**REPORTABLE**

# *IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA*

**CASE NO : 403 / 97**

***In the matter between***

**UNITRANS PASSENGER (PTY) LTD t/a GREYHOUND COACH LINES** — **Appellant**

***and***

**THE CHAIRMAN OF THE NATIONAL TRANSPORT COMMISSION** — **First respondent**
**THE NATIONAL TRANSPORT COMMISSION** — **Second respondent**
**INTERKAAP FERREIRA BUSDIENS** — **Third respondent**
**TRANSNET LTD (AUTONET DIVISION)** — **Fourth respondent**

**CASE NO : 415 / 97**

***And in the matter between***

**TRANSNET LTD (AUTONET DIVISION)** — **Appellant**

***and***

**THE CHAIRMAN OF THE NATIONAL TRANSPORT COMMISSION** — **First Respondent**
**INTERKAAP FERREIRA BUSDIENS (EDMS) BPK** — **Second Respondent**
**GREYHOUND COACH LINES (PTY) LTD** — **Third Respondent**
**BROADWAY BUS SERVICES (PTY) LTD** — **Fourth Respondent**

**CORAM** **Hefer, Howie, Marais, Olivier JJA, Madlanga AJA**

**DATE OF HEARING** **10 May 1999**

**DATE OF JUDGMENT** **28 May 1999**

**Legislation amending the process of obtaining a road carrier permit by terminating the authority of the National Transport Commission to adjudicate domestic applications in terms of the Road Transportation Act 74 of 1977 not applicable to applications pending on date on which amendment took effect. An application is pending when prescribed forms etc. lodged with secretariat of Commission.**

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## JUDGMENT

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**OLIVIER JA**

**OLIVIER JA :**

[1] The main question to be decided in the appeals before us is whether or not a pending application for a road carrier permit is affected by the introduction of legislation amending the application process; and, secondly, whether there was a pending application in the matter now before us.

[2] Before 1 May 1996 the National Transport Commission ("NTC") and the Local Road Transportation Boards had concurrent jurisdiction to award certain road carrier permits. An applicant for a permit could choose to apply to the NTC or to a Board. On 1 May 1996 Proclamation R22 altered this position in the following relevant ways :

1 The NTC was divested of its jurisdiction to award the class of permit relevant to this case.

2 The NTC was no longer empowered to refer an application to a Board.

3 Only Boards could award the relevant permit.

4 All provisions for the transfer of pending applications for the relevant permits from the NTC to Boards were repealed.

The Proclamation omitted any mention whether the NTC retained jurisdiction over applications lodged with it before 1 May 1996 but not finalised by that date. This, succinctly, became the fundamental issue in both appeals : can an application submitted to the NTC before 1 May 1996 be proceeded with before that tribunal, or has it become a dead letter?

## THE GREYHOUND APPEAL (CASE NUMBER 403 / 97)

[3] On 18 March 1996 the third respondent, Interkaap, lodged an application with the NTC in terms of sec 12 of the Road Transportation Act 74 of 1977 ("the Act") for a public road carrier permit.

On 3 May 1996, purporting to act in terms of Section 14(1) of the Act, the NTC published Interkaap's application in Government Gazette No. 17124 of the same date.

[4] The relevant portion of Section 13(1) of the Act before and after the promulgation of Proclamation R22 reads as follows :

> *(1) Subject to the provisions of this Act, the commission or a board shall receive and consider any application for the grant, renewal, amendment or transfer of a public road carrier permit ...* (own emphasis).

The relevant portion of Section 14(1) of the Act before and after 1 May 1996 reads as follows :

> *(1) The commission or a board -*
>
> *(a) shall, before considering any application for the grant, amendment (other than an amendment referred to in paragraph (b) for transfer of a public permit); ... publish in the Gazette such particulars of the application as may be prescribed by Regulation.* (own emphasis).

[5] On 23 May 1996, as it was entitled to do in terms of Section 14(2) of the Act, Greyhound submitted written objections in accordance with the Regulations. The grounds of objection dealt with the merits only.

[6] On 11 October 1996, Greyhound received a notice of set down from the NTC for a hearing of Interkaap's application on 29 October 1996. On that date, Greyhound and Transnet applied for postponements without success. Nevertheless the hearing of the matter on its merits was postponed to 15 November 1996, when Greyhound was represented and objected to the grant of the permit. At the conclusion of the argument on the merits, the NTC deferred its decision. Subsequent to this date, apparently on 29 November 1996, Greyhound received legal advice to the effect that, by virtue of the provisions of Proclamation R22, the NTC could not proceed with the

adjudication of Interkaap's application. By 3 December 1996 Greyhound's representative learned that the NTC would make known its decision, apparently in favour of Interkaap, on 5 December 1996.

[7] On 5 December 1996, Greyhound and another party, Broadway - not a party to this appeal - brought an urgent application against the NTC , *inter alia*, to interdict it from dealing further with the matter, and more particularly making its decision known or acting on it. The basis of the application was the averment that, by virtue of Proclamation R22, the NTC was divested of its powers to hear and decide applications for the relevant transport permits. At the same time a review application, based on the same legal contention, was launched by Greyhound. Its aim was to set aside the proceedings of the NTC in the Interkaap application.

[8] Pending the outcome of the two applications mentioned above, the NTC was interdicted from proceeding with the Interkaap application or from giving a decision on it.

[9] The review application brought by Greyhound giving rise to the present appeal was heard by Mynhardt J during May 1997. It was dismissed with costs. The judgment by Mynhardt J has since been reported as *Unitrans Passenger Bpk v Voorsitter, Nasionale Vervoerkommissie en Andere,* 1997 (4) SA 663 (T). The learned judge granted leave to appeal to this Court.

**THE TRANSNET APPEAL (CASE NUMBER : 415 / 97)**

[10] In all relevant aspects this appeal is identical to that of the Greyhound appeal, except that Transnet is the Appellant. Transnet too, in a separate application, but on the same grounds, sought an order declaring the NTC to be incompetent to consider and give a decision in the application made by Interkaap for the relevant transport permit. In the judgment of Mynhardt J, referred to above, this application was also dismissed with costs. The learned

judge granted Transnet leave to appeal to this Court.

[10] Counsel for the parties in both appeals dealt at length with the present state of the law regarding the retroactive effect of amending statutes.

[11] One may start the *conspectus* by stating the time-honoured principle formulated in *Peterson v Cuthbert and Co Ltd* 1945 AD 420 at 430, based upon the Roman-Dutch law, that no statute is to be construed as having retrospective operation (in the sense of taking away or impairing a vested right acquired under existing laws), unless the Legislature clearly intended the statute to have that effect (see also *inter alia* *Bartman v Dempers* 1952 (2) SA 577 (A) at 580 C).

[12] Then there is the distinction made in the case law between "true" retrospectivity (*i.e.* where an Act provides that from a past date the new law shall be deemed to have been in operation) and cases where the question is merely whether a new statute or an amendment of a statute interferes with or is applicable to existing rights, (see *Shewan Tomes and Co v Commissioner of Customs and Excise* 1955 (4) SA 305 (A) at 311; *R v Grainger* 1958 (2) SA 443 (A) at 445 C *et seq.*; *Euromarine International of Mauren v The Ship Berg and Others* 1986 (2) SA 700 (A) at 710 E - J; *Adampol (Pty) Ltd v Administrator, Transvaal* 1989 (3) SA 800 (A) at 811 D - 812 D; *Transnet Ltd v Ngcezula*, 1995 (3) SA 538 (A) at 548 H - 549 D ("*Transnet*"); *National Iranian Tanker Co v MV Pericles GC* 1995 (1) SA 475 (A) at 483 I).

[13] It is common cause that in the present case the amendment is not retrospective in the first mentioned,"strong" sense. But is it retrospective in the second, "weaker" sense, and if so, does affect only the future conduct of the pending proceedings, or does it reach back to nullify the steps that were taken in the past before the proclamation came into force?

[14] There was a time when a distinction was made between amending statutes affecting substantive rights and those affecting procedure only (see

*inter alia* *Curtis v Johannesburg Municipality* 1906 TS 308; Steyn, *Uitleg van Wette*, fifth edition, 1981 : 90 - 93). This distinction cannot be decisive, because many amending statutes may appear to be procedural in nature but in fact impact on substantive rights. The appeals now under discussion may be illustrations of the difficulty of distinguishing between procedural and substantive matters. The divesting of the NTC's power to adjudicate the Interkaap application, if that be the case, may affect the eventual outcome of the application if it is heard by a Board. (See the remarks in *Minister of Public Works v Haffejee NO* 1996 (3) SA 745 (A) at 752 B - 753 C).

[15] Even accepting that the matter under discussion relates to procedure, a useful and necessary distinction is that between the case where a statute amending existing procedures comes into effect before the procedure has been initiated, and the case where the amending statute comes into effect after the procedure has been initiated and is pending.

[16] In the first type of case, it has usually been held that the new procedure applies to any action instituted or application initiated after the date on which the amending statute takes effect unless a contrary intention appears from the legislation. The ratio of this rule is understandable. By the time the action is instituted or the application initiated, the old procedure is not part of the law any more. Even if the old procedure existed when the cause of action or the cause of the application arose, that in itself does not create a right to rely on procedure which no longer exists. *Minister of Public Works v Haffejee NO* *supra*, at 755 B - E makes that clear.

[17] We have to deal, however, with the second type of case, *i.e.* where the amending statute took effect after the action had been instituted or the procedure initiated. Considerations other than those under discussion in *Haffejee* may apply, as was expressly recognised in that case, at 754 A - G.

[18] What is the correct approach in cases such as the present where the action was instituted or the application was initiated before the amending

legislation came into being?

The rule is that unless a contrary intention appears from the amending legislation, the existing (old) procedure remains intact. This was laid down in *Bell v Voorsitter van die Rasseklassifikasieraad en Andere*, 1968 (2) SA 678 (A).

In that case the appellant had initiated proceedings under sec 11 (1) of the Population Registration Act 30 of 1950 to lodge a complaint against the racial classification of the third respondent. The application was enrolled for hearing by the Board on 25 May 1967. On 19 May 1967 Act 30 of 1950 was amended. The impact of one of the amendments was to extinguish the *locus standi* of the appellant to apply to the Board in respect of a third party such as the third respondent. The amending Act was, furthermore, expressly given retrospective effect to 7 July 1950, *i.e.* the date of the introduction of Act 30 of 1950.

[19] In spite of the apparently clear wording of the amending legislation this Court held that the appellant was entitled to pursue his application to the Board and to have it dealt with in terms of the unamended statute. Relying on P. Voet, *De Statutis* 8.1.3 Para 1, secs 2 (c) and (e) of the Interpretation Act, and on *Bartman v Dempers*, 1952 (2) SA 577 (A), Botha JA encapsulated the rule as follows (at 684 E - H) :

> *Die aanvaarding as deel van ons reg van die reël dat waar 'n wetsbepaling terugwerkend of andersins gewysig word onderwyl 'n geding hangende is, die regte van die gedingvoerende partye, by onstentenis van 'n ander bedoeling, volgens die wetsbepalings wat ten tyde van die instelling van die geding gegeld het, beoordeel moet word, blyk dus duidelik te wees. Dat dit die reël is wat ook deur die Engelse Howe by die uitleg van Wette toegepas word, blyk duidelik uit die gewysdes waarna in Bartman v Dempers,* supra*, verwys word. Sien ook Maxwell, Interpretation of Statutes, 111de Uitg., bl. 212).*
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> *By afkondiging van Wet 64 van 1967 op 19 Mei 1967, was appellant se beswaar van 25 Junie 1965 reeds deur die Sekretaris van Binnelandse Sake, ingevolge die destyds geldende bepalings van art. 11, na die in daardie artikel bedoelde raad vir beslissing verwys, en is die beswaar reeds*

> *deur die raad vir oorweging ter rolle geplaas en die appellant aangesê om op die bepaalde dag met sy getuies aanwesig te wees. Op bedoelde datum was oorweging van appellant se beswaar dus reeds by die raad hangende, en het hy die reg, binne die bedoeling van art. 12 (2) (c) van die Interpretasiewet, 1957, op 'n beslissing van sy beswaar, verkry. (Vgl. Mahomed, N.O v Union Government, 1911 AD 1 op bl. 10).*

Botha JA also dealt with the fact that the amending legislation was expressly given retrospective effect; and he considered whether the amendment was, therefore, applicable to pending applications. He decided not, for the following reasons, which seem to me to be particularly apt to the appeal before us:

(a) No provision had been made in the amending legislation for the repayment or forfeiture of the deposit paid by the applicant to the Board. The absence of such a provision, Botha JA held, was an indication that the legislature did not intend the amending legislation to affect an application pending before the Board.

(b) The retrospective application of the amending legislation could lead to inequitable results.

[20] A similar result was achieved in *Richard R. Currie Properties Ltd v Johannesburg City Council*, 1986 (2) SA 777 (A). During May 1983 Woodrich Investments (Pty) Ltd submitted an application to the Johannesburg City Council in terms of sec 4 (1) of the Sectional Titles Act 66 of 1971 for approval of a sectional division of a block of flats. During 1983 the block was sold to the appellant which intended to proceed with the pending application. At that stage the application had not been considered by the respondent City Council, nor had it done so by 1 October 1983 when certain amendments to the said Act came into operation. Respondent took the view that the amending legislation was applicable also to pending applications, and it refused to hear the appellant's application because it did not comply with newly prescribed formalities. The appellant sought a declaratory order that the respondent was

obliged to consider the application without regard to the amending legislation. The court *a quo* in refusing the application, held that the amendment had retrospective effect. The appeal succeeded, this Court deciding unanimously that the amending statute was not applicable to pending applications. Hefer JA held that the amended new procedural requirement could not be complied with retrospectively, nor was there any provision made for a pending application to be amended, rectified or supplemented. The inevitable result of giving retrospective effect to the amendments would be that all pending applications were automatically doomed to fail without even being considered. That could hardly have been intended.

[21] That the question of fairness and equity should be considered in deciding whether legislation amending procedure is applicable to pending applications or actions, also appears from the judgment of my brother, Marais JA, in *Haffejee*. He said (at 754 B - G) :

> *The manifest purpose of the amending legislation was to eliminate compensation courts from the expropriation scene and to direct all future claims for compensation, irrespective of amount, to the Supreme Court or to arbitration if the parties so agreed. The fact that the Legislature may have had perforce and* ex necessitate *to allow such compensation courts as had already been appointed and were already seized with claims to compensation to complete their tasks, does not derogate from the plainly expressed intent of the legislature to do away with such courts with effect from 1 May 1992. The unavailability after 1 May 1992 of a compensation court to a claimant whose right to compensation arose before that date but had not been invoked in that court by that date is not the consequence of an anomalous act of irrational legislative discrimination against him or her. Nor does implied legislative willingness (if that is what it be) to allow claimants who had instituted claims for compensation in the compensation courts before 1 May 1992 to proceed with their claims in those courts amount to an arbitrary and unjustifiable favouring of such claimants. The disruption, inconvenience, wastage of time and money, and other complications which could attend insistence upon pending and,* a fortiori*, pending part-heard cases being re-instituted before the Supreme Court are so obvious that they require no elaboration and there is no provision in the legislation for the mere transfer of such cases to the Supreme Court. Indeed, it is difficult to envisage how provision could fairly and effectively be made for the transfer of a case which is actually part-heard. These considerations are entirely*

> *absent in a case such as the respondent's where proceedings had not been instituted by 1 May 1992. I find no indication, clear or otherwise, in any of this that a claim such as the respondent's was to continue to be maintainable in a compensation court.*

[22] Of course, there may be cases where an amending statute introduces new procedural provisions which may on a proper interpretation, leave intact the steps that have already been taken and operate prospectively only. But that will not be the position where prospective operation would render abortive the steps taken in the past - unless such was the clear intention of the legislator. To apply the statute to the pending application in the present case would extinguish there and then the ability to proceed with the application. It would nullify the steps already taken by Interkaap.

[23] Applying the law to the facts of the present case, I can find no indication at all, express or implicit, that it was or could have been the intention of the legislature that the amending legislation should be applied to a pending application with the effect of preventing it from proceeding before the NTC to its final determination by that body. No provision is made for the transfer of a pending application before the NTC to a Local Road Transportation Board. No provision is made for the repayment of the application fees paid by the applicant. No indication is given of how the application should be proceeded with. No provision is made for compensating the applicant for wasted costs and expenses in preparing and presenting the pending application. It is unthinkable that the amending legislation should affect cases where the hearing has already taken place, and the NTC, having reserved judgment, is within a day or two of announcing its decision. The gross injustice and impracticability of applying the amending legislation to such a case is obvious. The principle is the same whether the application has just recently been made or just recently been heard.

I am of the view, therefore, that the amending statute does not affect

applications pending before the NTC.

[24] The appellants, however, have a second string to their bow. They submit that the application by Interkaap was not pending on 1 May 1996. It could, they say, only have become 'pending' when the NTC acted on the application by advertising it in terms of the Act. By that date the amending legislation had been put into operation, and would therefore be applicable. The NTC could therefore not proceed with the present matter because, so it was argued, the application was not pending when the amending legislation took effect on 1 May 1996. Reliance was placed on a remark by Price J in *M. G. Holmes (Pty) Ltd v National Transport Commission and Another*, 1951 (4) SA 659 (T) at 667 A - B, *viz.* that the crucial date on which to decide whether the applying company was properly incorporated and registered was the date of the hearing by the Commission and that :

> *A document which for convenience is called an application does not become an application until it is presented to the body which has to consider it. Previous to that date it is nothing more than a notification of an intention to make an application in terms of the document.*

[25] I respectfully disagree with this *dictum*. It is clear from the provisions of the Act itself that an application becomes pending as soon as the prescribed forms are lodged with the Secretary of the Commission. What the Commission receives is called in sec 13(1) an application. The Commission may refuse to consider such application (sec 13(2)(a); sec 13(2)(bA) to (bD)). The Commission must, before considering the matter, obtain particulars of the application (sec 14(1)). An objector objects to the application published in terms of sec 14(1) (sec 14(2)).

It may well be, as Price J held in *M.G. Holmes,* that the crucial date for establishing whether an application is formally in order is the date of the hearing, but for present purposes that does not mean that before that date there is no pending application.

[26] I am of the view that the amending legislation was not applicable to the Interkaap application and that the NTC is entitled and obliged to deal with the Interkaap application as if the amending legislation had not been passed.

Accordingly, both appeals are dismissed with costs.

**P.J.J. OLIVIER**

**CONCURRING :**
**Hefer JA**
**Howie JA**
**Marais JA**
**Madlanga AJA**