CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE CCT 14/06

Ex parte:

MINISTER OF SOCIAL DEVELOPMENT	First Applicant
MEC FOR SOCIAL DEVELOPMENT OF THE EASTERN CAPE PROVINCE	Second Applicant
MEC FOR SOCIAL SERVICES AND POPULATION DEVELOPMENT OF KWAZULU-NATAL	Third Applicant
MEC FOR SOCIAL SERVICES AND POPULATION DEVELOPMENT OF GAUTENG	Fourth Applicant
MEC FOR SOCIAL SERVICES AND POVERTY ALLEVIATION OF THE WESTERN CAPE PROVINCE	Fifth Applicant
MEC FOR SOCIAL SERVICES AND POPULATION DEVELOPMENT OF THE NORTHERN CAPE PROVINCE	Sixth Applicant
MEC FOR HEALTH AND WELFARE OF LIMPOPO PROVINCE	Seventh Applicant
MEC FOR SOCIAL DEVELOPMENT OF NORTH WEST PROVINCE	Eighth Applicant
MEC FOR SOCIAL DEVELOPMENT OF FREE STATE PROVINCE	Ninth Applicant
MEC FOR HEALTH AND WELFARE OF MPUMALANGA	Tenth Applicant

Heard on : 6 March 2006

Decided on : 9 March 2006

JUDGMENT

VAN DER WESTHUIZEN J:

Introduction

[1] This matter came before this Court as one of urgency. It is an ex parte application for direct access. The applicants ask the Court to vary its earlier order declaring a presidential proclamation invalid and suspending the declaration of invalidity for eighteen months, by ordering a further period of suspension. The issues to be decided include the determination of the time period stipulated in the previous order, as well as the question whether this Court has the power to order the suspension of an order of invalidity with regard to legislation which has become invalid because of the expiry of the suspension of the invalidity.

Background

[2] On 7 November 2003 the Pretoria High Court ordered that a presidential proclamation, Proclamation R7 of 1996, was invalid.[1] The proclamation sought,

[1] *Mashavha v President of the RSA and Others* 2004 (3) BCLR 292 (T) at para 19.1. Shongwe J ordered "[t]hat Proclamation R7 of 1996 was invalid insofar as it purported to assign the administration and amend provisions of the Social Assistance Act 59 of 1992."

within the framework of the allocation of executive and legislative powers in the interim Constitution, to assign the administration of almost the whole of the Social Assistance Act 59 of 1992 (the SAA) to provincial governments.

[3] The applicant in that matter, Mr Mashavha, who was represented by the Legal Resources Centre, then sought from this Court confirmation of the order of invalidity. The first respondent, the President of the Republic of South Africa, opposed neither the original application, nor the application for confirmation. The other four respondents were the Minister of Social Development and three provincial Members of Executive Councils (MECs). Only the KwaZulu-Natal MEC for Social Welfare and Population Development opposed the application. The Minister of Social Development filed an answering affidavit to place on record the facts and circumstances that made it appropriate to suspend the order of invalidity, as contemplated in section 172(1)(b)(ii) of the Constitution. The Minister also offered to pay the applicant's costs.

[4] This Court found that the proclamation was indeed unconstitutional and invalid and confirmed the High Court's finding of invalidity.[2] The Court took into account submissions made on behalf of the Minister of Justice and Constitutional Development, which indicated that there was much uncertainty around the SAA,

[2] *Mashavha v President of the RSA* 2005 (2) SA 476 (CC); 2004 (12) BCLR 1243 (CC) at paras 68 and 71.

that the capacity of the provinces to fulfil the obligations pursuant to the assignment of the SAA was limited, that a holistic solution was called for and that the government needed time to unify the entire system. It was submitted on behalf of the Minister that a solution was in the pipeline. The South African Social Security Agency Bill and the Social Assistance Bill were before Parliament. It had been anticipated that these two Bills would become law by 1 April 2004, but this did not happen.[3] The Minister requested that the order of invalidity of the proclamation be suspended until the provisions of the two Bills came into effect. Counsel for the applicant did not oppose a suspension of the order of invalidity, but wanted the suspension to last for a specified period. The Court concluded that suspension for a period of eighteen months would under the circumstances appear reasonable and fair to all interested parties.[4]

[5] Consequently the Court ordered on 6 September 2004 that:

> "1. Paragraph 1 of the order of the High Court is confirmed.
> 2. In terms of section 172(1)(b) of the Constitution the order of invalidity is suspended for a period of eighteen months from the date of this order."[5]

[3] The South African Social Security Agency Act 9 of 2004 (the South African Social Security Agency Bill) was assented to on 2 June 2004, and the Social Assistance Act 13 of 2004 (the Social Assistance Bill) was assented to on 10 June 2004. See id at fn 70.

[4] *Mashavha* above n 2 at para 69.

[5] Id at para 71.

[6] The applicants now seek from this Court an order that paragraph 2 of the order of 6 September 2004 be varied by the further suspension of the order of invalidity until 1 April 2006.

[7] According to the applicants, the period of suspension would expire on 6 March 2006. In their application lodged with the Registrar of this Court on Saturday 4 March 2006, the applicants asked for the matter to be heard on Monday 6 March 2006, as one of urgency. It was set down for hearing at 15:00 on that day.

[8] In the applicants' notice, signed on their behalf by the State Attorney, Johannesburg, and confirmed in an affidavit by Mr Vusumuzi Madonsela, the Director-General of the Department of Social Welfare, they set out the basis for the relief they seek: The first applicant, the Minister of Social Development, who is responsible for compliance with the court order, has not been able to fully comply with the order and cannot achieve compliance before 6 March. According to the applicants, the very considerable preparatory work required to comply is all but complete, and this non-compliance is not the result of any dilatoriness. New legislation in the form of the Social Assistance Act 13 of 2004 and of the South African Social Security Agency Act 9 of 2004 is in force, save for section 4 of the South African Social Security Agency Act.

[9] They claim that the proclamation to bring this last remaining section into force is in draft form and is at this time being approved by the first applicant, prior to referral to the President for signature and consequent promulgation. The regulations necessary in terms thereof are complete and will be promulgated immediately after the promulgation of the legislation. The practical arrangements to facilitate an orderly transfer of functions, assets and staff from the provinces to the Social Security Agency are all in place.

[10] However, among the steps undertaken to give effect to the court order was that relating to the establishment and funding of the new agency created in terms of the new legislation. According to the applicants, Parliament enacted the Division of Revenue Act 2005/2006 to provide a grant to the agency with effect from 1 April 2006 to administer social welfare. Because of the injunction of section 214 of the Constitution the sharing of funds among the provinces occurs once annually, according to the applicants. It is not possible in consequence of these arrangements to fund the agency prior to 1 April 2006. It is not clear why the problem thus created was not noticed earlier by the applicants, particularly given the importance of the payment of social grants.

[11] The formalities in respect of the proclamation to bring section 4 of the South African Social Security Agency Act into force are virtually in place. All formalities can be completed by 1 April 2006. This is a delay of 25 days from the

date on which the suspension expires. The relief is sought to avoid the implications of invalidity during this short period, according to the applicants.

[12] The applicants thus submitted that the application was urgent and must be heard no later than 6 March 2006 in order to enable them lawfully to arrange for the payment of social grants to people who would otherwise experience severe distress.

The issues

[13] The Chief Justice issued directions to the applicants to address argument to the Court on the following issues:

> "(a) The order in *Mashavha v President of the RSA and others* CCT 67/03 was handed down on 6 September 2004. On what basis is it argued that the time period stipulated in para 2 of that order expires on 6 March 2006 and not on 5 March 2006?
> (b) If the time period has elapsed, and the order of invalidity has come into force, what power has this Court to make any further order in the matter?
> (c) Why is this application brought on an ex parte basis, given that the order in question was given in a matter in which there was another party?"

These issues were addressed by the applicants' counsel at the hearing on 6 March 2006.

[14] During argument the correctness of the applicants' submissions concerning the consequences of the relief not being granted was also questioned and the possibility of alternative ways for the applicants to avoid the interruption of payments to people was put to counsel. At the close of oral argument, leave was given to counsel to make further written submissions to the Court. Written argument was filed on Tuesday 7 March 2006.

[15] In prayer 1 of the applicants' notice condonation is sought for the applicants' failure to comply with normal times and forms, on the basis of urgency. The alleged urgency thus also has to be considered, in view of the applicants' conduct and explanations and the role and function of this Court. This is done first. Thereafter the issues mentioned in paragraphs (c), (a) and (b) of the directions are dealt with respectively.

Urgency and non-compliance

(a) The applicants' conduct

[16] According to the applicants it is "self-evidentially critical" that an extension be considered no later than the date on which the order of suspension expires. The explanation referred to in paragraphs 8 to 10 above as to why the first applicant has been unable to comply with this Court's order is to some extent informative, but does not specifically indicate any serious intent or attempt to comply with the

order or contain a proper explanation for the failure to meet the time limits, as stated by Ngcobo J in paragraph 53 of his judgment. As to the reason for approaching this Court at such an extremely late stage, the applicants explain:

> "The need for an application for an extension of the order of suspension was regrettably recognised very late and this oversight is the explanation for the absence of a timeous application to achieve this purpose. The remissness is conceded; however, the above honourable court is requested to give weight to the bona fides of the officials involved in the process, and the demonstrable fact that the process is all but complete."

[17] The explanation for approaching this Court to hear their application on the very same day that the suspension order in their view expires is thoroughly unconvincing. It is admitted that the application is not timeous and that the need to approach the Court was regrettably recognised very late and remissness is conceded. The "bona fides of the officials involved in the process" is mentioned as a factor which should carry weight with the Court. Neither the meaning nor the relevance of the alleged bona fides is explained. The applicants' conduct seems to be a classic example of the creation of one's own urgency, which would under normal circumstances justify a finding that no urgency has been shown. This would be the case in any court, but particularly in this Court, which is neither intended nor well-suited to function as an urgent court.[6]

[6] See *President of the Republic of South Africa and Others v United Democratic Movement (African Christian Democratic Party and Others Intervening; Institute for Democracy in South Africa and Another as Amici Curiae)* 2003 (1) SA 472 (CC); 2002 (11) BCLR 1164 (CC) at para 30, quoted in the judgment of Ngcobo J.

(b) The consequences of the relief not being granted

[18] However, the applicants also refer to what they regard as the inevitable consequence of an extension not being granted and state:

> "[T]he present custodians of the distribution of welfare payments will either cease to make payments to deserving persons and thereby cause severe distress, or continue to make payments, without lawful authority to do so. Accordingly, if a suspension is not granted grave injustice will occur."

[19] The blatant remissness of the applicants in this matter might therefore unfortunately affect many people who are not responsible for the regrettable state of affairs. The SAA provides for the payment of pensions and other grants to people in need and to welfare organisations who care for them. According to the applicants, these payments cannot be made lawfully unless the relief is granted. Should this contention on the part of the applicants be correct, the matter would obviously be urgent. As stated by Ngcobo J in paragraphs 54 and 56 of his judgment, it is ironic that the applicants, who have been remiss in safeguarding the interests and indeed the constitutional rights of people, should put up the consequences of their remissness as a reason why relief should be granted. The plight of the people in need will not be ignored or taken lightly by the Court, however, even in the face of a complete lack of merit in the applicants' explanation of their own conduct.

[20] The applicants launched this application on the premise that nothing short of an extension of the suspension order from this Court could undo their error and avert the dire consequences that may ensue from that error. The possibility of alternatives to the relief sought in the absence of an extension was explored at length during oral argument. In addition, the applicants were invited to present written submissions regarding adequate alternatives. The applicants have, however, persisted in their view that no viable alternative to an extension order exists. Given that the mechanisms for payment are all in place, the money has been allocated, the beneficiaries are known and the purpose of payment is to meet constitutional obligations, we remain unconvinced that the wide powers given to government to fulfil its responsibilities preclude appropriate administrative arrangements being made to cover the 25 days. It is by no means clear that this Court's judgment in *Mashavha* precludes welfare payments being made by provincial officials of grants determined at the national level. We however refrain from deciding this issue and assume in favour of the applicants that the matter is urgent.

Ex parte nature of the application

[21] The applicants explain their decision not to serve a copy of the papers on the initial applicant, Mr Mashavha, by stating in their papers that the material relief sought by him has been effected. He has no material interest in the relief

sought. During argument it was added that locating him would have been difficult and time-consuming. It is hard to see why Mr Mashavha, as a receiver of social grants, would have no interest in the litigation. His attorneys, the Legal Resources Centre, could possibly have assisted in finding him. In my view he should have been notified, but in the light of what follows, nothing further needs to be said on this.

Expiry date of the period of suspension

[22] In paragraph 1 of this Court's order in *Mashavha*, the High Court's order that the proclamation is invalid is confirmed. In paragraph 2 of this Court's order of 6 September 2004 it is stipulated that "the order of invalidity is suspended for a period of eighteen months from the date of this order." The applicants' view, or "reckoning" as it is referred to in their notice, that the period of suspension expires on 6 March 2006, is not correct.

[23] The order of invalidity necessarily came into force when the order was made, on 6 September 2004. The suspension of the order also came into force on the same date, not only because of the words "from the date of this order" in paragraph 2 of the order, but also because if the suspension only came into force on 7 September, the proclamation would have been invalid from the time of the order of invalidity on 6 September until the advent of the next day. The period of

suspension ended on the last day of the eighteen months, namely at midnight on 5 March 2006, and 6 March 2006 falls outside the period of eighteen months.

[24] This Court has as yet not considered the computation of time or time periods. The general common law rule is that in the calculation of time the civilian method is applicable, unless a period of days is prescribed by law, or contracting parties intended another method to be used.[7] 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 subsequent 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.[8] It follows therefore that eighteen months from the date of judgment on 6 September 2004 ended at midnight on 5 March 2006.

[7] E Cameron "Time" in Joubert (ed) *The Law of South Africa* first reissue (Butterworths, Durban 2002) vol 27 para 433 at 371.

[8] A long line of case law has settled the issue. In *Joubert v Enslin* 1910 AD 6 at 25-26 the Appellate Division, expressly approving *Cock v Cape of Good Hope Marine Assurance Company* [1858] 3 Searle 114, laid down the general rule for computation: where the period in question is expressed in terms of weeks, months or years, the period will expire at the end of the day preceding the corresponding calendar day. In *Du Plessis v United African Furnishing Co* 1921 OPD 156 a defendant who, on 14 May, filed an application to rescind a default judgment of which he had knowledge on 14 April was held to have missed the one-month deadline. *Du Plessis* was accepted as correct for some 20 years and in an exhaustive consideration of the authorities and case law in *Nair v Naicker* 1942 NPD 3, another untimeous application to set aside a default judgment, Broome J was not persuaded to ignore its authority. See also *Minister of Police v Subbulutchmi* 1980 (4) SA 768 (A) at 771H-772E and cases cited therein; Cameron above n 7 at para 431.

[25] Counsel for the applicants submitted, however, that an order of invalidity is "sui generis", which demands a benevolent construction to "include the last day". Accordingly, so the argument goes, the method of calculating time will depend on the facts of the case, including whether the person affected by the order is a lay person or has knowledge of the law and how he or she understood the order.[9]

[26] This approach has no substance. Firstly, it can hardly be argued that the applicants in this case, as prominent members of the executive, with the State Attorney as their legal representative, are lay persons as far as reading or understanding court orders is concerned. It is furthermore not clear what "sui generis" in this context means. It does not follow that even "sui generis" court orders are not governed by the ordinary civil method of computation at least as far as months — as opposed to days — are concerned. A departure from this principle will undermine legal certainty.[10] A court will be burdened with difficult and untenable enquiries into the circumstances of the person affected by the order. This would leave court orders of invalidity open to the undesirable consequences of further litigation. It is a recipe for chaos.

[9] In *Semer v Retief and Berman* 1948 (1) SA 182 (C) at 188, for example, Ogilvie Thompson AJ remarked that lay persons "might quite understandingly consider" that a period stipulated on 15 July to last "[f]or three weeks from date hereof" would expire only "on 5th August, as distinct from at midnight on 4th August".

[10] In a concurring judgment in *Nair v Naicker*, above n 8 at 12, Hathorn JP expressed himself strongly on the duty of the courts to make the law certain and discard, particularly in this branch of the law, unsatisfactory detailed technical reasoning which could go either way according to the whim of the judge. Where decided cases have laid down a clear rule, easily applied, they should be scrupulously followed, even in hard cases.

Retrospective suspension of invalidity

[27] The period of suspension thus lapsed on Sunday 5 March 2006, before this application was heard. The applicants can no longer seek an extension of an existing suspension period. Instead, they apply for a revival of an expired suspension order and a temporary reversal of the declaration of invalidity. A court does not have the power to grant such an application.

[28] The applicants contend that section 172(1)(b)(ii) of the Constitution[11] empowers a court to order a "retrospective" extension of an order suspending a declaration of constitutional invalidity. By this they mean that a court can introduce a period of suspension once the declaration of invalidity has already taken effect. Specifically, the applicants point to the multiple use of the word "any" in the provision — a court may make a just and equitable order suspending the declaration of invalidity "for any period and on any conditions" — as indicating that a court has expansive powers. The applicants recognise, however,

[11] Section 172(1) provides as follows:

> "(1) 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."

that a court must limit its utilisation of the power under section 172(1)(b)(ii). They propose that a court should invoke this retrospective extension power only in the rarest of circumstances. In ascertaining whether a case qualifies, the applicants advance a three-part test that they claim is guided by the values of the Constitution: an extension with such retrospective effect can be granted if it (1) would not unfairly advantage one party; (2) would not detrimentally affect the vested rights of other parties; and (3) is necessary to avoid dire problems. According to the applicants, this is the rare case that meets the test.

[29] In *Minister of Justice v Ntuli*[12] this Court considered whether it has the power to vary a final order made by it in a constitutional matter. In *S v Ntuli*[13] the Court declared a provision of the Criminal Procedure Act 51 of 1977 invalid based on its inconsistency with the interim Constitution and suspended the declaration. Following the expiration of the suspension period, the Court heard an application by the Minister of Justice for an extension.

[12] 1997 (3) SA 772 (CC); 1997 (6) BCLR 677 (CC).

[13] 1996 (1) SA 1207 (CC); 1996 (1) BCLR 141 (CC).

[30] The Court first canvassed the common law principle governing a court's authority to vary its orders. This principle was summarised in *Firestone South Africa (Pty) Ltd v Genticuro AG*[14] as follows:

> "The general principle, now well established in our law, is that, once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter, or supplement it. The reason is that it thereupon becomes *functus officio*: its jurisdiction in the case having been fully and finally exercised, its authority over the subject-matter has ceased."[15]

[31] The Court then noted recognised exceptions to this general principle. These exceptions are variations to an order that are necessary to explain ambiguities, correct errors of expression, deal with accessory or consequential matters that were overlooked or inadvertently omitted, and correct orders for costs made without having heard argument on the issue.[16] The court in *Firestone* was willing to assume that a court might have a discretionary power to vary its orders in other appropriate cases, but emphasised that such a discretionary power "should be very sparingly exercised, for public policy demands that the principle of finality in litigation should generally be preserved rather than eroded . . . ."[17]

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[14] 1977 (4) SA 298 (A).

[15] Id at 306F-G (citation omitted).

[16] *Ntuli* above n 12 at para 22 citing *Firestone* above n 14 at 306G-308A.

[17] *Firestone* above n 14 at 309A.

[32] Next, the Court turned to the contention of the Minister, similar to that of the applicants in the present case, that the power granted to courts under section 172(1)(b)(ii) of the Constitution to suspend a declaration of invalidity "for any period and on any conditions" could be exercised subsequent to the issuance of an order. The Court explicitly rejected this contention:

> "The construction suggested by counsel for the Minister would enable a Court to revive a statute which it had previously declared to be invalid. If such an unusual power had been intended, I would have thought that it would be expressed in language much clearer than that which has been used, and that there would at least be some indication of the circumstances which would have to exist to justify the exercise of the power."[18]

The Court added:

> "The principle of finality in litigation which underlies the common law rules for the variation of judgments and orders is clearly relevant to constitutional matters. There must be an end to litigation and it would be intolerable and could lead to great uncertainty if Courts could be approached to reconsider final orders made in judgments declaring the provisions of a particular statute to be invalid."[19]

[33] However, the Court concluded that it was not necessary to decide the issue. For purposes of the judgment, the Court assumed that in rare circumstances a court could subsequently vary an order for the suspension of the invalidity of a statute

[18] *Ntuli* above n 12 at para 26.

[19] Id at para 29.

for good cause. The Court then held that the case was not one in which the exercise of the power would be warranted.[20]

[34] In *Zondi*[21] this Court reiterated the conclusion it came to in *Ntuli* that a court does not have the power to revive a statute that has been declared invalid. Unlike in *Ntuli*, *Zondi* involved an application to extend a suspension of a declaration of invalidity brought before the expiration of the suspension period. As such, the Court focused on the general issue of whether a court has the power to further suspend its order when the period of suspension has not yet expired.

[35] The Court first considered whether the common law read with section 173 of the Constitution — which provides that this Court, the Supreme Court of Appeal and the High Courts have the "inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice" — authorises the Court to extend a suspension order. The Court found merit in this approach, but determined that it was not required to base its holding on section 173.[22]

[20] Id at para 30.

[21] *Zondi v MEC for Traditional and Local Government Affairs and Others* 2006 (3) BCLR 423 (CC).

[22] Id at para 36.

[36] Instead, the Court relied upon section 172(1) of the Constitution. It held that it "not only has the power but also has the obligation under its just and equitable jurisdiction to vary that period of suspension and the conditions attached to the suspension, if necessary, to reflect the justice and equity required by the facts of the case."[23] The Court made clear, however, that this power survives only as long as the suspension period:

> "*During the period of suspension* this Court retains the power to reconsider the continued suspension of the declaration of invalidity and the period of suspension as well as the conditions of suspension in the exercise of its power to make an order that is just and equitable. When the facts on which the period of suspension was based have changed or where the full implications of the order were not previously apparent, there seems to be no reason both in logic and principle why this Court should not, *before the expiry of the period of suspension*, have the power to extend the period, if to do so would be just and equitable."[24] (Emphasis added.)

[37] Additionally, the Court read *Ntuli* as standing for the proposition that a court has no power to suspend a declaration of invalidity once the suspension period has lapsed. The Court described *Ntuli* as holding as follows:

> "What the Court held is that it is impermissible for a court to make a declaration of invalidity without making an order suspending the declaration of invalidity, and then later, in different proceedings, to make an order suspending the declaration of invalidity. The decision stresses two points: first, an order

[23] Id at para 39.

[24] Id at para 40.

> suspending the declaration of invalidity must be made at the same time as the declaration of invalidity; and second, if the declaration of invalidity is not suspended *or the period of suspension has lapsed*, a court has no power to suspend the declaration of invalidity, *for to do so would be to revive the constitutionality of a provision that it has already declared invalid*." [25] (Emphasis added.)

[38] *Ntuli* and *Zondi* make clear that the boundary of a court's power lies at the expiration of the suspension order. Before the expiration of the suspension order, the provision has not yet been declared invalid and a court retains its power under section 172(1)(b)(ii) to make a just and equitable order suspending the declaration of invalidity or extending an existing suspension. However, once the suspension period lapses, the provision is invalid and a court's suspension power under section 172(1)(b)(ii) has ended. The time of suspension and extension ceases, and the realm of revival and resuscitation begins. In short, the Constitution grants a court the power to suspend an order of constitutional invalidity. It does not grant a court the power to revive a law that has already become invalid.

[39] There are important reasons of constitutional principle underlying the conclusion that a court is not empowered to resuscitate legislation that has been declared invalid. To do so, a court would in effect legislate. Such an exercise would offend both the separation of powers principle in terms of which law-

[25] Id at para 43.

making powers are reserved for the legislature, and the principle of constitutional supremacy which renders law that is inconsistent with the Constitution invalid.

[40] In this case, the period of suspension expired on 5 March 2006. At the moment the suspension expired, this Court's declaration of invalidity took effect. Having declared the presidential proclamation invalid, this Court reached the boundary of its power. This Court cannot turn back time to "retrospectively extend" a suspension order that no longer exists. We cannot revive the invalid proclamation.

Conclusion

[41] The inevitable conclusion is that the relief sought by the applicants cannot be granted. For this, only the applicants must take full responsibility. They made a series of errors. The applicants did not comply timeously with this Court's order of 6 September 2004. They miscalculated the expiry date of the order suspending the order of invalidity. They approached the Court too late, at a time when it had become impossible to grant the relief they seek.

[42] I agree with the criticism levelled in the judgment of Ngcobo J of the conduct of the applicants and that their explanation falls far short of what would originally be required to grant the extension of a period of suspension of an order

of invalidity. However, I find it unnecessary to consider the question whether there is enough on the papers before us in this case to grant the relief sought, if we had the power to do so.

[43] It was argued on behalf of the applicants that they approached this Court because they respect the previous order of the Court, they do not wish to act unlawfully and they seek relief from the Court to assist them in their dilemma and in their commitment not to fail the people who depend on the payment of social grants. This is appreciated. However, it must at all times be understood that this Court has to apply the Constitution and the law, that it functions under the Constitution and the law and that the Constitution is the only source of its powers.

[44] This Court can and will exercise powers given to it by the Constitution in a practical way that takes constitutionally appropriate account of the difficulties government might have in co-ordinating its various legislative and executive activities, and it will always pay due attention to the impact its decisions will have on those who stand to be affected. It cannot, however, assume powers that it does not have.

[45] As stated earlier, this Court does not wish to ignore the plight of those in need of payments in terms of the SAA. It is a cause for serious concern. But, on the papers before this Court in this matter, it does not have the power to remedy

the situation. Whether this Court may have the power to issue any other just and equitable order or otherwise provide appropriate relief, cannot be determined in this application. No such order has been specified or sought by the applicants and no case for any such relief has been made out.

[46] It remains crucial for the relevant organs of government to fulfil their constitutional obligation and make every effort and to fully explore all legal possibilities to prevent the interruption of the payment of pensions and other social grants.

Order

[47] The application is dismissed.

Langa CJ, Moseneke DCJ, Madala J, Mokgoro J, Nkabinde J, O'Regan J, Sachs J, Skweyiya J, and Yacoob J concur in the judgment of Van der Westhuizen J.

NGCOBO J:

[48] I have had the benefit of reading the judgment of Van der Westhuizen J. I concur in his judgment and order. However, I consider it necessary to emphasise the principles that govern an application for the extension of the period of suspension.

[49] This is the third occasion that this Court has been called upon to consider the extension of the period of suspension of an order of invalidity. We considered this question in *Ntuli*[1] and more recently in *Zondi*.[2]

[50] The principles that emerge from these cases may be summarised as follows:

a. The principle of finality in litigation which underlies the common law rules for the variation of judgments and orders is applicable to constitutional matters. If courts were to be asked to reconsider final orders declaring provisions of statutes invalid, this could well lead to an intolerable situation and uncertainty.[3]

[1] *Minister of Justice v Ntuli* 1997 (3) SA 772 (CC); 1997 (6) BCLR 677 (CC). In *S v Steyn* 2001 (1) SA 1146 (CC); 2001 (1) BCLR 52 (CC), this Court considered the question whether an extension of time should be allowed to the government to comply with the decision in *Ntuli*, albeit in a different context, at para 45.

[2] *Zondi v MEC for Traditional and Local Government Affairs and Others* 2006 (3) BCLR 423 (CC).

[3] *Ntuli* above n 1 at para 29.

b. This Court has the power under its "just and equitable" jurisdiction to vary the period of suspension of an order of invalidity and to determine the conditions which are attached to the extension of the period.[4] If the period of invalidity is not suspended or the period of suspension has lapsed, this Court has no power to suspend or extend the suspension of the declaration of invalidity. To do so would be to revive legislation which had been invalidated in terms of the Court's order.[5]

c. The Court will vary the period of suspension that has not yet expired when it is just and equitable to do so. The determination of what is "just and equitable" or is "in the interests of justice" involves similar considerations.[6] And what is just and equitable depends on the facts of each case.[7]

d. Factors that are relevant to the enquiry whether it is just and equitable to extend the period of suspension include the sufficiency of explanation for failure to comply with the original period of

[4] *Zondi* above n 2 at para 37.

[5] *Ntuli* above n 1 at para 38.

[6] *Zondi* above n 2 at para 39; *Ntuli* above n 1 at para 31.

[7] *Zondi* above n 2 at para 47.

suspension; the potentiality of prejudice being sustained if the period of suspension were extended or not extended; the prospects of complying with the deadline; the need to bring litigation to finality; and the need to promote the constitutional project and prevent chaos.[8]

e. What is required is a balancing of all the relevant factors bearing in mind that the ultimate goal is to make an order that is just and equitable.[9]

f. An application for the extension of the period of suspension must be made within a reasonable time. It must be made in sufficient time to allow the matter to be considered by this Court before the expiry of the period of suspension.[10]

g. The explanation for failure to correct the constitutional defect within the time limit set out in the court order "must be set out fully,

[8] Id.

[9] Id.

[10] Id at para 55.

candidly, timeously and in a manner that conforms with the Rules of the Court."[11]

h. It should not be assumed that an extension of the period will be granted as a matter of course and in the public interest. If a proper case for the extension of the period of suspension is not made out, an applicant for the extension of the period of time runs the risk of the request being refused.[12]

i. This Court has the responsibility to ensure that the provisions of the Constitution are upheld and enforced. An applicant for the extension of the period of suspension should not therefore assume that the Court will lightly grant the suspension of an order of invalidity.

[51] The present application was lodged literally on the eve of the expiry date, namely, on a Saturday 4 March 2006, when the Court was closed for business. No prior warning was given. There is no explanation, nothing at all, why this matter was left until the very few hours before the deadline was due to expire. What must be borne in mind is that a Court of eleven members is ill-suited for an urgent application which requires a hearing there and then, in particular, when an

[11] Id at para 59.

[12] *Zondi* above n 2 at para 59; *Ntuli* above n 1 at para 42.

application is launched on a Saturday when the Court is closed for business. In *President of the Republic of South Africa and Others v United Democratic Movement* (*UDM*)[13] we said the following concerning urgent applications during recess:

> "The Constitutional Court is not designed to act in matters of extreme urgency. It consists of 11 members and a quorum of the Court is eight of them. This Court is in recess for some months of each year and during those times its members disperse to their homes which, in some cases, are a considerable distance from the seat of the Court in Johannesburg. Members of the Court, however, are obliged to be available for recall to the seat of the Court at short notice. However, it is not always possible to convene a quorum of the Court at very short notice during a recess. If the High Court is not able to grant an interim order in an urgent case where there is a justifiable fear of irreparable harm, a person who might be prejudiced by an act flowing from the legislation might well be left without an effective remedy. That would be an unfortunate consequence which should not lightly be held to be an inevitable consequence of the provisions of the Constitution."[14]

[52] The remarks in the *UDM* case apply equally to an urgent application brought on a Saturday when the Court is closed for business. Government has the obligation to avoid this unfortunate consequence. I understand that the practice that is followed in the High Court, which deals with urgent applications more often, is to give due notice and warn the judge performing urgent duties that an

[13] *President of the Republic of South Africa and Others v United Democratic Movement (African Christian Democratic Party and Others Intervening; Institute for Democracy in South Africa and Another as Amici Curiae)* 2003 (1) SA 472 (CC); 2002 (11) BCLR 1164 (CC).

[14] Id at para 30.

application will be brought. There is no reason why a similar practice was not followed in this matter. What this demonstrates is that the existence of a court order was only realised, at the earliest, some time on Friday. This was very late.

[53] There is another disturbing feature of this case. There is no explanation for the government's failure to meet the time limits in the court order. What was happening during the entire eighteen-month period is not set out. Nor is there any indication that the court order was drawn to the attention of Parliament to enable it to consider how to expedite the matter in the light of the court order. Once again, we must emphasise that an application for the extension of the period of suspension, like any application for an indulgence, must "set out fully, candidly, timeously" the explanation for the delay. In this case that was not done.

[54] Much was made of the fact that if the extension is refused, people who are receiving social welfare grants will be the first casualties. It is ironic that the applicants, who on their own admissions, have been remiss in safeguarding the interests of those people, should now put up the consequences of their remissness as a reason for seeking relief in this Court. It is not clear why people who are receiving social welfare grants would not be paid when there is clearly a constitutional obligation to pay and funds are available. Nor is there anything in the papers that suggests that the applicants will be prevented from taking steps to ensure that those who are entitled to social welfare grants are paid timeously and

that those who are applying for such grants have their applications considered timeously.

[55] As this Court observed in *Ntuli*:

> "This case demonstrates not only the importance of a prompt response by government to any order made by this Court that the provisions of an Act of Parliament is inconsistent with the Constitution and accordingly invalid; it also demonstrates the importance of ensuring that all relevant information is placed before the Court at the time of the proceedings for declaration of invalidity."[15]

[56] At issue in this case are rights of people to receive social assistance. This is a fundamental right enshrined in section 27(1)(c) of the Constitution. Given this, one would have expected the officials dealing with this matter to act promptly to comply with the court order. If the officials dealing with this matter had acted promptly in the period of eighteen months which have now passed since the original order was made, all the steps necessary to comply with the court order would have been complied with.

[57] I am satisfied that the government has had sufficient time to address the problem identified in the main judgment. There is no suggestion that the period of eighteen months was inadequate. All that we are told is that, "all practical arrangements to facilitate an orderly transfer of functions, assets and staff from the

[15] *Ntuli* above n 1 at para 41.

provinces to the Social Security Agency are all in place." There is no explanation why the remaining steps could not be taken during the past eighteen months. But what is clear is that the need to apply for the extension of the period of suspension "was regrettably recognised very late and this oversight is the explanation" for the delay in bringing this application.

[58] In the absence of any explanation, the delay in complying with the court order is therefore inexcusable. So too, is the delay in launching the present proceedings, which were initiated only a few hours before the period of suspension would terminate and in circumstances where it was not reasonably possible to hear the application and give a decision before the period of suspension had expired.

[59] We are not unmindful of the plight of those individuals who are receiving the social welfare grants as well as those who are seeking such grants. They are entitled to be paid those grants as and when they are due. Similarly, those who are seeking such grants are entitled to have their applications considered and, if they meet the relevant criteria, to be awarded such grants. Regrettably, this application was brought ex parte and without any notice either to the applicants in the original application or to their attorneys. However, there is nothing in this judgment which prevents any person who might be adversely affected by the refusal to extend the

period of suspension from approaching any court of competent jurisdiction to seek relief, if so advised.

[60] This judgment must not be understood as suggesting that even if the applicants had approached the Court timeously, the extension would have been refused. In *Zondi*, the applicant approached the Court 15 days before the expiry of the period of suspension, but the Court was nevertheless prepared to extend the period to allow the matter to be argued later. In this case, the applicants approached the Court very late, and left the Court with no time to consider extending the period of suspension before its expiry. In all the circumstances of this case, the lateness in approaching the Court, viewed against the lack of any explanation for the delay, the application must be dismissed.

Moseneke DCJ, Madala J, Mokgoro J, and Nkabinde J concur in the judgment of Ngcobo J.

For the applicants:	R Sutherland SC and S Baloyi instructed by the State Attorney, Johannesburg.