



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 122/15

In the matter between:

**MINISTER OF AGRICULTURE, FORESTRY
AND FISHERIES**

Applicant

and

**NATIONAL SOCIETY FOR THE
PREVENTION OF CRUELTY TO ANIMALS**

Respondent

Neutral citation: *Minister of Agriculture, Forestry and Fisheries v NSPCA* [2015] ZACC 27

Coram: Mogoeng CJ, Moseneke DCJ, Cameron J, Jafta J, Khampepe J, Madlanga J, Matojane AJ, Nkabinde J, Van der Westhuizen J, Wallis AJ and Zondo J

Judgments: Zondo J

Decided on: 28 August 2015

Summary: Extension of suspension of order of invalidity — depends on what is just and equitable — Court takes into account various factors, including steps taken to comply with original deadline for curing defect — explanation why that period was not enough — Prejudice to the public— Court to be approached timeously — suspension of order of invalidity extended

ORDER

The following order is made:

The order suspending the operation of the order of constitutional invalidity made by this Court on 11 July 2013 concerning sections 2 and 3 of the Performing Animals Protection Act 24 of 1935, as amended, is hereby extended from 28 August 2015 to 27 August 2016.

JUDGMENT

ZONDO J (Mogoeng CJ, Moseneke DCJ, Cameron J, Jafta J, Khampepe J, Madlanga J, Matojane AJ, Nkabinde J, Van der Westhuizen J and Wallis AJ concurring):

Introduction

[1] This is an application by the Minister of Agriculture, Forestry and Fisheries (Minister or applicant) for an order extending the period of suspension of operation of an order of invalidity that was made by this Court on 11 July 2013.¹ This application was launched as an urgent application on 6 July 2015. The suspension was due to lapse on 12 July 2015. After receipt of the application, as a holding measure, we extended the suspension to 28 August 2015. The Chief Justice simultaneously issued directions affording the respondent an opportunity to deliver opposing affidavits, if so advised, and for both the applicant and the respondent to deliver written submissions by fixed dates. The respondent did not deliver any opposing affidavits or written submissions. This being the case, the application must be determined as an unopposed application. I hasten to say that the fact that the application is not opposed

¹ This Court derives its power to make such an order from section 172(1)(b)(ii) of the Constitution.

does not relieve this Court of its obligation to satisfy itself that there is a proper basis for it. This is because an order extending the period of suspension of the operation of an order of invalidity cannot be had for the asking.

Background

[2] The founding affidavit in support of this application was deposed to by Mr Tembile Songabe who is the Director: Veterinary Public Health in the Department of Agriculture, Forestry and Fisheries in the Department's offices in Pretoria (Department). He says he was duly authorised to depose to the affidavit and, in support of this, refers to annexure "A" to his affidavit dated 29 June 2015. Although annexure "A" reveals that the Minister approved that this application be brought to this Court, there is nothing in annexure "A" that shows that Mr Songabe was authorised to depose to the founding affidavit. However, I am prepared to assume that he was duly authorised to do so but simply failed to provide the correct proof of his authorisation. I set out below the background to the matter as it can be gathered from Mr Songabe's affidavit.

[3] On 11 July 2013 this Court made an order confirming a declaratory order previously made by the North Gauteng High Court, Pretoria that sections 2 and 3 of the Performing Animals Protection Act as amended, (PAP Act),² were constitutionally invalid in so far as they relate to the requirement that a Magistrate decide applications for, and issue, licences referred to in those sections. The operation of the order of invalidity was suspended for a period of eighteen months from the date of the handing down of the judgment of this Court to enable Parliament to cure the constitutional defect. The period of eighteen months was to expire on 10 January 2015.

[4] By November 2014 — about two months or so before the expiry of the deadline — it had become clear to the Department that the constitutional defect would not be cured before the deadline. Accordingly, the applicant brought an application in

² 24 of 1935.

this Court asking for an order extending the period of suspension of the operation of the order of invalidity for six months. It is not necessary for present purposes to deal with the reasons advanced at that time why the period of eighteen months had not been adequate for the defect to be cured. It is enough to say that on 27 November 2014 this Court granted an order extending the period of suspension of the operation of the order of invalidity for a further period of six months from 12 January 2015. That period would expire on 12 July 2015. It is to be noted that, when the applicant approached the Court for the first extension, he did so at least two months before the expiry of the period of suspension. When he approached this Court this time, he did so only one week before the extended deadline. It is unacceptable for the applicant to have delayed for so long in bringing this application.

[5] On 10 December 2014 the Cabinet approved the Bill that had been prepared for the purpose of curing the constitutional defect once passed and assented to by the President. On 20 January 2015 the Bill was submitted to the State Law Advisors for “final certification”. On 3 March 2015 the Bill was submitted to Parliament in terms of Parliament’s Joint Rule 159. On the same day the Bill was introduced into the National Assembly under Rule 247(58) and was referred to the relevant Portfolio Committee.

[6] On 12 May 2015 the Portfolio Committee held public hearings on the Bill. On 26 May 2015 the Parliamentary support staff and the Department made presentations to the Portfolio Committee. Whereas the Minister had sought to amend only sections 2 and 3 of the PAP Act, on 5 June 2015 the Portfolio Committee took a resolution that it was necessary to amend other sections as well as a consequence of the proposed amendments. The other sections included sections 4, 5 and 7 of the PAP Act.

[7] Mr Songabe explains that the Portfolio Committee’s resolution means that more time must be allowed for the Portfolio Committee to complete its task on the Bill. He states that the Committee requires the permission of the National Assembly before it can work on amendments of sections in the PAP Act other than the sections

which the Bill was intended to amend when it was introduced into the National Assembly.

[8] He also points out the journey that the Bill must travel before it can be passed by Parliament and ultimately assented to by the President. I do not consider it necessary to set out all those processes in this judgment. It suffices to say that, depending on various factors, the journey can still be protracted. In this regard I mention that Mr Songabe has also pointed out that the Bill was labelled as a section 75 Bill when it was introduced in Parliament.³ He indicates that, as a section 75 Bill, it will also have to be referred to the National Council of Provinces.

Principles governing the extension of suspension orders

[9] The principles governing applications for the extension of the suspension of orders of invalidity have been dealt with in various decisions of this Court.⁴ It is, therefore, not necessary to go into any detailed discussion of those principles. It suffices to say that the Court will consider various factors and determine what would be just and equitable. 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. One of the factors is an explanation as to why the period that was previously granted by the Court was not adequate to ensure that the constitutional defect was cured. Another is whether the applicant acted diligently in taking steps aimed at ensuring that the defect was cured within the period fixed by the Court. The Court is also required to consider what the consequences to the public, Government or Parliament will be if the application for an extension is dismissed.

³ That is section 75 of the Constitution. A section 75 Bill is a Bill other than a Bill to which the procedure set out in section 74 or 76 applies. Section 74 refers to Bills amending the Constitution. Section 76 deals with ordinary Bills affecting provinces.

⁴ See, for example: *Acting Speaker of the National Assembly v Teddy Bear Clinic for Abused Children and Another* [2015] ZACC 16; *Minister of Transport and Another v Mvumvu and Others* [2012] ZACC 20; 2012 (12) BCLR 1340 (CC); and *Ex Parte Minister of Social Development and Others* [2006] ZACC 3; 2006 (4) SA 309 (CC); 2006 (5) BCLR 604 (CC).

Is it just and equitable to extend the suspension?

[10] When the applicant first approached this Court for an extension, an explanation was given as to what had been done between the time when the order of invalidity was made and the time when the application was launched. For purposes of the present application, it is not necessary to refer to the steps that were taken during that period. The steps that are relevant for present purposes are the steps that were taken after the grant of the first extension in November 2014 to the date when the present application was launched. What has happened from November 2014 to the date of the launch of this application is set out in paragraphs [5] to [8] above and need not be repeated. I am unable to say that what happened during those months reveals that the applicant did not act diligently in pursuit of compliance with the order of this Court. For that reason, there is nothing in what happened during that period that counts against the grant of the extension order.

[11] Another factor that must be taken into account in determining whether an application for an extension of the period of suspension of an order of invalidity should be granted are the possible consequences of a dismissal of such an application. In the present case Mr Songabe says that, if the suspension is not extended, the PAP Act will become unworkable. He also points out that it will not be possible to issue new licences in terms of the PAP Act. The effect will be that those employing animals in their business operations, such as security companies using guard dogs, will be required to have a licence but there will be no practical mechanism for them to obtain one. He states that members of the public who may wish to renew their licences will also not be able to renew them. These consequences weigh heavily with me because, as far as possible, the public should be protected from such consequences as they are not to blame for any delays in the processing of the Bill. A failure to extend the suspension will result in an untenable situation.

[12] I am satisfied that it would be just and equitable for this Court to extend the suspension of the operation of the order of invalidity to give the applicant and

Parliament more time to finalise the Bill, pass it into Act and have it assented to by the President.

[13] As to the period by which the suspension should be extended, the applicant has asked for 12 months or such period as this Court may consider reasonable. This Court initially gave Parliament 18 months within which to cure the defect. Then it was asked to add six months which it did. Now the Court is asked to add a further 12 months. If this Court extends the period of suspension by 12 months, by the end of that period Parliament will have had three years since the commencement of the suspension period to cure the defect. In my view that will have been more than enough time for the Bill to be passed into law and assented to by the President if all concerned give the matter the urgent attention it deserves. The period of suspension will be extended by 12 months. In granting this extension, it need hardly be said that the Court takes the Minister at his word regarding the period finally required to pass the Bill into law.

Order

[14] The following order is made:

The order suspending the operation of the order of constitutional invalidity made by this Court on 11 July 2013 concerning sections 2 and 3 of the Performing Animals Protection Act 24 of 1935, as amended, is hereby extended from 28 August 2015 to 27 August 2016.

For the Applicant:

G C Muller SC and M S
Mangolele instructed by the
State Attorney.