Don’t wait until it is too late

Opposition to Urban Tolling Alliance and Others v The South African National Roads Agency Ltd and Others (SCA) (unreported case no 90/2013, 9-10-2013) (Brand JA)

By Michele Gioia

In the case of *Opposition to Urban Tolling Alliance and Others v The South African National Roads Agency Ltd and Others* (SCA) (unreported case no 90/2013, 9-10-2013) (Brand JA) the Supreme Court of Appeal (SCA), recently dismissed the appeal of the Opposition to Urban Tolling Alliance (OUTA) and others relating to its review proceedings against the South African National Roads Agency (SANRAL) and others’ decision to declare certain roads situated within Gauteng as toll roads in terms of s 27 of The South African National Roads Agency Limited and Natio-nal Roads Act 7 of 1998.

The review proceedings were launched at the behest of OUTA, the Southern African Vehicle Renting and Leasing Association (SAVRALA) and the South African National Consumer Union. It was common cause that the appellants themselves comprised of various corporate organisations and members of the public.

This decision is regarded as the fall of the final obstacle faced by SANRAL in its plan to implement the proposed toll system in respect of certain highways in Gauteng. While there has been public dismay at the decision, it is interesting to examine the legal principles and reasons given by the court in arriving at the decision.

History of OUTA’s litigation

In March 2012 OUTA launched an urgent application wherein it sought an order interdicting SANRAL from levying and collecting tolls on the seven roads in Gauteng, pending a review of the decision to declare these roads as toll roads. This urgent application was granted on 28 April 2012 in the North Gauteng High Court.

The respondents’, however, appealed the decision by way of a direct appeal to the Constitutional Court. This appeal was successful and the judgment has since been reported as *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC). The Constitutional Court, however, stressed that its decision should in no way affect the outcome of the review application that was still to be heard.

In due course the review application came before Vorster AJ in the North Gauteng High Court (see *Opposition to Urban Tolling Alliance and Others v South African National Roads Agency Ltd and Others* (GNP) (unreported case no 17141/2012, 13-12-2012) (Vorster AJ)). He dismissed the review application with costs in favour of the respondents, including the costs reserved by the Constitutional Court. This gave rise to the appeal to the SCA.

The SCA decision

The important issue faced by the court centred around the period of time that had transpired between the time the decision to proceed with the toll system and the commencement of the litigation described above, which commenced during March 2012. The court first examined the historical timeline associated with the decision to implement the tolling system and, secondly, the time periods stipulated by s 7(1) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

The court’s examination of the timeline revealed that the decision to implement this system was first included in a report dated September 2006, which dealt with the need for improvements and additions to the South African transportation system and, in particular, the network of highways in Gauteng and the associated funding. This report also gave rise to the formation of the Gauteng Freeway Implementation Plan (GFIP). On 8 October 2007 the then Minister of Transport officially announced the launch of the GFIP.

The GFIP was launched at a media event at which members of the media (print, radio and TV) were present and the keynote address contained a presentation that referred to the proposed toll tariffs of between 30 and 50 cents per kilometre. Following this presentation of the freeway tolling concept, the implementation of the project and the expected toll tariff were reported in the printed media and on radio and television.

On 9 May 2008 SANRAL issued a media release to the effect that it had awarded seven contracts for the implementation of the GFIP. On 24 June 2008 work commenced in earnest on the project and continued for the next two years in order to prepare certain sections of the proposed toll road network for the FIFA 2010 Soccer World Cup. This analysis of the timeline was necessary in order to determine when the appellants, and for that fact the public at large, became aware of the respondents' decision to proceed with the tolling system.

It was necessary in order to determine whether the appellants had complied with s 7(1) of PAJA, which provided that any proceedings for judicial review must be instituted without unreasonable delay and not later than 180 days after the date on which the person concerned was informed of the administrator's action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.

It was common cause between the parties that the appellants had not complied with this requirement. Furthermore, the court found that the public at large, which included the appellants, must have known about the respondents' decision to proceed with the tolling system by at least 9 May 2008. Accordingly, a period of approximately five years elapsed before the appellants instituted the above-mentioned litigation.

The court was then asked to examine whether the delay in launching the above-mentioned proceedings could be condoned in terms of s 9(1) of PAJA, which provides that the 180-day period 'may be extended for a fixed period, by agreement between the parties or, failing such agreement, by a court or tribunal on application by the person or administrator concerned'. Section 9(2) provides that such an application may be granted 'where the interests of justice so require'. This formed the crux of the SCA's decision.

The court also dealt with the issue of the funding secured by SANRAL, which amounted to approximately R 20 billion. The court took cognisance of the respondents' allegations that, had the appellants launched their review application timeously (ie, shortly after the media statement of May 2008), SANRAL would not have attempted to secure this necessary funding and the freeway improvements would not have taken place. This funding included issuing bonds in order to raise the necessary finance and procuring a guarantee from the government as security for the repayment of the R 20 billion.

The court ultimately found that the proverbial horse had bolted and what SANRAL had done in the past five years could not be undone. Furthermore, the court found, in the event that the tolling system did not go ahead, SANRAL would default on the R 20 billion loan, which would result in it calling up the guarantee issued by the government's guarantee. This, in turn, would have a detrimental effect on the public of South Africa as this money would have to be recovered elsewhere.

Accordingly, the SCA dismissed the appeal. In applying what is known as the 'Biowatch principle' (this principle arising from the decision in *Biowatch Trust v Registrar, Genetic Resources, and Others* 2009 (6) SA 232 (CC)), the SCA, however, found it would be unreasonable to burden the appellants with costs orders in instances where applications are made against the state that involve important constitutional principles. Accordingly, the SCA reversed the costs orders issued against the appellants and gave no order as to costs.

What can be learned?

The court, in relation to the delay in launching the review proceedings, examined the undue delay rule and noted that, in terms of the common law, this rule required a two-stage inquiry. First, whether there was an unreasonable delay and, second, if so, whether the delay should in all the circumstances be condoned (the court, as an example, referred to the decision of *Associated Institutions Pension Fund and Others v Van Zyl and Others* 2005 (2) SA 302 (SCA) at para 47). In respect of the application of this two-stage inquiry to the provisions of s 7(1) of PAJA, Brand JA stated:

'Up to a point, I think, s 7(1) of PAJA requires the same two-stage approach. The difference lies, as I see it, in the legislature's determination of a delay exceeding 180 days as *per se* unreasonable. Before the effluxion of 180 days, the first enquiry in applying s 7(1) is still whether the delay (if any) was unreasonable. But after the 180-day period the issue of unreasonableness is pre-determined by the legislature; it is unreasonable *per se*. It follows that the court is only empowered to entertain the review application if the interest of justice dictates an extension in terms of s 9' (at para 26).

Accordingly, even if review proceedings are instituted within the 180-day period afforded by s 7(1) of PAJA, a court may still find that there was unreasonable delay on the part of the applicant in launching such proceedings.

While the outcome of this judgment disappoints many, it illustrates the danger of being complacent in review proceedings. The SCA referred to the decision in *Camps Bay Ratepayers' and Residents' Association and Another v Harrison and Another* 2011 (4) SA 42 (CC):

'As was explained in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* [para 31] administrative decisions are often built on the supposition that previous decisions were validly taken and, unless that previous decision is challenged and set aside by a competent court, its substantive validity is accepted as a fact. Whether or not it was indeed valid is of no consequence' (at para 62).

This decision highlights the importance of avoiding delay in launching review proceedings, especially if those proceedings are launched within the 180-day period provided for in terms of s 7(1) of PAJA.

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