



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 54/15

In the matter between:

ACTING SPEAKER OF THE NATIONAL ASSEMBLY

Applicant

and

TEDDY BEAR CLINIC FOR ABUSED CHILDREN

First Respondent

RAPCAN

Second Respondent

Neutral citation: *Acting Speaker of the National Assembly v Teddy Bear Clinic for Abused Children and Another* [2015] ZACC 16

Coram: Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Molemela AJ, Nkabinde J, Theron AJ and Tshiqi AJ

Judgment: Nkabinde J (unanimous)

Heard on: 7 May 2015

Order on: 13 May 2015

Reasons on: 15 June 2015

Summary: Extension of period of suspension of declaration of invalidity — factors to be considered — urgency — explanation sufficient

ORDER

On application for direct access to this Court:

1. Paragraph 1 of the order made by this Court on 31 March 2015 is varied so that the period of suspension is extended until Wednesday, 5 August 2015.
2. Costs are awarded in favour of the respondents.

REASONS FOR ORDER

NKABINDE J (Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Molemela AJ, Theron AJ and Tshiqi AJ concurring):

Introduction

[1] The applicant launched an urgent application for direct access to this Court concerning the declaration of invalidity granted in *Teddy Bear Clinic*.¹ In that case, sections 15 and 16 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act² (Act) were declared inconsistent with the Constitution and invalid.³

¹ *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* [2013] ZACC 35; 2014 (2) SA 168 (CC); 2013 (12) BCLR 1429 (CC) (*Teddy Bear Clinic*).

² 32 of 2007.

³ The relevant parts of the order in *Teddy Bear Clinic* read:

“The order of the North Gauteng High Court, Pretoria, is set aside and replaced by the following:

1. Sections 15 and 16 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (Act) are declared inconsistent with the Constitution and invalid to the extent that they impose criminal liability on children under the age of 16 years.
2. The declaration of invalidity is suspended for a period of 18 months from the date of this judgment in order to allow Parliament to correct the defects in the light of this judgment.
3. From the date of this judgment, a moratorium is placed on all investigations into, arrests of, prosecutions of, and criminal and ancillary proceedings

The declaration of invalidity was suspended, and the applicant now seeks an extension of that suspension period. The hearing of the urgent application was preceded by an order granting a limited extension of the suspension from 2 April 2015 until 15 May 2015. The issue for determination when the application was heard on 7 May 2015 was whether the period of suspension should be extended further to 5 August 2015.

[2] On 13 May 2015, this Court, having read the papers and considered the parties' written and oral submissions, granted the requested extension to 5 August 2015. These are the reasons that motivated the granting of the extension.

Parties

[3] The applicant is the Acting Speaker of the National Assembly (Acting Speaker).⁴ The first respondent is Teddy Bear Clinic for Abused Children. It is a not-for-profit company that provides a wide range of medical and related services to abused children and coordinates programmes to divert young sex offenders from the criminal justice system. The second respondent is Resources Aimed at the Prevention of Child Abuse and Neglect (RAPCAN). It is also a not-for-profit organisation dedicated to the prevention of child victimisation and the promotion of children's rights. Both organisations (respondents) are represented in this Court by the Centre for Child Law.

against, children under the age of 16 years in relation to sections 15 and 16 of the Act, pending Parliament's correction of the defects in the Act.

4. The Minister of Justice and Constitutional Development is required to take all steps necessary to ensure that, when a court has convicted a child under the age of 16 years of an offence referred to in sections 15 or 16 of the Act, or issued a diversion order following a charge under those provisions, the details of the child will not appear in the National Register for Sex Offenders, and a certificate of expungement is issued directing that the conviction and sentence or diversion order of such child be expunged."

⁴ Although Parliament was not cited in the proceedings in *Teddy Bear Clinic*, the declaration of invalidity was suspended in order to allow Parliament, the institution best-suited to balance the competing interests this sensitive topic raises, to correct the defect in the invalid sections.

Background

[4] On 3 October 2013 this Court, in *Teddy Bear Clinic*, declared sections 15 and 16 of the Act to be inconsistent with the Constitution and invalid to the extent that they impose criminal liability on children under the age of 16 for engaging in consensual sexual conduct.⁵ The bases for the declaration were that the sections infringed: (1) the rights of 12 to 16 year olds (adolescents) to dignity and privacy provided for in sections 10 and 14 of the Constitution and (2) the best interests of the child principle provided for in section 28(2) of the Constitution. The declaration of invalidity was suspended for a period of 18 months from the date of judgment to enable Parliament to correct the defects. To ensure that the unconstitutional state of affairs did not continue during the period of suspension, the Court ordered that a moratorium be placed on activities in relation to sections 15 and 16 pending Parliament's correction of the defects in the Act. The moratorium was placed on all investigations into, arrests and prosecutions of, and criminal and ancillary proceedings against adolescents and children 16 years and younger. It was said that this moratorium would put in abeyance any related reporting obligations which may otherwise have arisen from the operation of section 54 of the Act.⁶

[5] On 30 March 2015 the Acting Speaker launched an urgent application seeking an extension of the period of suspension to 5 August 2015. The next day, on 31 March 2015, this Court considered that it would be in the interests of all parties to allow for the filing of written submissions and an oral hearing. The Court granted a short extension to 15 May 2015 so that the application could be heard before the declaration of invalidity came into effect on 2 April 2015.⁷

⁵ Section 15 deals with the criminalisation of "sexual penetration", commonly known as statutory rape, while section 16 deals with the criminalisation of "sexual violation", commonly known as statutory sexual assault. It is important to note that the criminalisation of non-consensual sexual offences, including rape and sexual assault, whether committed by adults, adolescents or children, was not under challenge in that case. In addition, no party challenged the prohibition against "consensual" sexual activity between adults and adolescents or between adults and children. The case concerned only the criminalisation of consensual sexual activities between adolescents.

⁶ Above n 1 at para 111.

⁷ The order of 31 March 2015 reads:

[6] At the hearing, the issue for determination was narrow: whether the further extension to 5 August 2015 should be granted.

Acting Speaker's submissions

[7] The Acting Speaker contended that it was not through any dilatoriness on his part that an extension was sought. He submitted that the work required to comply with the order is at an advanced stage. Broadly, the steps taken since 3 October 2013, the date of judgment in *Teddy Bear Clinic*, until the application was ultimately lodged were the following:

- (a) From October 2013 to February 2014, the Department of Justice and Correctional Services (Department) engaged in internal discussions regarding how best to correct the defects identified by this Court;
- (b) From February 2014 until May 2014, the government delayed the process to await this Court's judgment in *J v NDPP*;⁸
- (c) By 31 July 2014 a draft amendment Bill was finalised for public comment; and
- (d) From October 2014 until March 2015 the public consultation process was undertaken.

“The Constitutional Court has considered the application for a six-month extension of its previous order suspending the declaration of constitutional invalidity. It has concluded that it would be in the interests of all parties to allow for oral hearing and the filing of written submissions as directed. Accordingly, it is appropriate to grant a short extension as set out in the order below.

Order:

1. Paragraph 2 of the order made by this Court on 3 October 2013 in the matter of *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* (CCT 12/13) [2013] ZACC 35 is varied so that the period of suspension is extended until Friday, 15 May 2015.
2. The issue of costs will be decided together with the merits of the application.”

⁸ *J v National Director of Public Prosecutions and Another* [2014] ZACC 13; 2014 (7) BCLR 764 (CC); 2014 (2) SACR 1 (CC) (*J v NDPP*). In this case, this Court ultimately found section 50(2)(a) of the Act invalid in so far as it precluded judicial discretion in determining whether the particulars of persons convicted of sexual offences against children or mentally disabled individuals be recorded in the National Register for Sexual Offenders.

[8] It is to the final process that the Acting Speaker attributes the need for an extension of the suspension period. The applicant avers that the public consultation process undertaken resulted in a considerably greater degree of public participation than had been anticipated. It further averred that the extension would permit Parliament to comply with its constitutional obligations under sections 59(1) and 72(1) of the Constitution by allowing for a full engagement with the public in respect of the prospective amendments.⁹

[9] The main reason advanced for the date of 5 August 2015 was that it would bring the period of suspension in line with that set by this Court in *J v NDPP*. The Acting Speaker contended that the Minister for Justice and Correctional Services (Minister) was considering the amendments to sections 15 and 16 together with those to section 50(2)(a), thereby addressing concerns in both *J v NDPP* and *Teddy Bear Clinic* simultaneously.¹⁰ The Acting Speaker also highlighted that this Court, in *Teddy Bear Clinic*, recognised the sensitivity of the subject matter of the impugned provisions and the high degree of public scrutiny it would attract, thus finding that Parliament is institutionally best-suited to ensure that the ultimate statutory regime is decided upon in an open, inclusive and transparent manner. It is contended that no

⁹ Section 59(1) provides:

“The National Assembly must—

- (a) facilitate public involvement in the legislative and other processes of the Assembly and its committees; and
- (b) conduct its business in an open manner, and hold its sittings, and those of its committees, in public, but reasonable measures may be taken—
 - (i) to regulate public access, including access of the media, to the Assembly and its committees”.

Section 72(1) provides:

“The National Council of Provinces must—

- (a) facilitate public involvement in the legislative and other processes of the Council and its committees; and
- (b) conduct its business in an open manner, and hold its sittings, and those of its committees, in public, but reasonable measures may be taken—
 - (i) to regulate public access, including access of the media, to the Council and its committees”.

¹⁰ See *Teddy Bear Clinic* above n 1 and *J v NDPP* above n 8.

prejudice would result if the extension is granted in the light of the moratorium imposed by the Court during the suspension period.

Respondents' submissions

[10] The respondents expressed gratitude to the Portfolio Committee on Justice and Correctional Service (Committee) for the work done in the process of amending the legislation. Having closely observed the work of the Committee and the significant volume of submissions received, the respondents did not oppose the granting of the extension, especially given that the amendments necessitated by *Teddy Bear Clinic* and *J v NDPP* are being considered in a single Bill. However, they remained steadfast that they would oppose any application for extension beyond 5 August 2015. The primary reason for their opposition was that last minute proposals were made by the Department, after the public consultation period had closed, which they view to be a “radical departure” from the draft Bill that was the subject of that consultation. This, in their view, could necessitate a further application.

Legal principles

[11] The Constitution empowers this Court to make a just and equitable order, following a declaration that impugned provisions are invalid for being inconsistent with the Constitution.¹¹ A just and equitable remedy includes an order suspending the declaration of invalidity for a period determined by the Court to enable Parliament to correct the defects.¹² When Parliament fails to correct the defects during the period of

¹¹ Section 172(1) of the Constitution 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.”

¹² *Id.*

suspension, an application requesting an extension must be made before the suspension period expires.¹³

[12] Although the extension was sought during the period of suspension, it is well established that the power to suspend must, for the sake of finality, be sparingly exercised.¹⁴ Factors which the Court will take into account, when exercising its broad remedial powers under section 172(1) of the Constitution, include: the sufficiency of the explanation for failing to correct the defect within the period of suspension; the prejudice likely to be suffered if the suspension is not extended; the prospects of correcting 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.¹⁵ I address these factors below, but before I do so, I deal first with the manner in which this Court was approached and the reasons for urgency.

[13] As an indication of the effort to comply, the Acting Speaker cited the fact that the Committee wrote a letter to the Speaker on 5 February 2015, requesting her to approach this Court for an extension.¹⁶ On 5 March 2015 it was decided that an extension should be sought. Funding was only approved on 24 March 2015. The urgent application was lodged on 30 March 2015, allowing the Court approximately two days within which to enable the respondents to file opposing papers and consider the merits of the application.

[14] The explanation proffered for the urgency is somewhat unsatisfactory. There is no explanation on the papers for the delay of a full 19 days between the decision being taken and funding being approved. Yet this Court was expected to consider the

¹³ *Ex Parte Minister of Social Development and Others* [2006] ZACC 3; 2006 (4) SA 309 (CC); 2006 (5) BCLR 604 (CC) (*Ex Parte Minister of Social Development*) at para 27.

¹⁴ *Cross-Border Road Transport Agency v Central African Road Services (Pty) Ltd and Another* [2015] ZACC 12 at para 50 and *Zondi v MEC Traditional and Local Government Affairs, and Others* [2004] ZACC 19; 2006 (3) SA 1 (CC); 2006 (3) BCLR 423 (CC) (*Zondi*) at para 47.

¹⁵ *Zondi* id. See also *Minister for Transport and Another v Mvumvu and Others* [2012] ZACC 20; 2012 (12) BCLR 1340 (CC) at para 7 and *Ex Parte Minister of Social Development* above n 13 at para 50.

¹⁶ The Committee's intention to approach this Court was announced on the government website on 3 February 2015.

respondents' papers and decide the application within three days. This should not be countenanced.

[15] Evidently the Acting Speaker was aware, or ought to have been aware, at least by December 2014, when the draft Bill was advertised for public comment, that the defects in the impugned provisions would not be corrected before 2 April 2015. Nonetheless, the application was launched at the eleventh hour. This Court is not institutionally designed to consider urgent applications of this kind. All state institutions must - with due deference to the rule of law, the separation of powers and the accepted checks and balances - treat this Court with the respect which the Court accords to organs of state in its dealing with them. It bears repeating that the kind of tardiness exemplified in this case should not be countenanced in the future.

Sufficiency of the explanation for extension

[16] That said, the explanation by the Acting Speaker for the delay in implementing this Court's order is, however, adequate. The responses from the public consultation process were extensive and deserved proper consideration. Indeed, the Constitution mandates it. In addition, there is reason in Parliament's decision to deal with the amendments to the Act occasioned by this Court's judgments in *Teddy Bear Clinic* and *J v NDPP*, in a single Bill. The principle of separation of powers means that courts ought to be wary of directing Parliament as to how to regulate its own processes, and where possible, permit Parliament to proceed with those it seeks to pursue in giving effect to its constitutional obligations.¹⁷

¹⁷ See sections 55 and 57(1) of the Constitution and *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 66. In this case the Court said:

“The other consideration a court must keep in mind is the principle of the separation of powers and, flowing therefrom, the deference it owes to the Legislature in devising a remedy for a breach of the Constitution in any particular case. It is not possible to formulate in general terms what such deference must embrace, for this depends on the facts and circumstances of each case. In essence, however, it involves restraint by the Courts in not trespassing onto that part of the legislative field which has been reserved by the Constitution, and for good reason, to the Legislature.”

[17] Although the order was directed to Parliament to correct the defects in the impugned provisions, one cannot discount the belated proposals by the Department which might have added to the delay. Contrary to the Acting Speaker's submissions, the respondents raised concerns regarding these proposals not so that this Court may pronounce on their validity, but to identify a factor that suggests that the process may not be completed within the proposed period of extension. At the hearing, however, this Court was assured, repeatedly, that Parliament will complete the process within the extended period and that there is no possibility of an application for a further extension. We had, and still have, no reason to doubt the veracity and good sense of the Acting Speaker's counsel in this respect, and are thus not in a position to regard those proposals as a challenge to the ability of Parliament to comply with the timeline.

Prejudice and whether the extension will be just and equitable

[18] The question remains whether prejudice is likely to be suffered if the period of suspension is not extended. The parties submitted that no prejudice would ensue in the light of the moratorium imposed by the Court. It is correct that the moratorium would continue to be operative. However, despite the parties' submissions that no prejudice is likely to be suffered, we should be mindful of the reasons why the declaration of invalidity was suspended in the first place. Potential remedies, including severance and reading-in, were considered by this Court in *Teddy Bear Clinic*.¹⁸ Notably, the Court held that these remedies might have "unintended consequences in relation to the operation of the Act as a whole".¹⁹

[19] The Court considered that a "holistic legislative revision by Parliament would be more appropriate". Khampepe J said:

"First, it cannot be denied that, notwithstanding their flaws, the impugned provisions serve an important function insofar as they impose criminal liability on an adult for

¹⁸ These remedies were granted by the High Court in *The Teddy Bear Clinic For Abused Children v Minister of Justice and Constitutional Development* 2013 JDR 0025 (GNP) and were motivated for in this Court by the respondents.

¹⁹ *Teddy Bear Clinic* above n 1 at para 108.

engaging in sexual conduct with a consenting adolescent. No other provisions in the [Act] serve this essential function. Any relief granted must preserve the criminalisation of such conduct by an adult.

Second, sections 15 and 16 clearly form part of a more general scheme regarding sexual offences, and are interlinked with various other provisions in the [Act]. Severing portions from, and reading words into, those sections might therefore have unintended consequences in relation to the operation of the Act as a whole, such that holistic legislative revision by Parliament would be more appropriate to address the concerns set out in this judgment. Indeed, courts should guard against patchwork judicial intervention in legislation.

Third, the regulation and legislation of sexual conduct in the public interest fall squarely within the Legislature's domain, subject, as always, to the prescripts of the Constitution. . . . While the current statutory regime is patently unconstitutional, it is quite conceivable that Parliament may wish to reconsider the close-in-age defence in the light of the finding set out above, or that it may wish to regulate "sexual penetration" between an adolescent and a minor aged 16 or 17 in a manner different to that proposed by the applicants. There is a significant difference between declaring the current Act to be unconstitutional, and instructing Parliament which of a range of constitutional policy choices it should make in addressing that unconstitutionality. The subject matter of the impugned provisions, in addition to being policy-laden, is sensitive and has attracted a high degree of public scrutiny. In our participatory democracy Parliament is institutionally best-suited to ensure that the ultimate statutory regime is decided upon in an open, inclusive and transparent manner, with all relevant parties who so desire being given the opportunity to shape the debate and the eventual outcome.

I am therefore of the opinion that, while sections 15 and 16 should be declared invalid, justice and equity warrant that their invalidity should be suspended for a period of 18 months in order to allow Parliament to remedy the defects in the statute."²⁰ (Footnotes omitted.)

These remarks remain apposite. It follows that a further extension would, in the circumstances, promote an orderly state administration for the benefit of the general public and be just and equitable.

²⁰ Id at paras 107-10.

Costs

[20] As to costs, at the same time as granting the extension, this Court granted costs in favour of the respondents. Although the respondents did not ultimately oppose the extension, there were cogent reasons why they filed papers and made submissions.²¹ The applicant correctly conceded, at the hearing, that the respondents are entitled to their costs, hence the costs award.

²¹ These were: (1) that there was reason to believe that the defect may not be corrected within the extended period; (2) that there was a period in the delay in the execution of this Court's order that may not have been satisfactory; and (3) that any further extension would be opposed.

For the Applicant:

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