

**REPORT TO NAPC ON CONSTITUTIONAL COURT  
JUDGMENTS THAT REQUIRE ACTION**

Constitutional and Legal Services

PARLIAMENT OF THE REPUBLIC OF SOUTH AFRICA

Date: 2023.02.02

**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)**

**1. Drugs and Drug Trafficking Act, 1992 (Act No. 140 of 1992)**

The Chairperson of the Portfolio Committee on Justice and Correctional Services has been advised on the implications of the judgment. On 31 May 2022, the Department of Justice and Constitutional Development undertook, in writing, to henceforth ensure that all the Bills with Constitutional Court deadlines are submitted to Parliament within 12 months or 6 months of the set deadline depending on the timeframe given (24 or 12 months). The Department must according to this undertaking target introduction of the Bill by 30 September 2023.

Suspension of the order lapses 30 September 2024.

The Court provided a remedy to apply in the 24 months within which Parliament has to address the defect.

*Centre for Child Law v Director of Public Prosecutions, Johannesburg and Others [2022] ZACC 35*

- Legal issue: Section 4(b) of the Drugs Act, which criminalises the use and/or possession of cannabis by a child, infringes a child's rights enshrined in sections 10 and 28 of the Constitution. The provision does not pass constitutional muster under the limitation analysis. The rationale for the judgment differed from that in the Prince judgment (See D 1 and 2 in this report) as the Court found that different rules apply to children in respect of the right to privacy. It is illegal for a child to use and/or possess cannabis, however, such a child cannot be arrested, prosecuted or sent to a residential diversion programme for contravening the impugned provision. Imposing a criminal sanction for the use and/or possession of cannabis on a child violates the right of a child not to be detained except as a measure of last resort, as well as the right of the child to have their dignity respected and protected. The criminalisation of the use and/or possession of cannabis by a child does not serve the intended purpose of protecting a child - there are less restrictive means that are appropriate to respond to children using or possessing cannabis.

**2. Copyright Act, 1978 (Act No. 98 of 1978)**

Both the Chairpersons of the Portfolio Committee on Trade and Industry and the Select Committee on Trade and Industry, Economic Development, Small Business Development, Tourism, Employment and Labour have been advised on the implications of the judgment. Clause 19D of the Copyright Amendment Bill, B13D-2017, addresses the judgment. This Bill is currently before the Select Committee for consideration. [Our office consulted with Blind SA and Section 27 to confirm that the wording of clause 19D is sufficient. Their response indicate that a few minor amendments may be required to ensure that the interpretation of the clause is clear. Our office is now consulting with the Department on the proposals made. The Committee has scheduled a briefing by our office on these proposals in Q2.](#)

Suspension of the order lapses 20 September 2024.

A read-in measure to apply during the period of suspension was provided.

*Blind SA v Minister of Trade, Industry and Competition and Others [2022] ZACC 33.*

- Legal issue: Sections 6 and 7, read with section 23, of the Copyright Act, was declared unconstitutional, invalid and inconsistent with the rights of persons with visual and print disabilities, as set out in sections 9(3), 10, 16(1)(b), 29(1) and 30

of the Constitution of the Republic of South Africa, 1996, to the extent that these provisions of the Copyright Act limit the access of such persons to published literary works, and artistic works as may be included in such literary works, in accessible format copies.

### **3. Marriage Act 25 of 1961 and Divorce Act 70 of 1979**

The Department of Justice and Constitutional Development is in a process of engaging the Department of Home Affairs and the South African Law Reform Commission in order to rationalize policy approaches. The Department confirmed that the matter has been allocated two officials to ensure that the deadline to submit to Parliament within ½ the time allowed (i.e. targeting introduction June 2023) is met.

The Department of Home Affairs confirmed that a white paper on the matter was approved by Cabinet on 23 March 2022. On 2 November 2022 the Department confirmed that a Bill has been drafted and is now being subjected to consultations in various government clusters. The draft bill was also submitted to the Office of the Chief State Law Adviser for a preliminary opinion. The Department confirmed that in this regard it is working closely with the Department of Justice and Constitutional Reform and the South African Law Reform Commission. The Department is targeting introduction of the bill in the 2023 / 2024 financial year.

Suspension of the order lapses 27 June 2024

A measure to apply during the period of suspension was provided.

*Women's Legal Centre Trust v President of the Republic of SA and Others [2022] ZACC 23 (28 June 2022).*

- Legal issue: Both the Marriage Act and the Divorce Act were declared inconsistent with sections 9, 10, 28 and 34 of the Constitution and thus unconstitutional to the extent that they fail to recognise marriages solemnised in accordance with Sharia law but which have not been registered as civil marriages, as valid marriages for all purposes in South Africa, and to regulate the consequences of such recognition.

### **4. Regulation of Interception of Communications and Provision of Communication Related Information Act 70 of 2002**

The Department confirmed that a draft Bill to address the issues raised in the judgment, was being drafted and will be consulted on with key stakeholders. The Department is considering to sever the portion of the Bill that addresses the constitutional defects and certain other urgent amendments as the review of the Act is of a technical nature and its development is time-consuming. The Bill has been placed on the draft Legislative Programme for the Department for 2022 – [Our office has followed up with the Department via the OLOGB on introduction as the target date was not achieved.](#)

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.

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

[The Drugs and Drug Trafficking Amendment Bill \[B19-2022\] was assented to on 12 December 2022 – Act No. 14 of 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.

## **6. Correctional Services Act, 1998 (Act No. 111 of 1998)**

The Department briefed the Portfolio Committee on progress on the relevant Bill in August 2022. The Department is experiencing challenges in respect of setting up an independent entity as it appears to be in conflict with a parallel process in National Treasury to integrate the administrative services of all independent entities into a joint shared service. An application for an extension of the order was successfully brought. On 14 November 2022, the Constitutional Court granted an extension to 2 December 2023. The Department has confirmed that they will contact National Treasury again for a final directive on the alone standing Bill, but they will introduce either that Bill, or a targeted amendment Bill by February 2023.

Suspension of the order lapses 3 December 2022. On 14 November 2022, this was extended to 2 December 2023.

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.

## **7. Electoral Act, 1998 (Act No. 73 of 1998)**

Extension to 10 Dec 2022 granted. As the Portfolio Committee had to advertise the amendments proposed by the NCOP, an extension was applied for. The Court granted an interim order and on 23 January 2023 granted an extension to 28 February 2023. The Committee is being briefed on public submissions this week.

Suspension of the order now lapses 28 Feb 2023 (extended from 10 December 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. Maintenance of Surviving Spouses Act, 1990 (Act No. 27 of 1990)**

**2. Intestate Succession Act, 1987 (Act No. 81 of 1987)**

On 31 May 2022, the Department confirmed that it has incorporated the amendments to section 1 of the Maintenance of Surviving Spouses Act, 1990 and section 1(1) of the Intestate Succession Act, 1987 into the Judicial Matters Amendment Bill, which the Department has prepared and which is awaiting internal processing. The Department is targeting introduction soon. The Bill has been placed on the draft Legislative Programme for the Department for 2022 – [Our office has followed up with the Department via the OLOGB on introduction as the target date was not achieved.](#)

Suspension of the order lapses 29 June 2023.

Read in provisions will come into operation if the defect is not corrected by 29 June 2023 – No gap in the law.

*Bwanya v Master of the High Court, Cape Town and Others [2021] ZACC 51 (31 December 2021)*

Legal issue: The Section 1 of the Maintenance of Surviving Spouses Act and section 1(1) of the Intestate Succession Act are unconstitutional to the extent the definitions of “spouse” and “marriage” in the said Acts do not provide for a surviving partner in a permanent life partnership in which partners have undertaken reciprocal duties of support.

**3. Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000**

In August 2022 the Department confirmed that the Promotion of Equality and Prevention of Unfair Discrimination Amendment Bill, which has already been developed by the Department, will be amended to incorporate the required amendments to section 10 as per the Qwelane judgment. The Bill was subjected to a public consultation process which yielded 93 415 comments (100 were substantive comments - the majority of the comments were petition-like). The Department is currently processing the comments received from the public and has scheduled a meeting with stakeholders who made substantive comments. Thereafter, the Bill will be processed for Cabinet approval to introduce the Bill in Parliament. The Bill is on the draft Legislative Programme for the Department for 2022 – [Our office has followed up with the Department via the OLOGB on introduction as the target date was not achieved.](#)

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.

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

None

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

**1. Riotous Assemblies Act, 1956 (Act No. 17 of 1956)**

The DOJ & CD presented to the Portfolio Committee that a draft Bill (Conspiracy and Inducement to Commit Serious Offence Bill), which will address the issues in the EFF judgment has been finalised. The National Prosecution Authority and the South African Police Services have already made inputs into the draft Bill. The Department confirmed that it is engaged in processing the Bill through to Cabinet to obtain approval to introduce the Bill into Parliament. The Bill is on the Legislative Programme for the Department for 2022 – [Our office has followed up with the Department via the OLOGB on introduction as the target date was not achieved.](#)

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.

**2. 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)**

**3. 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 (deliberating on proposed amendments to the Bill). The National Assembly gave permission for the Bill to be extended in scope to include issues relating to customary and commercial use, as well as palliative care. The extended Bill has been referred to the National House of Traditional and Khoi-San-Leaders for comment, which is due on 9 November 2022. [A further request for permission to extend the subject matter of the Bill was announced in the ATC of](#)

[2022.12.01. The Committee wants to include the commercialisation of hemp within the ambit of the Bill. The Bill initially excluded hemp in its definition of cannabis, so the Committee had to request the House to extent the scope to now extensively also look at hemp related issues.](#)

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.

#### **4. 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 continued 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.