



CONSTITUTIONAL COURT OF SOUTH AFRICA

National Treasury and Others v Opposition to Urban Tolling Alliance and Others

Case CCT 38/12

**Date of Hearing: 15 August 2012
Date of Judgment: 20 September 2012**

MEDIA SUMMARY

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.

On Thursday, 20 September 2012, the Constitutional Court handed down judgment on an urgent direct appeal by the National Treasury and South African National Roads Agency Limited (SANRAL) against a temporary restraining order granted by the North Gauteng High Court, Pretoria (High Court) preventing SANRAL from implementing and collecting tolls.

During 2007, Cabinet approved an extensive upgrade of roads in the Gauteng province as part the Gauteng Freeway Improvement Project (GFIP). The upgrade entailed extensive civil engineering work by SANRAL. In order to finance the roads upgrade, SANRAL incurred debt with third parties in the amount of R21 billion. In 2008, SANRAL took a decision, acting under the South African National Roads Agency Limited Act (SANRAL Act) and with the approval of the Minister of Transport, to declare certain Gauteng roads as toll roads.

Nearly four years later, on 23 March 2012, Opposition to Urban Tolling Alliance (OUTA) and other respondents, approached the High Court on an urgent basis for an interim interdict restraining SANRAL from levying and collecting toll on the Gauteng roads, pending the final determination of their application to review and set aside the decisions of: (a) SANRAL and the Transport Minister to declare the Gauteng roads as toll roads; and (b) of the Director General to grant certain environmental approvals related to the GFIP. Prinsloo J heard the urgent application and granted the interim interdict sought by the respondents.

In this Court, the applicants contended that the grant of the interdict was inconsistent with the constitutional principle of separation of powers. They questioned the suitability of the common law test that the High Court applied when it granted the interdict and urged this Court to adapt the test in circumstances where the grant of an interim interdict trespasses on the exclusive domain of the National Executive.

The respondents submitted that leave to appeal should be refused because ordinarily an interim order is not appealable. On the merits, they argued that the commencement of

e-tolling before the review of the impugned decisions will cause irreparable financial harm to many thousands of motorists in Gauteng. They added that the executive decisions under attack were not political, economic or so policy-laden as to warrant judicial deference.

In the main judgment, authored by Moseneke DCJ, this Court explained that the Road Freight Association's application for leave to intervene was dismissed on the basis that it did not show a direct and substantial interest in the appeal and that the Democratic Alliance's application to be admitted as *amicus curiae* was refused because its contentions were neither non-partisan nor different to those of the parties.

The Court held that the interim order had an immediate and irreparable effect and was thus appealable but that it was not necessary for the Court to develop the common law test for the grant of an interim interdict because it is already sufficiently flexible to permit a court to consider the principle of separation of powers when it weighs where the balance of convenience rests.

The judgment concluded that the interim interdict must be set aside because the High Court failed to consider or to give effect to the constitutional imperative of separation of powers. It held that beyond the common law, separation of powers is a vital tenet of our constitutional democracy. Courts must refrain from entering the exclusive terrain of the executive and legislative branches of government, unless the intrusion is mandated by the Constitution. It held that courts should only grant an interim interdict preventing the national executive from exercising its statutory power in exceptional circumstances and when a strong case is made out for the relief sought. Courts must ask whether it is constitutionally appropriate to grant an interdict whose effect would be to encroach upon the exclusive domain of another sphere of government.

The Court went on to hold that the High Court's deafening silence on the important consideration of separation of powers entitled it to intervene. The High Court should have held that the prejudice that would confront motorists in Gauteng if the interim interdict were not granted did not exceed the prejudice that the National Executive, National Treasury and SANRAL would have to endure were the temporary restraining order granted.

The Court reasoned that the harm and inconvenience to motorists, on which the High Court relied, resulted from a National Executive decision about the ordering of public resources, over which the Executive Government disposes and for which it, and it alone, has the public responsibility. Thus, the duty of determining how public resources are to be drawn upon and re-ordered lies in the heartland of Executive Government function and domain. What is more, absent any proof of unlawfulness or fraud or corruption, the power and the prerogative to formulate and implement policy on how to finance public projects reside in the exclusive domain of the National Executive, subject to budgetary appropriations by Parliament. Another consideration is that the collection and ordering of public resources almost inevitably calls for policy-laden and polycentric decision making. Courts are not always well suited to make decisions of that order. It bears repetition that a court considering the grant of an interim interdict against the exercise of power within the camp of executive government or legislative branch must have the separation of powers consideration at the very forefront.

Froneman J, writing separately, concurred in the outcome of the main judgment but differed in some of his reasoning. He adopted a narrower approach for the grant of leave to appeal,

and a separate requirement for temporary interdicts sought against the two other national arms of government.

The Court upheld the appeal, set aside the order of the High Court and ordered costs to be costs in the review.