CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 73/03

XOLISILE ZONDI	Applicant
versus	
MEMBER OF THE EXECUTIVE COUNCIL FOR TRADITIONAL AND LOCAL GOVERNMENT AFFAIRS	First Respondent
WILLIE STEENBURG	Second Respondent
KOBUS BOTHA	Third Respondent
RICHARD COOK	Fourth Respondent

Heard on : 8 November 2005

Decided on : 29 November 2005

JUDGMENT

NGCOBO J:

Introduction

[1] This case concerns the power of this Court to vary and extend the period of suspension of a declaration of invalidity. It is a sequel to our decision in the matter of *Zondi v Member of the Executive Council for Traditional and Local Government*

Affairs and Others[1] (the original application) in which judgment was handed down on 15 October 2004. In that case we were concerned with the constitutional validity of, among other provisions, the provisions of sections 16(1), 29(1), 33, 34 and 37 of the Pound Ordinance (KwaZulu-Natal), 1947[2] (the Ordinance). These provisions, and others not relevant for present purposes, were challenged by Mrs Zondi, the applicant in that case, on among other grounds, the grounds that they were inconsistent with sections 34 and 9(3) of the Constitution.

[2] This constitutional challenge was upheld. The Court thereafter made an order that:

> "(a) The MEC's non-compliance with the Rules of this Court is condoned.
>
> (b) The application for leave to appeal is granted.
>
> (c) The appeal is upheld in part and dismissed in part.
>
> (d) The application for leave to lead further evidence is refused and there is no order for costs.
>
> (e) Paragraph 1 of the order of the High Court is set aside and is replaced by the following:
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> (1) Sections 16(1), 29(1), 33, 34 and 37 of the ordinance are declared to be inconsistent with the Constitution and therefore invalid;
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> (2) the declaration of invalidity made in subpara (e)(1) above is suspended for a period of 12 months from the date of this order to enable the Provincial Legislature of KwaZulu-Natal to correct the inconsistency that has resulted in the declaration of invalidity; and
>
> (3) pending the enactment of legislation contemplated in subpara (e)(2) above:

[1] *Zondi v MEC for Traditional and Local Government Affairs and Others* 2005 (3) SA 589 (CC); 2005 (4) BCLR 347 (CC).

[2] No. 32 of 1947.

(i) The notice contemplated in s 16(1) of the ordinance shall be given to stockowners who are known or who, with the exercise of reasonable diligence, could be ascertained.

(ii) All sales pursuant to the provisions of s 34 of the ordinance shall be authorised by the magistrate's court having jurisdiction over the area where the relevant pound is situated.

(iii) No sale pursuant to s 34 shall be authorised unless:

(aa) the poundkeeper, on notice to the stockowner, who is known or who, with the exercise of reasonable diligence can be ascertained, lodges with a magistrate's court having jurisdiction over the area where the relevant pound is situated, a statement setting forth all the amounts due under the ordinance;

(bb) the amounts set forth in the statement by the poundkeeper are not disputed by the stockowner within seven days of such notice; and

(cc) the magistrate is satisfied that notice had been given to the stockowner, or that, with the exercise of reasonable diligence, the stockowner cannot be ascertained.

(iv) Where the amounts set forth in the statement of the poundkeeper are disputed, the magistrate shall summarily enquire into the matter, following such procedure as seems fair to the parties, and make such order as the magistrate considers just, including the order for costs.

(f) The orders in para (e) above shall come into effect on the date of this judgment.

(g) Should the Provincial Legislature of KwaZulu-Natal fail to remedy the unconstitutionality in the sections declared to be inconsistent with the Constitution in terms of subpara (e)(1) above within the period referred in subpara (e)(2), any interested person or organisation may, before the expiry of that period, apply to this Court for a further suspension of the declaration of invalidity and/or any other appropriate further relief.

(h) Mrs Zondi is awarded costs of the appeal.

(i) There will be no order for costs in relation to the application for direct access which was dismissed by the Court on 9 March 2004."

[3] On 23 September 2005 – 15 days before the date specified in the original order – the Member of the Executive Council for Traditional and Local Government Affairs, KwaZulu-Natal (the MEC) who was the first respondent in the original application, lodged with the Registrar of this Court an application purportedly under Rule 11. It stated that the MEC intended to make an application to this Court for an order in the following terms:

"An Order varying paragraph (e)(2) of this Court's Order in *Zondi v MEC for Local Government and Traditional Affairs* 2005 (3) SA 589 (CC) (CCT Case No: 73/03) to extend the period of suspension of declaration of invalidity from 12 to 24 months."

[4] That application concluded with a request that "the matter be placed before the Chief Justice to be dealt with in terms of Rule 11(4)". Under that sub-rule, where no notice of opposition is given or where the notice to oppose is given but no answering affidavit is lodged in response to an application, within the time limits prescribed by the rules, the Chief Justice may give directions as to how the application shall be dealt with.

[5] Mr Lionel Errol Pienaar, the General Manager in the KwaZulu-Natal Department of Local Government and Traditional Affairs (the Department) deposed to an affidavit in support of the application.

The procedure followed by the MEC

[6] Rule 11 deals with the application procedure in general. Sub-rule 11(1)(b) which deals with the form and content of such application provides, among other things, that such application

> " . . . shall set forth a day, not less than five days after service thereof on the respondent, on or before which such respondent is required to notify the applicant in writing whether he or she intends to oppose such application and shall further state that if no such notification is given, the Registrar will be requested to place the matter before the Chief Justice to be dealt with in terms of subrule (4)."[3]

[7] The application lodged by the MEC does not set out the time limits referred to in sub-rule 11(1)(b). A request to the Registrar to place the matter before the Chief Justice under Rule 11 can only be made upon the failure by the respondent either to give notice of intention to oppose or having given such notice, the respondent fails to lodge the answering affidavit within the period set out in the notice of motion. This is done in terms of Rule 11(3)(c)(i).[4] Having failed to set out the time limits required by sub-rule 11(1)(b), the matter could not be placed before the Chief Justice pursuant to sub-rule 11(4). The only basis upon which the matter could have been placed before the Chief Justice would have been if the application was lodged as one of urgency in terms of Rule 12. The application was not lodged in terms of Rule 12,

[3] Rule 11(4) of the Rules of the Constitutional Court provides:

> "When an application is placed before the Chief Justice in terms of subrule (3)(c), he or she shall give directions as to how the application shall be dealt with and, in particular, as to whether it shall be set down for hearing or whether it shall be dealt with on the basis of written argument or summarily on the basis of the information contained in the affidavits."

[4] Rule 11(3)(c)(i) of the Rules of the Constitutional Court provides:

> "Where no notice of opposition is given or where no answering affidavit in terms of paragraph (a)(ii) is lodged within the time referred to in paragraph (a)(ii), the Registrar shall within five days of the expiry thereof place the application before the Chief Justice."

notwithstanding the urgency involved. During oral argument, counsel could not offer any explanation as to why this was not done.

[8] The procedure followed by the MEC was not in accordance with the requirements of Rule 11.

The interim order of 4 October 2005

[9] In order to protect the interests of persons who might be prejudiced if the period of suspension fixed in the original order was not extended and in order to consider the underlying constitutional issues, on 4 October 2005, the Court, on its own motion, made an order that:

> "Paragraph (e)(2) of the Order of this Court made on 15 October 2004 is varied and the period of suspension of the declaration of invalidity is extended until 30 November 2005."

[10] Simultaneously, the Chief Justice issued directions setting the matter down for hearing on 8 November 2005; requiring Mrs Zondi, the applicant in the original application, to lodge her answering affidavit by 19 October 2005 if she wished to oppose the application; and setting out the periods for the filing of written arguments. The parties were also directed to address, amongst other issues, the following questions in their written arguments: (a) the circumstances under which this Court may extend the period of suspension of the declaration of invalidity in the light of our decision in *Minister of Justice v Ntuli* 1997 (3) SA 772 (CC); and (b) in the absence of paragraph (g) of the original order of this Court made on 15 October 2004 would this

Court have the power to extend the period of suspension of the declaration of invalidity?

[11] Notwithstanding the defect referred to above, this matter is an appropriate matter to be heard under Rule 12, which provides:

> "(1) In urgent applications, the Chief Justice may dispense with the forms and service provided for in these rules and may give directions for the matter to be dealt with at such time and in such manner and in accordance with such procedure, which shall as far as is practicable be in accordance with these rules, as may be appropriate.
> (2) An application in terms of subrule (1) shall on notice of motion be accompanied by an affidavit setting forth explicitly the circumstances that justify a departure from the ordinary procedures."

Mrs Zondi has since been given the opportunity to oppose the present application if she wishes to do so. She has chosen not to do so. The matter must therefore be treated as an unopposed application to vary and extend the period of suspension of the declaration of invalidity fixed in paragraph (e)(2) of the original order of this Court made on 15 October 2004.

Facts in support of the application

[12] In his affidavit requesting an extension of the period of suspension, Mr Pienaar outlines the steps taken thus far to comply with the original order and the anticipated future process. In addition, he provides an explanation for the delay.

[13] It appears from this affidavit that after the judgment of this Court in the original application was studied, it became apparent that the original Bill that was in existence

at the time of the original application, did not address the issues dealt with in the judgment of this Court in the original application. In addition, after its publication, the original Bill had "generated much controversy". In the light of this, it was decided "to jettison" that Bill and to recommence the process of drafting the legislation. In addition, it was decided to draft standard by-laws for adoption by municipalities which did not have the resources or funds to compile their own by-laws. This was apparently done because the "Pounds" fall within the competence of municipalities.[5] There is no indication of the dates when these decisions were made.

[14] It was decided further that the drafting process would be undertaken by a "service provider". The "service provider" was to be responsible for co-ordinating the drafting of the standard by-laws and the relevant legislation, management of the consultation and public participation process, the analysis of comments received and the drafting of the final versions of the legislation and the standard by-laws. During March 2005 the Department advertised the position of the "service provider". No applicants were forthcoming. The position was re-advertised on 15 May 2005. There

[5] In terms of Schedule 5 Part B of the Constitution "Pounds" fall within the competence of local government matters to the extent set out in sections 155(6)(a) and (7) of the Constitution. These provisions of the Constitution in turn provide:

> "(6) Each provincial government must establish municipalities in its province in a manner consistent with the legislation enacted in terms of subsections (2) and (3) and, by legislative or other measures, must—
>
> (a) provide for the monitoring and support of local government in the province;
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> (b) . . .
>
> (7) The national government, subject to section 44, and the provincial governments have the legislative and executive authority to see to the effective performance by municipalities of their functions in respect of matters listed in Schedules 4 and 5, by regulating the exercise by municipalities of their executive authority referred to in section 156(1)."

were applicants this time. Although the "service provider" was selected during June 2005, the "service provider" was only formally appointed on 18 July 2005.

[15] The delay in the appointment of the "service provider" is attributed to the fact that the Department underwent significant changes during this period including the appointment of a new MEC in December 2004, the appointment of a new departmental head in March 2005 and the restructuring program which took place within the Department. It is alleged that as a result of this, the appointment of the "service provider" and its ultimate formal approval took much more time than had been anticipated. It had been anticipated that the draft standard by-laws and the draft legislation would have been completed by February 2005. The internal deadlines proved impossible to meet.

[16] We are told that because of the delay in the appointment of the "service provider" "and other delays brought on by the service provider, it was decided not to utilise the service provider to draft the new legislation." The Department took over the drafting of the legislation and left the "service provider" to draft the standard by-laws. Neither the dates when these decisions were taken nor the nature of the "other delays" by the "service provider" are set out. The draft Bill was completed "by the end of July 2005" while the standard by-laws were completed "during early August 2005."

[17] As to the anticipated future process, Mr Pienaar outlines the legislative process through which the Bill has to go. This process includes: holding consultations with the South African Local Government Association and the KwaZulu-Natal Local Government Association; the publication of the Bill for comments; its consideration by the office of the Premier, the state legal advisors, the Portfolio Committee and eventually the Provincial Legislature; and assent to the Bill by the Premier.

[18] The draft Bill has since gone through the office of the Premier and was published for comment on 22 September 2005. At the time of preparing the affidavit, it was anticipated that the public comment procedure would be completed towards the end of October 2005, whereafter the comments would be considered and appropriate changes made to the Bill and the by-laws, if necessary. It is anticipated that the process of analysing the comments received and any consequential drafting would be completed by the end of November 2005, provided that no major redrafting is required. Thereafter the Bill would be submitted to the State Law Advisor for certification in accordance with the provincial legislative process.

[19] After certification by the State Law Advisor, the Bill will be submitted to the Executive Council for an "in principle" approval. Once the "in principle" approval has been obtained from the Executive Council, the Bill will return to the Department which will then prepare all necessary documentation required for the Speaker to introduce the Bill in the Legislature. The Speaker will first refer the Bill to the relevant Portfolio Committee for its consideration. It is expected that this process will

be over by the end of February 2006. Thereafter, the Bill will be referred to the Provincial Legislature for approval.

[20] The KwaZulu-Natal Provincial Legislature will hold its first sitting during mid-February 2006. It is not known how long the Portfolio Committee will take to process the Bill. On the assumption that the Bill will receive immediate attention in the Provincial Legislature and will not prove too controversial, it is anticipated that it will be approved by the Legislature at the beginning of March 2006. Mr Pienaar notes that the Legislature might decide to hold public hearings on the matter, given that it is a sensitive matter. This might prolong the process by approximately two further months. On this assumption the Bill will be approved by the Legislature by June 2006, it will then be sent to the Premier for assent. On these assumptions, Mr Pienaar estimates that the Bill will become law by the end of June 2006.

[21] However Mr Pienaar sounds a note of caution, observing that "the passage of legislation is not always uncomplicated or uncontroversial." He draws attention to a legislation which, because of its controversial nature, took over 24 months to finalise. Giving due allowance for unpredicted events and any delays in the political process and public notice and comment processes, Mr Pienaar predicts that a further 12 months suspension would be adequate to enable the Legislature to pass the remedial legislation contemplated in paragraph (e)(2) of the original order of this Court.

[22] Mr Pienaar alleges that the MEC only "realised during the course of July 2005 that it was perilously close to not complying with the period of 12 months in the order." Subsequently, steps were taken to approach this Court for the extension of the period of suspension.

[23] This then is the background to this application.

Questions presented

[24] The questions which have to be considered are: (a) whether this Court has the power to vary and extend the period of suspension previously fixed in the final order declaring the provisions of the Ordinance to be invalid and if so, (b) whether it is a power which should be exercised in the circumstances of this case. The first question arises because in the directions the parties were directed to address the broad question whether in the absence of paragraph (g) of the original order this Court would have the power to extend the period of suspension of the declaration of invalidity. Paragraph (g) allows any interested person to apply to this Court for the extension of the period of suspension before the expiry of that period.

[25] The question whether this Court has the power to extend the period previously fixed in the declaration of invalidity is an important constitutional question. And it concerns the powers of this Court when deciding a constitutional matter. In *Ntuli* this Court assumed without deciding that the period of suspension of invalidity may be

varied in an appropriate case.[6] Nor did the Court decide whether an application to extend the period of suspension of the declaration of invalidity falls to be determined under the Court's power to make a "just and equitable" order (section 172(1)(b)) or its power to "develop the common law, taking into account the interests of justice" (section 173).

[26] In view of this, the Chief Justice called for argument on the question whether in the absence of paragraph (g) of the original order of this Court made on 15 October 2004, this Court would have the power to extend the period of suspension of the declaration of invalidity. Argument was addressed to us on this question. In these circumstances it is necessary for this Court to deal with this question. It will be convenient to address this broad question first, before considering the powers of this Court to vary the period of suspension under paragraph (g) of the original order.

Does this Court have the power to extend the period of suspension of the declaration of invalidity in the absence of an order similar to paragraph (g)?

The common law position

[27] The MEC contended that in the absence of paragraph (g) of the original order, this Court would have the power to extend the period of suspension of the declaration of invalidity. In urging this power on this Court, the MEC relied upon the common law and sections 172(1) and 173 of the Constitution.

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[6] *Minister of Justice v Ntuli* 1997 (3) SA 772 (CC); 1997 (6) BCLR 677 (CC) at para 30.

[28] Under common law the general rule is that a judge has no authority to amend his or her own final order. The rationale for this principle is two-fold. In the first place a judge who has given a final order is *functus officio*. Once a judge has fully exercised his or her jurisdiction, his or her authority over the subject matter ceases.[7] The other equally important consideration is the public interest in bringing litigation to finality.[8] The parties must be assured that once an order of court has been made, it is final and they can arrange their affairs in accordance with that order.

[29] However our pre-constitutional case law recognised certain exceptions to this general rule. These exceptions are referred to in the *Firestone* case. These are supplementing accessory or consequential matters such as costs orders or interest on judgment debts; clarification of a judgment or order so as to give effect to the court's true intention; correcting clerical, arithmetical or other errors in its judgment or order; and altering an order for costs where it was made without hearing the parties.[9] This list of exceptions was not considered exhaustive. It may be extended to meet the exigencies of modern times.[10]

[7] *West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1926 AD 173 at 178 per Innes CJ*; Firestone South Africa (Pty) Ltd v Genticuro A.G.* 1977 (4) SA 298 (A) at 306F-G.

[8] *Ntuli* above n 6 at para 29; *Firestone* id at 309A.

[9] *Firestone* id at 306H-307G.

[10] *Firestone* id at 308B-D; *Ex parte Barclays Bank* 1936 AD 481 at 485; *Estate Garlick v Commissioner for Inland Revenue* 1934 AD 499 at 503-4.

[30] Simple interlocutory orders stand on a different footing. These are open to reconsideration, variation or rescission on good cause shown.[11] Courts have exercised the power to vary simple interlocutory orders when the facts on which the orders were based have changed[12] or where the orders were based on an incorrect interpretation of a statute which only became apparent later.[13] The rationale for holding interlocutory orders to be subject to variation seems to be their very nature. They do not dispose of any issue or any portion of the issue in the main action.[14]

[31] In *South Cape Corporation*, it was held that the granting of an order for leave to execute, which is a simple interlocutory order, is within a wide general discretion of the court.[15] And these orders are granted by courts as part and parcel of their inherent jurisdiction to control their judgments.[16] In exercising their discretion, courts are required to determine what is just and equitable in the circumstances of the particular case.[17] In particular, they have regard to the potentiality of irreparable harm if leave to execute were to be granted or refused.[18] The court further held that:

[11] *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 550H; *Duncan NO v Minister of Law and Order* 1985 (4) SA 1 (T) at 3A; *Bell v Bell* 1908 TS 887 at 891-3.

[12] *Sandell and Others v Jacobs and Another* 1970 (4) SA 630 (SWA); *Meyer v Meyer* 1948 (1) SA 484 (T).

[13] *Duncan* above n 11 at 3D.

[14] *South Cape Corporation* above n 11 at 552G.

[15] Id at 545C.

[16] Id at 545D.

[17] Id.

[18] Id at 545E.

> "Having regard, however, to the general nature of the discretion vested in the Court which makes such an order . . . it seems to me to be wholly appropriate that an order granting leave to execute should, in a proper case, be subject to correction, alteration or even to being set aside before the final determination of the matter on appeal."[19]

[32] An analysis of our pre-constitutional case law suggests that these exceptions were grounded on at least two interrelated considerations. The first was the need to do justice. Support for this is to be found in the *West Rand Estates* case, which is probably the first case in which the Appellate Division was called upon to consider whether it had the power to amend its order. In that case the Appellate Division had inadvertently omitted to award interest that had been claimed to a successful litigant. In amending the order, the court concluded that "the only course to pursue is to adopt the one which justice demands".[20] The court observed that "the Court is merely doing justice between the same parties".[21] And it added that this "is a plain matter of necessity and justice."[22] Subsequent case law did not suggest otherwise. This language makes it plain that in amending its order, the court was motivated by the need to do justice.

[33] The other consideration relates to the need to adapt common law to the changing times and circumstances. In *West Rand Estates*, and in dealing with the time limit for prescription of one day within which the amendment of an order was allowed

[19] Id at 552E-F.

[20] *West Rand Estates* above n 7 at 193.

[21] Id at 194.

[22] Id.

under common law, the court observed that what was considered to be an expedient or reasonable time previously may not be expedient or reasonable at the present time. It added that "[t]ime and circumstances bring about change and development; and modern exigencies and conditions may well require the observance of a longer period of prescription."[23] Thus in *Estate Garlick* the court adapted common law *ex necessitate rei* to meet the modern exigencies caused by the practice of making the costs orders without hearing argument.[24]

[34] What emerges from our pre-constitutional era jurisprudence is that the general rule that an order once made is unalterable was departed from when it was in the interests of justice to do so and where there was a need to adapt the common law to changing circumstances and to meet modern exigencies. It is equally clear from the case law that in departing from the general rule, the court invoked its inherent power to regulate its own process. Thus in *West Rand Estates*, the court held that:

> "It is within the province of this Court to regulate its own procedure in matters of adjective law. And, now that the point has come before it for decision, to lay down a definite rule of practice. I am of opinion that the proper rule should be that which I have just stated. The Court, by acting in this way, does not in substance and effect alter or undo its previously pronounced sentence, within the meaning of the Roman and Roman-Dutch law. The sanctity of the doctrine of *res judicata* remains unimpaired and of full force, for the Court is merely doing justice between the same parties, on the same pleadings in the same suit, on a claim which it has inadvertently overlooked."[25]

[23] Id at 193.

[24] *Firestone* above n 7 at 308H; *Estate Garlick* above n 10 at 503-4.

[25] *West Rand Estates* above n 7 at 194.

[35] This approach to the general rule by the Appellant Division is consistent with the Constitution. It is now entrenched in section 173 of the Constitution which provides that:

> "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."

[36] There is therefore much to be said for the view that common law, viewed in the light of section 173 of the Constitution, provides the power to extend the period of suspension of the declaration of invalidity as contended by the MEC.[26] This will of course require us to consider whether common law should now be developed in the interests of justice to bring it in line with the powers of this Court in deciding constitutional matters. However, in the view we take of the matter, it not necessary to do so. The MEC contended in the alternative that the power to extend the period of suspension is to be found in section 172(1) which deals with the powers of this Court in deciding a constitutional matter within its jurisdiction.

The position under the Constitution

[37] An application to vary an order declaring the provisions of the Ordinance to be invalid is either a constitutional matter or an issue connected with a decision on a constitutional matter. And, as such, it is within the jurisdiction of this Court.[27] The

[26] *Ntuli* above n 6 at para 31.

[27] *Ntuli* above n 6 at para 31; section 167(3)(b) and (c) of the Constitution provides:

powers of this Court when deciding a matter within its jurisdiction are set out in section 172(1) of the Constitution which reads:

> "(1) 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
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> (b) may make any order that is just and equitable, including—
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> (i) an order limiting the retrospective effect of the declaration of invalidity; and
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> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

[38] The question whether this Court has the power to extend the period of suspension of the declaration of invalidity must therefore be determined by reference to section 172(1). Among the powers conferred on this Court when deciding a constitutional matter is the power to "make any order that is just and equitable". This power includes the power to suspend "the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect." Indeed in the exercise of this power, the Court in the original application made an order suspending the declaration of invalidity for a period of 12 months to allow the KwaZulu-Natal Provincial Legislature to correct the constitutional defects in the Ordinance.

> "(3) The Constitutional Court—
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> (b) may decide only constitutional matters, and issues connected with decisions on constitutional matters; and
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> (c) makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter."

[39] The question that arises is whether having considered it just and equitable to suspend the order of invalidity for a fixed period this Court can extend that period. By its very nature an order that is "just and equitable" in the context of the suspension of a declaration of invalidity is subject to variation. This is so because the decision to suspend the declaration of invalidity, the determination of the period of suspension as well as the conditions to be attached to such suspension, are informed by the facts and circumstances that are at the disposal of the Court at the time the order is made. New facts may emerge or circumstances may change and render the period of suspension previously fixed to be unjust or inequitable. In these circumstances, 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.

[40] The power to make an order that is just and equitable is not limited to the time when the Court declares a statutory provision inconsistent with the Constitution and suspends the order of invalidity. During the period of suspension this Court retains the power to reconsider the continued suspension of the declaration of invalidity and the period of suspension as well as the conditions of suspension in the exercise of its power to make an order that is just and equitable. When the facts on which the period of suspension was based have changed or where the full implications of the order were not previously apparent, there seems to be no reason both in logic and principle why this Court should not, before the expiry of the period of suspension, have the power to extend the period, if to do so would be just and equitable.

[41] Our decision in *Ntuli* might at first reading be understood to suggest that section 172 cannot be read to permit this Court to vary an order suspending the period of the declaration of invalidity after the declaration of invalidity.[28] In paragraph 25 this Court held:

> "In my view subparas (a) and (b) of s 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 also suspend that order if there are good reasons for doing so."

[42] This passage must of course be read with paragraph 26 which indicates the context in which the above holding was made. In paragraph 26 the Court said:

> "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."

[43] What the Court held is that it is impermissible for a court to make a declaration of invalidity without making an order suspending the declaration of invalidity, and then later, in different proceedings, to make an order suspending the declaration of

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[28] *Ntuli* above n 6 at para 25.

invalidity. The decision stresses two points: first, an order suspending the declaration of invalidity must be made at the same time as the declaration of invalidity; and second, if the declaration of invalidity is not suspended or the period of suspension has lapsed, a court has no power to suspend the declaration of invalidity, for to do so would be to revive the constitutionality of a provision that it has already declared invalid.

[44] The power to vary the period of suspension flows from the Constitution. The suspension of an order of invalidity and allowing time to correct the constitutional defects are sanctioned by the Constitution. As we pointed out in *Steyn*, "this mechanism is intended to avert disorders or dislocation that may arise as a result of an immediate declaration of invalidity."[29] Having regard to the general discretion of this Court to make an order that is just and equitable and the purpose of suspending the declaration of invalidity, in principle, this Court should have the power to extend the period of suspension if the period of suspension previously fixed proved to be inadequate. The power to make an order that is just and equitable is therefore by its very nature a continuing power which may be exercised at any time during the period of suspension when it is just and equitable.

[45] In constitutional matters therefore the court has a wide general discretion to order the extension of the period of suspension of the declaration of invalidity and to determine the conditions which shall attach to the suspension. This discretion is part

[29] *S v Steyn* 2001 (1) SA 1146 (CC); 2001 (1) BCLR 52 (CC) at para 45.

and parcel of the power which the court has in deciding constitutional matters to make an order that is just and equitable. In determining what is just and equitable the court would normally have regard to the potentiality of prejudice to persons affected and the public order if the request for extension were to be refused.

[46] In my view, an application to extend the period of suspension of the declaration of invalidity falls to be dealt with under the Court's power to make an order that is "just and equitable". In view of this conclusion, it is not necessary to consider whether such application can also be dealt with under the court's power to develop the common law under section 173. Nor is it necessary in this case to develop the common law and adapt it to the powers of this Court in deciding constitutional matters within its jurisdiction. And as indicated above, our pre-constitutional jurisprudence indicates that the power of the court to vary an order is rooted in the interests of justice and the need to adapt the common law to changing circumstances. And furthermore as this Court observed in *Ntuli*, the determination of what is "just and equitable" or is "in the interests of justice" involves similar considerations. What is just and equitable will ordinarily be in the interests of justice.[30]

[47] What is just and equitable depends on the facts of each case. It must be emphasised that in view of the principle of finality, the power to extend the period of suspension should, as a general matter be "very sparingly exercised".[31] Factors that

[30] *Ntuli* above n 6 at para 31.

[31] *Firestone* above n 7 at 309A.

may be relevant in a particular case include the sufficiency of the explanation for failure to comply with the original period of suspension; the potentiality of prejudice being sustained if the period of suspension were extended or not extended; the prospects of complying with the deadline; the need to bring litigation to finality; and the need to promote the constitutional project and prevent chaos. What is involved is the balancing of all relevant factors bearing in mind that the ultimate goal is to make an order that is "just and equitable".

The power of this Court to extend the period of suspension of the declaration of invalidity under paragraph (g) of the original order

[48] Paragraph (g) of the original Order reads:

> "Should the Provincial Legislature of KwaZulu-Natal fail to remedy the unconstitutionality in the sections declared to be inconsistent with the Constitution in terms of subpara (e)(1) above within the period referred in subpara (e)(2), any interested person or organisation may, before the expiry of that period, apply to this Court for a further suspension of the declaration of invalidity and/or any other appropriate further relief."

[49] It is not uncommon for a court to make an order and reserve to itself the power to vary the order made.[32] In the past this Court has reserved its authority to reconsider orders for costs [33] or vary the period of suspension of a declaration of invalidity[34] or

[32] For some common law cases on this see *Moti v Moti and Hassim Moti Ltd* 1934 TPD 428 at 443; *Nedfin Bank Ltd v Muller and Others* 1981 (4) SA 229 (D) at 238H; *Afrimeric Distributors (Pty) Ltd v E I Rogoff (Pty) Ltd* 1948 (1) SA 569 (W) at 577.

[33] *Ferreira v Levin NO and Others* 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) and the follow up in *Ferreira v Levin and Others (No 2)* 1996 (2) SA 621 (CC); 1996 (4) BCLR 441 (CC).

[34] *Ntuli* above n 6 and *Zondi* above n 1.

made further appropriate orders.[35] Thus in *Steyn*,[36] the Court allowed the Minister of Justice and Constitutional Development to apply to it for an order varying the terms stipulated in the order or extending the period of suspension provided in the order. Such orders expressly contemplate that the order made may be varied if the circumstances warrant it. By their very nature such orders are therefore not final. Neither the principle of finality nor the doctrine of *functus officio* arise in relation to such orders. Those who are bound by these orders know in advance that the order is not final.

[50] Thus where a court, in its order, adds a paragraph similar to paragraph (g), the court is, in effect, making it plain that the order it has made is not to be understood as final. And an order of this kind does not preclude the court from reconsidering the matter in relation to which it has reserved the authority to reconsider. In paragraph (g) this Court expressly reserved to itself the power to vary and extend further the period of suspension of the declaration of invalidity. It follows therefore that paragraph (e)(2) of the original order of this Court is not final and the period of suspension contemplated therein may be varied and extended if circumstances so warrant.

[51] The power of this Court to make an order such as paragraph (g) is derived from the general power of this Court when deciding a constitutional matter within its jurisdiction contained in section 172(1) of the Constitution. This Court has a wide

[35] *Sibiya and Others v The Director of Public Prosecutions and Others* CCT 45/04, 7 October 2005, as yet unreported, in which this Court extended the period of time within which a report required by it had to be filed.

[36] *Steyn* above n 29.

discretion when deciding a constitutional matter. Its discretion includes the power to make an order that is just and equitable. And an order that is just and equitable is not confined to suspending a declaration of invalidity. Its power to make an order that is just and equitable is wide enough to include the power to reserve to itself the power to reconsider the period of suspension as well as the conditions upon which the declaration of invalidity is suspended, and if a proper case is made out, vary the period of suspension or the conditions attached to such suspension. And, as pointed out earlier, the question whether an order should be varied must be determined by reference to what is just and equitable.

[52] In this case therefore, apart from the power to extend the period of suspension under its general power to make an order that is just and equitable under section 172(1), this Court also has the power under paragraph (g) of the original order to extend the period of suspension of the declaration of invalidity when it is just and equitable to do so. In view of this, this application falls to be determined under paragraph (g) of the original order, which also requires the determination of what is just and equitable. The next question for consideration therefore is whether it is just and equitable to vary and extend the period of suspension in this case.

Should the period of suspension be varied and extended in this case?

[53] The manner in which this matter was conducted from the beginning deserves criticism. In the main application, the MEC took the attitude that it was not necessary for the High Court to reach the constitutionality of the provisions of the Ordinance.

As a result of this attitude he took a deliberate decision not to place before court information relating to the consequences of an order of invalidity. He persisted in this attitude notwithstanding the specific request to do so by the High Court. As a consequence the High Court made an order of invalidity without such information. His belated attempt to lead further evidence in this Court was declined. The information that was placed before this Court at the time of the original order related to the draft Bill that was in existence then. There was no information as to how long it would take to process that Bill. As a consequence the Court made the original suspension order without the full facts relating to how long the process of finalising the Bill would take.

[54] In the second place, as early as March 2005, it must have been manifestly clear that the deadline would not be met. In fact, the Department had anticipated that the standard by-laws and draft legislation would be ready by February 2005. Mr Pienaar states that "internal deadlines proved impossible to meet." Yet the application was only lodged on 23 September 2005. There is no explanation for this delay. We were informed from the bar that part of the delay is attributable to a diskette that got lost in the offices of the State Attorney, Johannesburg. The State Attorney concerned has not put up any affidavit explaining this. It is undesirable in matters of this nature for an explanation to be given by way of statements from the bar. An explanation must be contained on affidavit.

[55] Applications of this nature must be made within a reasonable time. It must be made in time to allow the matter to be considered by this Court before the expiry of the period of suspension. Where the application is made late but closer to the date of the expiry of the suspension period, it must be brought by way of urgency in terms of the rules of this Court. Here the application was made barely 15 days before the expiry date, five days before the end of Court term and there was no prayer to have the matter heard as a matter of urgency. The notice of motion did not set out the periods within which Mrs Zondi was required to indicate her notice of opposition or lodge her answering affidavit as required by Rule 11. In the result there were no time limits within which the matter had to be considered. This Court had, on its own motion, to extend the period fixed in the original order to 30 November 2005 purely to preserve the rights of the parties and to consider the underlying constitutional issues.

[56] In the third place, the explanation given for failure to meet the deadline leaves a great deal to be desired. It is lacking in particularity, the dates when crucial decisions were taken being either not specified or only specified in vague terms such as "during early August" or "by the end of July". In addition, while the delay is attributed to the delays in the appointment of a "service provider" and the delays brought about by the "service provider", the change in the MEC and the restructuring of the Department, there is no indication as to what attention, if any, was given to the court order and to meeting the deadline in the meantime. Nor is there any indication whether the KwaZulu-Natal Provincial Legislature was apprised of the court order and what steps, if any, that Legislature took to ensure timeous compliance with the court order.

[57] It is alleged that the draft Bill still has to go through a process over which the Department has no control. This process includes a consideration of the Bill by the Executive Council, the Portfolio Committee and the Legislature itself. In addition, it will also involve holding of public hearings and a consideration of comments. The officials and functionaries who are in control of these further processes have not provided any information as to how long their respective processes would take. Nor have these officials and functionaries been shown to be unwilling to provide this information. In the result the Court has to speculate on how long the process will take.

[58] There is no suggestion that the order has been drawn to the attention of the KwaZulu-Natal Provincial Legislature to enable it to consider how to expedite the process of enacting the relevant legislation and thereafter place information before this Court that would enable it to assess for itself the sufficiency of the period of extension now requested. After all it is the Legislature that is required by the court order to correct the constitutional defect. And it is therefore the Legislature that must take steps to ensure compliance with the court order. It was therefore incumbent upon the MEC to draw the court order to the attention of the Provincial Legislature.

[59] It is necessary to bear in mind that when a law is declared invalid it is not just the parties to the litigation who are affected, the public as a whole has an interest, particularly those likely to be covered by the law. What is in issue is not just potential

disrespect for the time limits in the court order, but the interests of the public. Reasons that justify or at least explain failure to meet the time limits in the court order, must be set out fully, candidly, timeously and in a manner that conforms with the Rules of the Court. Those responsible for drafting remedial legislation should not assume that as a matter of course and in the public interest an extension of the time period will be granted. If a proper case for extension is not made out in an appropriate way then the drafters of the new legislation must be aware that they run the risk of the request for an extension of the period of suspension being refused.

[60] That said however, there are factors that have combined to produce a delay. When the original order was made, it was made on the basis that there was already in existence a draft Bill that would not take long to finalise. At the time the full implications of the judgment on that draft Bill were not apparent. Having been drafted prior to the judgment of this Court, the MEC had to reconsider the draft Bill in the light of the judgment which dealt with the key provisions of the Pound legislation. Having reconsidered the Bill, the MEC was compelled to jettison it, resulting in the process having to commence afresh. This process was bound to result in delays not previously anticipated. We are also mindful of the fact that the legislative process is time consuming and not uncomplicated. Because it involves human beings, unforeseen delay sometimes occurs, as this case shows.

[61] A new Bill was completed by the end of July 2005. The proposed standard by-laws for municipalities were completed during August 2005. On 22 September 2005

the Bill was published for comment in the Provincial Government Gazette. The process seems to be well under way. There is no reason to believe that the Legislature will not give priority to the enactment of the relevant legislation, once the court order is drawn to its attention, as it should have been in the first place. Nor is there any reason to doubt that the other institutions and functionaries who still have to consider the Bill, will not expedite the Bill in view of the delay that has already occurred. This is therefore not an appropriate case for a structural injunction.

[62] There is a further consideration that is relevant in this case. In the main judgment we emphasised the importance of Pound legislation and said:

> "The need to take immediate action against trespassing animals cannot be gainsaid. Unattended animals may cause damage to crops and property. They could also pose safety or health hazards to other animals and members of the public. It is therefore necessary to have a mechanism for dealing quickly and effectively with animals found trespassing on land or straying in public places or on public roads. The need for such mechanisms must be viewed against the responsibility of livestock owners to ensure that their animals do not trespass onto other people's land. If they should neglect their livestock, they must be prepared to pay the price for such neglect. Pound legislation is therefore necessary to deal with those livestock owners who neglect their responsibilities."[37]

[63] If the relief sought in the present proceedings were to be refused, the land owners would be left without any protection in the interim. We considered that "a just and equitable" order is one that "should protect both the rights of stockowners and

[37] *Zondi* above n 1 at para 80.

landowners."[38] The protection of landowners requires "a mechanism for dealing quickly and effectively with animals found trespassing on land or straying in public places or on public roads."[39] With this in mind, we put in place an interim regime designed to protect both the stockowners and landowners. If the period of suspension is not extended, the interim regime will fall away and the landowners would lose the protection. The result would be chaos and lawlessness. The rule of law would be the first casualty.

[64] We are not unmindful of the need to bring litigation to finality. This is an important consideration too. It engenders confidence in the rule of law and, ultimately, in the judicial process. It is confidence that courts require to ensure compliance with their orders. Yet this consideration must at times yield to the interests of promoting the constitutional project. Part of that constitutional project is to allow the KwaZulu-Natal Provincial Legislature to correct the constitutional defects in the pound legislation but at the same time ensuring that neither stockowners nor the landowners are unduly prejudiced in the interim.

[65] The original order was made in the public interest. It was made to protect the public from trespassing and straying animals. The powerful consideration in this matter which outweighs others is that the public will suffer considerable prejudice if the order of suspension were not extended. There will be no mechanism for dealing

[38] Id at para 130.

[39] Id at para 80.

immediately and effectively with trespassing and straying animals. By contrast, if the period of suspension were extended, there would be no prejudice. The constitutional rights of the public are protected by the interim regime that we put in place. And having regard to where the legislative process is at present, there is no reason to believe that a period longer than 12 months is required to finalise the legislation.

[66] In all the circumstances, this is therefore a proper case for the exercise of the power to vary and extend the period of suspension. It is just and equitable that the period of suspension of the declaration of invalidity be extended for a further period of 12 months. In the result, a relief substantially the same as that prayed for in the notice of motion should be granted. The effect of granting the relief sought is that the order made on 4 October 2005 extending the period of suspension to 30 November 2005 falls away.

The order

[67] In the event, the following order is made:

Paragraph (e)(2) of the original order made by this Court in the matter of *Zondi v MEC for Traditional and Local Government Affairs and Others* 2005 (3) SA 589 (CC); 2005 (4) BCLR 347 (CC) is varied and the period of suspension contemplated in that paragraph is extended for a further period of 12 months until 15 October 2006.

Langa CJ, Moseneke DCJ, Mokgoro J, O'Regan J, Sachs J, Skweyiya J, Van der Westhuizen J and Yacoob J concur in the judgment of Ngcobo J.

For the applicant:	No appearance.
For the first respondent:	AJ Dickson SC and AA Gabriel instructed by the State Attorney, Johannesburg.