

THE PHARMACEUTICAL MANUFACTURERS ASSOCIATION OF SA AND
ANOTHER
IN RE: THE EX PARTE APPLICATION OF THE PRESIDENT OF THE REPUBLIC OF
SOUTH AFRICA AND OTHERS

CCT 31/99

Explanatory Note

The following explanation is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

This case deals with important issues about the role of the courts in controlling public power. It raises the question whether a court has the power to review and set aside a decision by the President of South Africa to bring an Act of Parliament into force. The matter arose when the Transvaal High Court was requested to review and set aside the President's decision to bring the South African Medicines and Medical Devices Regulatory Authority Act 1998 into operation on 30 April 1999 .

The purpose of the Act is to govern the registration and control of medicines for human and animal use, and to replace previous legislation dealing with these matters. The Act seeks to control the flow of medicines on the market through classifying medicines into specific categories. In order to be effective the Act requires a comprehensive regulatory infrastructure including the determination of schedules regulating the manufacture, sale and possession of substances controlled by the Act. The applicants (the President and others) alleged that, through an error made in good faith, the Act had been brought into operation before the necessary regulatory infrastructure had been put in place and as a consequence the entire regulatory structure had been rendered unworkable. The result would be highly damaging to the public in that control over dangerous medicines would be lost before the new schedules were in place.

The matter was referred to the Constitutional Court by the High Court for confirmation of its order declaring the decision of the President to bring the Act into force null and void. The Constitutional Court, in a unanimous decision delivered by Chaskalson P, confirmed the order of the Transvaal High Court, but gave reasons that are different from those of the High Court. Two issues had to be decided by the Court. The first was whether the High Court's order setting aside the President's decision was a finding of "constitutional invalidity" that required confirmation by the Constitutional Court under section 172(2) of the Constitution. If so, the second issue was whether the President's decision to bring the Act into force was constitutionally valid or not.

The first issue: could the matter be determined solely under the common law by the High Court or was it a question of constitutional invalidity to be determined by the Constitutional Court?

Commenting on whether the High Court's order was a finding of "constitutional invalidity", the Court emphasised that the control of public power by the courts through judicial review is and always has been a constitutional matter. This is so irrespective of whether the principles are set out in a written Constitution or contained in the common law. Judicial review is an incident of the separation of powers under which courts regulate and control the exercise of

public power by the other branches of government. Before the interim Constitution came into force in April 1994, the principles of judicial review were developed through the “crucible” of the common law. Since the adoption of the interim Constitution, public power is controlled by the written Constitution, which is the supreme law. The common law precedent continues to inform the law only to the extent that it is consistent with the Constitution. Consequently, there is only one system of law. Thus, orders of invalidity under the courts’ powers of judicial review are orders of constitutional invalidity. If the order of invalidity relates to conduct of the President, section 172(2) of the Constitution requires that it be confirmed by the Constitutional Court. The Court therefore held that the High Court’s order was subject to confirmation.

The second issue: did a court have the power to review the President’s decision, and if so, should it be set aside?

In deciding the second question, the Court noted the reluctance of courts in other countries to review decisions of this nature because of the political nature of the judgment required and its closeness to legislative powers. The Court held that the power was not “administrative action” as contemplated in the administrative justice clause in the bill of rights, and therefore did not fall within the controls of public power set out in that clause. Rather, it was a power of a special nature, the character of which is neither legislative nor administrative although it is more closely linked to the legislative than the administrative function. However, the exercise of such a power is not beyond the reach of judicial review, because the exercise of all power must conform with the Constitution, and, in particular, the requirements of the rule of law — a foundational principle in the Constitution. The Court held that this includes the requirement that a decision, viewed objectively, must be rationally related to the purpose for which the power was given. Thus, even if the President acts in good faith, his decision may be invalid if it does not meet this objective requirement. This does not mean, however, that a court can interfere with a decision simply because it disagrees with it or considers that the power was exercised inappropriately.

On the facts, the Court held that the decision to bring the Act into force on 30 April 1999, before the necessary schedules were in place, though through no fault of the President, was objectively irrational. It noted that no rational basis for the decision had been suggested and that the President himself approached the court urgently, with the support of the Minister of Health and the professional associations most directly affected by the Act.

The effect of the Constitutional Court’s decision in this case is that the 1965 legislation that governed the control of medicinal substances and that was to be replaced by the 1998 Act remains in force until such time as the President determines a date for bringing the new Act into force.