

REPORT TO NAPC ON CONSTITUTIONAL COURT JUDGMENTS THAT REQUIRE ACTION

Constitutional and Legal Services

PARLIAMENT OF THE REPUBLIC OF SOUTH AFRICA

Date: 2021.11.18

REPORT

A. CASES WHERE THE ORDER IS STILL SUSPENDED AND ONCE SUSPENSION LAPSES THERE WILL NOT BE A MEASURE IN PLACE (THERE WILL BE A GAP IN THE LAW IF NOT CORRECTED BY THEN)

1. Regulation of Interception of Communications and Provision of Communication Related Information Act 70 of 2002

The Department confirmed that a Bill revising the Regulation of Interception of Communications and Provision of Communication Related Information Act 70 of 2002 is being drafted. This Bill also addresses the issues raised by the Constitutional Court on the Act. A first draft of the Bill will be made available early in 2022 to relevant stakeholders for their comments and recommendations. The Department aims for introduction during July / August 2022.

Suspension of the order lapses 3 February 2024.

A read in is provided, but only during the period of suspension.

AmaBhungane Centre for Investigative Journalism NPC and Another v Minister of Justice and Correctional Services and Others; Minister of Police v AmaBhungane Centre for Investigative Journalism NPC and Others [2021] ZACC 3 (4 February 2021)

- Legal issue: The Regulation of Interception of Communications and Provision of Communication Related Information Act 70 of 2002 (RICA) is unconstitutional in so far as it fails to ensure sufficient safeguards in a number of respects related to the nature of the application (ex parte), the independence of the judge involved in the application, where the subject is a practicing lawyer or journalist, the use of the data obtained and notifying the subject of surveillance when possible.

2. Drugs and Drug Trafficking Act 140 of 1992 —section 63 + amendments to Schedules 1 and 2

The Department confirmed that the proposed amendments are being dealt with in the new Extradition Bill. Internal consultations on the Bill are ongoing, where-after Cabinet approval will be sought. A public consultation process is envisaged in January 2022. I.r.o the Schedules, a Draft Bill was approved by the JCPS DG Cluster. It will now be submitted to Cabinet for approval of public participation. The Department aims for introduction during March / April 2022.

Suspension of the order lapses 17 December 2022.

No read in provision, nor measure to apply during the suspension or thereafter was provided.

Smit v Minister of Justice and Correctional Services and Others [2020] ZACC 29 (18 Dec 2020)

- Legal Issue: Section 63 is declared to be inconsistent with the Constitution and invalid to the extent that it purports to delegate plenary legislative power to amend Schedules 1 and 2 to the Drugs and Drug Trafficking Act to the Minister of Justice and Correctional Services. The amendments to Schedules 1 and 2 effected since the Act became operational were also accordingly declared to be unconstitutional.

3. Correctional Services Act, 1998 (Act No. 111 of 1998)

The Department has indicated that it is planning to bring a Bill to Parliament in August 2021. Monthly follow ups are made with the Committee support staff. CLSO also briefed the Portfolio Committee on 1 June 2021 and sent a letter to the Department in September 2021 to enquire as to the progress on the Bill.

Suspension of the order lapses 3 December 2022

No read in provision, nor measure to apply during the suspension or thereafter was provided.

Sonke Gender Justice NPC v President of the Republic of South Africa and Others [2020] ZACC 26 (4 December 2020)

- Legal Issue: Sections 88A(1)(b) and 91 of the Correctional Services Act 111 of 1998 are constitutionally invalid to the extent that they fail to provide an adequate level of independence to the Judicial Inspectorate for Correctional Services. Section 7(2), read with sections 10, 11, 12 and 35 of the Constitution, imposes a positive obligation on the State to establish and maintain a correctional services oversight mechanism that is adequately independent. The close financial and administrative ties between the Judicial Inspectorate and the Department undoubtedly undermine the independence of the Judicial Inspectorate. It is neither financially, nor operationally independent.

4. Electoral Act, 1998 (Act No. 73 of 1998)

The Department briefed the Portfolio Committee on Home Affairs on 9 February 2021 regarding the appointment of a Ministerial Advisory Committee on Electoral Reform to assist the Department with developing policy regarding amendment to the Electoral Act. The Minister was invited to brief the Committee on progress on the Bill on 5 November 2021, but the Minister's chief of staff wrote to Parliament and indicated that "Cabinet has not seen or deliberated on the matter for it to be introduced to Parliament." The letter also confirmed that the advisory committee appointed in February 2021 has completed their work. This report will now be taken to Cabinet.

Our Office concludes accordingly that a Bill must still be developed. The date to correct the defect is 10 June 2022. To date, we have no indication as to when a Bill will be introduced. Given recess periods, if the Bill is introduced in January 2022, Parliament only has just under 5 months to process the Bill in both Houses, and for the President to consider and assent to the Bill. The period allowed for deliberations in Parliament is of concern.

Suspension of the order lapses 10 June 2022.

No read-in provision was provided.

New Nation Movement NPC and Others v President of the Republic of South Africa and Others [2020] ZACC 11 (11 June 2020)

- Legal Issue: The Electoral Act was declared unconstitutional to the extent that it requires that adult citizens may be elected to the National Assembly and Provincial Legislatures only through their membership of political parties. This limitation infringes the constitutional

right of freedom of association in section 18, as well as the section 19(3)(b) right enjoyed by would-be independent candidates to stand for and hold public office.

B. CASES WHERE THE ORDER IS STILL SUSPENDED AND A MEASURE IS PROVIDED THAT WILL APPLY ONCE SUSPENSION LAPSES (THERE WILL NOT BE A GAP IN THE LAW)

1. Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

An opinion was sent to the PC: Justice and Correctional Services. The Department confirmed in correspondence dated 3 October 2021 that an amendment to address the order of the Court, is being drafted, where after it will be submitted to Cabinet for approval. The Department aims to introduce the Bill in March 2022.

Suspension of the order lapses 29 July 2023.

A read in provision was provided, and will apply during the suspension period as well as after the suspension had lapsed, should Parliament not fail to cure the defect within the period of suspension. There is thus no gap in the law.

Qwelane v South African Human Rights Commission and Another [2021] ZACC 22 (30 July 2021)

- Legal issue: Section 10(1) of the Equality Act is inconsistent with section 1(c) and section 16 of the Constitution and thus unconstitutional and invalid to the extent that it includes the word “hurtful” in the prohibition against hate speech.

Email from MP 2021.08.18: I watched the DoJ’s presentation to the PC on Justice and Correctional Services this morning. Although the briefing was about the soon to be re-introduced Hate Speech Bill, the Department also concentrated on the abovementioned CC judgment and correctly advised the PC that the Hate Speech Bill is a separate process to the CC deadline process, as the latter process deals with PEPUDA.

Interestingly, though, the Department had this to say about PEPUDA and the CC judgment:

“The Department published amendments to PEPUDA, and comments are currently being evaluated. The Qwelane judgment, while providing a reading-in to address the constitutionally invalid clause, gave Parliament 24 months to cure the defect. In reviewing the PEPUDA amendments, an amendment to address the order of the CC, will be drafted.”

2. Riotous Assemblies Act, 1956 (Act No. 17 of 1956)

The Department confirmed on 3 October 2021 that A draft Bill is being prepared with key stakeholders (SAPS and NPA). Initial discussions have taken place and proposals have been drafted. The Department envisages introduction of the Bill by April 2022.

Suspension of the order lapses 26 November 2022.

A read in provision was provided, and will apply during the suspension period as well as after the suspension had lapsed. There is thus no gap in the law.

Economic Freedom Fighters and Another v Minister of Justice and Correctional Services and Another [2020] ZACC 25 (27 November 2020)

- Legal Issue: Section 18(2)(b) of the Riotous Assemblies Act was declared unconstitutional is declared to be inconsistent with section 16(1) of the Constitution (freedom of expression) and invalid to the extent that it criminalises the incitement of another to commit “any offence”. A read in is provided to qualify this section, so that it only applies to any serious offence.

3. Criminal Procedure Act, 1977 (Act No. 51 of 1977) - Section 154(3) (Justice)

[The Criminal Procedure Amendment Bill, 2021 \[B12-2021\] was introduced on 26 May 2021. The Portfolio Committee on Justice and Correctional Services reported on an amended Bill – ATC 2021.09.07 and the Assembly passed the Bill on 2021.09.10. It is now before the relevant Select Committee: The Select Committee has called for public submissions with closing date 2021.11.15 and plans to consider these submissions on 2021.11.17.](#)

Suspension of the order lapses 3 December 2021.

A read in provision was provided by the Court and will continue after the above date unless amended – no gap in the law.

Centre for Child Law and Others v Media 24 Limited and Others [2019] ZACC 46 (4 December 2019)

- Legal Issue: The case deals with the prohibition on exposing the identities of children involved in crime, either as accused, witness or victim. The court also considered whether a child can waive the right to have his / her identity protected once they reach adulthood.

C. CASES WHERE THE SUSPENSION OF THE ORDER LAPSED WITHOUT A MEASURE BEING AVAILABLE (THERE IS A GAP IN THE LAW)

1. Local Government: Municipal Systems Amendment Act, 2011 (Act No. 7 of 2011)

The Local Government: Municipal Systems Amendment Bill, 2019 [B2-2019] was passed by the National Assembly and transmitted to the NCOP for concurrence on 3 December 2020. The Select Committee considered final mandates and adopted its report and the Bill on Friday 12 November.

Suspension of the order lapsed 8 March 2019. The Department approached the Court for an extension of the period provided, which application was refused.

No interim measure was provided.

South African Municipal Workers' Union v Minister of Co-Operative Governance & Traditional Affairs and Others [2017] ZACC 7 (9 March 2017)

- Legal Issue: When before Parliament, the Amendment Bill was incorrectly classified as a section 75 Bill. The Constitutional Court accordingly found the Amendment Act invalid. The declaration of invalidity was suspended for a period of 24 months to allow the Legislature an opportunity to correct the defect.
- Consequences in practice:
 - Any appointments made or decisions taken under the Amendment Act are still valid as the order was specifically made prospective so that municipalities were not negatively affected in respect of decisions and appointments made under the Amendment Act.
 - The order would thus not disrupt the administration of municipalities or undo transactions. Municipalities can just no longer use the specific provisions of the Amendment Act from 8 March 2019.
 - The Amendment Act mainly dealt with human resource matters, which municipalities can still execute sufficiently under the provisions of the principal Act.

D. CASES WHERE THE SUSPENSION OF THE ORDER LAPSED WITHOUT CREATING A GAP IN THE LAW (THERE IS NO GAP IN THE LAW)

1. Drugs and Drug Trafficking Act, 1992 (Act No. 140 of 1992), ss 4(b) and 5(b) read with Part III of Schedule 2 (Justice)

2. Medicines and Related Substances Control Act, 1965 (Act No. 101 of 1965), s22A(9)(a)(i) (Health)

The Cannabis for Private Purposes Bill [B19-2020] was introduced on 2020.09.01 and is being considered by the Portfolio Committee on Justice and Correctional Services.

The Department of Health has indicated that they support the Bill developed by the Department of Justice that will regulate cannabis.

Suspension of the order lapsed 17 September 2020.

A read in provision is provided in the interim and will continue to apply should the defect not be corrected by the above date – no gap in the law.

Minister of Justice and Constitutional Development and Others v Prince; National Director of Public Prosecutions and Others v Rubin; National Director of Public Prosecutions and Others v Acton and Others [2018] ZACC 30 (18 September 2018)

- Legal Issue: The affected sections declared inconsistent with section 14 of the Constitution to the extent that they criminalise the use or possession in private or cultivation in a private place of cannabis by an adult for his or her own personal consumption in private.

3. Immigration Act, 2002 (Act No. 13 of 2002), Section 34(1)(b) and (d)

The Department is working on an overall review of the affected legislation.

The suspension of the order lapsed 28 June 2019.

A remedy was provided by the Court, which remedy continues to apply – No gap in the law.

Lawyers for Human Rights v Minister of Home Affairs and Others [2017] ZACC 22 (29 June 2017)

- Legal Issue: Section 34(1)(b) and (d) of the Immigration Act 13 of 2002 declared invalid in that they do not allow for automatic judicial oversight and not allow a detained illegal foreigner to challenge the lawfulness of his detention in person in court within 48 hours.