CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 117/11
[2013] ZACC 44

In the matter between:

MINISTER OF COMMUNICATIONS	Applicant
and	
PHUMLA RUTH PATRICIA NGEWU	First Respondent
POST OFFICE RETIREMENT FUND	Second Respondent
MINISTER OF FINANCE	Third Respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Fourth Respondent
MAWETHU NGEWU	Fifth Respondent

Heard on	:	7 November 2013
Order granted	:	7 November 2013
Reasons for order	:	5 December 2013

JUDGMENT

MADLANGA J (Moseneke ACJ, Skweyiya ADCJ, Cameron J, Dambuza AJ, Froneman J, Jafta J, Mhlantla AJ, Nkabinde J, Van der Westhuizen J and Zondo J concurring):

[1] On 7 November 2013 this Court granted an order in the following terms:

> "1. The application for an amendment of this Court's order in Case Number CCT 117/11 handed down on 7 March 2013 to extend the period of suspension of the order of invalidity from eight months to 14 months is dismissed with costs.
>
> 2. Reasons for this order are to follow."

These are the reasons.

[2] The proceedings we entertained on an urgent basis on 7 November 2013 are a sequel to an order granted by this Court on 7 March 2013.[1] That order declared sections 10 to 10E of the Post Office Act[2] invalid for being inconsistent with section 9(1) of the Constitution. The declaration of invalidity was suspended for eight months.[3] The constitutional invalidity stemmed from the fact that sections 10 to 10E of the Post Office Act do not provide for the former spouse of a member of the Post Office Retirement Fund, who has been awarded a portion of that member's pension interest in the fund pursuant to section 7(8) of the Divorce Act,[4] to be paid that portion

[1] *Ngewu and Another v Post Office Retirement Fund and Others* [2013] ZACC 4; 2013 (4) BCLR 421 (CC) (*Ngewu*).

[2] 44 of 1958.

[3] Para 4 of the order in *Ngewu* above n 1.

[4] 70 of 1979. Section 7(8) of the Divorce Act provides:

> "Notwithstanding the provisions of any other law or of the rules of any pension fund—
>
> (a) the court granting a decree of divorce in respect of a member of such a fund, may make an order that—

on divorce or dissolution of a customary marriage (the "clean break" principle). By contrast, the Pension Funds Act[5] and the Government Employees Pension Law[6] do have a provision of that nature. The upshot of this is that former spouses of members of pension funds subject to the Pension Funds Act and Government Employees Pension Law can claim their share of their former spouses' pension interest at the time of divorce.[7]

[3] In addition, the order of 7 March 2013 said:

> "If the constitutional defect is not remedied by 7 November 2013, section 24A of the Government Employees Pension Law, Proclamation 21 of 1996, shall be read into the Post Office Act 44 of 1958 as section 10F thereof and will take effect."[8]

The effect of the reading-in was that if the period of suspension came to an end without any remedial action having been taken by Parliament, former spouses of members of the Post Office Retirement Fund would enjoy benefits in accordance with the "clean break" principle.

(i) any part of the pension interest of that member which, by virtue of subsection (7), is due or assigned to the other party to the divorce action concerned, shall be paid by that fund to that other party when any pension benefits accrue in respect of that member;

(ii) the registrar of the court in question forthwith notify the fund concerned that an endorsement be made in the records of that fund that that part of the pension interest concerned is so payable to that other party and that the administrator of the pension fund furnish proof of such endorsement to the registrar, in writing, within one month of receipt of such notification;

(b) any law which applies in relation to the reduction, assignment, transfer, cession, pledge, hypothecation or attachment of the pension benefits, or any right in respect thereof, in that fund, shall apply *mutatis mutandis* with regard to the right of that other party in respect of that part of the pension interest concerned."

[5] 24 of 1956.

[6] Proclamation 21 of 1996.

[7] *Ngewu* above n 1 at para 1.

[8] Para 5 of the order in *Ngewu* above n 1.

[4] As fate would have it, as late as 4 November 2013 no remedial action had been taken by Parliament. This was so despite the fact that prior to the grant of the order of 7 March 2013, the applicants had indicated to this Court that the amendment would be finalised within six months. On 4 November 2013 the Minister of Communications brought an urgent application asking that the period of suspension of the declaration of invalidity be extended from eight to 14 months. The notice of motion gave the respondents until the close of business on 6 November 2013 to file opposing affidavits. Ms Ngewu, the only respondent to oppose the application, filed her answering affidavit on that day. The matter was set down for hearing the following day.

[5] An antecedent question which must be answered by this Court is whether, as at 7 November 2013 when the application was heard, the period of suspension had expired already. If it had expired, this Court would have lacked competence to extend or revive it.[9] If it had not, on the authority of *Zondi*,[10] this Court was at liberty to extend the period. What then is the answer to the question?

[6] Two paragraphs in the order bear relevance to this enquiry. They are paragraphs 4 and 5.[11] Paragraph 4 says that "[t]he declaration of invalidity is

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

[10] *Zondi v MEC, Traditional and Local Government Affairs, and Others* [2005] ZACC 18; 2006 (3) SA 1 (CC); 2006 (3) BCLR 423 (CC) at para 40.

[11] See [3] above.

suspended for eight months to enable Parliament to cure the defect." Standing by itself, paragraph 4, according to the civilian computation of time, means that the period of suspension expired at midnight when the 6th of November 2013 ended.[12] Paragraph 5 of the order specifies that the reading-in will take effect if the defect is not remedied "by" 7 November 2013. This raises the question whether the reading-in took effect at midnight when the 6th ended and the 7th began or at midnight at the end of the 7th. The New Shorter Oxford English Dictionary defines the word "by" in relation to time to mean, amongst others, "**a** In the course of, at, in, on; during . . . **b** On or before, not later than." The English Court of Appeals, relying on this dictionary meaning held, in *Eastaugh*[13] that as a matter of definition "by the date" ought to mean "on or before the date". The date specified is thus included.

[7] Read separately, the two paragraphs appear to refer to different dates. However, the proper approach is to read them together in the context of the entire order under interpretation. The object of the reading-in was to avoid a lacuna in the event of the declaration of invalidity coming into effect. Therefore, what was envisaged in issuing the order was that on the expiry of the suspension and if the declaration of invalidity were to take effect, the reading-in would also come into operation at the same time. I am led to the conclusion that on a proper reading of paragraphs 4 and 5 of the order, the period of suspension was to expire at the end of 7 November. It is at that point that the reading-in would take effect. Thus when we

[12] According to the civil computation method a period of time expressed in months expires at the end of the day preceding the corresponding calendar day in the last month. It is settled law that the commencement of a period of time in curial calculation is governed by the ordinary civilian method where any unit of time other than days is used. See Cameron "Time" in Joubert et al (eds) LAWSA (reissue) vol 27 at paras 423-34 and 438.

[13] *Eastaugh and Others v Macpherson* [1954] 3 All ER 214 (CA) (*Eastaugh*) at 215B-C.

heard the urgent application, it was still open to this Court to extend the period of suspension.

[8] In *Mvumvu*[14] Jafta J cautioned:

> "[I]n 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, the power to extend a period of suspension is not lightly exercised. 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 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 general public. These factors must be weighed against the need to have finality in litigation."[15] (Footnotes omitted.)

[9] It is on these factors that the applicant failed woefully to convince us that an extension was warranted. The applicant says that an amendment Bill had already been published for public comment on 31 October 2012. The Bill was amended and presented to Cabinet by the applicant's predecessor in June 2013, and not in March 2013 as originally intended. Several reasons are given for the delay. They include the woes faced by the previous Minister, which culminated in her participation in hearings before Parliament's Ethics Committee.

[14] *Minister for Transport and Another v Mvumvu and Others* [2012] ZACC 20; 2012 (12) BCLR 1340 (CC) (*Mvumvu*).

[15] Id at para 7.

[10] The applicant avers that Cabinet approved the Bill during the same month it was submitted to it. He assumed office as recently as 10 July 2013. Since then, he and his department have not been guilty of any inaction insofar as the process of procuring the legislative amendment is concerned. What gave rise to the delay was a dispute at a meeting of the Portfolio Committee on Communications on 8 October 2013. The dispute related to "the proper tagging of the Bill". The applicant says that "the tagging issue arises because the Bill affects the consequences of dissolution of customary marriages, which may require the Bill to be dealt with in accordance with section 76 of the Constitution, rather than section 75."[16] A legal opinion has been sought on this. Parliament's last term for the year ended on 8 November 2013 and it was not expected that the opinion would have been received before that date. Based on what he had been informed by the Portfolio Committee, the applicant stated that an extension of six months would suffice.

[11] Much as one accepts that, on the available information, the applicant appears to have acted expeditiously in taking the legislative process forward, there are glaring omissions in the explanation. The applicant says that it became evident in September 2013 that the legislative process would not be completed before the period of suspension had expired. But the decision to seek an extension was only taken on 9 October 2013. No explanation is given for not taking the decision in September or

[16] Section 75 regulates the procedure to be followed when Parliament considers ordinary Bills not affecting provinces. Section 76, on the other hand, governs the procedure to be followed when Parliament considers ordinary Bills that do affect provinces. Ordinary Bills do not include Bills amending the Constitution (section 74) and money Bills (section 77).

earlier than 9 October. The delay between 9 October 2013 and 4 November 2013[17] is explained on the basis that the applicant was "assembling" information "necessary to found an application of this nature". The narrative given by the applicant could not have required a period of about a month to put together. Likewise, just by looking at its nature, it must have been a matter of relative ease for the applicant and the departmental officials to collate the information that makes up the annexures to the applicant's affidavit.[18] Absent a cogent explanation, this Court is left in the dark as to why the applicant approached us three days before the expiry of the period of suspension. The explanation given does not come close to being sufficient.

[12] Ms Ngewu paints a picture of destitution continuing until Parliament remedies the defect in the legislation. She is unemployed and has no means of sustenance. She has been forced to live on handouts.[19] She has nowhere to stay and has had to move from place to place, staying wherever she can be accommodated. Needless to say, all

[17] 4 November 2013, being the date the urgent application was lodged.

[18] The documents that make up the relevant annexures are:

(a) an affidavit by Minister Dina Pule requesting the eight month suspension that was granted on 7 March 2013;

(b) Minutes of Portfolio Committee on Communications (National Assembly) meeting of 6 August 2013;

(c) Minutes of Portfolio Committee on Communications (National Assembly) meeting of 17 September 2013;

(d) Minutes of Portfolio Committee on Communications (National Assembly) meeting of 18 September 2013;

(e) Minutes of Portfolio Committee on Communications (National Assembly) meeting of 8 October 2013; and

(f) Portfolio Committee Amendments to South African Post Office SOC Limited Amendment Bill.

[19] For example, on 5 September and 2 October 2013 Ms Ngewu asked for financial assistance from her attorneys of record, the Women's Legal Centre.

of this is quite demeaning. The prejudice that she would suffer as a result of an extension is manifest.

[13] By contrast, the state is not going to suffer any real prejudice if the extension is not granted. That is so because the only difference between the reading-in in paragraph 5 of this Court's previous order and what is contained in the Bill is that the reading-in provides for payment to a former spouse of a fund member within 60 days of an election having been made, while the Bill provides for payment to be made within 30 days, in certain circumstances. The applicant was candid enough to say that he was "constrained to admit that the administrative and substantive consequences of the differences are small." However, he argued that if the extension was not granted and the reading-in took effect, the Parliamentary process would have "to begin again" and the work that had been undertaken in procuring the amendment would come to nought. To say the least, this boggles the mind. Why the process would not simply be taken forward and finalised escapes me. And the fact that the applicant has not explained what he means does not assist either.

[14] The applicant further argued that, should the suspension not be extended and the reading-in come into effect, this Court will be intervening in an area of exclusive legislative power at a time when a legislative amendment is on the verge of being enacted. I do not agree. Our constitutional jurisprudence has, for some time now, permitted reading-in in appropriate circumstances.[20] In any event, the applicant's

[20] See for example *Minister of Home Affairs and Another v Fourie and Another (Doctors for Life International and Others,* Amici Curiae*); Lesbian and Gay Equality Project and Others v Minister of Home Affairs and*

predecessor consented to the order of 7 March 2013 well aware that if remedial action was not taken during the period of suspension, the reading-in would take effect. In fact, this Court was assured that the then respondents, who included the applicant's predecessor, were comfortable with the reading-in. It is apt to quote our original judgment in *Ngewu*:

> "Parliament and the Executive should carefully consider the consequences of failing to remedy this constitutional defect, especially how the rather extensive reading-in will affect the structure and application of the relevant legislation. This must be done, even though counsel for the respondents – when prompted by the Chief Justice during the presentation of oral submissions – gave the assurance that his clients were comfortable with the reading-in as well as the period of suspension."[21] (Footnote omitted.)

In these circumstances, the separation of powers point now raised by the applicant rings hollow.

[15] Weighing up all the relevant factors, this Court could not but come to the conclusion that it was not just and equitable to grant an extension of the period of suspension.

[16] It was for these reasons that the following order was made on 7 November 2013:

Others [2005] ZACC 19; 2006 (1) SA 524 (CC); 2006 (3) BCLR 355 (CC) and *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* [2004] ZACC 12; 2004 (4) SA 125 (CC); 2004 (7) BCLR 775 (CC).

[21] *Ngewu* above n 1 at para 18.

1. The application for an amendment of this Court's order in Case Number CCT 117/11 handed down on 7 March 2013 to extend the period of suspension of the order of invalidity from eight months to 14 months is dismissed with costs.

For the Applicant:	Advocate S Yacoob instructed by the State Attorney.
For the First Respondent:	Advocate I Goodman instructed by the Women's Legal Centre.