IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 17/95
CCT 15/97

THE MINISTER OF JUSTICE — Applicant

versus

NICKO NTULI — Respondent

Heard on: 22 May 1997
Decided on: 5 June 1997

JUDGMENT

CHASKALSON P:

[1] Section 309(4)(a) of the Criminal Procedure Act 51 of 1977 read with section 305 prohibits a person who has been convicted by a lower court of an offence and is undergoing imprisonment for that or any other offence from prosecuting in person any appeal relating to such conviction:

> "unless a judge of the Provincial or Local Division having jurisdiction has certified that there are reasonable grounds for [the appeal]".

[2] On 8 December 1995 this Court held in the matter of *S v Ntuli*[1] that the provisions of section 309(4)(a) were inconsistent with sections 25(3)(h) and 8(1) of the interim

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[1] 1996 (1) SA 1207 (CC); 1996 (1) BCLR 141 (CC).

Constitution[2] and made an order in the following terms:

> "Section 309(4)(a) of the Criminal Procedure Act is declared to be invalid on the score of its inconsistency with the Constitution. Parliament is required to remedy the defect by 30 April 1997, with the result that our declaration of invalidity is suspended until that happens or that date arrives, whichever occurs earlier, when it will come into force."[3]

[3] On 25 April 1997 – five days before the date specified in the order the State Attorney, acting on behalf of the Minister of Justice, lodged a document with the Registrar of this Court which purported to be a Notice of Motion in terms of rule 17 stating that the Minister intended to make application to this Court at 10h00 on 29 April 1997 for an order in the following terms:

> "1) Dispensing with the forms and services prescribed by the Rules of Court and directing that this matter be heard as one of urgency in terms of the provisions of Rule 17(1).
> 2) Requesting an extension in respect of the date of 30 April 1997 as determined by the Honourable Court on 8 December 1995 to a date not later than the final adjournment of Parliament in 1998.
> 3) Directing the respondent to pay the costs of this application only in the event of him opposing it.

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2 Section 25 (3) of the interim Constitution provides that: " Every accused person shall have right to a fair trial, which shall include the right ...
(h) to have recourse by way of appeal or review to a higher court than the court of first instance".
Section 8(1) reads "Every person shall have the right to equality before the law and to equal protection of the law".

3 Para 30 of the judgment.

4) Further and/or alternative relief. "

Mr Nicko Ntuli was cited as the respondent in the proceedings and the Notice of Motion was given the case number under which *S v Ntuli* had been dealt with. An affidavit deposed to by Mr Bassett, the Director of the parliamentary legislation section of the Department of Justice, to which I will refer later in this judgment, was relied upon in support of the application.

[4] The procedure followed by the State Attorney was not in accordance with the requirements of rule 17. That rule provides that direct access to this Court will be allowed only in exceptional circumstances:

> "Where the matter is of such urgency, or otherwise of such public importance, that the delay necessitated by the use of the ordinary procedures would prejudice the public interest or prejudice the ends of justice and good government."

The rule requires such application to be

> "lodged with the registrar [of the Constitutional Court] and served on all parties with a direct or substantial interest in the relief claimed."

and provides that

> "[u]pon receipt of the application, the matter shall be disposed of in accordance with directions given by the President [of the Court]."

In terms of the rule such directions may include a direction that the matter is not a proper one for the exercise of the special power of the Court to permit direct access, and may also include directions putting the applicant and other interested parties on terms to submit written argument in support of their contentions within a specified period and in addition to allow such parties to address oral argument to the Court.

[5] Rule 17 does not permit the applicant to set the matter down for hearing. The applicant must first obtain leave from the President of the Court to approach the Court by way of direct access. If this is granted the matter will then be set down by the President of the Court for a date which will be fixed with due regard to the Court roll and the time necessary for the preparation of arguments by the parties to the dispute.

[6] The procedure followed by the State Attorney was defective in another respect. Rule 2 of the Rules of this Court specifies the Court terms and rule 2(2) provides that "a case may be heard out of term if the President so directs. " The first term prescribed by rule 2 terminates on 31 March and the next term commences on 1 May. The Notice of Motion not only ignored the procedures prescribed by rule 17, but purported to set the application down for hearing out of term. This was done without consultation with the President of the Court and without any direction from him.

[7] The 25th of April was a Friday. The State Attorney purported to set down the matter for hearing on the Tuesday after the intervening weekend. The only party given

notice of the application was Mr Nicko Ntuli, who had no interest in the outcome since his case had already been disposed of in terms of the order made by the court below in *S v Ntuli* and would not have been affected by any order which might be made in consequence of the Minister's application. In any event, the application had not been served on him, but had been served on the Legal Resources Centre which had appeared on his behalf when the question of law was referred to this Court for determination. There was nothing to indicate that it had authority to represent him in new proceedings. The Attorney General who had participated in the previous proceedings was not given notice of the application nor was he made a party to it.

[8] On 25 April when the application was lodged with the Registrar, the President of the Court was in Cape Town attending a meeting of the Judicial Service Commission. He was advised that the application had been lodged and said that he would deal with it on his return to the seat of the Court during the weekend. It was not possible to convene a Court of eight members to deal with the matter on 29 April. Nor would it have been appropriate to have dealt with the matter on 29 April even if eight members had been available. The Notice of Motion was defective. The founding affidavit relied upon in support of the application was clearly inadequate and failed to explain why the defect in the legislation had not been cured during the 17 months allowed for that purpose by the Court. It also failed to explain why the Court had been approached out of term and only five days before the expiry of the specified period, when it must have been abundantly clear to the Department for some time that any legislation necessary to cure the defect

would not be passed before the expiry of the specified period. Apart from these defects in the papers, the question raised was one of importance which called for detailed argument in respect of the powers of the Court and its competence to grant the relief sought on behalf of the Minister.

[9] The legal representatives of the Minister were informed that the matter would not be dealt with on 29 April and that directions would be given by the President of the Court as to how the matter was to be disposed of. The President took the view that argument on both sides of the case would be necessary in view of the legal issues raised by the application, and that counsel should be appointed to assist the Court in this regard. At the request of the Court the Legal Resources Centre, which had represented Mr Ntuli in the earlier proceedings, undertook to present the necessary additional argument to the Court.

[10] Directions were given as to the issues on which argument would be required. They were the applicability of rule 17, whether the Attorney General should have been cited as a party to the application, whether the Court has the power to extend the period of suspension prescribed by its order, and if it did, whether good cause to exercise such power had been established. The applicant was put on terms to lodge written argument with the Registrar by 12 May and the Legal Resources Centre to lodge argument by 19 May. The matter was set down for hearing on 22 May 1997 .

[11] On 12 May the applicant sought leave to lodge supplementary affidavits by the Minister of Justice and Mr Bassett. These affidavits, running to over 100 pages,

contained an apology for the delay in dealing with the matter and attempted to explain the reasons for the delay, and to show why it was necessary in the interest of justice and good government that the period of suspension of the order be extended. Subsequently the applicant sought leave to amend the Notice of Motion so as to substitute for the second prayer, a prayer in the following terms:

> "The declaration of invalidity of section 309(4)(a) of the Criminal Procedure Act, No 51 of 1977, made by this Court in case number CCT 17/95 on 8 December 1995, is suspended as from the date of this judgment until Parliament remedies the defect in the said section 309(4)(a) or 28 November 1998 arrives, whichever occurs earlier, when it will come into force."

[12] Shortly before the date fixed for the hearing the Human Rights Commission lodged an application to intervene in the proceedings as an *amicus curiae*. It indicated that it wished to oppose the application and that it would be represented by the Legal Resources Centre. The Human Rights Commission is established under the Constitution and its functions include the promotion of respect for and the protection of human rights and the taking of steps to secure appropriate redress where human rights have been violated.[4] The Minister's application raised issues relevant to the constitutional duties of the Human Rights Commission. It therefore had an interest in the outcome of the proceedings, whereas Mr Ntuli had none. In the circumstances it was decided that although there was nothing to indicate that the argument for the Human Rights Commission would differ from that to be advanced at the request of the Court, the Human Rights Commission had

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[4] The important role of the Human Rights Commission is referred to by Ackermann J in paragraph [8] of his judgment in *Fose v The Minister of Safety and Security* (case CCT 14/96 as yet unreported).

an interest in the proceedings and should be admitted as an *amicus*.

[13] The Court convened to deal with the application was not composed of exactly the same judges as those who had decided *S v Ntuli*. Counsel for the parties were asked to consider whether there was any reason why a Court composed partly of different members to those who had participated in the decision in *S v Ntuli* should not be convened to deal with the Minister's application. Both sets of counsel submitted, in my view correctly, that this would be competent. Although the application by the Minister had been lodged by the State Attorney under case number 17/95 – the number allocated to the matter of *S v Ntuli* – it was in fact a new substantive application brought in terms of the 1996 Constitution and the amended Notice of Motion seeking relief from the date of the judgment in this matter made this clear. The order made by this Court on 8 December 1995 was final both in form and in substance. It disposed of the only issue referred to the Court – the validity of section 309(4)(a) – and did so in a manner which left nothing to be dealt with or decided at a later date. It was not suggested by the Minister that there had been an error in the formulation of the order made on 8 December 1995; his case was that circumstances had arisen since then which made it necessary for further time to be given to permit the defect to be cured. The application was brought and argued on this basis. In the circumstances the Court, as convened, is competent to deal with the matter.[5] We were advised by counsel that the Attorney General had received notice of the application and

[5] Although the issue of the composition of the court does not seem to have been raised in either case, the unsuccessful applications to vary orders of court in *Firestone South Africa (Pty) Ltd v Gentiruco AG* 1977 SA (4) 298 (A) and *First National Bank of South Africa Ltd v Jurgens & Others* 1993 (1) SA 245(W) were decided by courts differently composed to the courts which had made the orders.

did not wish to intervene or participate in the proceedings. The matter is an appropriate matter to be heard under rule 17.

[14] In his affidavit requesting an extension of the period of suspension Mr Bassett says: "As already pointed out, the consultative process initiated as a result of the order of this Court of 8 December 1995 is not yet completed". The affidavit reveals, however, that the process has barely commenced and that it is only comparatively recently that anything constructive has been done in response to this Court's order.

[15] The judgment in *S v Ntuli* was delivered on 8 December 1995. For reasons that are not explained by Mr Bassett in his affidavit the judgment was apparently not brought to the attention of the Department of Justice until 7 February 1996. It evoked no response other than an instruction to the State Attorney on 1 March 1996 to close his file. Some time in May or June 1996 a colleague, who had read the judgment in the South African Law Reports, drew Mr Bassett's attention to the order which had been made. As a result of this apparently casual discussion, Mr Bassett was alerted to the decision but nothing seems to have been done at that stage to respond to the order that had been made. Some time later Mr Bassett referred the matter to a consultant who had been appointed to assist the Parliamentary legislation division of the Department of Justice to cope with what Mr Bassett described in his first affidavit as an "onerous legislative programme for 1996 and other pressing commitments flowing from the Constitution". The consultant was only appointed on 9 September 1996, which means that the first significant response by the

Department of Justice to this Court's order of 8 December 1995 was made only nine months after the order was made.

[16] The consultant seems to have acted promptly, and to have compiled a written report dealing with the matter on 19 September 1996. His recommendation was that the offending provisions of the Criminal Procedure Act should be repealed, and consideration should be given to amending the legal aid scheme to make provision for legal aid to be provided in appeals in which such assistance was warranted.

[17] This report was not taken further until 11 November 1996 when there was a discussion between the consultant and one of the Chief Directors of the Department. This led to amendments being made to the memorandum, which was apparently submitted to the Minister during the second half of December 1996. This was approximately one year after the Court had made its order. This seems to have been the first occasion on which the matter was brought to the attention of the Minister.

[18] On 7 January 1997 the Minister approved the recommendations made in the departmental memorandum, and also suggested that consideration be given to a constitutional amendment to separate the right to appeal from the right to a fair trial.

[19] On 22 January 1997 the Department decided to consult the judiciary, and other institutions in the legal profession on the matter. It did so and received various responses

which are referred to in a departmental memorandum dated 5 March 1997. What was clearly of concern to the Department was that most of the judges indicated that their courts would not be able to cope with the additional work if an unrestricted right of appeal was allowed to all prisoners who had been convicted by magistrates. The memorandum, after referring to this, recommended that:

> "... [a]pplication should be made timeously to the Constitutional Court for the extension of the cut-off date of 30 April 1997 for legislation remedying the unconstitutionality of sections 309(4)(a) and 305 of the Criminal Procedure Act, 1977."

[20] It is not clear when this memorandum was placed before the Minister, or when a firm decision was taken to approach the Court, though it appears from one of the documents attached to Mr Bassett`s second affidavit that the instruction was probably given on 17 March 1997. At this stage the file was mislaid in the Department, and Mr Bassett says that he could not find it. It was ultimately found by an official who had been overseas when Mr Bassett was searching for the documents. Ultimately on 22 April 1997, eight days before the expiry of the 17 month period, the State Attorney was instructed to proceed with the application. Counsel was retained on 24 April and on the following day the application was lodged in the circumstances described earlier in this judgment. It was supported by a short affidavit made by Mr Bassett, dealing somewhat cursorily with the history of the matter since 8 December 1995.

[21] This then is the background to the application. The questions which have to be considered are whether a court has the power to vary a final order made by it in a

constitutional matter, and if so, whether it is a power which should be exercised in the circumstances of this case.

[22] The general principles of the common law applicable to the variation of orders of court were summarised by Trollip JA in *Firestone South Africa (Pty) Ltd v Genticuro AG*[6] as follows:

> "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." (citation omitted)

Certain exceptions to this general principle have been recognised and are referred to in the *Firestone* judgment.[7] They are variations in a judgment or order which are necessary to explain ambiguities, to correct errors of expression, to deal with accessory or consequential matters which were "overlooked or inadvertently omitted", and to correct orders for costs made without having heard argument thereon.

[23] Trollip JA was prepared to assume in the *Firestone* case that the list of exceptions might not be exhaustive and that a court might have a discretionary power to vary its orders in other appropriate cases. He stressed, however, that the

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6 1977 (4) SA 298 (A) at 306F–G.

7 Id at 306G – 308A.

"... assumed discretionary power is obviously one that should be very sparingly exercised, for public policy demands that the principle of finality in litigation should generally be preserved rather than eroded ...".[8]

[8] Id at 309A.

[24] Counsel for the Minister contended that the powers of a court to vary an order made in a constitutional matter are not subject to the limitations of the common law. They depend, so it was argued, on the provisions of the Constitution[9] which in section 172(1) provides:

> "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."

Counsel relied in the first instance on the specific power in section 172(1)(b)(ii) to suspend a declaration of invalidity "for any period and on any conditions". This power, he contended, was not linked in time to the making of the order of invalidity and could be exercised subsequent to the making of such order.

[25] In my view sub-paragraphs (a) and (b) of section 172(1) should not be read disjunctively so as to permit a court to order that a declaration of invalidity may be suspended in different proceedings to those in which the declaration of invalidity is made. They should rather be read together to mean that when a court declares a statutory provision inconsistent with the Constitution to be invalid, as it is required to do, it may

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9 Act 108 of 1996.

also suspend that order if there are good reasons for doing so.

[26] The construction suggested by counsel for the Minister would enable a court to revive a statute which it had previously declared to be invalid. If such an unusual power had been intended I would have thought that it would be expressed in language much clearer than that which has been used, and that there would at least be some indication of the circumstances which would have to exist to justify the exercise of the power. As appears from what is said later in this judgment, however, there is no need to decide this question, which can be left open.

[27] Reliance was also placed on the general power set out in section 172(1)(b) to "make any order that is just and equitable", and on the provisions of section 173 of the Constitution which provides:

> "The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

It was contended that if the common law governs the power of a court to vary an order made in a constitutional matter, section 173 permits the law to be developed to meet the exigencies of constitutional adjudication, and in particular the special case of orders declaring laws to be invalid. If, however, the general power contained in section 172(1)(b) applies, and if it would be "just and equitable" in an appropriate case to do so, a court would have the power to order the extension of the period of suspension made in a previous order.

[28] Counsel for the Minister pointed out that an order declaring provisions of a statute to be invalid is not limited in its application to the parties to the suit, but is of general application. It may be necessary, so the argument went, for such an order to be varied in the interests of justice and good government particularly where the full facts were not placed before a court at the time of the hearing, and the implications of the order for persons who were not represented at the hearing might not have been taken into account. It is therefore implicit in any order of suspension that the period of suspension can be extended if circumstances change or if the full implications of the order made only become apparent at some future time.

[29] The principle of finality in litigation which underlies the common law rules for the variation of judgments and orders is clearly relevant to constitutional matters. There must be an end to litigation and it would be intolerable and could lead to great uncertainty if courts could be approached to reconsider final orders made in judgments declaring the provisions of a particular statute to be invalid.

[30] In the view that I take of this matter, however, it is not necessary to decide whether a court is free to extend the period of suspension previously fixed in a final order declaring a provision of a statute to be invalid. For the purposes of this judgment I am prepared to assume that in an appropriate case an order for the suspension of the invalidity of the provisions of a statute may subsequently be varied by a court for good cause. But if this is so, such a power, like the discretionary powers assumed in the

Firestone case, would be one that "should be very sparingly exercised". In my view the present case is not one in which the exercise of such a power would be warranted.

[31] An application to vary an order declaring a provision of a statute to be invalid is either a constitutional matter or an issue connected with a decision on a constitutional matter and as such is within the jurisdiction of this Court.[10] Whether such an application falls to be dealt with under the Court's power to make an order that is "just and equitable" or under its power to "develop the common law, taking into account the interests of justice", similar considerations will be involved. An order which is not in the interests of justice is not likely to meet the just and equitable requirement; and ordinarily, what is just and equitable, will be in the interests of justice.

[32] The interim Constitution came into force on 27 April 1994. At the heart of the Constitution was a commitment to respect and uphold fundamental rights enshrined in Chapter 3. That commitment is affirmed and reinforced in the 1996 Constitution which records in its preamble that one of the goals of the Constitution is to establish a society based on the recognition of fundamental human rights. Section 1 of the 1996 Constitution is to the same effect. It identifies the values on which the Republic of South Africa has been founded as being:

> "(a) Human dignity, the achievement of equality and the advancement of human rights

[10] Section 167(3)(b) and (c) of the 1996 Constitution.

and freedoms.

(b) Non-racialism and non-sexism.

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

(d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."

The importance of these values is recognised by section 74 of this Constitution which entrenches section 1 more firmly than any other provision of the Constitution. It provides:

"Section 1 and this subsection may be amended by a Bill passed by –

(a) the National Assembly, with a supporting vote of at least 75 per cent of its members; and

(b) the National Council of Provinces, with a supporting vote of at least six provinces."

This can be contrasted with provisions of the Bill of Rights, declared to be "the cornerstone of democracy in South Africa",[11] which can be amended with the support of two-thirds of the members of the National Assembly and six of the provinces in the National Council of Provinces.[12]

[33] Of particular importance to the present matter are the values enshrined in section 1 of the 1996 Constitution which demand the achievement of equality, the advancement of human rights and freedoms, the supremacy of the Constitution and the rule of law.

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11 Section 7(1) of the 1996 Constitution.

12 Section 74(2) of the 1996 Constitution.

[34] In *S v Ntuli* this Court declared that section 309(4)(a) of the Criminal Procedure Act was not only inconsistent with the right of appeal guaranteed by section 25(3)(h) of the interim Constitution, but was also inconsistent with the guarantee of equality in section 8.

[35] It was recognised in the judgment that, notwithstanding the importance of these rights, time should be allowed to remedy the defect in the Criminal Procedure Act. No information was placed before this Court at the time of the hearing of *S v Ntuli* to suggest that the remedial steps required in order to comply with the interim Constitution would be complicated and would require more than the generous period of almost 17 months allowed by the Court for this purpose.

[36] In view of the importance of the matter, the importance of the rights involved, and the clear indication in the Court's judgment that the ongoing breach of rights would not be allowed to endure beyond 30 April 1997, one would have expected a prompt reaction by the Department of Justice to the Court's order, and that steps would have been taken as a matter of urgency to determine the course to be pursued to remedy the defect, and to formulate the legislation, if any, needed for that purpose.

[37] The sorry tale of what in fact happened has already been set out and need not be repeated. The delays were inexcusable. So too was the delay in launching the present

proceedings which were initiated only five days before the period of suspension would terminate, and in circumstances in which it was not reasonably possible for a decision to be given before the period of suspension had expired.

[38] The difficulties confronting the applicant in securing a variation of the order made on 8 December 1995 have been compounded by the fact that the order which it now has to seek is one to revive legislation which has been invalidated in terms of the Court's order. I have no doubt that this should not be done. To vary the order retrospectively would interfere with vested rights. To vary it prospectively would in effect mean that the court has ordered that the legislation should be enforced until 30 April, that it should not be enforced from 30 April until the date of its order in the present case, but that it should thereafter be enforced. Such a proposition need only be stated to be rejected. It would not only make the Court party to the continued infringement of fundamental rights, but it would give rise to a situation in which prisoners convicted after 30 April 1997 would be treated unequally as far as their right of appeal is concerned.

[39] In any event I am of the opinion that the government has had sufficient time to address the problem identified in the judgment in *S v Ntuli*. In saying this I am not unmindful of the difficulties confronting the government during the early days of the transition to the new constitutional order. Those difficulties were taken into account in fixing the period for which the declaration of invalidity was originally suspended. If the officials dealing with the matter in the Department of Justice had acted promptly in the

period of almost 18 months which have now passed between the decision in *S v Ntuli* and the delivery of this judgment, Parliament could have been asked to bring section 309(4)(a) of the Criminal Procedure Act into line with the Constitution, or provision could have been made for the representation of convicted prisoners in custody who wish to appeal, but do not have the means to secure legal representation. The additional 18 months that the Department of Justice now seeks to enable it to attend to the matter is the result of the neglect of the officials who were dealing with the matter and not the declaration of invalidity. It is said that the courts do not have the resources to handle the additional appeals which will result from the declaration of invalidity coming into force. If this is so, it is a consequence of the rights conferred by the Constitution and departmental neglect, and not the order made by this Court.

[40] In his affidavit Mr Bassett says that the enforcement of the Court's order in *S v Ntuli* would be seriously prejudicial to the administration of justice. In that submission he seems to ignore that an essential component of the administration of justice is the recognition of the fundamental rights of accused persons. It is now more than three years since the interim Constitution came into force. Throughout this period of three years convicted prisoners have been denied important constitutional rights, and this state of affairs cannot be allowed to continue. If the order in *S v Ntuli* is carried out it will still take some time before appeals which have been noted by persons in custody, reach the courts. If more time than that is required to enact legislation to deal with the matter, such legislation must be drafted and introduced with the sense of urgency that the situation

demands. During the intervening period contingency plans will have to be made by the Department of Justice to deal with the situation and to meet its obligations under the Constitution.

[41] This case demonstrates not only the importance of a prompt response by government to any order made by this Court that the provisions of an Act of Parliament is inconsistent with the Constitution and accordingly invalid; it also demonstrates the importance of ensuring that all relevant information is placed before the Court at the time of the proceedings for a declaration of invalidity. Such information should be directed both to the justification for the infringement, if that contention is to be advanced, and to the consequences that will ensue if an order of invalidity is made. More often than not this Court has been asked to make an order in terms of section 98(5) of the interim Constitution without having any information before it as to the time needed for remedial action to be taken. It has had to ask counsel to establish how much time will be necessary, and to make an order in the light of such information and its own evaluation of what may be necessary. In future more will be required. It is the duty of the Minister responsible for the administration of the statute, who wishes to ask for an order of invalidity to be suspended, whether under the interim or the 1996 Constitution, to place sufficient information before the court to justify the making of such an order, and to show the time that will be needed to remedy the defect in the legislation. This should be done with due regard to the importance of the fundamental rights enshrined in the Constitution, and to the fact that it is an obligation of the government to ensure that such rights are

upheld and that the suspension of rights consequent upon the difficulties of the transition is kept to a minimum.

[42] This Court has the responsibility of ensuring that the provisions of the Constitution are upheld and enforced. It should not be assumed that it will lightly grant the suspension of an order made by it declaring a statutory provision to be invalid and of no force and effect, or if it does so, that it will allow more time than is necessary for the defect in the legislation to be cured.

[43] There remains the question of costs. Mr Trengove asked that the applicant be ordered to pay the costs of the opposition to the application. I have come to the conclusion that such an order should not be made. Mr Ntuli had no real interest in the outcome of the litigation. The Legal Resources Centre entered the picture at the request of the Court, and subsequently at the request of the Human Rights Commission. Its assistance in these proceedings is much appreciated by the Court. That said, it must be borne in mind that when counsel appears at the request of the Court it is not customary to make an order for costs against the losing party. Similarly, the intervention by an amicus curiae, does not ordinarily result in an order for costs either for or against the amicus. If regard is had to these factors, and the substance of these proceedings, I take the view that this is not a case in which there should be an order for costs.

[44] In the circumstances the following order is made. The application is dismissed,

and no order is made as to costs.

Ackermann J, Didcott J, Kriegler J, Langa J, Madala J, Mokgoro J, and O'Regan J all concur in the judgment of Chaskalson P.

Counsel for the Applicant	:	JJ Gaunlett SC, JC Heunis and NJ Motata instructed by the State Attorney, Johannesburg.
Counsel for the Respondent and the Human Rights Commission	:	WH Trengove SC, A Cockrell and P Mtshaulana instructed by the Legal Resources Centre.