IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

17/1/22 [redacted]
DATE SIGNATURE

CASE NO: 28368/2021

In the matter between:

AMBASSADOR DUTY FREE (PTY) LTD	Applicant
and	
THE MINISTER OF FINANCE	First Respondent
THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE	Second Respondent
THE MINISTER OF INTERNATIONAL RELATIONS AND COOPERATION	Third Respondent
and	
NU-AFRICA DUTY FREE SHOPS (PTY) LTD	Intervening Applicant

CASE NO: 32175/2021

AND in the matter between:

FLEMINGO DUTY FREE SHOPS INTERNATIONAL SA (PTY) LTD	First Applicant
INTERNATIONAL TRADE & COMMODITIES 2055 CC t/a ASSORTIM DUTY FREE	Second Applicant
and	
THE MINISTER OF FINANCE	First Respondent

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE — Second Respondent

THE MINISTER OF INTERNATIONAL RELATIONS AND COOPERATION — Third Respondent

and

NU-AFRICA DUTY FREE SHOPS (PTY) LTD — Intervening Applicant

JUDGMENT ON REMEDY

D S FOURIE, J:

[1] In the judgment handed down on 21 September 2021 (the review order) this Court upheld the contention of the intervening applicant (Nu-Africa) that sections 75(15)(a)(i)(bb) of the Customs and Excise Act 91 of 1964 and 74(3)(a) of the Value-Added Tax Act 89 of 1991 permit an unlawful delegation of plenary legislative power to the first respondent (the Minister) and are therefore unconstitutional and invalid (paragraphs (D) 5.1 and 5.2 of the review order).

[2] In the review order, this Court also declared unconstitutional various amendments to the Schedules of the Customs Act published in Government Gazette Nos. 44473 and 44705 and the amended Schedule to the VAT Act published in Government Gazette Nos 44473 and 44705 (paragraphs (D) 5.3 and 5.4 of the review order).

[3] In the review order, leave was granted to the Minister and Nu-Africa (in paragraph (D) 8.1 of the order) to file a supplementary affidavit on the question of remedy. Both parties are *ad idem* that the order should only operate

prospectively. However, the Minister has argued in the supplementary affidavit that the declarations of invalidity should be suspended for a period of 24 months, whereas Nu-Africa has contended that the declarations of invalidity should operate with immediate prospective effect as from 1 August 2021, being the date on which the amended Schedules came into effect.

[4] As a preliminary matter, counsel for Nu-Africa has argued that the Minister as the party requesting a suspension of the order of invalidity has a burden or onus to persuade the Court to exercise such a power (*Mistry v Interim National Medical and Dental Council of South Africa* 1998 (4) SA 1127 (CC) at par 37). He also made reference to a *dictum* of Kriegler J in *S v Ntsele* 1997 (11) BCLR 1543 (CC) where the learned Judge stated that High Courts must engage with issues of retrospectivity, prospectivity or suspension when declaring statutes constitutionally invalid.

[5] However, in their heads of argument both counsel have now pertinently pointed out what the Constitutional Court said in *Minister of Justice and Constitutional Development and Others v Prince* 2018 (6) SA 393 (CC) concerning the competence of a High Court to suspend a declaration of invalidity of an Act of Parliament when deciding a constitutional attack. In paragraph 2 of the judgment Zondo ACJ stated the following:

> *"It is neither necessary nor competent for a High Court to suspend an order of constitutional invalidity that relates to a statutory provision or an Act of Parliament when it grants such an order of constitutional invalidity. It is unnecessary because s. 172(2) of the Constitution provides that 'an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court'. That means that any order of constitutional invalidity of an Act of Parliament or a provision of*

> *an Act of Parliament made by a Court other than this Court does not take effect for as long it has not been confirmed by this Court. Such a suspension order is incompetent because it purports to suspend the operation of an order that is not in operation in any event."*

[6] This view appears to be in contrast to the view expressed by Kriegler J in *Ntsele*. Counsel for Nu-Africa submitted that the contrasting approaches in *Prince* and *Ntsele* are not capable of clear resolution as *Ntsele* was not overruled explicitly in *Prince*. It seems to me, as far as this issue is concerned, that *Ntsele* has at least been overruled by necessary implication as it was clearly stated in *Prince* that the High Court is not competent to suspend a declaration of invalidity that relates to a statutory provision or an Act of Parliament. Counsel for the Minister as well as counsel for Nu-Africa have accepted that this Court is bound by the abovementioned statement of the Constitutional Court in *Prince* and that it is not competent for this Court to suspend a declaration of invalidity that relates to a statutory provision or an Act of Parliament. I agree with this approach.

[7] However, that is not the end of this debate. Counsel for Nu-Africa has nevertheless made submissions as to why suspension would not be just and equitable. I was also invited to consider these submissions for the benefit of the Constitutional Court when it decides the confirmation proceedings. It was also contended that the above issues do not concern the declarations of invalidity in respect of the *amended Schedules* as these declarations of invalidity do not require confirmation by the Constitutional Court (unlike the order in respect of the Customs Act and VAT Act). It was therefore still requested that the declarations

of invalidity in paragraph (D) 5.3 and 5.4 of the review order should operate with immediate prospective effect as from 1 August 2021.

[8] Counsel for the Minister has submitted, given that it is now common cause that it would not be competent for this Court to suspend the declarations of invalidity, that no purpose would be served in engaging in a debate about the merits of Nu-Africa's contentions. Now that the evidence is on record (to be supplemented by evidence in the proceedings before the Constitutional Court), the parties may hold their fire until the confirmation proceedings. Therefore, so it was contended, the appropriate way to proceed would be for this Court simply to confirm its review order.

[9] Nu-Africa has advanced various reasons as to why the Minister has not discharged the onus regarding a suspension of the order of invalidity. I do not think it is necessary for this Court to consider the arguments put forward by both Nu-Africa and the Minister in this regard as the issue of suspension will have to be decided by the Constitutional Court. I have nevertheless decided to merely state my view on this issue as mentioned in par 13 below, if that would be of any assistance.

[10] However, I do think it is necessary to consider the submission that the declarations of invalidity in respect of the *amended Schedules* do not require confirmation by the Constitutional Court. Orders of invalidity that relates to a statutory provision or an Act of Parliament require confirmation, but orders of invalidity of delegated legislation made in terms of an Act by a Minister do not (section 172(2)(a) of the Constitution and *Minister of Justice and Constitutional*

Development and Others v Prince, *supra*, par 2 and Currie & De Waal, The Bill of Rights Handbook, 6th Ed, p 117). This is so despite the standard legislative formula found in definition sections to the effect that *"this Act"* includes any regulations issued in terms of powers granted by it (*The Bill of Rights Handbook*, supra p 117 and the authorities cited).

[11] The Schedules to the Customs Act and the VAT Act are not, in my view, delegated legislation made in terms of the Customs Act or the VAT Act by the Minister. These Schedules are part and parcel of an Act of Parliament (cf *Smit v Minister of Justice and Correctional Services* 2021(3) BCLR 219 (CC) par 35 and further). The purported amendments to these Schedules by the Minister did not change the statutory status thereof to that of delegated legislation created or made by the Minister, such as Regulations or even Rules. On the contrary, the reason why the amended Schedules were declared unconstitutional is because section 75(15)(a)(i)(bb) of the Customs Act and section 74(3)(a) of the Value-Added Tax Act purport to confer on the Minister the power to amend these schedules and thereby conferring on the Minister plenary legislative power. In short, these Schedules, even in its amended form, remain part and parcel of an Act of Parliament as original legislation. I therefore do not agree with the submission by counsel for Nu-Africa that the declarations of invalidity in respect of the amended Schedules do not require confirmation by the Constitutional Court. In my view all the declarations of invalidity as referred to in paragraphs (D) 5.1 to 5.4 of the review order, require confirmation by the Constitutional Court. It will therefore be necessary to make an order in this regard to avoid any misunderstanding or uncertainty.

[12] However, even if I have misdirected myself in this regard and should it be found that the declarations of invalidity in respect of the amended Schedules do not require confirmation by the Constitutional Court, then there is another reason why an order as requested by Nu-Africa (that the declarations of invalidity with regard to the amended schedules should operate with immediate prospective effect as from 1 August 2021) should not be granted by this Court. If a suspension order were to be granted by the Constitutional Court in respect of the relevant sections of the Customs Act and the Value-Added Tax Act, it will defeat the purpose if an order were to be granted now that the declarations of invalidity in respect of the amended Schedules should operate with immediate prospective effect as from 1 August 2021. That will not be in the interest of justice.

[13] I am therefore of the view that the Minister's request for a suspension of the declarations of invalidity should favourably be considered to enable Parliament to correct the constitutional defects in this legislation, to provide for a lawful manner to properly regulate the quantity of goods that may be purchased duty-free by Diplomats and to prevent any further abuse of these privileges.

[14] That finally brings me to the issue of costs in respect of the argument on remedy. Both the Minister and Nu-Africa filed supplementary affidavits and heads of argument. As far as the issue of remedy is concerned, it is to be expected that the Constitutional Court will make a final order in this regard. There is no clear winner as far as this round before this Court is concerned. I am therefore of the view that it will be fair to both parties if I make no order as to costs.

ORDER

In the result I make the following order with regard to the issue of remedy:

1) This order should be read in conjunction with the order already granted on 21 September 2021 under the above case numbers between the same parties;

2) The declarations of invalidity in respect of section 75(15)(a)(i)(bb) of the Customs and Excise Act 91 of 1964, section 74(3)(a) of the Value-Added Tax Act 89 of 1991, the amended Schedules to the Customs Act published in Government Gazette Nos. 44473 and 44705 and the amended Schedule to the VAT Act published in Government Gazette Nos. 44473 and 44705 (as more fully referred to in the review order in paragraphs (D) 5.1 to 5.4) are all subject to confirmation by the Constitutional Court and shall have no force unless confirmed by the Constitutional Court;

3) The Registrar of this Court is directed to forward the judgment and order dated 21 September 2021 as well as this judgment and order to the Registrar of the Constitutional Court in terms of the provisions of Rule 16(1) of the Constitutional Court Rules for consideration of the declaration of invalidity orders made by this Court, within 15 (fifteen) days of this order;

4) No order as to costs is made in respect of the proceedings conducted after 21 September 2021 on the issue of remedy.

[redacted]

D S FOURIE
JUDGE OF THE HIGH COURT
PRETORIA 17/1/22