



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 62/12  
[2012] ZACC 20

In the matter between:

MINISTER FOR TRANSPORT First Applicant

ROAD ACCIDENT FUND Second Applicant

and

ANELE MVUMVU First Respondent

LOUISE PEDRO Second Respondent

BIANCA SMITH Third Respondent

Heard on : 14 August 2012

Order granted on : 14 August 2012

Reasons for order : 27 September 2012

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REASONS FOR ORDER

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JAFTA J (Mogoeng CJ, Moseneke DCJ, Cameron J, Froneman J, Khampepe J, Skweyiya J and Van der Westhuizen J concurring):

[1] The Minister for Transport and the Road Accident Fund (applicants) launched this application on an urgent basis for an order varying and extending the period of

suspension fixed by this Court in an earlier judgment between them and the present respondents.<sup>1</sup> In that order, specified parts of section 18 of the Road Accident Fund Act<sup>2</sup> were declared invalid but the declaration of invalidity was suspended for 18 months to enable Parliament to cure the defect in the impugned provisions.<sup>3</sup> As the order was issued on 17 February 2011, the period of suspension would lapse on 17 August 2012.

[2] When the applicants realised that Parliament was unable to enact remedial legislation within the period of suspension, they promptly launched this application on 2 July 2012. The matter was set down for hearing on 14 August 2012. The respondent did not oppose the relief sought. At the hearing, this Court issued an order in these terms:

“Paragraph 2 of the order made by this Court in the matter of *Mvumvu and Others v Minister of Transport and Another* 2011 (2) SA 473 (CC) is varied and the period of suspension contemplated in that paragraph is extended for a further period of six months.”

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<sup>1</sup> *Mvumvu and Others v Minister of Transport and Another* [2011] ZACC 1; 2011 (2) SA 473 (CC); 2011 (5) BCLR 488 (CC).

<sup>2</sup> 56 of 1996.

<sup>3</sup> “The following order is made:

1. It is declared that ss 18(1)(a)(i), 18(1)(b) and 18(2) of the Road Accident Fund Act 56 of 1996, as they read before 1 August 2008, are inconsistent with the Constitution and invalid.
2. The declaration of invalidity referred to in para 1 above is suspended for 18 months from the date of this order, to enable Parliament to cure the defect.
3. In the event of the declaration of invalidity coming into force without Parliament having cured the defect, the order of invalidity will not apply to claims in respect of which a final settlement has been reached or a final judgment has been granted, before the date of this order.
4. The costs order granted by the High Court is confirmed.
5. The respondents are ordered to pay the costs of proceedings in this Court, jointly and severally.”

We stated at the time the order was made that reasons for it would follow. These are the reasons.

[3] Section 172(1) of the Constitution empowers this Court to make a just and equitable order, following a declaration that legislation is invalid for being inconsistent with the Constitution.<sup>4</sup> In the context of this section, a just and equitable remedy includes an order suspending the declaration of invalidity for a period determined by the court. The operation of the invalidity order is suspended so as to allow Parliament to cure the defect. But sometimes it occurs, as is the position here, that Parliament is unable to correct the defect before the period of suspension lapses.

[4] When Parliament fails to cure the defect during the suspension period, it becomes necessary to request the Court to extend the period of suspension in order to prevent the coming into operation of the order of invalidity. However, the request must be made and the decision to extend must come before the suspension expires as an expired one cannot be extended, nor can it be revived.<sup>5</sup>

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<sup>4</sup> 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.”

<sup>5</sup> *Ex Parte Minister of Social Development and Others* [2006] ZACC 3; 2006 (4) SA 309 (CC); 2006 (5) BCLR 604 (CC) at para 27.

[5] The power of this Court to extend the period of suspension flows from the broad power it enjoys to grant a just and equitable order. In *Zondi v MEC, Traditional and Local Government Affairs and Others*<sup>6</sup> this Court said:

“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.”<sup>7</sup>

[6] However, in view of the principle that once a court has delivered a final order or judgment, it becomes *functus officio* and thus cannot correct, alter or supplement the order,<sup>8</sup> the power to extend a period of suspension is not lightly exercised.<sup>9</sup> The Court will ordinarily grant an extension if it is just and equitable to do so. In determining whether it will be just and equitable, the Court must take into account factors such as the sufficiency of the explanation for failure to carry out the order within the original period of suspension; prejudice likely to be suffered if suspension is not extended; prospects of curing the defect within the extended period; as well as the need to promote a functional and orderly state administration for the benefit of the

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<sup>6</sup> [2005] ZACC 18; 2006 (3) SA 1 (CC); 2006 (3) BCLR 423 (CC).

<sup>7</sup> Id at para 40.

<sup>8</sup> *Firestone South Africa (Pty) Ltd v Gentiruco A.G.* 1977 (4) SA 298 (A).

<sup>9</sup> *Zondi* above n 6 at para 47.

general public.<sup>10</sup> These factors must be weighed against the need to have finality in litigation.

*Sufficiency of explanation*

[7] The applicants aver that work on a draft amendment bill commenced immediately after 17 February 2011. Although they had expected the bill to be short, drafting it proved to be a difficult task. They had to weigh up a wide range of considerations so as to compensate properly road accident victims such as the respondents, while avoiding the effects of a substantial unbudgeted expenditure which was not sustainable. In addition, they had to investigate and determine the effect of the proposed amendment bill on common law claims against individual wrongdoers.

[8] Having produced a bill, a process of consultation was undertaken and interested parties were afforded the opportunity to make representations on it. Many of the comments received were critical of the bill, pointing to its unfairness and also stating that it was unworkable. Following these public comments, a decision was taken to revise the bill to address concerns raised during the public consultation. The revised bill was submitted to the Chief State Law Advisor in February 2012. Various technical amendments were suggested. Before it was submitted to Cabinet in May, the bill was forwarded to the Joint Cluster for Social Protection, Community and Human Development.<sup>11</sup> Cabinet approved the bill on 30 May 2012.

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<sup>10</sup> *Ex Parte Minister of Social Development and Others* above n 5 at para 50 and *Zondi* above n 6 at para 47.

<sup>11</sup> This Cluster is a committee of Ministers responsible for relevant portfolios.

[9] On 6 June 2012, the bill was submitted to Parliament and on the same date it was referred to the Portfolio Committee on Transport and the Select Committee on Public Services, where it had to begin its course through Parliament. But Parliament went into recess and reconvened on 24 July 2012. In view of this the bill could not go through the various stages necessary for passing legislation, hence this application for extension of the suspension period.

[10] This Court was satisfied that an acceptable explanation was tendered for the failure to cure the defect within the period of suspension fixed in the order of 17 February 2011.

*Whether it was just and equitable to extend*

[11] The applicants advanced two grounds in urging this Court to exercise its power to extend. First, they contended that should the declaration of invalidity come into force, the financial liability of the Road Accident Fund would be increased by an amount of approximately R2.263 billion as opposed to an additional amount of R1.3 billion by which its liability will increase if the bill comes into force before the expiry of the extended suspension. The applicants asserted that these amounts would add to the Fund's accumulated deficit which would render it financially unstable. They claimed that the expiration of the suspension period in August this year would burden the Fund with an additional unbudgeted expenditure of almost R1 billion. They contended that the lapsing of the suspension would undermine the efforts to turn the Fund into a financially sustainable entity.

[12] Second, with reference to the original judgment in which the relevant order was made, the applicants pointed out that the coming into force of the order of invalidity would give rise to unfair consequences. In its judgment, this Court drew attention to other provisions of the Act which suffered from the same defect but were not part of the impugned provisions. The Court urged Parliament when correcting the relevant defects also to address those provisions. If the declaration of invalidity were to come into force, the people whose claims were governed by provisions not declared invalid would continue to suffer the inequality brought about by those provisions. The bill currently before Parliament addresses the plight of those claimants as well as that of the present respondents.

[13] The applicants estimated that the bill could be passed into law within a period of about three months but it transpired at the hearing that a longer period of suspension would be realistic. In these circumstances, this Court was satisfied that it was just and equitable to extend the suspension by a period of six months.

[14] It is for all these reasons that the Court extended the period of suspension.

For the Applicants:

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Edward Nathan Sonnenbergs  
Attorneys.