validity of the section requiring consultation which is questioned, it is the factual compliance of the National Road Agency Board with those legal requirements, as set out in sec 9 (1) (a) read with sec 9 (3), which is challenged. The state was therefore challenged to prove a fact and not the law. Where the state is required to prove a fact in order to establish criminal liability, it is required by our general law to do so beyond reasonable doubt.

The right of the accused to raise the defence of invalidity of the administrative act of declaring a toll road - *Oudekraal* case (*supra*):

As has already been sated, reliance by the state on the *omnia praesumuntur rite esse acta* principle does not help it (the state) to establish the unlawfulness of the conduct of the accused. Furthermore, on a proper reading of the judgment in the *Oudekraal* case (*supra*), that judgment does not help the state either. On the contrary, the case establishes clearly the right of the accused to raise the defence of invalidity of the administrative act of declaring a toll road in this type of case. To demonstrate this it is perhaps necessary to look closely at the *Oudekraal* case.

In that case the Administrator of the Cape Province (the predecessor of the Premier of the Province) had taken a decision of approving the establishment of a township on a piece of

land where there were Muslim graves, including kramats. Kramats are graves of persons who, in the Muslim faith, have assumed greater position of spirituality. The approval was without any conditions to protect the graves, or to excise them from the land on which the township (houses and roads) was to be erected.

It was found on the facts that the decision of the Administrator was unlawful and invalid from the outset. (This in spite of the fact as to whether the Administrator was aware of the existence of the graves, or not: on the facts it appears he was not aware.) The decision was in addition found to be *ultra vires*.

The question, relevant to this case, that the court considered (see from paragraph [26] at page 241H et seq.), was: what consequences followed from the conclusion that the Administrator, had acted unlawfully? The court answered the question by laying down as a principle that the City Council was not entitled to disregard the approval and all its consequences, simply because it (the Council) believed it to be invalid and illegal: until set aside by judicial review the approval existed and it has legal consequences that cannot simply be "*overlooked*". As the court put it," *even an unlawful administrative act is capable of producing legally valid consequence for as long as the unlawful act is not set aside*" (paragraph [26] at page 242B-C).

It is on this principle, I presume, that the state sought to rely in arguing that the accused was obliged to regard the declaration of the toll road as valid and effective as long as it has not been judicially set aside. The state also argued that the accused's remedy was to bring an application for review and not simply to ignore the toll road.

The Supreme Court of Appeal in the *Oudekraal* case noted that the principle thus laid down produces an apparent anomaly in that it postulates an unlawful act which can produce legally effective consequences. It is in the examination of this apparent anomaly that the real principles which are applicable in the present case emerged. The SCA reasoned that the "*anomaly*" could be explained on the basis of three possible approaches or principles:

(a) firstly, it could be explained on the basis of the presumption of validity of administrative acts expressed in the *maxim, omnia praesumuntur rite esse acta*;

(b) it could also be explained on the basis of what the court described as "*legal pragmatism*" that holds that administrative acts or orders are capable of legal consequences and remain valid and effective for the purposes for which they were ostensibly taken, unless the necessary proceedings are taken at law to establish the cause of invalidity and to get them quashed or otherwise upset; and

(c) it may also be explained on the basis of an analysis which distinguishes between what exists in law and what exists in fact. The analysis is based on an article by Christopher Forsyth: "*The Metaphysic of Nullity: Invalidity, Conceptual Reasoning and the Rule of Law*" in *Essays on Public Law in Honour of Sir William Wade QC*, Clarendon Press. *Forsyth* points out that when a void administrative act is not an act in law, it is, and remains, an act in fact, and its mere factual existence may provide foundation for legal validity of later decisions or acts.

It is instructive to look at each of these approaches a little closer, as the court did in the *Oudekraal case.*

Evidential presumption of legality - *omnia praesumuntur* rule:

Explaining the *omnia praesumuntur* principle, Lawrence Baxter in *Administrative Law* at 355 states:

> "*There exists an evidential presumption of validity expressed by the maxim omnia praesumuntur rite esse acta; and until the act in question is found to be unlawful*

by a court, there is no certainty that it is. Hence it is sometimes argued that unlawful administrative acts are 'voidable' because they have to be annulled."

The contention or explanation based on the evidential presumption of legality has already been answered above. To recap, if the explanation were to be a question of evidential presumption, it would mean that once evidence establishes otherwise (whether in proceedings to set aside or in any other legal proceedings) then the presumption is rebutted and the invalidity must automatically set in with retrospective effect. In my view, and for reasons already given, the evidence in this case leaves no room for the applicability of the evidential presumption. The state has simply not discharged the *onus* which rested on it to prove that the toll road in question was lawfully and validly declared as such.

The second explanation based on legal pragmatism, and the third one based on the analysis of Forsyth tend to overlap. They both postulate that administrative acts, though still invalid in law, retain their legal force until set aside by appropriate legal process, often judicial review. I will however examine each one separately.

Legal pragmatism - Unlawful administrative acts are legal till set aside:

According to the *Oudekraal* case the legal pragmatism approach is explained by an adage that where a court declines to set aside an invalid administrative act on the grounds of delay, in a sense "*delay would 'validate' a nullity*" (see Corbett J, as he then was, in *Harnaker v Minister of Interior* 1965 (1) SA 372 (C) at 331C); or as better put by Lord Radcliffe in *Smith v East Elloe Rural District Council* [1956] AC 736 (HL) at 769-70 ([1956] 1 All ER 855 at 871H; [1956] 2 WLR 888) (quoted in the *Oudekraal* case):

"*An [administrative] order ... is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or*

otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders."

If one follows the reasoning on legal pragmatism as explained by Corbett J and Lord Radcliffe, then the invariable legal position (and not just a presumption) will be that unless and until quashed by appropriate legal proceedings the apparently "*invalid*" administrative act is legally effective for its purpose like the most impeccable of orders. On this reasoning thus when quashed or set aside, the declaration of invalidity operates from the date of setting aside or quashing and has no retrospective effect. The latter approach goes more with the reasoning of the *Oudekraal* case where the Honourable Howie and Nugent AJJ reasoned that:

"*The functioning of a modern state would be considerably compromised if all administrative acts could be given effect or ignored pending on the view the subject takes of the validity of the act in question.*"

On this reasoning, the declaration of the toll road would remain an administrative act with legal consequences and legal force, despite its "*invalidity*", until set aside. A court in which a declaration of invalidity and setting aside is not sought by way of application for review would therefore have to accept the legal validity and forcefulness of such declaration. The absurdity here is that the court would have to follow or enforce a condition which, on the facts before it, appears to be liable to be set aside on the basis of invalidity. This also does not accord with the practice in our courts, where the courts, in criminal proceedings, have refused to recognize administrative and other acts which are unlawful either on the basis of unconstitutionality or other law, and have readily pronounced on their invalidity in the course of criminal proceedings.

Unlawful administrative act exists as a fact and provide legal validity for subsequent acts:

For Howie and Nugent AJJ (in the *Oudekraal* case (*supra*)), however, a convincing explanation of the apparent anomaly is found on the analysis by Forsyth who argues that while a void administrative act is not an act in law, it is, and remains an act in fact, and its mere factual existence would provide the foundation for the legal validity of later decisions or acts. This is the approach which was accepted by the SCA and which this court will follow.

On this analysis and argument of Forsyth, while the declaration of a toll road may in law be void and is therefore not an act in law, subsequent acts based on its mere factual existence (the fact of the declaration having been made) may serve as a sound basis for another later decision or act (e.g. the proclamation or collection of toll fees, or the conclusion of an agreement with the concessionaire, etc). In other words, as I understand the argument, it is the subsequent separate act or decision which may be legal although the initial void administrative act remains a nullity. In the context of our case, once it is established that the declaration of a toll road was a nullity in law, can the non-observance of it by the accused be unlawful for the purposes of establishing criminal liability for his conduct? This appears to be a more problematic rationale for the state. It seems to me that an administrative act which is a legal nullity cannot serve as the basis of unlawfulness of the conduct of an accused. A legal nullity cannot be the source of unlawful nature of an act committed or performed in contravention thereof. To hold otherwise would appear to fly in the face of the *nullum crimen sine lege* principle which is basic to criminal liability in our law.

Indeed that this is so appears clear from the following further expositions in the *Oudekraal* case. In paragraph [31] at page 243H-244A the learned judges said:

> *"Thus the proper enquiry in each case – at least at first – is not whether the initial act was valid but rather whether its substantive validity was a necessary precondition for the validity of consequent acts. If the validity of consequent acts is dependent on no more than the factual existence of the initial act then the*

consequent act will have legal effect for so long as the initial act is not set aside by a competent court."

In the context of the present case the substantive validity of the declaration of the toll road is certainly a necessary precondition for the unlawfulness and thus criminal nature of the conduct of the accused in refusing to pay the toll fees. The alleged unlawful criminal character of the conduct of the accused cannot be said to "*depend on no more than the factual existence*" of the declaration of the toll road. The unlawfulness of conduct for criminal liability is a question of law and not of fact.

As the learned judges point out further in paragraph [32] at page 244B-D:

"*When construed against the background of principles underlying the rule of law a statute will generally not be interpreted to mean that a subject is compelled to perform or refrain from performing an act in the absence of a lawful basis for that compulsion. It is in those cases – where the subject is sought to be coerced by a public authority into compliance with an unlawful administrative act – that the subject may be entitled to ignore the unlawful act with impunity and justify his conduct by raising what has come to be known as a 'defensive' or a 'collateral' challenge to the validity of the administrative act.*"

The learned judges define a "*defensive*" or "*collateral*" challenge as a challenge to the validity of the administrative act that is raised in proceedings that are not designed directly to impeach the validity of the administrative act. This is precisely what the accused had done in the present case. In the reasoning of the honourable judges the accused is perfectly entitled to do so.

The example given in the *Oudekraal* case is the English case of *Boddington v British Transport Police* [1999] 2 AC 143 (HL) ([1998] 2 All ER 203) at 172B-D (AC) (226a-b (All ER)). In that case the defendant had been charged with smoking a cigarette in a railway carriage in contravention of a prohibitory notice posted in the carriage pursuant

to a byelaw. The House of Lords held that the defendant was entitled to seek to raise the defence that the decision to post the notice (which activated the prohibition in the byelaw) was invalid because the validity of the decision was essential to the existence of the offence. As Lord Irvine LC said (at 153A-154A (AC) (209e-g (All ER)) :

> "*It would be fundamental departure from the rule of law if an individual were liable to conviction for contravention of some rule which is itself liable to be set aside by a court as unlawful. ... Any system of law under which the individual was convicted and made subject to a criminal penalty for breach of an unlawful byelaw would be inconsistent with the rule of law.*"

Similarly, I dare say, a conviction of an individual for not complying with the consequences of an administrative act, such as the declaration of a toll road, which declaration is in itself unlawful, would not be consistent with the rule of law.

In the *Oudekraal* case, Howie P and Nugent JA quoted further with approval from the *Boddington* case (*supra*) the following passages:

> "*... in approaching the issue of statutory construction the courts proceed from a strong appreciation that ours is a country subject to the rule of law. This means that it is well recognised to be important for the maintenance of the rule of law and the preservation of liberty that individuals affected by legal measures promulgated by executive public bodies should have a fair opportunity to challenge these measures and to vindicate their rights in court proceedings.*" (at 244I-245A)

And further:

> "*Provided that the invalidity of the byelaw (to which one may add administrative act) is or may be a defence to the charge a criminal case must be the paradigm of collateral or defensive challenge.*" (at 245B)

And furthermore:

> "*In Eshugbayi Eleko v Officer Administering the Government of Nigeria [1931] AC 662 at 670, a habeas corpus case, Lord Atkin observed that 'no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a court of justice'. There is no reason why a defendant in a criminal trial should be in a worse position. And that seems to me to reflect the true spirit of the common law.*" (at 245D)

And even furthermore the learned judges quoted with approval the following explanation by Forsyth (*op cit*) at 156:

> "*Only where an individual is required by an administrative authority to do or not to do a particular thing, may that individual, if he doubts the lawfulness of the administrative act in question, choose to treat it as void and await developments. Enforcement proceedings will have to be brought by the administrative authority involved; and the individual will be able to raise the voidness of the underlying administrative act as a defence.*"

On the reasoning of Forsyth, there was nothing untoward with Mr Smith, the accused in the present matter not initiating review proceedings. The Road Agency Board could as well have instituted enforcement or declaratory proceedings against which the accused would have been perfectly entitled to raise the same defences as he raises in this case. He would in other words have been entitled to raise the so-called collateral challenge to the validity of the declaration of the toll road.

Furthermore, the honourable judges of appeal stated in paragraph [36] at page 246B-C:

> "*It is important to bear in mind (and in this regard we respectfully differ from the Court a quo) that in those cases in which the validity of an administrative act may be challenged collaterally a court has no discretion to allow or disallow the*

raising of that defence: The right to challenge the validity of an administrative act collaterally arises because the validity of the administrative act constitutes the essential prerequisite for the legal force of the action that follows and ex hypothesis the subject may not then be precluded from challenging its validity."

The learned judges observe further that:

"*The rule of law dictates that the coercive power of the State cannot generally be used against the subject unless the initiating act is legally valid.*" (at 246B)

In my respectful view the passages quoted from the *Oudekraal* case clearly indicate that far from supporting the position of the State in this case the principles examined and accepted in the *Oudekraal* case support the position of the accused in raising the collateral or defensive challenge of the invalidity of the declaration of the toll road as a defence in the criminal proceedings which are no more than coercive measures taken by the State against him. The principles support further the view that it is appropriate in proceedings of this nature to hold that the *onus* is on the state to establish, amongst others, the legal validity of the declaration of the toll road beyond all reasonable doubt in order to secure a conviction of the accused on counts 1 to 12, that is, failure and refusal to pay toll. As I have already stated the state has failed to discharge that *onus*.

Counts 13 to 24, failure by the accused to comply with a steady red traffic light sign, rest on a different basis with regard to the lawfulness of the conduct of the accused. In regard to those counts it is not the validity of the declaration of the toll road which is under challenge. What is under attack, with regard to those counts, is the lawfulness of the subsequent setting up of the traffic signs at the toll plaza which flowed from the declaration of the toll road and the awarding of the concession contract to TRAC, which set up the traffic signs. On the reasoning in and the authority of the *Oudekraal* case, even if the administrative act of declaration of the toll road is unlawful and invalid, it nevertheless exists as a fact and provides legal validity for the subsequent act of setting up the traffic signs, including the red traffic light. The setting up of those traffic signs

cannot be a legal nullity. The validity of the traffic signs depend on no more that the factual existence (and not the legal validity) of the toll road and the consequent contract in terms of which the government parties granted the authority to the concessionaire to put up signs to regulate traffic on that road. The accused is not entitled to disregard the traffic signs simply because he believes those who put them up did not have powers to do so because of the invalidity of a prior administrative act that authorized them to do so. Put otherwise, the lawfulness of the traffic light on the toll road does not depend on the lawfulness or validity of the declaration of the toll road. The accused therefore acted unlawfully in disobeying the traffic sign.

That really disposes of this case, or at least counts 1 to 12. I however find it instructive to comment briefly on at least one other general defence raised by the accused with regard to proof of unlawfulness of his conduct relative to counts 1 to 12.

Linkage to the 1998 SANRA Act: "'Operated' as such":

The defence has also argued that even if it had been proved on the facts that the particular road had been properly and lawfully declared a toll road under the 1971 Act, there is no proof that the jurisdictional facts for the toll road to be regarded as a toll road under the 1998 SANRA Act, under which the accused has been charged, are satisfied. The argument is in essence that the linkage of the declaration of the toll road from the 1971 Act to the 1998 Act does not exist.

The relevant section of the 1998 SANRA Act is section 27 (6) which provides that:

"*(6) Any national road or portion of a national road (including any bridge or tunnel thereon) which under section 9 of the previous Act had been declared a toll road for the purposes of that Act and which immediately before the incorporation date exists and is operated as such under the previous Act, will be regarded as and treated for all purposes as if it had been declared a toll road under subsection (1) of this section.*"

The Act makes it clear in the definition section that (a) the "previous Act" referred to in sec 27 (6) is the 1971 Act (the National Roads Act No. 54 of 1971; (b) "the incorporation date" mean the date on which the Agency is incorporated as a company in accordance with section 3 and issued with a certificate to commence business; and (c) the Agency is defined as the national road agency envisaged for the Republic by section 2 (of the SANRA Act) and which in terms of that section, is established by the incorporation of a company, named The South African National Roads Agency Limited.

The appropriate certificate of incorporation of the Agency and its certificate to commence business have been handed in by consent as Exhibits "G" and "F" respectively. They are both dated 19 May 1998. That is thus the incorporation date referred to in section 27(6) and on which it has to be determined whether the N4 road or portion of it at the Nkomazi plaza (where the offence is alleged to have been committed) had been declared a toll road and existed and was operated as such under the 1971 Act.

The jurisdictional facts or requirements for the linkage are thus:

(c) the road must have been declared a toll road for the purposes of the 1971 Act;

(d) immediately before the incorporation date (19 May 1998), the toll road in question

i. must have existed; and

ii. must have been "operated as such".

The argument of the defence is that even if requirements (a) and (b) (i) above were satisfied, requirement (b) (ii) was certainly not satisfied in that the "toll road" in question was not "operated as such" under the 1971 Act immediately before the incorporation date. One must thus assume for the purposes of this argument that the toll road had been properly declared as such and existed immediately prior to the material date. The focus is thus on whether the toll road was operated as such at the time.

There is once more a difference in the meaning which the prosecution and the defence urges the court to attach to the word "operated" as used in the section. Based on the different meanings which they attach the state argues that the "toll road" in question not only existed but was also "operated as such" on the incorporation date, while the defence argues that he toll road was certainly not "operated as such" on that date.

Before I proceed to interpret this expression, which is another terrain of controversy between the state and the defence, it is perhaps necessary to give the sequence of important dates and then summarise the evidence around the issue, which came primarily from the state through Sterling Sean White and Andrew Mitchell.

The important dates in sequence around the issue are:

(a) The Concession Agreement was signed on 05 May 1997;

(b) The notice of intention to declare the final toll road was published in the government gazette on 18 July 1997;

(c) The final toll road with which we are concerned in this case was declared on 07 November 1997;

(d) According o the state all resolutive conditions in the Concession Agreement had been fulfilled by 06 February 1998;

(e) On 06 March 1998 the construction of portions of the toll road, in particular the clearing of the site for the Middelburg Plaza, started. This was the first step in the construction process;

(f) The SANRA Act No. 7 of 1998 was assented to on 23 March 1998;

(g) The SANRA Act came into operation on 01 April 1998;

(h) The Agency was incorporated and issued with a certificate to commence business on 19 May 1998 (the incorporation date which is the material date);

(i) The first amounts of toll fees (for the various classes of vehicles as determined by the Minister) were published by Government Notice No. 1486 on 20 November 1998 (contained in Government Gazette No. 19483), and were for

the Middelburg Toll Plaza. This was the first date from which toll fees could lawfully be levied on the road users;

(j) The next amounts, in date sequence, were published in Government Notice No. 793 on 18 June 1999 (contained in Government Gazette No. 202227) and were for the Nkomazi Plaza;

(k) The third amounts were published on 14 February 2000 in Government Notice No. 135 (contained in Government Gazette No. 20874) and were for the Machado Toll Plaza.

I now turn to the evidence relevant to determine the question whether the toll road was operated as such on 19 May 1998.

Andrew Mitchell is a director in the law firm, Bell Dewar & Hall. He testified that he was involved in the drafting of the Concession Agreement (which was signed between the Republic of South Africa, the Republic of Mozambique and TRAC). He was the leader of the legal team that was involved in the negotiation and drawing of the agreements between April and December 1997. The team also monitored compliance with various requirements, clauses and conditions of the contract. Clause 24.2 of the agreement contains a number of conditions to which the agreement as a whole was subject. The specific focus of the evidence of Mitchell was to prove, by means of Exhibits K1 to K9, as well as Exhibit L, being the amendment to the concession agreement (Exhibit I), that all the resolutive conditions had become fulfilled by the 6th February 1998 and that concession agreement became effective on that day.

The concession agreement defines "the effective date" of the agreement as "the date when conditions specified in clause 24.2 have been met as certified by the implementing authority, which certification shall be made when the conditions in clause 24.2 are satisfied". On 12 December 1997 the implementing authority issued a Resolutive Conditions Certificate in which it certified that the resolutive conditions contained in clauses 24.2(i), 24.2(ii), 24.2(iii), 24.2(v), 24.2(vii), 24.2(x),

24.2(xii),24.2(xiv), 24.2(xv) and 24.2(xvi) had been fulfilled. On 12 December 1997 the parties concluded Amendment Number 1 to the concession contract in terms of which resolutive condition contained in clause 24.2(iv) was deleted. On 04 February 1998 the implementing authority issued a Resolutive Conditions Certificate in which it certified that resolutive conditions contained in clauses 24.2(iv) and (xi) had been fulfilled. He testified in effect that all the conditions precedent were certified by the implementing authority as having been fulfilled by 04 February 1998, the latter being the last date by which the last of the conditions were certified as having been fulfilled. On 06 February 1998 TRAC (the concessionaire) addressed a letter to the implementing authority requesting that the implementing authority confirm that the effective date as defined by the concession contract had occurred. The letter was signed by the implementing authority to confirm the effective date as 06 February 1998. It is also the date on which Nedbank confirmed the funds as having been transferred to certain disbursements accounts referred to in the payment instructions received by the bank on that same day. The date was thus also the financial close of the deal. From that day onwards the parties considered themselves bound by the agreement and acted in accordance therewith.

The import of Mitchell's testimony was that the effective date of the agreement was reached on 06 February 1998 and was certified as such in terms of the agreement.

Sterling Sean White testified that he is the assistant financial manager employed by TRAC in Midrand and has been so employed since 08 August 1997. He has had sight of the original concession agreement and confirmed that it was signed on 07 May 1997. He was employed after its signature. He is aware of the effective date as provided for in the concession agreement as the date on which the implementing authority certified the conditions contained in clause 24.2 to have been certified. He also confirmed the effective date as finally brought about by means of the certification as 06 February 1998.

For them in TRAC the effective date was of great significance. To them "it was the day that TRAC actually came into being." As he says "had this day not happened, TRAC and the commencement of operations of our tollgate would not have happened."

From that day TRAC immediately went into action to start doing on the road what it had undertaken to do it terms of the contract. Construction phase had to start and they had to start rehabilitating, strengthening and reconstructing certain sections of the road. He described a number of things which had to be done immediately once they had the effective date: they had to start preparing the road by way of designer construction contract that they had signed; they had to start bringing plant to the site, they had to obtain clearance from the implementing authority that the road reserve had been proclaimed and that TRAC was able to access it; they had "to start effecting various design construction and operational requirements as per the contract"; all designs had to be completed by engineers. He said once the effective date had come by "operational and maintenance" work as provided for in the agreement had to commence immediately. In his words "Once we had the effective date we had to then start operating the road, from the point of view of maintaining the fencing, maintaining the street lighting, maintaining the tunnel lighting, making sure all the electricity was operational and ensuring that the road started becoming a toll road in the sense that have actually agreed to do in terms of the agreement and on that basis that we had to uphold certain standards."

The right for TRAC to charge and collect tolls from road users was also provided for in the concession contract. TRAC started tolling at Middelburg Plaza in December 1998. From then the process of tolling unfolded further as tariffs were published in the government gazette. After Middelburg, tolling commenced next at Machado Plaza and then subsequently at Nkomazi plaza.

It is clear from the evidence of this witness that according to him TRAC started operating the toll road immediately after the effective date. He regards all the process

in the maintenance, clearance, design and construction of parts of the road as the "operating" of the road. He also regards as part of the operating of the road the initial financial exercise of opening and operating accounts with electricity bodies, establishing accounts in the name of TRAC, the exercise in establishing the route, preparing for all operations along the routes, purchasing vehicles, purchasing equipment, recruiting personnel and commencing the whole operational aspects of it.

The collection of tolls, he testified, is only a small portion of the process of operating a toll road. On this basis he testified thus that TRAC had started operating the road already by 19 May 1998. The import of his evidence was to say to the court that the toll road was operated as such before 19 May 1998.

Interpretation of "operated as such":

The prosecution has urged me to accept that because the state witness Sterling White says the toll road was operated immediately prior to 19 May 1998, I should accept that he understands the meaning of the word, and accept accordingly that the toll road was indeed operated. However whether on that day the toll road was "operated as such" within the meaning of the expression in section 27 (6) of the SANRA Act is a matter of legal interpretation. The opinion of Sterling White, who testified for the state, as to the meaning of that word, is of little, if any assistance to the court. The court must itself determine the meaning of the word as used in the Act and satisfy itself of the ordinary legal meaning of the word or expression, as used in the context, and decide on the facts whether the toll road was operated as such on the particular date.

To revert to the meaning of "operated" in relation to section 27(6), the Act itself does not define the word. Surprisingly the word has also not received judicial attention by our courts. One thus has to have regard to the ordinary every day grammatical meaning of the word and its usage in the relevant legislation.

The Collins English Dictionary defines the word "operate" as meaning to function or cause to function, to control the functioning of, to manage or direct or pursue (a business, system etc).

The Oxford English Dictionary (Volume X) gives the following meaning: The word comes from the Latin word "*operare*" meaning to work; also in later Latin to have effect, produce by working; to be in working.

The Shorter Oxford English Dictionary (On Historical Principles) gives the meaning of the word "operate" as "to work or bestow labour upon." The same dictionary gives three further meanings of the same word, all of which are related to and tend to shed light on the contextual meaning of the word as used here: "1. To be in working, exercise influence, produce an effect, act. 2. To cuase or actuate the working of; to work (a machine, etc.). 3. To direct the working of; to manage, conduct, work (a railway, business, etc.)."

In *The Concise Oxford Dictionary (10th Edition, Revised)* the meaning of "operate" is given as "1 (with reference to machine, process, etc.) function or control the functioning of. 2 (with reference to an organization) managed or be managed and run. > (of an armed force) conduct military activities. 3 be in effect."

The *Webster Third New International Dictionary of the English Language (Unabridged)* also gives three related meanings as follows: "1. to perform a work or labour : exert power or influence ... 2. to produce or take an appropriate effect : issue in the result designed (he drug *operated* quickly) 3. to an operation or series of operatons (a mill for *operating* on the crude ore)."

Finally in *West's Legal Thesaurus / Dictonay* by William P Statsky the meaning of "operate" is given as "To perform a function or produce an effect (trained to operate the system). Run, conduct, govern, command, steer, carry on, guide, oversee,

maneuver, be in charge of, superintend, engineer, take charge of, engage, preside, supervise, execute, use, minister, occasion, cause."

All these dictionary meanings, and indeed any dictionary meaning, are helpful only as a guide; for indeed in the final end each word and expression whose meaning stands to be determined derive their true meaning from the context in which they stand to be interpreted.

Thus, in determining the meaning of the word one has to bear in mind the full context in which it is used and how it is qualified in the section in question. The section makes it clear that a national road which has been declared a toll road under the previous (1971) Act is to be regarded and treated as if it had been declared a toll road under the 1998 SANRA Act if immediately before the incorporation date it exists and is "operated as such" under the previous Act. One must not only look at the word "operate" to determine its meaning. One must have regard to the full expression: the toll road must not only exist, but it must also be "operated as such". The expression "as such" must be allowed to shed light on the meaning of the word "operated". The toll road must thus not only have existed but it must also have been operated as a toll road on 19 May 1998. In the ordinary everyday use of the expression a road which has been declared as toll road is operated as a toll road if it is used or made available to be used by motorist as a toll road in the sense that toll fees are legally collectable for the use of that road. I say so for reasons that I will explain hereunder.

It seems to me that the process that leads to the toll road being operated has a start and a completion point. Firstly the road may have to be declared as a toll road (if it was no previously declared), then has to be planned, designed, constructed, tolls have to be determined and fixed lawfully and then once complete the toll road operated. I will understand a toll road to be operated as such if it is used by vehicles as a toll road against the payment of a toll which is lawfully levied. A toll road, like any other road, also has to be maintained, managed and controlled. Finances for a toll road may also have to be arranged and administered, personnel employed and supervised. The

arrangement of finances and construction of a toll road will however on their own not constitute the operation thereof as a toll road. These are at best steps in the preparation or maintenance of a toll road and not its operation. In the same way the operation of a stone crushing equipment is constituted by its handling or manipulation in the process of crushing stones. When such machinery is being built, designed, repaired or the finances for its erection are arranged or managed, or if the machine is repaired or maintained, we do not speak of it as being operated; it is operated as a stone crushing machine if it is manipulated in the process of crushing stones – it is being operated when it is being used in the process of what it is meant to do as its main function.

Furthermore the legislature uses the word "operate" in relation to a national road and a toll road in the previous and the current Act; and unless a contrary intention is evident from the context the word should be presumed to be used with the same meaning. The legislature seems to distinguish the "operating" of a toll road from its planning, design, construction, management, control and maintaining as connoting different meanings.

For in the 1971 Act, in section 5 (1) (c), (f), (p) and (q) the legislature describes the general powers, functions and duties of the Board, in relation to roads, *inter alia*, as follows:

"(c) to plan, design or construct any national road;

(f) by itself or in collaboration with or through any person or body, to research ... whether in the Republic or elsewhere, in connection with the design, planning, construction or operation of road ..."

(p) to collect or cause to be collected by any person appointed for that purpose, money payable as toll on a toll road;

(q) to provide, establish, maintain and operate toll gates on a toll road:"

Again in section 9 (4A) (a) the 1971 Act provides:

"Notwithstanding anything to the contrary in this Act contained –

(a) the Board may under the conditions and for the period it deems fit, with the approval of the Minister, and in terms of an agreement authorise any person to plan, design, construct and operate a national road or any portion thereof which has, in terms of this section, been declared to be a toll road, or any portion of a toll road so declared;"

In the 1998 SANRA Act, where section 27(6) appears, the legislature uses the word "operate" and its derivatives in relation to a toll road, *inter alia* in the following sections:

"25 (1)The Agency, within the frame work of government policy, is responsible for, and is hereby given power to perform, all strategic planning in relation to the South African national roads system, as well as the planning, design, construction, operation, management, control, maintenance and rehabilitation of national roads for the Republic, and is responsible for the financing of all those functions in accordance with the business and financial plan, so as to ensure that government's goals and policy objectives concerning national roads are achieved, subject to section 32 (2)."

25 (2) For the purposes of subsection (1) –

(a) the Agency, on incorporation date, will take over from the South African Roads Board the responsibility for all projects and work which, before that date, had been commenced in terms of the previous Act by the South African Roads Board in connection with the planning, design, construction, operation, management, control, maintenance and rehabilitation of a national road or the planning of a proposed national road, and which is still pending on that date;

26. In addition to the Agency's main powers and functions under section 25, the Agency is competent –

(a) at the request of a municipality of the Premier of a province, and with the Minister's approval, to perform any work in connection with any road (whether a national road or a road of which that municipality or province is the road authority), including the planning, design, and construction of such a road, or to have it done under its supervision for the account of that municipality or province. ...

(c) to appoint any private person, institution or body, in terms of a contract concluded for that purpose, in order to perform any work on behalf of the Agency with regard to the planning or design of a national road or proposed national road or the construction, operation, management, control, maintenance, or rehabilitation of a national road or in order to perform any work in the execution of a project or in connection therewith, and to monitor the execution and the work performance."

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

28 (1) Despite section 27 the Agency may enter into an agreement with any person in terms of which that person, for the period and in accordance with the terms and conditions of the agreement, is authorised –

(a) to operate, manage, control and maintain a national road or portion thereof which is a toll road in terms of section 27 or to operate, manage and control a toll plaza at any toll road; or

(b) to finance, plan, design, construct, maintain or rehabilitate such a national road or such a portion of a national road and to operate, manage and control it as a toll road."

It appears that in the context of both the 1971 Act as well as the 1998 SANRA Act the legislature clearly distinguishes the various processes of planning, designing, construction, establishing, maintaining, financing and operation of a road. This is particularly clear in relation to section 28 (1) (a) on the one hand and section 28 (1) (b) on the other in the 1998 SANRA Act. The sense in which the word and its derivatives like "operation" is used, particularly in the sections of the 1998 Act, is important in that all these are sections in the midst of which section 27 (6) appears. The context is close and similar. The legislature must therefore have used the word "operated" in relation to a toll road in a sense that distinguishes it from design, plan, finance or construct as the legislature clearly did in all other sections, particularly those around the one in issue. It is highly unlikely that the legislature would have used the word and its derivatives so close with different meanings without expressly distinguishing the meanings.

While one or more of these processes may conceivably overlap in particular situations, there is nothing to suggest that when the legislature laid down, as a requirement for a toll road declared under the 1971 Act to be regarded as a toll road under the 1998 SANRA Act, that on a particular date the toll road in question had not only to exist but must also to be operated as a toll, that it would be sufficient if such a road is merely being designed, constructed, financed or even maintained. To be operated as a toll road the road must, as I have said, be used as under the conditions where a toll is or may lawfully be levied for its use.

Although each of the key words used has not been defined by statute, the Act distinguishes the declaring, planning, designing, construction of a toll road. It will be incorrect to reason that and thus regard the planning, designing or construction of a toll road as its operation for the purposes of sec 27(6). True, a toll road may not be operated upon before it has been planned, designed or constructed, in as much as any road cannot be operated as a road unless it has been constructed. The planning, design and construction of a road is however not its operation. The planning, design, and construction of a road are all preparatory steps that need to be done before it is operated as such. Similarly the planning, design and construction of a toll road (including

arrangements for its financing and the appointment of personnel) are all preparatory steps that precede its operation. They are not themselves the "operation" of a toll road though they contribute to and may overlap therewith. Ordinarily, a toll road is operated as such after all preparatory steps, including the construction of toll gates, have been completed.

It may well be that the collection of toll is not an essential part of the operation of a toll road. It is however certainly an important part of the business of operating a toll road. For instance if the Board or the person authorised to collect toll, was to elect to suspend the collection of toll for a particular period, the operation of a toll road may well not cease. It seems to me however that the right and legal ability to collect the toll is not only an important part but also an essential part of the operation. It will thus not be correct to speak of the operation of a road as a toll road when the toll has not even been approved, determined or prescribed by the Minister.

On 19 May 1998 no toll fees had been determined and published by the Minister. None were thus legally collectable. All what the evidence indicate is that the clearing of the site for the Middelburg plaza had started; the finances were arranged and the design work had also begun; its construction may even have started. In the words of Sterling White the process of making the road a toll road had begun. The toll road was however not operated as a toll road.

On this conclusion alone, an important element for a conviction under the 1998 SANRA Act, namely, unlawfulness of the conduct of the accused, has not been established.

Decision on Lawfulness:

The decision on proof of unlawfulness of the conduct of the accused for a conviction under the 1998 SANRA Act, in this case has been made on the evidence before court. In the nature of the proceedings before me, this is not a case in which the setting aside of the declaration of the toll gate was considered; nor indeed can such a question be considered without citing and hearing all the interested parties, which would include, the Department

or Minister of Transport, The South African National Road Agency or its Board, and Trans Africa Concessions (TRAC) as the concessionaire.

All what the court in the present case had to consider and decide is whether the state has proved beyond reasonable doubt all the elements of the offences charged under the 1998 SANRA Act, including the unlawfulness of the conduct of the accused, which on the facts hinged on proof that the road in question was lawfully declared as a toll road under the 1971 Act and that it is a toll road under the 1998 SANRA Act. As I have already indicated elsewhere, on the facts, the state has not discharged the onus to proof that the toll road was lawfully and properly declared. The state has also not proved that the road in question is a toll road under the 1998 SANRA Act, under which the accused has been charged in counts 1 to 12. The unlawfulness of the conduct of the accused on those counts has accordingly not been proved. As I have already stated the unlawfulness of the conduct of the accused with regard to counts 13 to 24 has been proved beyond reasonable doubt.

Other defences:

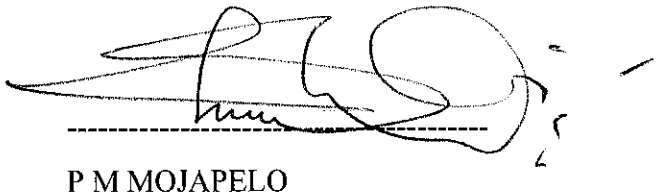
As I stated earlier in this judgment the accused also raised certain constitutional defences in which he questioned the constitutional validity of the declaration of the toll road on the basis that they violated his rights under the bill of rights. He also argued that his right to fair administrative process was violated by TRAC when they denied him the exemption or concession from the normal or usual toll fees for certain classes of vehicles which TRAC granted to certain other road users based on arbitrary considerations. The validity of the concession contract was also questioned on the basis that such a contract can only be entered into in respect of a road that has been declared a toll road; that while the toll road had been declared when the contract was entered into on 05 May 1997, when the toll road was later repealed by proclamation, the agreement had become void and that its validity could not have been resuscitated by the subsequent declaration of the toll road, which, in any event, was different from the one that had been declared previously when the contract was concluded. In the light of the decision I reached on the points

considered in this judgment, it is not necessary for me to consider any of these other defences.

Intention and Verdict:

As far as intention is concerned, in his statement in terms of sec 220 of the Criminal Act 51 of 1977, the accused admitted that he acted intentionally in committing the acts. The state therefore did not have to prove that the accused acted intentionally. Indeed, intention was inherent in the protest nature / character of his conduct.

In the premises, the state has failed to prove the guilt of the accused on counts 1 to 12; the accused is therefore found not guilty and discharged on those counts. The accused is found guilty and convicted as charged on counts 13 to 24.



P M MOJAPELO
JUDGE OF THE HIGH COURT

Date: 21 June 2006