



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM The Registrar, Supreme Court of Appeal
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Please note that the media summary is for the benefit of the media and does not form part of the judgment.

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

MEDIA STATEMENT

Today, the Supreme Court of Appeal (SCA) dismissed an appeal by the South African National Roads Agency Limited (SANRAL) and partially upheld a cross-appeal by the City of Cape Town (the City) against an order of the Western Cape Division of the High Court, Cape Town. The court a quo had reviewed and set aside: (a) an application by SANRAL to the Minister of Transport (the Minister) to approve the declaration of a number of toll roads; and (b) the subsequent decision by the Minister to approve that declaration. In doing so, it had condoned a lengthy delay by the City in bringing the review application.

The issues before the SCA were (i) whether the City's delay in bringing the review application against the decisions of SANRAL and the Minister was correctly condoned by the court a quo; (ii) whether the decisions by the Minister and the SANRAL board relating to the declaration of a number of toll roads were lawful; and (iii) whether SANRAL should be interdicted from entering into a proposed concession contract relating to the contemplated toll roads.

The case concerned the much publicised N1-N2 Winelands Toll Highway Project, and the legality of the process followed in declaring certain national roads as toll roads. The SCA explained that it is within the prerogative of the legislative and executive arms of government to formulate and implement policy on how to embark on, and finance, public projects, including national highways. It would accordingly be in breach of the separation of powers for the court to rule on whether the project in question ought to be embarked upon, and whether tolling was an appropriate means of financing it. Nevertheless, the court emphasised that it could and must ensure that the organs of state tasked with

making these important decisions had acted in accordance with the principle of legality and had complied with the statutory prescripts regulating their activities.

With regard to the present process, the SCA found that both SANRAL and the Minister had acted unlawfully in purporting to have the roads declared as toll roads in terms of The South African National Roads Agency Limited and National Roads Act 7 of 1998 (the Act).

The Act required that, for a road to be lawfully declared a toll road, SANRAL must apply to the Minister to have the road declared as a toll road, and the Minister must approve that application. On the evidence, however, it appeared that SANRAL's board of directors had never held a meeting to consider the matter, and had never formally approved the tolling of the roads. This was held to be a fundamental and egregious flaw. The project was one of national importance involving costs that run into billions of Rands. The SCA considered that this required serious and informed deliberation, and found this to be sorely lacking. It held further that a board resolution adopted by a differently constituted board years after the fact could not lawfully 'confirm' a decision that had never been taken. It accordingly upheld the portion of the cross-appeal directed at having this resolution set aside.

Concerning the Minister's decision to approve the declaration, the Minister had considered his role to be primarily an oversight role. The SCA held that this was incorrect. The Minister, in scrutinising the application for the declaration of a toll road, was exercising a control function as a member of the executive over an organ of State which was statutorily and politically accountable to him. He was required to bring an independent mind to bear. As the Minister had misconstrued his powers and function when coming to the relevant decision, this decision too was unlawful and liable to be set aside.

Regarding the issue of condonation, the SCA confirmed the court a quo's decision to condone the City's delay in bringing the review application. The SCA held that although the delay was unreasonable, given the nature of the matter and the egregious flaws in the process followed in declaring the roads as toll roads, the interests of justice required that condonation be granted.

Accordingly, the SCA held that the decisions by both SANRAL and the Transport Minister were invalid.

However, the SCA refused to grant the City's further request that SANRAL be interdicted from entering into a proposed concession contract regarding the toll roads. The SCA held that as there was no certainty regarding whether the roads would be tolled at all, and if they were, the details of such tolling, it would be premature to grant such an interdict. As a result, that portion of the cross-appeal was not upheld.

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