



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 24/21

In the matter between:

SPEAKER OF THE NATIONAL ASSEMBLY

First Applicant

**CHAIRPERSON OF THE NATIONAL
COUNCIL OF PROVINCES**

Second Applicant

and

WOMEN'S LEGAL CENTRE TRUST

First Respondent

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

Second Respondent

**MINISTER OF JUSTICE AND CONSTITUTIONAL
DEVELOPMENT**

Third Respondent

MINISTER OF HOME AFFAIRS

Fourth Respondent

**SOUTH AFRICAN HUMAN RIGHTS
COMMISSION**

Fifth Respondent

**COMMISSION FOR THE PROMOTION
AND PROTECTION OF THE RIGHTS
OF CULTURAL, RELIGIOUS AND
LINGUISTIC COMMUNITIES**

Sixth Respondent

**LAJNATUN NISAA-IL MUSLIMAAT
(ASSOCIATION OF MUSLIM
WOMEN OF SOUTH AFRICA)**

Seventh Respondent

and

COMMISSION FOR GENDER EQUALITY

Intervening Party

and

MUSLIM ASSEMBLY CAPE

First Amicus Curiae

UNITED ULAMA COUNCIL OF SOUTH AFRICA

Second Amicus Curiae

Neutral citation: *Speaker of the National Assembly and Another v Women's Legal Centre Trust and Others* [2024] ZACC 18

Coram: Maya CJ, Gamble AJ, Kollapen J, Majiedt J, Mathopo J, Mhlantla J, Rogers J, Theron J and Tshiqi J.

Judgments: Mathopo J (unanimous)

Order Issued on: 26 June 2024

Reasons issued on: 18 September 2024

Summary: Declaration of invalidity — extension of the period of suspension — Marriage Bill — public involvement — urgent application — just and equitable order

REASONS FOR ORDER

MATHOPO J (Maya CJ, Gamble AJ, Kollapen J, Majiedt J, Mhlantla J, Rogers J, Theron J and Tshiqi J concurring):

Introduction

[1] This is an application for an extension of the period of suspension of the declaration of invalidity, following this Court's decision in *Women's Legal Centre Trust v President of the Republic of South Africa*.¹ On 28 June 2022, this Court handed down an order

¹ *Women's Legal Centre Trust v President of the Republic of South Africa* [2022] ZACC 23; 2022 (5) SA 323 (CC); 2023 (1) BCLR 80 (CC).

that declared the Marriage Act² and the Divorce Act³ inconsistent with sections 9, 10, 28 and 34 of the Constitution, in that they fail to recognise marriages solemnised in accordance with *Sharia* law (Muslim marriages). This Court also declared sections 6, 7(3) and 9(1) of the Divorce Act inconsistent with the Constitution.

[2] The declaration of constitutional invalidity of 28 June 2022 was suspended for a period of 24 months to allow Parliament to correct the defect, and was due to expire on 27 June 2024.

[3] On Wednesday, 26 June 2024, this Court made the following order:

1. “The declaration of invalidity in paragraph 1.6 of the order of this Court in *Women’s Legal Centre Trust v President of the Republic of South Africa* [2022] ZACC 23; 2022 (5) SA 323 (CC); 2023 (1) BCLR 80 (CC) is further suspended from 27 June 2024 to 27 June 2026.
2. No order as to costs is made.
3. Reasons for this order shall be given at a later date.”

[4] This matter was decided without a hearing, and these are the reasons for the order of this Court, dated 26 June 2024.

Urgent extension application

[5] On 23 April 2024, approximately two months before the expiry of the suspension period, the applicants, the Speaker of the National Assembly and the Chairperson of the National Council of Provinces (collectively referred to as Parliament), brought an urgent application to this Court, seeking an extension of the suspension of declaration of invalidity for another two years, until 27 June 2026.

[6] The Chief Justice issued directions requesting the following:

² 25 of 1961.

³ 70 of 1979.

1. “The applicants and respondents that are opposing this application are directed to file written submissions of not more than 20 pages each in which they address the following issues—
 - (a) the urgency of the application;
 - (b) any prejudice that may be suffered in granting the extension sought by the applicants; and
 - (c) the prospects of the Marriage Bill [B43-2023] being passed during the extended period of suspension.
2. The applicants must file written submissions on or before Monday, 10 June 2024.
3. The respondents must file written submissions on or before Monday, 17 June 2024.”

[7] Parliament filed written submissions within the prescribed time. The first respondent (Women’s Legal Centre Trust) and the second respondent (President of the Republic of South Africa) filed notices to abide. The other parties did not participate in these proceedings.

[8] Parliament submitted that the reason for the extension sought is to ensure that there is meaningful public engagement in respect of the Marriage Bill, in accordance with sections 59(1)(a) and 72(1)(a) of the Constitution.⁴ It also submitted that it is just and equitable for the extension to be granted, to allow Parliament to cure the constitutional defects, and that this Court has a wide discretion to do so.⁵

⁴ Sections 59(1)(a) reads:

“Public access to and involvement in National Assembly

(1) The National Assembly must

(a) facilitate public involvement in the legislative and other processes of the Assembly and its committees”.

Section 72(1)(a) reads:

“Public access to and involvement in National Council

(1) The National Council of Provinces must facilitate public involvement in the legislative and other processes of the Council and its committees”.

⁵ *Acting Speaker of the National Assembly v Teddy Bear Clinic for Abused Children* [2015] ZACC 16; 2015 (10) BCLR 1129 (CC) at para 11; *Zondi v Member of the Executive Council for Traditional and Local Government Affairs* [2005] ZACC 18; 2006 (3) SA 1 (CC); 2006 (3) BCLR 423 (CC) at para 45.

[9] Parliament pointed out that the Divorce Amendment Act⁶ was assented to by the President on 6 May 2024 and, therefore, the defects in the Divorce Act identified by this Court are not the subject of the application for extension, but only those defects that the Marriage Bill is intended to cure. According to Parliament, this is an indication that the Marriage Bill is likely to be passed in the extension period requested.

[10] The Marriage Bill, as submitted by Parliament, is complex in nature because it involves different religious laws (such as those that relate to the Muslim, Hindu and Jewish faiths). It, therefore, requires multi-disciplinary research into the impact of the policy development by all affected communities. Furthermore, this Bill requires input from more than one government department.

[11] The Bill was only introduced to the National Assembly on 13 December 2023. Parliament submitted that five months is not sufficient time to facilitate public involvement, deliberate on the Bill, and finalise the provincial legislatures' processes. Parliament has provided dates and timelines which indicate that it is taking the necessary measures to comply with due process.

[12] In relation to urgency, Parliament referenced *New Nation I*⁷ and *New Nation II*⁸ and submitted that their application demonstrates the presence of all the factors listed that determine urgency. It submitted that if it is not granted the extension, it will not be able to redress the defect in the Marriage Act and will have failed to comply with the order. As stated, the suspension of invalidity initially granted by the order of this Court was due to expire on 27 June 2024.

[13] Parliament submitted that no prejudice will be suffered because the necessary steps have already been taken. As it stands, the Department of Home Affairs is

⁶ 1 of 2024.

⁷ *New Nation Movement NPC v President of the Republic of South Africa* [2019] ZACC 27; 2019 (9) BCLR 1104 (CC) (*New Nation I*) at para 8.

⁸ See *Speaker of the National Assembly v New Nation Movement NPC* [2023] ZACC 12; 2023 (7) BCLR 897 (CC) (*New Nation II*) at para 19.

registering Muslim marriages in terms of section 3 of the Recognition of Customary Marriages Act.⁹ The promulgation of the Divorce Amendment Act is indicative of steps being taken. Lastly, prejudice is more likely to be suffered if the relief sought in this application is not granted because there will be no binding legislation to regulate affected marriages.

[14] With regard to the prospects of the Bill being passed during the extension period sought, Parliament relied on the steps that have already been taken. It stated that the process is currently in the public participation stage and under the control of Parliament. It submitted that, on average, Bills take 27 months to be passed by both Houses and that it never exceeds a period of 48 months. Parliament states that it is certain that the Bill will be passed within 24 months.

Analysis

Urgency

[15] The determination of urgency in the context of this application requires a consideration of various factors. These include, but are not limited to, the adequacy of the reasons provided for the failure to comply with the extended suspension period, prejudice if the relief sought is or is not granted, and the prospects of curing the constitutional defects within the new deadline or, more generally, the prospects of complying with the deadline. I now turn to the facts as pleaded by Parliament to determine whether a case for urgency has been made out.¹⁰

[16] As stated above, Parliament brought an urgent application before this Court approximately five weeks before the expiry of the suspension period. Rule 12 of this Court's rules sets out the requirements for urgent applications. The rules require an explicit setting out of the circumstances that would justify a departure from the ordinary processes. This Court issued directions requesting specific submissions in order to

⁹ 120 of 1998.

¹⁰ *New Nation II* above n 8 at para 19.

exercise its discretion to satisfy itself that the matter is indeed urgent. After 27 June 2024, Parliament would have been in contravention of the order contained in the first judgment had the order of this Court not been granted on 26 June 2024. To avoid such contravention, it was decided that this matter required the urgent attention of this Court.

Power of this Court to grant extension

[17] This Court has the power to grant extension orders in respect of orders made in terms of section 172 of the Constitution. According to section 172(1)(b), courts are afforded a wide discretionary power to grant a just and equitable remedy if it is in the interests of justice to do so. In *New Nation II*,¹¹ dealing with a second application for an extension of the period of suspension of the declaration of invalidity, this Court held that—

“[a] proper case justifying the need for an extension must be made out because the effect of suspending the operation of a declaration of invalidity is to preserve law which has been found unconstitutional and void, usually, as was the case here, to afford Parliament opportunity to remedy the defect.”

[18] Parliament has sufficiently indicated the steps that have been taken, and the timelines cannot be faulted. Parliament has also managed to comply with the order in relation to the Divorce Amendment Act. It is worth noting that the first respondent, who was the applicant in the initial judgment, did not oppose this urgent application, nor did any of the other parties. Additionally, Parliament has implemented temporary measures to regulate affected marriages while the Bill undergoes the prescribed legislative process. In my view, this suggests that there will be no prejudice suffered.

[19] Parliament has sufficiently explained the adverse implications of not granting an extension on its constitutional obligations to provide a meaningful platform for public participation. The Constitution recognises participatory democracy as a vital element

¹¹ Id at para 22.

of South Africa's democracy. In *South African Iron and Steel Institute*,¹² it was held that "the purpose of public participation and involvement in democratic processes is primarily to influence decision-making processes that affect the will of the people"¹³. In *Doctors for Life*,¹⁴ Ngcobo J captured the idea of participatory democracy as follows:

"The participation by the public on a continuous basis provides vitality to the functioning of representative democracy. It encourages citizens of the country to be actively involved in public affairs, identify themselves with the institutions of government and become familiar with the laws as they are made. It enhances the civic dignity of those who participate by enabling their voices to be heard and taken account of. It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice. It strengthens the legitimacy of legislation in the eyes of the people. Finally, because of its open and public character it acts as a counterweight to secret lobbying and influence peddling. Participatory democracy is of special importance to those who are relatively disempowered in a country like ours where great disparities of wealth and influence exist."

[20] This Court also took judicial notice of the delay that will be occasioned due to the 2024 elections. In the new term, Parliament will comprise new members. Some of them will require time to familiarise themselves with the Parliamentary rules and procedures governing the law-making processes as well as with the subject matter of the Bill, taking into account its complexity in as far as the laws governing various traditional and religious faiths are concerned.

[21] It was therefore just and equitable, and in the interests of justice, for the extension to be granted and it was so ordered.

¹² *South African Iron and Steel Institute v Speaker of the National Assembly* [2023] ZACC 18; 2023 (10) BCLR 1232 (CC) at para 28.

¹³ *Id* at para 28.

¹⁴ *Doctors for Life International v Speaker of the National Assembly* [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC) at para 115.

For the Applicants:

M Gwala SC and N Mathe-Ndlazi
instructed by the State Attorney, Cape
Town