CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 163/14

In the matter between:

CROSS-BORDER ROAD TRANSPORT AGENCY Applicant

and

CENTRAL AFRICAN ROAD SERVICES (PTY) LIMITED First Respondent

MINISTER OF TRANSPORT Second Respondent

and

ROAD FREIGHT ASSOCIATION Amicus Curiae

Neutral citation:	*Cross-Border Road Transport Agency v Central African Road Services (Pty) Ltd and Another* [2015] ZACC 12
Coram:	Mogoeng CJ, Moseneke DCJ, Cameron J, Froneman J, Jappie AJ, Khampepe J, Madlanga J, Molemela AJ, Nkabinde J, Theron AJ and Tshiqi AJ.
Judgment:	Jappie AJ (unanimous)
Heard on:	17 February 2015
Decided on:	12 May 2015
Summary:	Doctrine of objective constitutional invalidity — retrospectivity — default position Orders properly construed — interpretation — terms and context of order with judgment as a whole

Declaration of statutory invalidity — powers of courts to vary the retrospectivity of an order of constitutional invalidity — power to be exercised during suspension period

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ORDER

On appeal from the North Gauteng High Court, Pretoria:

1. Leave to appeal is granted.
2. Leave to file a replying affidavit is refused.
3. The appeal is dismissed with costs.

JUDGMENT

Jappie AJ (Moegoeng CJ, Moseneke DCJ, Cameron J, Froneman J, Khampepe J, Madlanga J, Molemela AJ, Nkabinde J, Theron AJ and Tshiqi AJ concurring):

Introduction

[1] On 31 March 2011 the Minister of Transport promulgated amendment Regulations[1] in terms of section 51 of the Cross-Border Road Transport Act.[2] The effect of these Regulations increased the permit fees payable to the Cross-Border Road Transport Agency (Agency) by cross-border road transport operators by a substantial amount.

[1] Cross-Border Road Transport Act, 1998 (Act No. 4 of 1998): Amendment Regulations, 2011, GN R284 *GG* 34168, 11 March 2011 (Regulations).

[2] 4 of 1998.

[2] Central African Road Services (Pty) Ltd (Road Services) and Deernam (Pty) Ltd (Deernam) brought an application in the North Gauteng High Court, Pretoria (High Court) for the review and setting aside of the Regulations, contending that the Regulations were inconsistent with the Constitution and must therefore be invalidated. The application was opposed by the Minister of Transport (Minister) and the Agency.

[3] The application came before Makgoka J who, on 15 February 2013, found for Road Services and Deernam. He found the Regulations invalid on various grounds. These were: (a) they were only published in English, contrary to the constitutional requirement that laws must be promulgated in two official languages; (b) the right to procedural fairness in the publication and promulgation of the Regulations had been violated; (c) proper consultation on the tariff increases had not taken place; and (d) the Agency's board had failed to apply its mind to the draft regulations.

[4] He accordingly declared the Regulations invalid but suspended the order of invalidity for a period of six months to enable the Minister and the Agency to republish the Regulations and thereafter to receive and consider public comment. The order of Makgoka J reads as follows:

> "1. It is declared that the [Regulations] were published in a manner inconsistent with s 6(3) of the [Constitution], and were invalid for the period between 1 April 2011 and 28 October 2011;
> 2. The invalidity period referred to in (1) above, shall have no effect on the permit fees and/or penalties paid during that period in terms of the Regulations;
> 3. It is declared that the first respondent (the Minister) and the second respondent (the agency) have failed to comply with their constitutional obligation to ensure procedural fairness in the publication and promulgation of the Regulations;
> 4. It is declared that the second respondent (the agency) has failed in its constitutional duty to comply with its duty to facilitate proper public comment before publishing the Regulations;

5. It is declared that the board of the agency has failed in its statutory duty to properly consider the draft regulations, for the sake of consulting with the Minister;
6. The Regulations are, as a consequence, promulgated in a manner that is inconsistent with the provisions of Promotion of Administrative Justice Act 3 of 2000 and s 33 of the Constitution, and are therefore invalid;
7. The order declaring invalid the Regulations is suspended for a period of six (6) months to enable the agency and the Minister to republish the Regulations and thereafter to receive and consider public comments;
8. The applicants' constitutional challenge relating to taxation or money bill of is dismissed;
9. The respondents are ordered to pay 80% of the applicants' costs including the wasted costs occasioned on 5 March 2012 which the respondents are liable to pay 100%."

[5] The Minister failed to promulgate valid regulations within the period of suspension provided for in paragraph 7 of the order and failed to make an application to extend the six-month period. It is common cause that the order of invalidity came into operation at midnight on 14 August 2013, after the six-month period lapsed, but the parties dispute whether the order operates retrospectively as of the date the Regulations were promulgated, 31 March 2011, or prospectively from 15 August 2013.

[6] On 1 October 2013, about a month after the suspension period lapsed, Road Services brought an urgent application in the High Court. In Part A of the Notice of Motion, Road Services sought an order compelling the Agency to issue to it transport permits in terms of the Regulations as they stood prior to the introduction of the invalidated 2011 Regulations.

[7] In Part B of the Notice of Motion, Road Services sought a declaratory order that the six-month period contemplated in paragraph 7 of the order of 15 February 2013 lapsed at midnight on 14 August 2013. It also sought an order that the invalidity referred to in paragraph 6 of the order came into operation with full

retrospective effect at midnight on 14 August 2013. Further that, until the Minister promulgates constitutionally valid regulations amending the permit fees, the fees payable by cross-border road transport operators are those set out in the existing Regulations.

[8] The application came before Heaton-Nicholls J who, on 1 November 2013, granted the following order:

> "1. The period of 6 months contemplated in paragraph 7 of the order handed down by this court on the 15 February 2013 . . . lapsed at midnight on the 14 August 2013.
> 2. The order of invalidity in paragraph 6 of the order, handed down by this court on the 15 February 2013 . . . accordingly came into operation with full retrospective effect at midnight on the 14 August 2013.
> 3. Until such time as the 2nd respondent may promulgate new constitutionally valid regulations amending the permit fees set out in the Cross Border Road Transportation Regulations 1998, published under Government Notice NoR464 of 3 April 1998, as amended by the Government Notice Nos R998 of 13 August 1991, R682 of 7 July 2000 and R677 of 2 June 2003 (the existing regulations), the permit fees payable by Cross Border Road Transport Operations are those set out in the existing regulations.
> 4. That the respondents pay the costs of this application jointly and severally except for the applicants' cost of drafting the notice of motion and the founding affidavit which are disallowed."

[9] The Agency applied for, but on 18 June 2014 was refused, leave to appeal to the Supreme Court of Appeal. On 16 July 2014, the Agency then petitioned the Supreme Court of Appeal for leave to appeal which petition was dismissed on 8 September 2014.

[10] The Agency now applies to this Court for the following relief:

> "1. Granting the applicant leave to appeal against the judgment and order of the North Gauteng Division of the High Court delivered on 1 November 2013;

2. Upholding the appeal with costs, including the costs of two counsel.
3. Setting aside the order of the High Court and replacing it with an order in the following terms:
   '(1) It is declared that the period of 6 months contemplated in paragraph 7 of the order handed down by this Court on 15 February 2013 . . . lapsed at midnight on 14 August 2013;
   (2) It is further declared that the order of invalidity in paragraph 6 of the order handed down by this Court on 15 February 2013 . . . accordingly took effect from 15 August 2013;
   (3) It is further declared that from 15 August 2013 until such time as the second respondent promulgates new regulations amending the permit fees set out in the Cross-Border Road Transport Regulations, 1998 published in Government Notice No R464 of 3 April 1998, as amended by Government Notice Nos R464 of August 1999, R682 of July 2000 and R677 of 2 June 2003 ("the existing regulations"), the permit fees payable by cross border road transport operators are those set out in the existing regulations;
   (4) Each party is ordered to pay its own costs.'
4. Further or alternative relief."

Issues

[11] The question to be considered is what principles govern the operation of orders of constitutional invalidity that are suspended where the suspension period has passed without the enactment of remedial legislation. And further, whether a court has the power to vary a final order made, and if so whether that power should be exercised.

Jurisdiction

[12] This application raises important questions on the principles that govern declarations of constitutional invalidity as well as a court's power to vary an order where that order, properly construed, is silent on the question of retrospectivity. These questions relate directly to the powers of the Court.[3] This is a constitutional

[3] See section 172 of the Constitution which is set out at [15]. See also section 173 of the Constitution which is set out at n 32.

matter and the application thus falls within the jurisdiction of this Court. It is therefore in the interests of justice to grant leave to appeal.

The doctrine of objective constitutional invalidity

[13] Whether a law is invalid is determined by an objective enquiry into its conformity with the Constitution.[4] The doctrine of objective constitutional invalidity was laid out in *Ferreira v Levin* where this Court held that finding a law to be in conflict with the Constitution "does not invalidate the law; it merely declares it to be invalid".[5] A law that has been found to be inconsistent with the Constitution ceases to have any legal consequences.[6]

[14] Due to the impact that the doctrine of objective constitutional invalidity could have, the interim Constitution expressly regulated the consequences of a declaration of invalidity. The interim Constitution provided, in relevant part, that—

> "the declaration of invalidity of a law or a provision thereof—
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> (a) existing at the commencement of this Constitution, shall not invalidate anything done or permitted in terms thereof before the coming into effect of such declaration of invalidity; or
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> (b) passed after such commencement, shall invalidate everything done or permitted in terms thereof."[7]

A declaration of constitutional invalidity would therefore have different consequences depending on whether the law was enacted before the interim Constitution or not.

[4] *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* [1995] ZACC 13*;* 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) (*Ferreira v Levin*) at para 26.

[5] Id at para 27.

[6] Id at para 26.

[7] Section 98(6).

[15] The final Constitution no longer draws this distinction. The power to regulate the consequences of a declaration of invalidity however subsists. The Constitution provides in relevant part:

> "(1) When deciding a constitutional matter within its power, a court—
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> . . .
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> (b) may make any order that is just and equitable, including—
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> (i) an order limiting the retrospective effect of the declaration of invalidity; and
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> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."[8]

[16] In *National Coalition* this power was characterised as follows: "Under the 1996 Constitution, and in the absence of a contrary order by a competent court, nothing more is provided other than that it has retrospective effect".[9] The rule that retrospectivity follows is derived directly from the doctrine of constitutional invalidity and is implied by the power provided for in section 172(1)(b)(i). Section 172(1)(b)(i) contains a broad discretionary power that allows courts to limit the retrospectivity of a declaration of invalidity provided that it is "just and equitable" to do so.[10]

[17] This Court in *Executive Council*[11] then held:

> "If exercised, this power has the effect of making the declaration of invalidity subject to a resolutive condition. If the matter is rectified, the declaration falls away and what was done in terms of the law is given validity. If not, the declaration of invalidity takes place at the expiry of the prescribed period and the normal

[8] Section 172.

[9] *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* [1998] ZACC 15; 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) (*National Coalition*) at para 84.

[10] Id at para 87.

[11] *Executive Council, Western Cape Legislature, and Others v President of the Republic of South Africa and Others* [1995] ZACC 8; 1995 (4) SA 877 (CC); 1995 (10) BCLR 1289 (CC) (*Executive Council*).

> consequences attaching to such a declaration ensue. In the present case that would mean that s 16A and everything done under it would be invalidated."[12]

[18] The Agency contended that reference to the "normal consequences" begs the question and that this passage is not determinative of anything. In support of this contention it asserted that the interim constitutional powers under section 98(5) and (6)[13] were more prescriptive and confined when compared to the broad remedial powers of section 172(1) of the final Constitution.

[19] The Court in *Executive Council* went on to explain the rationale for granting remedial powers to the courts to temper the effect of an order of constitutional validity through section 98(5) and (6) of the interim Constitution:

> "The powers conferred on the Courts by s 98(5) and (6) are necessary powers. When the Constitution came into force there were many old laws on the statute book which were inconsistent with the Constitution. If all of them were to have been struck down and all action taken under them declared to be invalid, there could have been a *legislative vacuum and chaotic conditions*.
>
> . . .
>
> There may also be situations in which it is necessary for the Court to act to avoid or control the consequences of a declaration of invalidity of post-constitutional legislation where the result of invalidating everything done under such legislation is

[12] Id at para 106.

[13] Section 98 provided in part:

> "(5) In the event of the Constitutional Court finding that any law or any provision thereof is inconsistent with this Constitution, it shall declare such law or provision invalid to the extent of its inconsistency: Provided that the Constitutional Court may, in the interests of justice and good government, require Parliament or any other competent authority, within a period specified by the Court, to correct the defect in the law or provision, which shall then remain in force pending correction or the expiry of the period so specified.
>
> (6) Unless the Constitutional Court in the interests of justice and good government orders otherwise, and save to the extent that it so orders, the declaration of invalidity of a law or a provision thereof—
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> (a) existing at the commencement of this Constitution, shall not invalidate anything done or permitted in terms thereof before the coming into effect of such declaration of invalidity; or
>
> (b) passed after such commencement, shall invalidate everything done or permitted in terms thereof."

> disproportional to the *harm which would result* from giving the legislation temporary validity."[14] (Emphasis added.)

The words "legislative vacuum and chaotic conditions" and "harm which would result" are plainly in reference to the "normal consequences" of retrospective invalidity. This principled approach in *Executive Council* is also applicable under the final Constitution.

[20] In summary, the consequences that ordinarily flow from a declaration of constitutional invalidity include that the law will be invalid from the moment it was promulgated. That is, the order will have immediate retrospective effect. This is the default position.

Orders properly construed

[21] This default position can, however, be varied by an order of court, exercising the express power under section 172(1)(b)(i) of the Constitution, for numerous reasons pertaining to justice and equity. The language of both this provision and what was stated in *National Coalition*[15] suggests that it is only an order of court that can vary the consequences that flow from the doctrine of constitutional invalidity.

[22] Unless the order of court expressly varies those consequences, then it would appear that retrospectivity must follow. However, this would be too formalistic. In the Supreme Court of Appeal, Cameron JA in *De Kock* described this approach as "both too absolute and too general"[16] and held that "[t]he effect of a declaration of invalidity must rather depend on the *terms and context* of the order the Court . . .

[14] *Executive Council* above n 11 at para 107.

[15] *National Coalition* above n 9 at para 87 where this Court held: "Under the 1996 Constitution, and in the absence of a contrary *order* by a competent court, nothing more is provided other than that it has retrospective effect." (Emphasis added.)

[16] *De Kock and Others v Van Rooyen* [2004] ZASCA 136; 2005 (1) SA 1 (SCA) at para 25.

issues".[17] The order must be interpreted on the terms and the context of the order together with the judgment as a whole.[18]

[23] The Agency argues that there are a number of orders from this Court which granted a suspended declaration of invalidity and were silent on retrospectivity but where this Court cannot have intended the declarations to operate retrospectively on expiry of the suspension period. It further argues that had the orders in *Steyn*,[19] *Moseneke*[20] and *Heath*[21] come before this Court to consider whether retrospectivity should apply, this Court may well have construed the orders to limit the application of retrospectivity.

[24] In *De Kock*, the Court concluded that the order in *Steyn* did not intend for the declaration of invalidity to have retrospective effect in the event of Parliament failing to remedy the defect.[22] This was because the Court that granted the suspension clearly did not contemplate that, if the condition specified in it were not fulfilled, there would be full retrospective invalidity. That would have entailed large-scale invalidation of possibly thousands of criminal convictions, for the most part on purely formal grounds.

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[17] Id at para 27 (emphasis added).

[18] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) at para 18, cited with approval by a majority of this Court in *National Credit Regulator v Opperman and Others* [2012] ZACC 29; 2013 (2) SA 1 (CC); 2013 (2) BCLR 170 (CC) at fn 105. See also *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* [2013] ZASCA 176; 2014 (2) SA 494 (SCA) at paras 10-2.

[19] *S v Steyn* [2000] ZACC 24; 2001 (1) SA 1146 (CC); 2001 (1) BCLR 52 (CC).

[20] *Moseneke and Others v The Master and Another* [2000] ZACC 27; 2001 (2) SA 18 (CC); 2001 (2) BCLR 103 (CC).

[21] *South African Association of Personal Injury Lawyers v Heath and Others* [2000] ZACC 22; 2001 (1) SA 883 (CC); 2001 (1) BCLR 77 (CC).

[22] *De Kock* above n 16 at para 27, where Cameron JA held:

> "The Court may order (or its order on a proper construction may mean) that if Parliament does not intervene timeously the declaration of invalidity takes effect retrospectively. That does not seem to me to have been the intention or the effect of the order in *Steyn*. There the Court stated expressly that 'upon the expiry of [the period of suspension] automatic appeals will be restored'. In addition, it gave a range of further reasons for suspension." (Footnote omitted.)

[25] A court's decision to suspend the effect of an order of invalidity entails the exercise of a wide power and can be utilised for numerous reasons provided it is just and equitable to do so. This often relates to giving the Legislature time to intervene but could equally relate to concerns of the effect an order might have on the administration of justice.[23] The latter could indicate that the order, properly construed, limits retrospectivity. That is, reasons for limiting retrospectivity could be bound up in the reasoning of the judgment and in the justification provided for suspending the effect of an order of invalidity.

[26] Yet, any indications in the judgment that ostensibly contextualise the order must be strong. Judges will be well-apprised of the consequences of a declaration of constitutional invalidity and therefore silence in an order cannot readily be taken to mean judicial inadvertence. This will be elaborated on in the course of this judgment.

[27] It is now necessary to deal with the order of Makgoka J. There are a few noticeable characteristics in the order itself: first, the Regulations were declared invalid broadly for four reasons; second, the order expressly limits the retrospective effect that the declaration of invalidity might have in respect of payments made during the period when the Regulations had not been promulgated in a second official language, in this case Afrikaans; third, the order suspended the effect of the invalidity for a period of six months; and lastly, there is no mention of retrospectivity pertaining to the remaining paragraphs of the order.[24]

[28] Makgoka J accepted most of Road Services' challenges to the Regulations, dismissing only the argument that the Regulations constituted a tax. The reasoning in the judgment essentially mirrors the order. In only one section of the judgment does the Judge make reference to the suspension of the order but no analysis was given as to why ultimately the declaration of invalidity should be suspended. Unlike in *Steyn*,

[23] Id at para 25.

[24] The "remaining paragraphs" refer to paragraphs 3 to 6 of the order at [4].

the judgment does not detail the reasons behind the suspension order, except at paragraph 57:

> "It is common cause that the promulgation of the regulations on 31 March 2011 only in English was inconsistent with section 6(3)(a) of the Constitution, and invalid, until they were repromulgated in Afrikaans on 28 October 2011. The applicants counsel urged me to *order refund of the fees paid* by the applicants during the period of invalidity. In considering this submission I must keep in mind the common cause fact that the agency was effectively bankrupt before the introduction of the regulations. In addition, it has not been suggested by the applicants that they are unable to afford the new tariffs. On the other hand, *there is every likelihood that should the agency be ordered to refund the applicants and other hauliers, the agency would simply collapse*. I am therefore not inclined to accede to the request. Had the regulations not been repromulgated in Afrikaans, and the invalidity persisted until declared by the court, the court would *most probably have suspended the order of invalidity for the defect to be cured. In the present case the defect has been cured*. I see no reason why the outcome should be different if the defect has been voluntarily cured." (Emphasis added.)

[29] In my view these comments were made in response to the language defect that was challenged and do not necessarily pertain to the other defects that the Judge analysed. This is apparent from both the heading "s 6(3) of the Constitution" and the first sentence of the paragraph which speak directly to the language contention raised by Road Services. Despite the context in which these comments were made in the judgment, the sentiments expressed in relation to the Agency's financial state must pertain to all the other defects. I acknowledge that the Judge would have been able to limit retrospectivity based on these sentiments alone if he thought it was just and equitable to do so.[25] I do not think that that was the case here.

[25] The broad discretion provided in section 172 of the Constitution ensures that a judge can limit retrospectivity for *any reason* that he or she thinks is just and equitable. That is, the interpretative exercise does not need to be shaped by concerns only for the administration of justice. The Road Freight Association was granted leave to be admitted as amicus curiae (a friend of the court). It made submissions on the retrospective effect of orders of invalidity in foreign jurisdictions. In *Sanderson v Attorney-General, Eastern Cape* [1997] ZACC 18; 1998 (2) SA 38 (CC); 1997 (12) BCLR 1675 (CC) at para 26, this Court acknowledged the benefit of foreign law but also warned that "the use of foreign precedent requires circumspection and acknowledgment that transplants require careful management." The foreign jurisdictions cited by the Road Freight Association differ from South Africa in two marked respects: They do not have the express power to limit retrospectivity built into their Constitutions

[30] The comments were in response to a specific request by the applicants that the Court should order the repayment of the permit fees collected during the period in which there was no compliance with section 6(3) of the Constitution. What is clear from this paragraph is that if the Judge had found himself in a position where the Afrikaans version had not been published, he would have suspended the order of invalidity. He reasoned that he would have taken this approach and provided the Minister with an opportunity to rectify the defect as he recognised that the Agency was in a desperate financial state. Since the Court would have given the Minister an opportunity to remedy the defect in respect of this contention, the Judge reasoned that there is no sense in ordering that the money be returned. Despite this, the Regulations had subsequently been published in Afrikaans and thus the language contention was moot.

[31] The sentiments expressed in relation to the Agency's financial position speak to the question of whether to suspend or not. They do not speak to whether or not to limit the retrospective effect should that suspension order lapse. The paragraph is silent as to what the Judge would have done if a fair opportunity had been given to the Minister and the Minister had failed to remedy the defect. The possibility where the Minister fails to do anything was not contemplated. That is, the order, properly construed, is silent on the question of retrospectivity in the event that remedial legislation was not enacted.

[32] Counsel for the Agency then contended that if this Court were to conclude that the order has retrospective effect as a result of the order being silent, this Court would be imposing an undesirable outcome through, what it argued, was "judicial inadvertence". It would however be wrong to assume that a judge's silence can be taken for judicial inadvertence. Where a judgment is silent on this issue, it is to be assumed that a judge has taken a decision not to moderate the default position.

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and further, in South Africa, that power can be exercised for any reason that is "just and equitable". These cases were unable to assist this Court as a result.

[33] In *Moise*[26] this Court unconditionally confirmed an order of the High Court declaring a provision of a statute[27] unconstitutional. Shortly after the judgment was delivered, the Women's Legal Centre approached this Court requesting a variation of that order, submitting that this Court ought to have stated expressly that the order would have retrospective effect.[28] They maintained that the order was otherwise ambiguous. This Court held that this was unnecessary – that silence indicated full retrospective effect:

> "The current position is that the Constitution assumes the full retrospective effect of constitutional invalidation and empowers the Court declaring the invalidation to limit its retrospective effect. . . . Because the order of the High Court declaring the section invalid as well as the confirmatory order of this Court were silent on the question of limiting the retrospective effect of the declaration, the declaration was retrospective to the moment the Constitution came into effect. That is when the inconsistency arose. As a matter of law the provision has been a nullity since that date."[29]

[34] It must be accepted that the Judge did not exercise the Court's broad remedial powers to alter the default position. It follows, as Heaton-Nicholls J concluded, that the declaration of constitutional invalidity is retrospectively invalid from the date the Regulations were promulgated.

Discretion to vary an order

[35] At the hearing the Agency belatedly argued that this Court should develop the common law and exercise a discretion to vary Makgoka J's order and limit its retrospective effect. In other words, that there is a discretion on the part of a second court, after the lapse of the period of suspension, to limit the retrospective effect of the

[26] *Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening (Women's Legal Centre as Amicus Curiae)* [2001] ZACC 21; 2001 (4) SA 491 (CC); 2001 (8) BCLR 765 (CC).

[27] Section 2(1)(a) of the Limitation of Legal Proceedings (Provincial and Local Authorities) Act 94 of 1970.

[28] *Ex Parte Women's Legal Centre: In re Moise v Greater Germiston Transitional Local Council* [2001] ZACC 2; 2001 (4) SA 1288 (CC).

[29] Id at para 13.

order of invalidity issued by the original court. The Agency acknowledged that this may entail the development of the common law.

[36] On numerous occasions, this Court has held that it is undesirable for parties to raise a new issue for the first time at this stage of the litigation.[30] An apex court benefits immeasurably from the proper and extensive ventilation of issues in the courts below. Failure to do this could have the effect of causing prejudice to the other party involved in the litigation.[31] We are however not obliged to decide this matter. Even if we were, it would not affect the outcome. As will become apparent in a moment, the point has no merit.

[37] If this Court has the power to vary the retrospective nature of an order, after the lapse of suspension, and once it has taken effect, that power is either located in section 172(1) or in section 173 of the Constitution. Section 173 provides that certain courts have the inherent power to regulate their own processes.[32] I evaluate both options.

[38] A court does not normally have the power to vary its own final order. This is because ordinarily a court's order should be final and immutable.[33] A court becomes *functus officio* which means that its jurisdiction in the case has been "fully and finally

[30] *S v Molimi* [2008] ZACC 2; 2008 (3) SA 608 (CC); 2008 (5) BCLR 451 (CC) at para 49; *Crown Restaurant CC v Gold Reef City Theme Park (Pty) Ltd* [2007] ZACC 2; 2008 (4) SA 16 (CC); 2007 (5) BCLR 453 (CC) at para 5; *Du Toit v Seria* [2006] ZACC 25; 2006 (8) BCLR 869 (CC) at paras 4-5; and *Lane and Fey NNO v Dabelstein and Others* [2001] ZACC 14; 2001 (2) SA 1187 (CC); 2001 (4) BCLR 312 (CC) at para 5.

[31] *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* [2011] ZACC 30; 2012 (1) SA 256 (CC); 2012 (3) BCLR 219 (CC) at paras 51-2.

[32] Section 173, entitled "Inherent power", provides:

> "The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

[33] See *Mpofu v Minister for Justice and Constitutional Development and Others* [2013] ZACC 15; 2013 (2) SACR 407 (CC); 2013 (9) BCLR 1072 (CC) at para 14, referring to the civil case of *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A). See also *Ka Mtuze v Bytes Technology Group South Africa (Pty) Ltd and Others* [2013] ZACC 31; 2013 (12) BCLR 1358 (CC) at para 18.

exercised" and its authority over the subject matter has ended.[34] This principle is essential for certainty and the rule of law. Chaskalson P in *Ntuli* held:

> "The principle of finality in litigation which underlies the common law rules for the variation of judgments and orders is clearly relevant to constitutional matters. There must be an end to litigation and it would be intolerable and could lead to great uncertainty if Courts could be approached to reconsider final orders made in judgments declaring the provisions of a particular statute to be invalid."[35]

[39] Exceptions to this general rule have, however, been recognised. *Firestone*, approved by this Court in *Ntuli*, outlined some exceptions to the rule which include the need to correct errors of expression, to explain ambiguities, to address accessory or consequential matters which were seemingly "overlooked or inadvertently omitted" or to correct cost orders if they were made without the benefit of argument on the issue.[36] This list was not held to be exhaustive.[37] The ability of a court to depart from the general rule has been held to flow from the court's inherent power to regulate its own processes.[38]

[40] This Court has in *Ntuli*, *Zondi* and *Minister of Social Development*[39] addressed whether an extension of a suspension order, sought out of time or at the final hour, could be granted.[40] Any power to do so was said to be housed in section 172(1) of the Constitution.[41] The Court in *Zondi* held:

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[34] *Firestone South Africa (Pty.) Ltd. v Genticuro A.G.* 1977 (4) SA 298 (A) (*Firestone*) at 306F-G.

[35] *Minister of Justice v Ntuli* [1997] ZACC 7; 1997 (3) SA 772 (CC); 1997 (6) BCLR 677 (CC) at para 29.

[36] Id at paras 22-6 and *Firestone* above n 34 at 306G-308A. See also *Zondi v Member of the Executive Council for Traditional and Local Government Affairs and Others* [2005] ZACC 18; 2006 (3) SA 1 (CC); 2006 (3) BCLR 423 (CC).

[37] See *Ntuli* id at paras 22-3 and *Firestone* id at 309A.

[38] *Zondi* above n 36 at paras 34-5.

[39] *Ex Parte Minister of Social Development and Others* [2006] ZACC 3; 2006 (4) SA 309 (CC); 2006 (5) BCLR 604 (CC) (*Minister of Social Development*).

[40] See also *Minister of Justice and Constitutional Development v Nyathi and Others* [2009] ZACC 29; 2010 (4) SA 567 (CC); 2010 (4) BCLR 293 (CC) where the Minister of Justice and Constitutional Development applied for an extension one day before the expiry of the suspension order. A limited extension order was granted. In *Minister of Communications v Ngewu and Others* [2013] ZACC 44; 2014 (3) BCLR 364 (CC) the Minister urgently applied for an extension of the suspension period three days before it was due to expire. This Court, relying on *Minister of Transport and Another v Mvumvu and Others* [2012] ZACC 20; 2012 (12) BCLR 1340

> "When the facts on which the period of suspension was based have changed or where the full implications of the order were not previously apparent, there seems to be no reason both in logic and in principle why this Court should not, *before the expiry of the period of suspension*, have the power to extend the period, if to do so would be just and equitable."[42] (Emphasis added.)

[41] A court has the power to extend a suspension period of a declaration of invalidity because the decision to suspend was ultimately premised on facts and circumstances applicable to the time the order was issued. These facts and circumstances may well change and a court must be alive to that possibility. But that power can only be exercised "before the expiry of the period of suspension".[43]

[42] A court does not have the power to vary a suspension order once the suspension period has lapsed. *Minister of Social Development* makes this plain:

> "*Ntuli* and *Zondi* make clear that the boundary of a court's power lies at the expiration of the suspension order. Before the expiration of the suspension order, the provision has not yet been declared invalid and a court retains its power under s 172(1)(b)(ii) to make a just and equitable order suspending the declaration of invalidity or extending an existing suspension. However, once the suspension period lapses, the provision is invalid and a court's suspension power under s 172(1)(b)(ii) has ended. The time of suspension and extension ceases, and the realm of revival and resuscitation begins. In short, the Constitution grants a court the power to suspend an order of constitutional invalidity. It does not grant a court the power to revive a law that has already become invalid."[44]

[43] The Court went on to detail the rationale behind this "time bar":

(CC), where it was held that a suspension period would only be extended if it was just and equitable to do so, concluded that it would not be just and equitable to provide for an extension of the suspension period.

[41] *Zondi* above n 36 at para 38.

[42] Id at para 40, see also paras 44-5.

[43] Id at para 40.

[44] *Minister of Social Development* above n 39 at para 38.

> "There are important reasons of constitutional principle underlying the conclusion that a court is not empowered to resuscitate legislation that has been declared invalid. To do so, a court would, in effect, legislate. Such an exercise would offend both the separation of powers principle, in terms of which lawmaking powers are reserved for the Legislature, and the principle of constitutional supremacy, which renders law that is inconsistent with the Constitution invalid.
>
> In this case, the period of suspension expired on 5 March 2006. At the moment the suspension expired, this Court's declaration of invalidity took effect. Having declared the presidential proclamation invalid, this Court reached the boundary of its power. This Court cannot turn back time to 'retrospectively extend' a suspension order that no longer exists. We cannot revive the invalid proclamation."[45]

[44] By logical extension courts' powers in respect of retrospectivity under section 172(1)(b)(i) must similarly be restricted. The period of suspension expired at midnight on 14 August 2013. Once the suspension period expired, the Regulations were invalid retrospectively. The Regulations have been invalid for over a year and a half. The Court cannot now limit retrospectivity as that would amount to reviving the Regulations.

[45] Further, should a second court be allowed to limit retrospectivity after the fact it will amount in substance to the powers of section 172(1)(a) and (b) being utilised disjunctively. *Ntuli* found that the powers in section 172 could not be exercised at different moments in time.[46] *Zondi*, explaining what was meant in *Ntuli*, reasoned as follows:

> "What the Court held is that it is impermissible for a court to make a declaration of invalidity without making an order suspending the declaration of invalidity, and then

[45] Id at paras 39-40.

[46] *Ntuli* above n 35 at para 25 held:

> "In my view subparas (a) and (b) of s 172(1) should not be read disjunctively so as to permit a Court to order that a declaration of invalidity may be suspended in different proceedings to those in which the declaration of invalidity is made. They should rather be read together to mean that when a Court declares a statutory provision inconsistent with the Constitution to be invalid, as it is required to do, it may also suspend that order if there are good reasons for doing so."

> later, in different proceedings, to make an order suspending the declaration of invalidity. The decision stresses two points: first, an order suspending the declaration of invalidity must be made at the same time as the declaration of invalidity; and second, *if the declaration of invalidity is not suspended or the period of suspension has lapsed, a court has no power to suspend the declaration of invalidity*, for to do so would be to revive the constitutionality of a provision that it has already declared invalid."[47] (Emphasis added.)

[46] Again, by logical inference, if the original order properly construed does not limit the retrospective effect of the declaration of invalidity, then a second court has no power to limit retrospectivity after the fact.

[47] The question now is whether it is in the interests of justice for this Court to develop the common law and allow for a discretion to be exercised. I pause here to note again that the manner in which this application was pleaded demonstrates the unfavourable position that a final appellate court finds itself in where a crucial submission, in relation to the discretion question, is canvassed for the first time during oral submissions. In any event *Zondi* and *Ntuli* hinted at the possibility of this development under the Court's inherent powers to regulate its own processes but did not take a view on the matter.[48] I am prepared to assume that in an appropriate case another court may subsequently vary the retrospective effect of a declaration of invalidity but this is not an appropriate case.

[48] The Agency contends that it will not be able to afford to pay the permit fees collected from 1 April 2011, the date the Regulations took effect, until 15 August 2013. It contends that the refund would amount to R318 988 280. Road Services disputes that this is the amount that would be owed and submits that it is not supported by audited financial statements or records of the Agency. Road Services contends that the Agency misled Makgoka J in the High Court about its financial position claiming that it was not in a position to repay permit fees when it in fact had

[47] *Zondi* above n 36 at para 43.

[48] Id at para 36 and *Ntuli* above n 35 at para 27.

an accumulated surplus. I do not believe that these factual discrepancies are relevant to a finding before this Court.

[49] Makgoka J provided the Minister with a reasonable opportunity to remedy the defects but the Minister failed to promulgate new regulations. The Minister has made no representations to this Court, filing only a notice of intention to abide. Moreover, the Minister has not proffered any explanation regarding the failure to make use of the period of suspension, to facilitate the promulgation of remedial regulations, before the lapse of the period of suspension. The Agency too has failed to provide facts in this regard.

[50] Although the Agency's financial position is unfortunate, the possibility of insolvency has been brought about by the Agency's own actions. It has only itself to blame. Its plight, which can be remedied, is best done so by the Executive or the Legislature and not by the courts. In any event, if a discretion were to exist it ought only to be exercised sparingly and the circumstances warranting such exercise must be quite compelling indeed. These circumstances are not present here.

[51] I now turn to the approach by Heaton-Nicholls J. It is true, as the Agency contended, that the Judge was under the impression that, as the second Court, it had no discretion to deal with retrospectivity at all. Heaton-Nicholls J indicated as follows: "my hands are tied" as the validity of the Regulations "would automatically kick in after the expiry of the 6 month period, as a matter of law". No doubt it would have assisted clarity if the second Court had analysed the judgment of the first Court in order to contextualise the order, as this Court has now done, but ultimately the second Court was correct, it had no discretion to limit the retrospectivity of the declaration of invalidity after the fact.

Replying affidavit

[52] The applicant attempted to file a replying affidavit with this Court. The Rules of this Court for good reason do not make provision for a replying affidavit to be filed.

This Court retains the discretion to admit further affidavits if it is in the interests of justice to do so.[49] The replying affidavit relates to the factual dispute between the parties. This factual dispute is not relevant to the issues before this Court and therefore leave to file the replying affidavit is refused.

Conclusion

[53] The relief sought by the Agency is to be refused.

Order

[54] In the result, the following order is issued:

1. Leave to appeal is granted.
2. Leave to file a replying affidavit is refused.
3. The appeal is dismissed with costs.

[49] See rule 19 of the Rules of this Court read with *Ka Mtuze* at para 15 and *Oriani-Ambrosini, MP v Sisulu, MP, Speaker of the National Assembly* [2012] ZACC 27; 2012 (6) SA 599 (CC); 2013 (1) BCLR 14 (CC) at para 16.

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