

REPORT TO NAPC ON CONSTITUTIONAL COURT JUDGMENTS THAT REQUIRE ACTION

Constitutional and Legal Services
PARLIAMENT OF THE REPUBLIC OF SOUTH AFRICA
Date: 2024.03.07

New Judgments

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. Electoral Commission Act, 1996 (Act No. 51 of 1996) / Referendums Act, 1983 (Act No. 108 of 1983)

[The Portfolio Committee on Home Affairs is currently considering the Electoral Commission Amendment Bill \[B15-2023\] which “seeks to address Parliament’s alleged failure to enact legislation to regulate the calling and holding of provincial referenda”. It is a Private Member’s Bill. The Department and IEC is scheduled to respond to the Bill on Tuesday 12 March.](#)

No suspension of order or finding of invalidity, however the Court directed that the applicants may seek appropriate relief if the Bill is not enacted within a reasonable time or is inconsistent with the Constitution. The Applicants have indicated that they would do so if no steps have been taken by 23 January 2025 (letter dated 5 March 2024).

Heindre Joseph Wyngaard and Another v The Premier of the Western Cape and Others (Constitutional Court Case No: 139/123)

- Legal issue: The applicant sought an order that the Court declare that section 127(2)(f) of the Constitution places a constitutional obligation on Parliament to pass national legislation enabling Premiers to call provincial referenda and that Parliament failed to fulfil this constitutional obligation. The Court concluded that it was not in the interest of justice to hear the application at this stage as Parliament is currently considering the Electoral Commission Amendment Bill which “seeks to address Parliament’s alleged failure to enact legislation to regulate the calling and holding of provincial referenda.” The Court Order noted that the applicants may seek appropriate relief if the Bill is not enacted within a reasonable time or is inconsistent with the Constitution.

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)

None

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. Divorce Act, 1979 (Act No. 70 of 1979)

An opinion was sent to the Chairperson of the Portfolio Committee on Justice and Correctional Services and Others. Our office also contacted the Department to enquire about steps planned. The Department confirmed via email on 23 November 2023 that it is in the process of developing Bills to amend both the Divorce Act, 1979 and the Matrimonial Property Act, 1984 in order to provide for the issues raised in this judgment.

Suspension of the order lapses 9 October 2025.

A read in measure is provided pending the legislation to cure the constitutional defects.

EB (born S) v ER (born B) and Others; KG v Minister of Home Affairs and Others [2023] ZACC 32

- Legal issue: Subsection 7(3) of the Divorce Act, 1979 (Act No. 70 of 1979) provides that where spouses married out of community of property get divorced, the divorce court may make an equitable order that assets of the one spouse be transferred to the other (redistribution order). The Act however does not provide for instances where the marriage was dissolved by death, or where the marriage was entered into on or after 1 November 1984. Subsection 7(3) of the Divorce Act was declared inconsistent with the Constitution and invalid to the extent that it fails to include the dissolution of marriage by death, and fails to provide for a marriage that was entered into on or after 1 November 1984

2. Traditional and Khoi-San Leadership Act, 2019 (Act No. 3 of 2019)

A decision was taken in the Committee that the matter will be addressed by way of an Executive Bill. The Department confirmed by letter dated 12 December 2023 that they have commenced the development of a Bill, using the existing Act as a basis. The main differences between the existing Act and the Bill are to be found in the transitional provisions. The Bill was referred to the Office of the Chief State Law Adviser on 30 October 2023 for a preliminary certification. The Department also developed a comprehensive Socio-Economic Impact Assessment (SEAIS) and referred it to the DPME in the Presidency on 8 December 2023. Once the preliminary certification is received, the Department will have the Bill placed on the agenda of the relevant Cluster Working Group which is likely to take place in February 2024. This will be followed by presentation of the Bill to the DG Cluster whereafter it will be submitted for consideration by the Cabinet Committee and Cabinet.

Suspension of the order lapses 29 May 2025.

No measure provided.

Mogale and Others v Speaker of the National Assembly and Others (CCT 73/22) [2023] ZACC 14; 2023 (9) BCLR 1099 (CC); 2023 (6) SA 58 (CC) (30 May 2023)

- Legal issue: The Court found various inadequacies in the public participation processes: insufficient notice; no pre-hearing education; inaccessibility of public hearings held by the NA in places like Bloemfontein, Polokwane and Mpumalanga; various provincial legislatures did not provide members of the public with transport to attend their public hearings; either no or not enough copies of the Bill were provided, and in many cases the copies that were provided were not in a language that the local community could

understand; improper attention was given to certain groups to the exclusion of other groups; the content of submissions was insubstantially considered by the Select Committee and certain provincial legislatures; inaccuracies in the reports which recorded the contents of the public hearings; the deficiencies which occurred at various stages of the public participation process are numerous and material.

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

[The Cannabis for Private Purposes Bill \[B19B–2020\] was passed by the NCOP on 27 February 2024 and has been sent for assent.](#)

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.

4. Copyright Act, 1978 (Act No. 98 of 1978)

[Clause 19D of the Copyright Amendment Bill, B13D-2017, addresses the judgment. The Select Committee adopted a Bill on 5 September where amendments to align the Bill with the judgment were effected. The Portfolio Committee agreed with the amendments effected by the NCOP. The Bill was passed by the Assembly on 29 February 2024, and it has been sent for assent.](#)

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.

5. Marriage Act 25 of 1961 and Divorce Act 70 of 1979

The Department submitted JR159 notices to Parliament – see ATC of 12 December 2023, and introduced the Marriages Bill on 13 December 2023 [B43-2023]. [A call for comments on the Bill will be made soon – the process to advertise is currently with procurement. Political and financial authorisation to ask for an extension of the court order has also been granted. CLSO has instructed the State Attorney, and Counsel was appointed to draft the necessary pleadings.](#)

Divorce: [The Divorce Amendment Bill \[B22–2023\] was passed by the NCOP on 27 February 2024 and has been sent for assent.](#)

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.

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

The Regulation of Interception of Communications and Communication-Related Information Amendment Bill [B28-2023] was passed by National Council of Provinces on 6 December 2023 and has been sent for assent.

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.

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

An opinion was provided to the relevant Chairperson and the Committee briefed. A decision was made to deal with this matter in the next Parliament as there is no gap in the law and the Committee was busy with urgent legislation that affected the upcoming elections.

Suspension of the order lapses 03 December 2025.

The Court provided a read-in that applies immediately and will continue to apply after the above date. There is thus no gap in the law.

One Movement South Africa NPC v President of the Republic of South Africa and Others [2023] ZACC 42

- Legal Issue: The Court had to consider whether the contesting signature requirement violated any rights and if so, whether the violation was justified. The Court found that the signature requirement of 15% arbitrary and extensively limited an independent candidate from contesting the election. The Court held that the risk of “frivolous contestation” was relatively unknown, and there were less restrictive means to prevent this, i.e. deposits and a lower signature threshold of 1000 signatures.

2. Immigration Act, 2002 (Act No.13 of 2002)

An opinion was provided to the relevant Chairperson. A follow up will be made with the Department, but it is likely that this case will be dealt with in the review of this Act expected in the Lawyers for Human Rights v Minister of Home Affairs and Others [2017] ZACC 22 (29 June 2017) case below.

Suspension of the order lapses 03 December 2025.

The Court provided a read-in that applies immediately and will continue to apply after the above date. There is thus no gap in the law.

Rayment and Others v Minister of Home Affairs and Others [2023] ZACC 40

- Legal Issue: Where one parent is a foreign national and the other a South African citizen or permanent resident, and the good faith spousal relationship between them has ended, the Act requires that the parent who is a foreign national must cease working and leave the Republic in order to apply for a new visa. The Court found the sections dealing with this matter unconstitutional as they limit the right to human dignity of both the child and the parent who is a foreign national, as well as the right to family life.

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

New court order, but old matter

The Department briefed the Portfolio Committee on Home Affairs on 24 October 2023 regarding a Bill being developed to address this judgment. The Department confirmed that it will be very similar to the Committee Bill that Parliament started in 2018. The Committee decided not to proceed with that Bill in 2019 as the Department indicated that it wanted to do a review of the whole Act.

The suspension of the order lapsed 28 June 2019. The Department approached the Court in 2023 to extend the order. The Court supplemented its previous order and provided a 12-month period within which the defect is to be addressed. The new suspension period lapses 29 October 2024.

A remedy was provided by the Court in the 2017 case, which resulted in there being no gap in the law. In the 2023 judgment, the Court confirmed that if the remedial legislation is not enacted and brought into force within the said 12-month period, the provisions continue to apply until such remedial legislation is enacted and brought into force.

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.

4. Promotion of Access to Information Act, 2000 (Act No. 2 of 2000) (sections 35 and 46)

5. Tax Administration Act, 2011 (Act No. 28 of 2011) (sections 67 and 69)

SARS confirmed on 22 August 2023 that they are in talks with DOJ regarding required amendments to ensure that the date set by the Court is adhered to.

DOJ confirmed in an email on 23 November 2023 that the Department is in consultation with the South African Revenue Services and has prepared a draft Promotion of Access to Information Amendment Bill. It is envisaged that the Bill will be submitted to Parliament immediately after the elections.

Suspension of the order lapses 29 May 2025.

The Court provided a remedy that will apply immediately and will continue to apply after the suspension of the order lapses, unless Parliament made amendments to the Act in that regard.

Arena Holdings (Pty) Ltd t/a Financial Mail and Others v South African Revenue Services and Others [2023] ZACC 13

- Legal issue: Taxpayer information cannot reasonably be subject to the “public-interest override” in circumstances where the override is potentially available to justify the disclosure of information that may relate to the life and the safety of an individual, the defence or the security interest of the country or the private information of a third party (including their medical records), all of which can happen in terms of section 46 of PAIA. It was not shown that absolute confidentiality is a pre-condition for taxpayer compliance. Accordingly, the limitation to the right to access to information and freedom of expression is not reasonable and justified. The Court held that the High Court’s order of constitutional invalidity of section 35 and 46 of PAIA, and sections 67 and 69 of the TAA was confirmed.

6. Mediation in Certain Divorce Matters Act 24 of 1987

An opinion was sent to the Chairperson of the Portfolio Committee on Justice and Correctional Services advising them of the possible ways to deal with the judgment. A letter

was also sent to the affected Departments to enquire into actions to be taken. We are still waiting on a response. The Department confirmed in an email dated 23 November 2023 that it has prepared a draft Mediation in Certain Divorce Matters Amendment Bill. It is envisaged that the Bill will be submitted to Parliament immediately after the elections.

Suspension of the order lapses 28 June 2025.

The Court provided a remedy that will apply immediately and will continue to apply after the suspension of the order lapses, unless Parliament made amendments to the Act in that regard.

Centre for Child Law v T S and Others [2023] ZACC 22

- Legal issue: Section 4 precludes never-married parents and married parents who are not going through a divorce, and their children, from accessing the services of the Office of the Family Advocate in the same manner as married parents who are divorced or going through a divorce do. Accordingly section 4 limits section 9(1) and 9(3) of the Bill of Rights and is not justifiable in terms of section 36 of the Constitution. Section 4 also is an unjustifiable limitation of the rights of affected parents and children in terms of sections 10 and 28 of the Bill of Rights.

7. Children's Act 38 of 2005 — constitutionality of section 40

An opinion was sent to the Chairperson of the Portfolio Committee on Social Development advising them of the possible ways to deal with the judgment. A letter was also again sent in November 2023 to the affected Departments to enquire into actions to be taken. We are still waiting on a response.

Suspension of the order lapses 28 June 2025.

The Court provided a remedy that will apply immediately and will continue to apply after the suspension of the order lapses, unless Parliament made amendments to the Act in that regard.

VJV and Another v Minister of Social Development and Another (CCT 94/22) [2023] ZACC 21 (29 June 2023)

- Legal issue: Section 40 is unconstitutional to the extent that it excludes permanent life partners from its application.

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

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

The Select Committee reported on Bill 14-2023 on 22 November 2023 without amendments. The NCOP passed the Bill on 29 November 2023 and the Bill was sent for assent.

Suspension of the order would have lapsed 3 December 2022. On 14 November 2022, this was extended to 2 December 2023. That period has now lapsed.

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.

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

The Judicial Matters Amendment Bill [B7-2023] was passed by National Council of Provinces on 6 December 2023 and has been sent for assent.

Suspension of the order lapsed 29 June 2023.

Read in provisions will come into operation if the defect is not corrected by 29 June 2023 (definitions are expanded: survivor, spouse, and marriage; section 1 of the Intestate Succession Act is expanded to include a partner in a permanent life partnership) – 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

The Judicial Matters Amendment Bill [B7-2023] was passed by National Council of Provinces on 6 December 2023 and has been sent for assent.

Suspension of the order lapsed 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.

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

The Department confirmed confirmed in a letter dated 22 May 2023 that they have processed the draft Conspiracy, Instigation and Incitement to Commit Offence Bill through the Cluster and submitted the same to Cabinet for consideration. However, the Bill was stood down in order from the Cabinet Committee for Justice Crime Prevention and Security (during September 2022) in order to deal with certain issues raised by the National Prosecuting Authority. They confirmed that they have meanwhile revised the Bill and plan to re-table the Bill for Cabinet to consider granting permission to introduce the Bill, with Parliament’s schedule permitting. The Department confirmed via email on 23 November 2023 that this was one of the Bills that was considered not to be a priority as they were required by the Leader of Government to re-prioritise Bills due to the upcoming elections, especially as the Court provided a reading-in provision.

Suspension of the order lapsed 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.

5. 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)

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

The Cannabis for Private Purposes Bill [B19B–2020] was passed by the NCOP on 27 February 2024 and has been sent for assent.

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.