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CASE NO: 60113/2013

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

PRETORIA 01 NOVEMBER 2013

BEFORE THE HONOURABLE MADAM JUSTICE HEATON-NICHOLLS

In the matter between:

CENTRAL AFRICAN ROAD SERVICES (PTY) LTD^R

Applicant

And

CROSS-BORDER ROAD TRANSPORT AGENCY
THE MINISTER OF TRANSPORT

1st Respondent
2nd Respondent

HAVING HEARD counsel(s) for the party(ies) and having read the documents filed of record

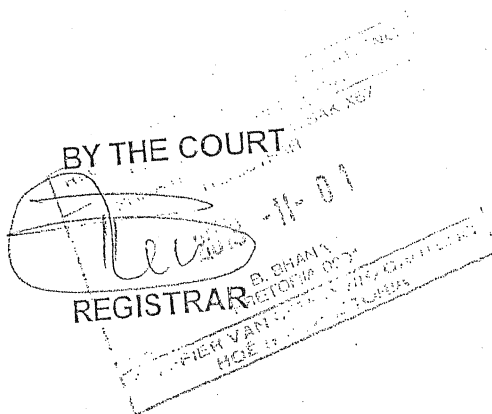
IT IS ORDERED

1. THAT the period of 6 (six) months contemplated in paragraph 7 of the order handed down by this Court on 15 February 2013 under case number 32238/2011 lapsed at midnight on 14 February 2013.
2. THAT the order of invalidity in paragraph 6 of the order handed down by this Court on 15 February 2013 under case number 32238/2011 accordingly came into operation with full retrospective effect at midnight on 14 August 2013.
3. THAT until such time as the second respondent may promulgate new constitutionally valid regulations amending the permit fees set out in the Regulations Promulgated Cross-Border Road Transport Regulations, 1998, published by Government Notice No: R. 464 of 3 April 1998, as amended by Government Notice Nos. R. 464 of August 1999, R. 682 of July 2000 and R. 677 of 2 June 2003 (the existing regulations) the permit fees payment by cross border road transport operators are those set out in the existed regulations.

01/11/2013

4. THAT the respondents pay the costs of the application except for the applicant's costs of drafting the notice of motion and founding affidavit which are disallowed.

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☐ Att: MARIUS SWART ATT.
HIGH COURT TYPIST: EM

iAfrica Transcriptions (Pty) Limited
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION - PRETORIA

SI

CASE NO: 60113/2013

DATE: 2013-11-01

<u>DELETE WHICHEVER IS NOT APPLICABLE</u>	
1. REPORTABLE: YES/NO	
2. OF INTEREST TO OTHER JUDGES: YES/NO	
3. <u>REVISED.</u>	
<u>9/6/14</u>	<u>CT Nicholls</u>
DATE	SIGNATURE

In the matter between

10 CENTRAL AFRICAN ROAD SERVICES (PTY) LTD

Applicant

And

CROSS-BORDER & ROAD TRANSPORT AGENCY

1st Respondent

MINISTER OF TRANSPORT

2nd Respondent

J U D G M E N T

Nicholls, J:

- 20 [1] On the 15 February 2013, the applicant, a road transportation company involved in cross border transportation, was granted an

order by Makgoka J in the following terms:

1. That the 2011 Cross Border Road Transport amendment regulations published in the Government notice number R 284, published on the 31 March 2011, in terms of the Cross Border Transport Act 4 (1998) (for Regulations) but published in a manner inconsistent with Section 6(3) of the Republic of South Africa, Constitution Act 108 of 1996 (the Constitution), and were invalid for the period between 1 April 2011 and 28 October 2011.

2. That 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. That the 1st Respondent (The Minister) and the 2nd Respondent (The Agency) have failed to comply with their constitutional obligations to ensure procedural fairness in the publication and promulgation regulations.

4. That the 2nd Respondent (The Agency) has failed in its constitutional duty to comply with its duty to facilitate a proper public comment before publishing the regulation.

5. 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. That the regulations are, as a consequence promulgated in a manner that is inconsistent with the provisions of the promotion of the Administrative Justice Act (3) (2000) and Section 33 of the Constitution and are therefore invalid.

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7. That 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 regulation and thereafter to receive and consider public comments.

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8. That the Applicant's constitutional challenge relating to the taxation or money bill is dismissed.

9. That the respondents are to pay 80% of the applicants costs occasioned on 5 March 2012, which the respondents are liable to pay 100%.

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[2] On the 1 October 2013 the applicant brought an urgent application directing the 1st respondent to issue certain road transport permits against payments of R1 690.00 per country. (This is the amount payable in terms of the 1998 regulations as opposed to the 2011 regulations which increased the fees by 250%). An order was granted in terms of Part A of the application that the above order operate as an interim order pending the final adjudication of part B. The matter now comes before court for the hearing of part B.

[3] In Part B the applicant seeks a declaratory order that the 6 months contemplated in paragraph 7 of the order of the 15 February 2013 lapsed at midnight on the 14 August 2013; that the order of invalidity in paragraph 6 of the order of 15 February 2013 came into operation with full retrospective effect at midnight on the 14 August 2013. Further, until such time that the 2nd respondent may promulgate new constitutionally valid

regulations amending the permit fee, the fees payable by Cross Border Road Transport operators are those set out in the existing regulations.

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[4] It is common cause that the 6 month period referred to in the order of 15 February 2013 lapsed at midnight on the 14 August 2013 and that in order to extend the 6 month period, an application for extension would have had to have been made within the 6 month period. It is also common cause that no such application for extension was made.

10 [5] The Constitutional court has held that an application for the extension of an order can only be made during the period of suspension and not after this period has lapsed.¹ The rationale behind this is that a court cannot retrospectively extend a suspension order which no longer exists.

[6] The respondents' case on the merits, is that last Monday they filed an application for leave to appeal against the judgment and order of 15 February 2013. Therefore, they argue that Rule 49(11) of the Uniform Court of Rules is applicable. Rule 49(11) provides that an application for leave to appeal suspends the operation of the order pending the outcome of the
20 decision.

[7] The Constitutional Court dealt with precisely the same point in

¹ *ex parte Minister of Social Development and Others* 2006 (4) SA 309 (CC); *Minister of Justice v Ntuli* 1997 (3) SA 772 (cc),

*Minister of Health v New Clicks South Africa (PTY) Limited*². In that case the Minister of Health had sought leave to appeal against a judgement of the Supreme Court of Appeal setting aside the regulations she had published relating to pricing systems for medicines and related substances. She then approached the Constitutional court seeking an urgent order declaring that the judgment and order of the Supreme Court of Appeal was urgently suspended upon the bringing of the application for leave to appeal.

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[8] At paragraphs 15 and 16 the Court held that:

10 "15. Section 2 of the Constitution provides that:

"This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."

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Any law inconsistent with the Constitution is therefore invalid. When a court considers and upholds a challenge to the validity of a law, it then declares the law to be invalid, but the law's fundamental invalidity flows from its inconsistency with the Constitution, not from the court order. As this Court held in *Ferreira v Levin* NO;⁸

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"The Court's order does not invalidate the law; it merely declares it to be invalid. It is very seldom patent, and in most cases is disputed, that pre-constitutional laws are inconsistent with the provisions of the Constitution. It is one of this Court's functions to determine and pronounce on the invalidity of laws, including Acts of Parliament. This does not detract from the reality that pre-existing laws either remained valid or became invalid upon the provisions of the Constitution coming into operation. In this sense laws are objectively valid or invalid depending on whether they are or are not inconsistent with the

² *Minister of Health v New Clicks South Africa (PTY) Limited* CCT 59/04, judgment delivered on 30 September 2005

Constitution. The fact that a dispute concerning inconsistency may only be decided years afterwards, does not affect the objective nature of the invalidity."

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"16. The common law rule, that the execution of a judgment is suspended pending an appeal has no application to declarations of constitutional invalidity of legislation.

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If a law is objectively invalid, a declaration of invalidity made by a competent court that is subsequently set aside on appeal does not validate the law. For the same reason an appeal against the declaration of constitutional invalidity does not breathe life into the law. The objective validity or any validity of the law will ultimately be determined at the end of the appeal process. This does not mean, however that courts have no power to temper the effects of constitutional invalidity made pending the finalisation of the appeal process."³

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[9] The Constitutional Court went on to say that ordinarily the invalidity would take effect from the date of promulgation of law but the effect can be ameliorated by Section 172(1)(b) of the Constitution which empowers the court to suspend the declaration of invalidity for a period if it is just and equitable to do so. This is precisely what this court did when granting the order of 15 February 2013: it tempered the effect of the declaration of invalidity by suspending the order for 6 months, to allow for the necessary consultations to take place. Unfortunately since February 2013, the first respondent has done nothing further to bring its regulations in line with

³ *Minister of Health v New Clicks South Africa (PTY) limited*, case CCT 59/04, paragraph 16

constitutional requirements. It is therefore not open to the respondent to come at this stage and ask for relief.

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Not surprisingly, counsel for the respondent could not elaborate on what possible order this court could give, other than to refuse the granting of the declaratory order.

[10] It is correct that the notice of motion did not provide the first respondent an adequate opportunity to file an answering affidavit to part B. Counsel for the applicant conceded that it was irregular in this respect. The question then arises what the effect of such an affidavit would be. Counsel for the respondent stated that the affidavit would show the undue hardship that would be suffered by the first respondent should the order of invalidity be granted. This point was also raised in the answering affidavit to the urgent application.

[11] I am sympathetic to the plight of the respondent. However, irrespective of what an affidavit from the respondent may contain, my hands are tied. It can in no way affect the outcome of the application. The alleged hardship cannot breathe life into an invalid law. I am not convinced that it was even necessary for the applicant to bring this application as the invalidity would automatically kick in after the expiry of the 6 month period, as a matter of law. For this reason even a postponement to file an answering affidavit would serve no purpose.

[12] The order of Makgoba J, of the 15 February 2013, must stand unless

an appeal court sets it aside. The 6 month suspension period has expired.
The regulation is now invalid.

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[13] I now turn to the question of costs. Even though to file an answering affidavit would serve no purpose at this stage, the court's disapproval towards the applicant in failing to allow sufficient time for the answering affidavit can be reflected in the costs order. Courts should frown upon irregular papers. In the circumstances, I will disallow all costs relating to the drafting of the notice of motion and the founding affidavit.

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In the result I make the following order.

ORDER

1. The period of 6 months contemplated in paragraphs 7 of the order handed down by this court on the 15 February 2013, under case number 32238/2011 lapsed at midnight on the 14 August 2013.

20 2. The order of invalidity in paragraph 6 of the order, handed down by this court on the 15 February 2013, under case number 32238/2011 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

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Cross Border Road Transportation Regulations 1998, published under Government Notice No R 464 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 2013 (the existing regulations), the permit fees payable by Cross Border Road Transport Operations are those set out in the existing regulations.

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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.
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