



## CONSTITUTIONAL COURT OF SOUTH AFRICA

**Cross-Border Road Transport Agency v Central African Road Services (Pty) Ltd**

**CCT 163/14**

**Date of hearing: 17 February 2015**

**Date of judgment: 12 May 2015**

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### MEDIA SUMMARY

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*The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.*

Today the Constitutional Court handed down judgment in a matter concerning the legal principles that govern the operation of suspended orders of constitutional invalidity where the suspension period has expired without the enactment of remedial legislation.

In February 2013, the Cross-Border Transport Amendment Regulations (Regulations), passed in 2011, were declared unconstitutional and invalid by the North Gauteng Division of the High Court (High Court) because, they had not been published in two official languages and insufficient public participation processes had been conducted. The Court suspended the order of invalidity for a period of six months in order to give the Minister of Transport (Minister) an opportunity to remedy the situation. This period expired on 15 August 2013 without new regulations being published.

A dispute then arose between Central African Road Services (CARS), a cross border transport operator, and the Cross-Border Road Transport Agency (the Agency), the government agency responsible for the imposition and collection of tariffs. The dispute was in relation to whether the regulations are invalid prospectively from the date that the declaration of invalidity expired, or whether the regulations are invalid with full retrospective effect. Upon returning to the High Court to resolve this dispute, the High Court found that the regulations were invalid from the date they were first published. It further concluded that although the invalidity had been suspended to afford the Minister an opportunity to remedy the situation, when the period expired, the regulations were automatically invalid with full retrospective effect.

The Agency approached this Court requesting it to set aside the decision of the High Court and replace it with an order that on the expiry of the suspension period, the invalidity of the Regulations operated prospectively from the date of the lapse of the suspension period. The Agency contended that the order and the judgment of the High Court intended for the Regulations to be invalid prospectively. It further contended that if this Court finds that the High Court's declaration of invalidity does not operate prospectively, that this Court has the power to vary a final order made.

CARS opposed the application for leave to appeal. It argued that the normal rule is that an order of invalidity is effective with full retrospective effect, but that a court has the power to depart from this default position and determine whether an order will operate retrospectively or prospectively. CARS further argued that after the expiry of the period of suspension without any remedial Regulations, the invalidity of the Regulations operated retrospectively from the date of their publication.

The Road Freight Association was admitted as a friend of the court in the proceedings and urged this Court to consider foreign law, which largely favours the retrospective effect of an order of invalidity.

In a unanimous judgment by Jappie AJ, the Court held that in circumstances where the period of suspension lapses without the enactment of remedial legislation, the default position is that a declaration of invalidity operates retrospectively. Further, the default position can be departed from where, on a proper reading of a judgment and order of a court, it is apparent that retrospectivity was not intended to follow on expiry of the suspension period when no remedial legislation has been passed. Furthermore, the Court considered whether it has the discretion to vary a final order of the High Court but did not decide the issue. The Court found that the order of the High Court, properly construed, declared the Regulations invalid with retrospective effect and that the second court had no power to vary that order. The appeal was dismissed.