

SOUTH AFRICA / JUDGMENT

Minister of Agriculture, Forestry and Fisheries v National Society for the Prevention of Cruelty to Animals (CCT186/16) [2016] ZACC 26; 2016 (11) BCLR 1419 (CC) (25 August 2016)

[2016] ZACC 26

COURT

Constitutional Court

BEFORE

Mogoeng, Nkabinde, Cameron, Froneman, Jafta,
Khampepe, Madlanga, Mbha, Mhlantla, Musi, Zondo

CASE / FILE NUMBER

CCT 186/16

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CONSTITUTIONAL
COURT OF SOUTH AFRICA

Case

CCT 186/16

In the matter

between:

MINISTER OF
AGRICULTURE, FORESTRY
AND
FISHERIES Applicant
and
NATIONAL SOCIETY
FOR THE
PREVENTION Respondent
OF CRUELTY TO
ANIMALS

Neutral citation:

Minister of Agriculture, Forestry and Fisheries v National Society
for the Prevention of Cruelty to Animals [2016] ZACC 26

Coram:

Mogoeng CJ, Nkabinde ADCJ, Cameron J, Froneman J, Jafta J,
Khampepe J, Madlanga J, Mbha AJ, Mhlantla J, Musi AJ and Zondo
J
Judgment: The
Court (unanimous)

Decided on:

25 August 2016

Summary:	Extension of period of suspension of order of invalidity — factors to consider when granting an extension — caution to be exercised in continually extending court orders — urgency and potential prejudice established ORDER The following order
is made:	1. Paragraph 2 of the order of this Court dated 11 July 2013 in <i>National Society for the Prevention of Cruelty to Animals v Minister of Agriculture, Forestry and Fisheries and Others</i> [2013] ZACC 26; 2013 (5) SA 571 (CC); 2013 (10) BCLR 1159 (CC) is varied so that the period of suspension of the order of invalidity is extended from 27 August 2016 until 31 July 2017. 2. There is no order as to costs.

JUDGMENT

THE COURT (Mogoeng CJ, Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mbha AJ, Mhlantla J, Musi AJ and Zondo J concurring):

Introduction

- [1] The applicant, the Minister of Agriculture, Forestry and Fisheries (Minister), brings urgent proceedings requesting a third extension of a suspended order of invalidity made by this Court on 11 July 2013.[1] The current application was lodged on 4 August 2016. The suspension of the order of invalidity lapses on Saturday, 27 August 2016.[2] The Minister urges the Court to further extend the suspension for six months or for a longer period this Court considers reasonable.[3] As was the case in *NSPCA III*, the respondent, the National Society for the Prevention of Cruelty to Animals (NSPCA), has neither opposed nor responded to the application.[4]

Background

- [2] In a judgment handed down on 15 November 2012, the North Gauteng High Court, Pretoria (High Court)[5] declared sections 2 and 3 of the Performing Animals Protection Act[6] (Act) unconstitutional.[7] The Court held that these provisions, insofar as they required a Magistrate to determine applications and issue licenses for the training, exhibition or use of animals, were constitutionally invalid as they unjustifiably infringed the doctrine of separation of powers.[8]
- [3] The High Court held that the function of issuing licenses and certificates, as envisaged in sections 2 and 3 of the Act, were “executive or administrative functions which have nothing to do with the core judicial functions of Magistrates”. [9] The Court emphasised that legislation “that tends to undermine or confuse separation of powers” is inconsistent with the Constitution.[10] Since section 165(1) of the Constitution vests judicial authority only in the courts,[11] sections 2 and 3 of the Act were invalid insofar as they threatened the

independence of the Judiciary by obliging Magistrates to perform executive or administrative functions.[12]

- [4] This Court confirmed the declaration of invalidity on 11 July 2013.[13] In fashioning a remedy, the Court suspended the order of invalidity for 18 months from the date of handing down the judgment to allow Parliament an opportunity to remedy the constitutional defects (July 2013 order).[14] Before the 18 months expired, the Minister successfully applied urgently for an extension.[15] In an order issued on 27 November 2014, this Court amended paragraph 2 of the July 2013 order to extend the period of suspension of the order of invalidity until 12 July 2015 (November 2014 order).[16]
- [5] On 6 July 2015, the Minister urgently applied for a further extension. This was because it was practically impossible to meet the new deadline the November 2014 order set. The Minister then requested that the order of invalidity be further suspended from 12 July 2015 until 12 July 2016. Following a temporary suspension until 28 August 2015, this Court granted a further extension until 27 August 2016.[17]

The August 2016 application

- [6] The Minister now requests a third extension. The November 2014 application was lodged about two months before the suspension expired. The current application was filed a mere three weeks before the deadline expired. The July 2015 application was instituted only one week before expiry. Whether this Court should grant a third extension depends on, amongst other things, the reasons for the delay in failing to remedy the constitutional defects of the Act,[18] as well as the fairness of and need for a further extension.[19]

Reasons for the delay

- [7] The Minister[20] sets out the various steps undertaken in the process of amending the offending legislation. He then identifies the fundamental

reason for the delay in remedying the statute – when the National Council of Provinces (NCOP) voted on the Performing Animals

Protection Amendment Bill (Bill), insufficient delegates were present. So the necessary quorum was lacking.

- [8] Section 75(2) of the Constitution provides:

“When the National Council of Provinces votes on a question in terms of this section, section 65 does not apply; instead—

- (a) each delegate in a provincial delegation has one vote;
- (b) at least one third of the delegates must be present before a vote may be taken on the question; and

- (c) the question is decided by a majority of the votes cast, but if there is an equal number of votes on each side of the question, the delegate presiding must cast a deciding vote.”

In a letter dated 7 June 2016 addressed to the President, the Leader of the Opposition in the NCOP, Honourable Elza van Lingen MP, noted that there were fewer than 30 delegates present on 25 May 2016 when the NCOP plenary voted on the Bill. This was fewer than the required quorum of one-third of the NCOP’s ninety members. Since this was so, the President was requested not to assent to the Bill. This was because “[a]ny further steps taken to pass the Bill into law without it first being referred back to the NCOP to be legitimately voted on would amount to an abuse of process and would fundamentally violate the Constitution”.

- [9] On 5 July 2016, the President in response wrote to the Speaker of the National Assembly (Speaker) seeking advice as to the appropriate course of action to follow to cure the potential unconstitutionality arising from the NCOP vote. At the time the current application was filed, there had been no response to the President’s letter. The President then addressed a further letter to the Speaker on 8 August 2016. Here, he expressed the view that the procedure in section 75(2) of the Constitution and Rule 61 of the NCOP’s Rules was not adhered to by the NCOP.[21] The President therefore decided not to assent to the Bill, but rather to refer it back to the National Assembly.
- [10] The Minister states that the time required to cure the defect in the voting of the Bill is not certain. What is certain is that additional time is required.

Urgency

- [11] In grounding urgency, the Minister submits that, although it was apparent from as early as 11 July 2016 that a further extension was required, certain internal protocols had to be met before this application could be lodged. The Minister seems to accept that the explanation is rather weak. He ought to have been aware from as early as 7 June 2016 – when the petition was addressed to the President – or, at the very latest, 5 July 2016 – when the President wrote to the Speaker – that a further extension would be required. Had immediate action been taken, both adherence to internal protocols and a timely application would have resulted.
- [12] The late filing of the application is regrettable. Even so, the matter is plainly urgent – the suspension of the order of invalidity is due to lapse on 27 August 2016.

Principles

- [13] In *Zondi*,[22] this Court reiterated that the power of this Court to vary an order must be determined with reference to section 172(1) of the

Constitution, which includes the power to make an order that is “just and equitable”. [23] Relying on section 172(1) of the Constitution, Ngcobo J held that—

“this Court not only has the power but also has the obligation under its just and equitable jurisdiction to vary that period of suspension and the conditions attached to the suspension, if necessary, to reflect the justice and equity required by the facts of the case.”[24]

[14] The power to vary a suspended order of invalidity thus flows from the Constitution and “falls to be dealt with under [this] Court’s power to make an order that is just and equitable.”[25] Since new facts and circumstances may emerge during a period of suspension, this Court retains the power (during the suspended

period) to vary both the duration of the suspension and any conditions attaching thereto.[26]

[15] In *Teddy Bear Clinic II*,[27] this Court emphasised that a just and equitable remedy includes an order suspending a declaration of invalidity to allow Parliament an opportunity to cure the constitutional deficiencies. Nkabinde J pointed out that “when Parliament fails to correct the defects during the period of suspension, an application requesting an extension must be made before the suspension period expires”.[28]

[16] What is just and equitable depends on the facts of each case.[29] In determining this, several factors must be taken into account: the sufficiency of the explanation provided for failing to comply with the original (or extended) period of suspension; the potential prejudice that is likely to follow if an extension is or is not granted; the prospects of curing the constitutional defects within the new deadline; the need to bring finality to litigation; and the need to promote the constitutional project and ensure effective state administration.[30]

[17] A careful balancing of the relevant factors is required,[31] bearing in mind that the discretionary power of a court to vary its orders should be “very sparingly exercised, for public policy demands that the principle of finality in litigation should generally be preserved rather than eroded”.[32] In particular, an extension cannot just be had for the asking.[33]

Application of the factors

[18] Is the explanation advanced by the Minister for the delay legitimate? Yes. The lack of quorum in the NCOP when the Bill was voted on is not the Minister’s fault – nor something he could have foreseen or anticipated. And the constitutional issue is serious, since the inquorate plenary in the NCOP could invalidate the Bill in its entirety. Indeed, as is apparent from the petition addressed to the President, should the President assent to the Bill before these issues are resolved, this might be in violation of section 75(2) of the Constitution and may render the Bill unconstitutional.

[19] And, as we indicated last time, public order and state administration will be disrupted if a further extension is not granted. This is because, as the Minister submits, absent sections 2 and 3 of the Act, no authority will be vested with the power to issue or renew licenses.
Orderly

state administration will be severely implicated if no authority is able to issue licenses in relation to these provisions. This will lead to prejudice on the part of both potential applicants and existing license holders.[34] It is no doubt for this reason that the NSPCA did not oppose the previous extension applications, and does not oppose this.

[20] The potential prejudice (if any) if the period of suspension is further extended is far less than the prejudice that would result if the further extension were denied. This is buttressed by the fact that this Court left intact sections 2 and 3 of the Act pending Parliament's intervention to cure the unconstitutionality of these provisions.[35]

[21] Of course, the need to attain finality in the process cannot be gainsaid. As emphasised in *Zondi*, it is "an important consideration too. It engenders confidence in the rule of law and, ultimately, in the judicial process." [36] Counter-balancing this is the need to promote the constitutional project. This includes allowing Parliament an opportunity to cure legislative deficiencies in a constitutionally compliant manner.[37]

Just and equitable to grant a further extension

[22] In *Nyathi*, [38] this Court noted that the state is under a constitutional obligation to pass legislation within specific time frames.[39] In emphasising that extensions of orders of invalidity should not be granted lightly, Mokgoro J invoked the founding values of constitutional supremacy and the rule of law:[40]

"One of the fundamental values in the Constitution gives express recognition to South Africa as a constitutional democracy founded on the supremacy of the Constitution and the rule of law. The Constitution also provides that no person or organ of State shall interfere with the functioning of the courts. It stipulates that organs of State have a duty to assist and protect the

courts to ensure, amongst other imperatives, the dignity and effectiveness of the courts. Similarly, the Constitution provides that an order or decision by a court binds all persons to whom and organs of State to which it applies. The Constitution further places an obligation upon the public administration, which encompasses a value-based public service, to be accountable." [41]

[23] Bearing this in mind, the rule of law requires adherence to and observance of a court order by "all persons to whom and organs of state to which it applies". [42] Caution must be exercised in continually granting extensions to suspended orders of invalidity.[43] We underscore that extensions will not be granted simply as a matter of course or at the last minute. [44] As Zondo J has stated, "an order extending the period of suspension of the operation of an order of invalidity cannot be had for the asking".[45]

[24] But there is a good explanation for the unusual number of extensions here, as well as for this further extension. It is necessary, and just and equitable, to grant the Minister additional time to remedy the impugned provisions.

[25] The Minister asked this Court to extend the period of suspension for six months or for a period of time it considers reasonable. To ensure that Parliament has enough time to remedy the defects in the NCOP voting, it seems appropriate to extend the period of suspension of the order of invalidity to 31 July 2017.

[26] Given that this is the third extension (and more than three years since the original declaration of invalidity), it need hardly be said that further requests may encounter more stormy waters.

Order

[27] The following order is made:

1. Paragraph 2 of the order of this Court on 11 July 2013 in *National Society for the Prevention of Cruelty to Animals v Minister of Agriculture, Forestry and Fisheries and Others* [2013] ZACC 26; 2013 (5) SA 571 (CC); 2013 (10) BCLR 1159 (CC) is varied so that the period of suspension of the order of invalidity is extended from 27 August 2016 until 31 July 2017.

For the Applicant: The State Attorney.

- [1] *NSPCA v Minister of Agriculture, Forestry and Fisheries, and Others* [2013] ZACC 26; 2013 (5) SA 571 (CC); 2013 (10) BCLR 1159 (CC) (NSPCA II) at para 43.

- [2] *Minister of Agriculture, Forestry and Fisheries v National Society for the Prevention of Cruelty to Animals* [2015] ZACC 27; 2015 (11) BCLR 1387 (CC) (NSPCA III) at para 14.

- [3] The Minister requested an extension until 31 October 2016, alternatively for six months or for such longer period as this Court considers reasonable.

- [4] See para 1 of NSPCA III above n 2 which states that the respondent did not oppose the application requesting the second extension of the suspended order

of invalidity.

- [5] Now known as the High Court of South Africa, Gauteng Division, Pretoria.

- [6] 24 of 1935.

- [7] *National Society for the Prevention of Cruelty to Animals v Minister of Agriculture, Forestry and Fisheries and Others* [2012] ZAGPPHC 329 (NSPCA I) at para 46.

- [8] *Id* at para 27. Legodi J declared sections 2 and 3 of the Act constitutionally invalid insofar as they required a Magistrate to issue licenses for the exhibiting or training of performing animals or for the use of dogs in safeguarding. The declaration of constitution invalidity was said to have no effect until confirmed by the Constitutional Court.

- [9] *Id* at para 27.

- [10] *Id* at para 20.

- [11] Section 165(1) of the Constitution provides: “The judicial authority of the Republic is vested in the courts.”
- [12] NSPCA I above n 7 at paras 19 and 27.
- [13] NSPCA II above n 1 at para 43.
- [14] Id.
- [15] NSPCA III above n 2 at para 4.
- [16] After considering the request for a further six month extension of the suspended order, the Court concluded that sound reasons existed for granting the extension.
- [17] NSPCA III above n 2 at para 14.
- [18] Ex Parte Minister of Social Development and Others [2006] ZACC 3; 2006 (4) SA 309 (CC); 2006 (5) BCLR 604 (CC) (Minister of Social Development) at para 50(g) where Ngcobo J (in a concurring judgment) stated that: “The explanation for failure to correct the constitutional defect within the time limit set out in the court order must be set out fully, candidly, timeously and in a manner that conforms with the Rules of the Court.”
- [18] Ex Parte Minister of Social Development and Others [2006] ZACC 3; 2006 (4) SA 309 (CC); 2006 (5) BCLR 604 (CC) (Minister of Social Development) at para 50(g) where Ngcobo J (in a concurring judgment) stated that:
- “The explanation for failure to correct the constitutional defect within the time limit set out in the court order must be set out fully, candidly, timeously and in a manner that conforms with the Rules of the Court.”*
- [19] NSPCA III above n 2 at para 9 where Zondo J stated that: “If it would be just and equitable to grant the extension, the Court should grant it. If it would be just and equitable to refuse it, the Court should refuse it.”
- [19] NSPCA III above n 2 at para 9 where Zondo J stated that:
- “If it would be just and equitable to grant the extension, the Court should grant it. If it would be just and equitable to refuse it, the Court should refuse it.”*
- [20] The Minister is Mr Senzeni Zokwana.
- [21] Rule 61 of the Rules of the National Council of Provinces 9th Edition (NCOP’s Rules) states:
- “(1) When a question before the Council is to be decided by the votes of individual members and fewer than one third of the members are present when the vote is to be taken, the bells must be rung for three minutes.
- (2) If at least one third are still not present after the bells have been rung, the presiding officer must postpone the decision of the question.”

[21] Rule 61 of the Rules of the National Council of Provinces 9th Edition (NCOP's Rules) states:

“(1) When a question before the Council is to be decided by the votes of individual members and fewer than one third of the members are present when the vote is to be taken, the bells must be rung for three minutes.

(2) If at least one third are still not present after the bells have been rung, the presiding officer must postpone the decision of the question.”

[22] *Zondi v MEC, Traditional and Local Government Affairs, and Others* [2005] ZACC 18; 2006 (3) SA 1 (CC); 2006 (3) BCLR 423 (CC) (Zondi).

[23] Id at para 38. Section 172(1) of the Constitution states: “When deciding a constitutional matter within its power, a court—

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

(b) may make any order that is just and equitable, including—

(i) an order limiting the retrospective effect of the declaration of invalidity; and (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.”

[23] Id at para 38. Section 172(1) of the Constitution states:

“When deciding a constitutional matter within its power, a court—

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

(b) may make any order that is just and equitable, including—

(i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.”

[24] Zondi above n 22 at para 39.

[25] Id at paras 44-6. In *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) (Firestone) at 306F-G, the Court canvassed the common law principles governing a court's authority to vary its orders: “The general principle, now well established in our law, is that, once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter or supplement it. The reason is that it thereupon becomes *functus officio*: its jurisdiction in the case having been fully and finally exercised, its authority over the subject-matter has ceased.”

[25] Id at paras 44-6. In *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) (Firestone) at 306F-G, the Court canvassed the common law principles governing a court's authority to vary its orders:

"The general principle, now well established in our law, is that, once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter or supplement it. The reason is that it thereupon becomes functus officio: its jurisdiction in the case having been fully and finally exercised, its authority over the subject-matter has ceased."

[26] Zondi above n 22 at para 39.

[27] *Acting Speaker of the National Assembly v Teddy Bear Clinic for Abused Children and Another* [2015] ZACC 16; 2015 (10) BCLR 1129 (CC) (Teddy Bear Clinic II).

[28] Id at para 11.

[29] Zondi above n 22 at para 47.

[30] Id. See also *Minister of Social Development* above n 18 at para 50 and *Teddy Bear Clinic II* above n 27 at para 12.

[31] Zondi above n 22 at para 47.

[32] *Firestone* above n 25 at 309A.

[33] *NSCPA III* above n 2 at para 1.

[34] See para 11 of *NSCPA III* above n 2, where Zondo J expressed similar concerns when extending the period of suspension of the order of validity to 27 August 2016.

[35] *NSPCA II* above n 1 at para 41.

[36] Zondi above n 22 at para 64.

[37] Id.

[38] *Minister for Justice and Constitutional Development v Nyathi and Others* [2009] ZACC 29; 2010 (4) SA 567 (CC); 2010 (4) BCLR 293 (CC) (Nyathi).

[39] Id at para 1.

[40] Id at para 28. Section 1(c) of the Constitution provides that: "The Republic of South Africa is one, sovereign, democratic state founded on the following values:

(c) Supremacy of the constitution and the rule of law."

[40] Id at para 28. Section 1(c) of the Constitution provides that:

"The Republic of South Africa is one, sovereign, democratic state founded on the following values:

(c) Supremacy of the constitution and the rule of law."

[41] Nyathi above n 38 at paras 28-9.

[42] Section 165(5) of the Constitution provides: “An order or decision issued by a court binds all persons to whom and organs of state to which it applies.”

[43] NSCPA III above n 2 at para 1.

[44] Minister of Social Development above n 18 at para 50(h), where Ngcobo J stated that “it should not be presumed that an extension of the period will be granted as a matter of course and in the public interest.”

[45] NSPCA III above n 2 at para 1.

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