

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

In the ex parte matter of The Minister of Social Development and Others

CCT 14/06

Decided on 09 March 2006

MEDIA SUMMARY

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

On Saturday 4 March 2006 the Minister of Social Development, along with Members of the Executive Councils (MECs) from each province, filed an urgent application for direct access to this Court. The applicants asked for a further suspension of an earlier order of the Court that, after declaring a presidential proclamation invalid, had suspended the declaration of invalidity to enable the legislature to correct the defect.

In 2004, in *Mashavha v President of the RSA and Others*, this Court confirmed a finding by the Pretoria High Court that a presidential proclamation, Proclamation R7 of 1996, was unconstitutional and invalid. That proclamation sought to assign the administration of the Social Assistance Act 59 of 1992 to provincial governments. In confirming the order of the High Court, this Court suspended the order of invalidity for eighteen months from the date of its order, 6 September 2004. The Court ordered the suspension in response to submissions by the Minister of Justice and Constitutional Development that the South African Social Security Agency Bill and the Social Assistance Bill would become law and solve the problem created by the presidential proclamation and that some time was needed to put the necessary measures into place.

The Minister of Social Development and the MECs contended that the suspension period would expire on 6 March 2006 and asked to be heard on that date. The applicants stated that the Minister had not fully complied with the order and would not comply by 6 March. They requested an additional suspension of 25 days, in order to complete the final step required to bring the remaining section of the South Africa Social Security Agency Act into force and to fund the Social Security Agency. The applicants contended that a further suspension was the only means legally available to arrange for the payment of social grants to people who would otherwise experience severe distress during the 25 day period when the old law was no longer operative and the new law had not yet come into operation.

Van der Westhuizen J, writing for the majority of the Court, dismissed the application. The Court found thoroughly unconvincing the applicants' explanations for not timeously complying with the order and for approaching the Court on the same day that the suspension order expired. However, being concerned about the plight of the people who depend upon social security grants, the Court assumed in favour of the applicants that the matter should be heard on an urgent basis.

The Court found that, using the method of computing time period generally accepted in law, the period of suspension ended at midnight on 5 March 2006, and that 6 March 2006 fell outside the eighteen month period. Accordingly, at the time of the hearing, the suspension period had already lapsed.

The Court held that once the suspension period lapsed, the Court had no power to extend the suspension period. At the moment the suspension expired, the declaration of invalidity took effect. Having declared the presidential proclamation invalid, the Court reached the boundary of its power. The Court cannot turn back time to "retrospectively extend" a suspension order that no longer exists, and the Court cannot revive the invalid proclamation. To do so would intrude into the domain of the legislature.

The Court was not convinced that the order sought by the applicants was the only way of lawfully allowing for the payment of social grants. It concluded that it is crucial for the relevant organs of state to make every effort to explore fully all legal possibilities to meet its constitutional obligations and to prevent the interruption of the payment of pensions and other social grants.

In a separate judgment, Ngcobo J concurs in the judgment and order of Van der Westhuizen J. He states that in considering an application to extend the period of suspension of an order of validity, the Court must balance all of the relevant factors, bearing in mind the goal of making an order that is just and equitable. One of the relevant factors is the explanation given for the delay. In this case, he finds that there was no explanation either for the delay in complying with the court order or for the delay in initiating the present proceedings. He therefore concludes that the government failed to make out a case for the extension of the period of suspension of the order of validity.