

Re: FAST TRUCK INTERIOR AND HARDWARE LTD

[Rwanda SUPREME COURT-RS/INCONST/RCOM 00001/2022/SC- Ntezilyayo, P.J.,
Nyirinkwaya, Hitiyaremeye, Muhumuza and Karimunda, J.) 19 May 2023]

Constitution – Unconstitutional law – For a law to be petitioned for unconstitutionality, must be a law which is still in force – When the challenged law or its provisions are no longer into force the petition against it is inadmissible.

Facts: When the Commercial High Court was examining the appeal filed by Rwanda Revenue Authority in the judgment RCOMA 00443/2021/HCC, Fast Truck Interior and Hardware Ltd, as party to the case, raised an objection about the unconstitutionality of a law, it states that the article 64 of the Law n^o 25/2005 of 04/12/2005 on tax procedures is unconstitutional.

The President of the Commercial High Court referred to article 74 of the Law n^o 30/2018 of 02/06/2018 determining the jurisdiction of courts and wrote to the President of the Supreme Court and notified him of the above raised issue, the Court's Registry received and registered the issue. The Government of Rwanda on the behalf Rwanda Revenue Authority raised the objection about the inadmissibility of the claim filed by Fast Truck Interior and Hardware Ltd, arguing that the law challenged by Fast Truck Interior and Hardware Ltd has already been repealed and it therefore cannot be challenged for unconstitutionality. It expounds that when a law is no longer into force, it cannot be examined to determine whether it is contrary or not to the Constitution, because normally when a Court declares a law unconstitutional, it is consequently repealed. The fact that the claimant states that law affected it even if it was repealed is not a ground to challenge it while it is no longer into force, especially it affected it because it contravened it while it was still into force.

Fast Truck and Hardware Ltd pleaded by stating that though the above law had been repealed, its article 64 kept applying since it is the very article that Rwanda Revenue Authority applied for charging with the Value-added Tax. It is not necessary to notify the Parliament in case a Court declares a law contrary to the Constitution as that law was repealed, rather it can affect the decisions taken by the Court on basis of that law that should be invalidated.

Held: 1. A claim seeking the unconstitutionality of a law is admissible in case the claimant indicates the challenged law and its annexes if any, it is repealed by a competent court in case it finds that it violates the human rights provided under the Constitution.

2. A law challenged for unconstitutionality must be into force, applicable and enforced. When a law or its article is no longer into force nor applied, the claim is ungrounded and inadmissible. Therefore, the claim by Fast Truck Interior and Hardware Ltd is not admitted since article 64 of the Law n^o 25/2005 of 04/12/2005 on tax procedures no longer exists.

**Objection sustained.
Petition rejected.**

Statutes referred to:

The Constitution of the Republic of Rwanda of 2003, revised in 2015, articles 29 and 61;
Law n^o 026/2019 of 18/09/2019 on Tax Procedures, article 98;
Law n^o 30/2018 of 02/06/2018 relating to jurisdiction of courts, articles 72 and 74;
Law n^o 25/2005 of 04/12/2005 on Tax procedures, articles 30 and 64.

Cases referred to:

Speaker of the National Assembly and Another v. Land Access Movement of South Africa and Others [2019] ZACC 10, rendered on 19/03/2019.
Civil Appeal Nos. 823-827 of 2022 (Arising out of SLP (C) Nos.2001-2005 of 2021)

Judgment

I. BACKGROUND OF THE CASE

[1] Fast Truck Interior and Hardware Ltd seized the Commercial Court and sued Rwanda Revenue Authority, seeking waiver of the Value-Added Tax amounting to 32,258,138 Frw allegedly unlawfully charged. On 12/05/2021, the above Court heard the case RCOM 00257/2021/TC and found the claim justified, and it waived the charged tax.

[2] Rwanda Revenue Authority appealed the above ruling before the Commercial High Court. During the hearing of the case RCOMA 00443/2021/HCC, whereby Counsel Hategeka Placide representing Fast Truck Interior and Hardware Ltd raised an objection and submitted that the article 64 of the Law n^o 25/2005 of 04/12/2005 on tax procedures is unconstitutional.

[3] With reference to article 74 of the law n^o 30/2018 of 02/06/2018 relating to jurisdiction of courts, the President of the Commercial High Court wrote to the President of the Supreme Court on 28/12/2022 and notified him of the raised objection, the Supreme Court's Registry received the claim and docketed it as RS/INCONST/RCOM 00001/2022/SC, its examination was fixed on 25/01/2023, but on that date, upon the request of the State Attorney, the case was not heard.

[4] The case was heard on 19/04/2023, Fast Truck Interior and Hardware Ltd was represented by Counsel Hategeka Placide while the Government of Rwanda was represented by Counsel Kabibi Spéciose together with Counsel Twahirwa Jean Baptiste.

[5] By its submissions and even through its pleading, the Government of Rwanda raised an objection and argued that Law n^o 25/2005 of 04/12/2005 on Tax Procedures which Fast Truck Interior and Hardware Ltd alleges to be unconstitutional has been repealed; arguing that it can therefore not be challenged for unconstitutionality, adding that such a claim should not be admitted.

[6] In reaction to the above objection, Counsel Hategeka Placide submitted that the Supreme Court should admit and examine the claim lodged by Fast Truck Interior and Hardware Ltd adding that though the above mentioned Law n^o 25/2005 had been repealed, its article 64 kept applying since it is this very article that Rwanda Revenue Authority used when it imposed it with 32,258,138 Frw for Value-Added Tax.

[7] The underlying issue that the Court has to examine in this case is to determine whether a repealed law can be challenged for unconstitutionality.

II. ANALYSIS OF THE ISSUE OF THE CASE

1. Whether a repealed law can be challenged for unconstitutionality

[8] Counsel Kabibi Spéciose representing the Government of Rwanda submits that the article 98 of the Law n^o 026/2019 of 18/09/2019 on Tax Procedures provides that “Law n^o 25/2005 of 04/12/2005 on Tax Procedures as modified and complemented to date and all prior legal provisions contrary to this Law are repealed”. This means that the challenged Law n^o 25/2005 of 04/12/2005 is no longer into force.

[9] She further submits that a repealed law cannot be challenged to determine whether it is contrary or not to the Constitution, because normally when a Court declares a law unconstitutional, it is consequently repealed, the Parliament and the Government are notified, it is therefore impossible to repeal a law that no longer exists.

[10] She also explains that for such claims, the decision of the Supreme Court is “ex-nunc” meaning that it is effective since the date it is taken and it has no retroactive effects.

[11] She adds that the claimant’s allegation that the repealed law affected it even if it was repealed is not a ground to challenge it while it is no longer into force, especially it affected it because it contravened it while it was still into force.

[12] Concerning the procedure used by the persons affected by the allegedly unconstitutional acts to file the claims against them, Counsel Kabibi Spéciose argues that the claim by Fast Truck Interior and Hardware Ltd submitted with reference to article 74 of Law n^o 30/2018 is different from the applications for remedies of unconstitutional acts and the claimant intends to change the claim, she requests the Court to adjudicate the case within the limits of the subject-matter, delimiting the case on the sole issue of determining whether it is possible to challenge the Law n^o 25/2005 for unconstitutionality while it no longer exists.

[13] She cited the example of similar cases that were rendered from other countries. She cited case Civil Appeal Nos. 823-827 of 2022 (arising out SLP (C) Nos. 2001-2005 of 2021) point 16, whereby under this case, there was an Assam Act¹ that was published in 2004, later the Manipular Act was published in 2012, which is exactly similar to the Act of 2004, and this is the Act that had been attacked before the Supreme Court of India for grounds of unconstitutionality and the Court found the claim justified. Later, the Act of 2012 was challenged for unconstitutionality on basis of the case rendered in 2004, but pending the Court’s decision, the Parliament repealed the Act of 2012 and replaced it with that of 2018 and the High Court upheld that the Parliament had no power to replace it because the Act of 2012 was unconstitutional. But the Supreme Court upheld that by the publication of the Act of 2018, the Act of 2012 was repealed, the High Court should not have examined the issue related to the constitutionality as it was repealed.

¹ The Assam Parliamentary Secretaries (Appointment, Salaries, Allowances and Miscellaneous Provisions) Act, 2004.

[14] She further submits that the above issue decided by the Supreme Court of India is similar to the case that Fast Truck Interior and Hardware Ltd brought to this Court since the challenged Law n^o 25/2005 of 04/12/2005 has been repealed ; and she therefore requests the Court to refer to the position set by the Supreme Court of India to uphold that a repealed law cannot be challenged for unconstitutionality as it is no longer into force.

[15] Counsel Twahirwa Jean Baptiste supplements her by adding that a law is challenged for unconstitutionality for being repealed ; it is evident that such procedure is only possible when the law is still valid and therefore applicable ; since the challenged law no longer exists, it is thus obvious that it cannot be challenged for unconstitutionality.

[16] With regard to the statements by Fast Truck Interior and Hardware Ltd that the law is challenged as it has been applied for levying the Value-Added Tax, he submits that such issue should not be examined by the Supreme Court, rather in case of any prejudice caused by the application of the Law n^o 25/2005 of 04/12/2005, it should bring the matter under the tax-related cases.

[17] Pleading about such issue, Counsel Hategeka Placide submits that Fast Truck Interior and Hardware Ltd did not seize the Court to uphold that the article 64 of the Law n^o 25/2005 of 04/12/2005 on tax procedures is unconstitutional in usual procedure for filing such claims, rather it lodged it as a matter of unconstitutionality of the law arising in the hearing of the case before the Commercial High Court.

[18] He further sustains that the reason why Fast Truck and Interior Ltd requested the Court to uphold that the article 64 of the above mentioned Law n^o 25/2005 of 04/12/2005 is unconstitutional even if it is repealed is that Rwanda Revenue Authority applied it for imposing it a tax just as it is indicated in the last paragraph of the notice about the violations committed on 13/10/2020 as it concerns the acts performed when it was into force, it is therefore obvious that though the above law has been repealed, it kept applying and it can be challenged for its unconstitutionality.

[19] Concerning the notification to the Parliament in case the court declares it unconstitutional, he submits that such is not necessary more so that the concerned law has already been repealed, rather it affected the decisions taken by the Court with reference to the above law and they should be revoked.

DETERMINATION OF THE COURT

[20] Paragraph one of article 72 of the Law n^o 30/2018 of 02/06/2018 determining the jurisdiction of courts provides that “The Supreme Court is petitioned by any person or company and associations with legal personality over petitions seeking to declare unconstitutional a law if they have any interest”. Paragraph 2 provides that “The applicant must put in the annex to the complaint a copy of the law that is the subject of the dispute and its annexes, if any”. Paragraph 5 provides that “When the Supreme Court holds that such a law is unconstitutional, it shall inform the Parliament and the Government thereof. Such a declaration is published in the Official Gazette of the Republic of Rwanda”.

[21] Article 74, paragraphs one and two of the above mentioned Law n^o 30/2018 provide that when the Supreme Court hears other cases than those related to the examination of the unconstitutionality of a law and a matter of unconstitutionality of the law arises, it handles the issue before the adjudication of the case on the merits. When such issue is raised by parties or upon the court own motion, during the case hearing before the lower courts, the latter immediately suspend the hearing of the main case and refer the issue to the Supreme Court for a related ruling.

[22] As above reminded, the main issue in this case on which both parties do not agree is to determine whether a repealed law can be challenged for unconstitutionality whereby the State Attorneys assert that such procedure is impossible whereas the counsel of Fast Truck Interior and Hardware Ltd argues that nothing prohibits it in case such law was still applied, even after it was repealed, on the acts that occurred when it was into force.

[23] The Court finds that the issue related to the fact that a repealed law can be challenged for unconstitutionality was examined by other constitutional courts of other countries.

[24] Before the Constitutional Court of South Africa with the case of Speaker of National Assembly and other v Land Access Movement of South Africa and others [2019] ZACC 10, rendered on 19/03/2019, whereby under paragraph 8, “The applicants challenged the constitutionality of the repealed Amendment Act on two grounds: first, that the NCOP² and the provincial legislatures respectively breached section 72(1)(a) of the Constitution by failing to “facilitate public involvement” in the passing of the Bill that preceded the repealed Amendment Act” and under paragraph 10, “It also declared the repealed Amendment Act to be invalid, thereby accepting the LAMOSA respondent’s first argument³”.

[25] The Supreme Court of India, in the case above cited in the State Attorney submissions, holds that due to the fact that a repealed law is no longer into force, the Court cannot examine its unconstitutionality, to that extent, the High Court committed an error in declaring a non-existing law as unconstitutional⁴.

[26] The Court observes that the aforementioned two cases rendered by courts of other countries indicate that the issue of determining whether a repealed law can be challenged for unconstitutionality, was not similarly upheld by those courts; therefore, in examining the claim filed to it, the Court has to determine, on basis of the existing legal provisions, whether it is possible for a party to request to this Court to examine whether a repealed law is unconstitutional.

[27] Considering the article 72 and article 74, paragraphs 1 and 2 of the above mentioned law n^o 30/2018, the Court finds that the legislator did not explicitly precise grounds on which the Court relies to examine the admissibility of a claim for unconstitutionality of a law raised by a party in

² National Council of Provinces.

³ Speaker of the National Assembly and Another v Land Access Movement of South Africa and Others [2019] ZACC 10, rendered on 19/03/2019, accessed on <http://www.saflii.org/za/cases/ZACC/2019/10.html>.

⁴ (...) “The aforesaid judgments leave no room for doubt that after enactment of the Repealing Act, 2018, the 2-12 Act did not survive and the High Court ought not to have considered the constitutional validity of the same. To that extent, the High Court committed an error in declaring a non-existing law as unconstitutional.” The State of Manipur & Ors Vs Surjakumar Okram & Ors, Civil Appeal Nos. 823 – 827 of 2022, 1 February 2022, <https://indiankanoon.org/doc/118737687/>

the case hearing, therefore, it is evident that such claim should be examined through the same procedure that is usually used for unconstitutionality-related claims as per the provisions of article 72.

[28] The Court finds that one of the conditions for the admissibility of unconstitutionality-related claims is that the applicant must indicate the challenged law and its annexes, if any. It is therefore understandable that such claims seek for the repealing of the challenged law in case the Supreme Court finds that it violates the human constitutional rights.

[29] With regard to the repealing of unconstitutional laws as highlighted by the fact that in the paragraph 5 of article 72 of the above mentioned law n^o 30/2018, the Legislator has provided that once a law is declared unconstitutional, the Supreme Court informs the competent organs for being rectified or repealed. The Competent organs are the Parliament and the Government.

[30] Considering the conditions for filing the claims seeking to confirm the unconstitutionality of a law and the subsequent formalities in instances where such is the case, the Court finds that the formalities are important so that if they are not respected, the decision taken by the Court would be invalidated because the Supreme Court could not inform the Parliament and the Government for repealing a non-existing law or publishing in the Official Gazette the judgment upholding that a law is repealed while it has been published that it was repealed. This is not different with the statements of Counsel Hategeka Placide during the hearing whereby he submitted that it is not necessary to inform the Parliament because the concerned law has already been repealed.

[31] The effects of repealing a law have been well explained under the case “ The State of Manipur vs Surjakumar Okram” rendered by the above mentioned Supreme Court of India, especially on page 6, under paragraph 15, whereby the Supreme Court of India held that “the effect of repealing a statute is to obliterate it as completely from the records of Parliament as if it had never been passed; and it must be considered as a law that never existed except for the purpose of those actions which were commenced, prosecuted and concluded whilst it was an existing law. It is a settled legal proposition that whenever an Act is repealed, it must be considered as if it had never existed. Repeal is not a matter of mere form but is of substance. Therefore, on repeal, the earlier provisions stand obliterated/abrogated/wiped out wholly”⁵.

[32] Considering all the elucidations provided under the preceding paragraphs, the Court undoubtedly finds that a law challenged for unconstitutionality should be an existing law, meaning a law which is into force, as sustained by the State Attorneys.

[33] The Court finds that the statements Counsel Hategeka Placide representing Fast Truck Interior and Hardware Ltd which challenged the repealed Law n^o 25/2005 of 04/12/2005 on Tax Procedures because Rwanda Revenue Authority applied to levy a tax amounting to 32,258,138 Frw, are unfounded given that the tax-related decisions are administrative and they can be challenged by an appeal before the Commissioner General as article 30 of the same Law so provides, and in case aggrieved party is not satisfied by such decision, he/she seizes the court.

⁵ *The State of Manipur vs Surjakumar Okram on 1 February, 2022* rendered by the Supreme Court, accessed on <https://indiankanoon.org/doc/118737687/>.

[34] The foregoing elucidations indicate that there is a procedure provided for a taxpayer aggrieved by the article 64 of the aforementioned Law n^o 25/2005 for seeking justice ; Fast Truck Interior and Hardware Ltd had already recourse to the procedure by applying for the waiver of the tax, such procedure is different from challenging a non-existing law for its unconstitutionality while and it has been obliterated from the legal books as above explained.

[35] Basing on the foregoing elucidations, the Court finds that the claim filed by Fast Truck Interior and Hardware Ltd challenging the article 64 of the above mentioned Law n^o 25/2005 for its unconstitutionality, is not admitted as the law no longer exists.

III. DECISION OF THE COURT

[36] Holds that the objection raised by the Government of Rwanda has merit.

[37] Holds that the claim filed by Fast Truck Interior and Hardware Ltd seeking to confirm that the article 64 of the Law n^o 25/2005 on Tax Procedures is contrary to articles 29 and 61 of the Constitution, is not admitted for examination.

[38] Decides that the hearing of the case RCOMA 00443/2021/ HCC before the Commercial High Court shall be resumed.