

"FA3"

CASE NO: 60113/2013

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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

PRETORIA 18 June 2014

BEFORE THE HONOURABLE MADAM JUSTICE HEATON-NICHOLLS

In the matter between:

CROSS-BORDER ROAD TRANSPORT AGENCY
THE MINISTER OF TRANSPORT

1ST APPLICANT
2ND APPLICANT

And

CENTRAL AFRICAN ROAD SERVICES (PTY) LTD

RESPONDENT

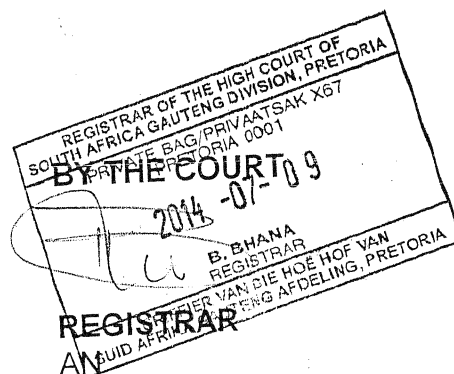
HAVING HEARD counsel for the parties and having read the application for leave to appeal against the judgment of the Honourable Justice HEATON-NICHOLLS delivered on 01 NOVEMBER 2013.

IT IS ORDERED

1. THAT the application for leave to appeal is dismissed with costs;
2. THAT the appellant is to pay the costs of the respondent's application in terms of Rule 30.

Attorney: MARIUS SWART

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IN THE HIGH COURT OF SOUTH AFRICA



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GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO. 2013/60113

DELETE WHICHEVER IS NOT APPLICABLE

1. REPORTABLE: YES/NO

2. OF INTEREST TO OTHER JUDGES: YES/NO

3. REVISED.

18/6/2014

DATE

SIGNATURE

In the matter between:

CROSS-BOARDER ROAD TRANSPORT AGENCY
THE MINISTER OF TRANSPORT

First Applicant
Second Applicant

And

CENTRAL AFRICAN ROAD SERVICES (PTY) LTD

Respondent

JUDGMENT

NICHOLLS, J

- [1] This matter pertains to regulations promulgated by the Cross Border Road Transport Agency ("CBRTA") which purported to increase the permit fees payable by cross border road transport operators by 250%. On 15 February 2013 Makgoka J gave an order declaring the regulations constitutionally invalid, which invalidity was postponed for a period of 6 months to enable CBRTA to republish the regulations and to receive public comment. The CBRTA did nothing during the 6 month period. In the May 2014 the Minister of Transport published new regulations.
- [2] Pursuant to an application for a declarator by one of the cross border road operators, Central African Roads Services (Pty) Ltd ("CARS"), I granted an order on 1 November 2013 that the 6 month period referred to in Makgoka's order lapsed at midnight on 14 August 2013 and accordingly the order of invalidity came into operation with full retrospective effect at midnight on 14 August 2013. CBRTA seeks leave to appeal against this order. CARS launched a Rule 30 application that the application for leave to appeal was irregular and should be set aside. The application for leave to appeal has since been amended and the only remaining issue in this regard is the costs of the Rule 30 application.
- [3] Essentially the grounds for appeal are twofold. The first is that I erred in finding that the order of invalidity operated with full retrospective effect. Instead I should have found that the effective date of the invalidity was 15 August 2013. In argument it was submitted that this court had no jurisdiction to interpret the order of Makgoka J which was clear and unambiguous. In particular the court erred in granting relief that qualified, varied or supplemented the order of Makgoka J by ordering that the invalidity had full retrospective effect. The second ground is that by refusing CBRTA a postponement in which to file an opposing affidavit to Part B, they were precluded from advancing ways in which the effect of the invalidity could be ameliorated.

[4] There seems to have been a typographical error in the Registrar's office in respect of the last line of paragraph 1 of my order. My judgment states the date on which Makgoka J's order lapsed was midnight 14 August 2013. Instead the date typed in the order is 14 February 2013. Insofar as it is necessary paragraph 1 of my order is hereby amended by the substitution of the words 14 February 2013 with the words 14 August 2013.

[5] I will deal with the question of retrospectivity. Once a court declares a law invalid, it is not the court's order which invalidates the law but the law itself is objectively valid or invalid depending on whether or not it is consistent with the Constitution.¹ The consequence of the doctrine of objective invalidity is that a pre-existing law which is declared invalid becomes invalid from the date of the promulgation of the law or the date upon which the Constitution came into effect. This is notwithstanding that there may be a period during which the court postpones or suspends the invalidity and notwithstanding the fact that the declaration of invalidity is made at a later stage.²

[6] The appellant correctly pointed out that Makgoka J's order was a matter of simple calculation and not of interpretation. However, what the appellant failed to appreciate was that by declaring it to be of full retrospective effect, this was not a matter of interpretation but merely a statement of the legal consequences flowing from the Makgoka J's declaration of invalidity. In light of the various Constitutional Court judgments on this aspect there is no prospect of another court coming to a different conclusion and this ground of appeal must accordingly fail.

[7] With regard to the second ground of appeal that CBRTA was precluded from showing the resultant financial hardship the declaration of invalidity would

¹ *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC) paragraph 29-30

² *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC); *Minister of Health and Others v New Clicks South Africa (Pty) Ltd* Case CCT 59/04 delivered on 30 September 2005 paragraphs 15 -17 ; *National Director of Public Prosecutions v Mohamed NO and Others* 2003 (4) SA 1 (CC)

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have, CBRTA argued that the court misdirected itself in assuming that amelioration could only amount to revival of the regulations. Counsel for CBRTA stated that the intention was not to breathe life into an invalid law but rather to be afforded the opportunity to demonstrate possible ways to ameliorate this hardship. My refusal to allow further affidavits amounted to a failure to determine appropriate relief that was just and equitable in terms of section 172 (1) of the Constitution.

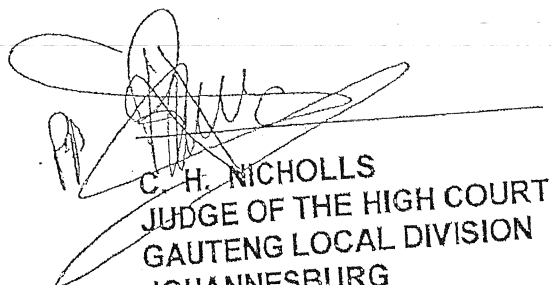
[8] This submission is based on a misconception that I can make an order regarding the fees to be paid to CBRTA despite the fact that the 6 month period of suspension has expired. It is not within this court's power to extend the period of suspension of invalidity once the 6 month period has lapsed³. The Constitutional Court has made it clear that the power to ameliorate survives only as long as the suspension period. Once the regulation is found to be objectively constitutionally invalid and once the 6 month suspension period has lapsed, there is nothing that this, or any other court, could conceivably do to ameliorate the effect of invalidity. The old regulation is the only valid existing regulation. This ground of appeal has no merit.

[9] In respect of the costs of the Rule 30 application there is no reason why CARS should not get these costs. They have been substantially successful.

In the result I make the following order:

1. The application for leave to appeal is dismissed with costs.
2. The appellant is to pay the costs of the respondent's application in terms of Rule 30.

³ *Ex Parte Minister of Social Development and Others* 2006 (4) SA 309 (CC); *Minister of Health and Others v New Clicks South Africa (Pty) Ltd* (supra); *ex parte Minister of Social Development and Others* 2006 (4) SA 309 (CC) paragraphs 36 - 40


C. H. NICHOLLS
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION
JOHANNESBURG

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Appearances

Counsel of the applicant : Adv. E.C. Labuschagne SC
Adv. J. Motepe
Instructing Attorneys : Savage Jooste & Adams Inc.
Counsel for the defendant : Adv. C. Van der Merwe
Instructing Attorneys : Marius Swart Attorneys
Date of hearing : 11 June 2014
Date of judgement : 18 JUNE 2014