CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 59/04

MINISTER OF HEALTH	First Applicant
PROFESSOR D McINTYRE NO	Second Applicant
versus	
NEW CLICKS SOUTH AFRICA (PTY) LTD	First Respondent
PHARMACEUTICAL SOCIETY OF SOUTH AFRICA	Second Respondent
UNITED SOUTH AFRICAN PHARMACIES	Third Respondent
LA TANDT AND ASSOCIATES (PTY) LTD	Fourth Respondent
IRVINE AND MILLER (PTY) LTD	Fifth Respondent
MEDICROSS HEALTH CARE HOLDINGS LTD	Sixth Respondent
NETWORK HEALTH CARE HOLDINGS LTD	Seventh Respondent
I M DAVIS NO 2 CC	Eighth Respondent

IN RE:

APPLICATION FOR DECLARATORY RELIEF

Heard on : 15-16 March 2005

Decided on : 30 September 2005

JUDGMENT

THE COURT:

Introduction

[1] This is an application for declaratory relief brought by the Minister of Health and the Pricing Committee in the main application (the applicants) in *Minister of Health and Another v New Clicks and Others*, a judgment which is also delivered today. In the main application the applicants seek leave to appeal against the judgment and order of the Supreme Court of Appeal (the SCA) handed down on 20 December 2004, setting aside the regulations relating to a transparent pricing system for medicines and Scheduled substances published by the Minister of Health.[1] In this application they seek an urgent order declaring that the judgment and order of the SCA[2] was automatically suspended upon the bringing of the application for leave to appeal to this Court.

[2] The facts which form the basis of this application are subject to dispute. What appears to be common cause is as follows. After the SCA handed down its judgment, the applicants lodged their application for leave to appeal to this Court almost immediately. The parties each came to a different view about the effect of the lodging by the applicants of their application for leave to appeal. Members of the Department of Health (the Department) made various remarks in the media to the effect that the

[1] Government Gazette 26304 GN R553, 30 April 2004.

[2] *Pharmaceutical Society of South Africa and Others v Tshabalala-Msimang and Another NNO; New Clicks South Africa (Pty) Ltd v Minister of Health* 2005 (3) SA 238 (SCA); 2005 (6) BCLR 576 (SCA).

filing of the application for leave to appeal had the effect of suspending the order of the SCA. These statements also made clear that in the light of its view that the regulations were valid and effective, the Department expected stakeholders to comply with them. Various newspapers reported the intention of the Department to prosecute anyone failing to comply with the regulations. On 12 January 2005, the Department of Health issued the following media release:

> "The Department of Health welcomes the directive by the Chief Justice of the Constitutional Court to set the date of a hearing on an application for leave to appeal on the government's medicine pricing regulations.
>
> . . . .
>
> The implication of the matter being heard before the Constitutional Court is that last month's ruling by the Supreme Court of Appeal setting aside the medicine pricing regulations remains suspended.
>
> The General Public, Pharmaceutical Manufacturers, Wholesalers, Distributors, Pharmacists and Doctors should note that the pricing regulations are effective as set under the Medicines and Related Substances Act. Therefore all stakeholders are expected to abide by the regulations until the Constitutional Court makes a final decision on this issue."

[3] On 19 January 2005, the attorneys for the second to eighth respondents (the PSSA respondents) published a full-page advertisement in various newspapers, which reads as follows:

> "Legal status of the Medicine Pricing Regulations
>
> On 20 December 2004, the Supreme Court of Appeal delivered its judgment setting aside the earlier decision of the Cape High Court, which had upheld the validity of the Medicine Pricing Regulations. The Supreme Court of Appeal found that the

> Medicine Pricing Regulations, 'failed the test of legality' and in consequence the Regulations were 'invalid and of no force and effect'.
>
> Subsequently, the Minister of Health lodged an application for leave to appeal against the decision of the Supreme Court of Appeal to the Constitutional Court. The application for leave to appeal is due to be heard on the 15th of March 2005.
>
> We have in conjunction with independent senior counsel, provided written advice to the Pharmaceutical Society of South Africa, as well as our other clients in these proceedings, that the mere lodging of an application for leave to appeal, does not suspend the Supreme Court order. This advice has been confirmed by a number of independent law firms, which share the same view.
>
> Accordingly, we have advised our clients that the Medicine Pricing Regulations are currently null and void and of no force and effect.
>
> In these circumstances, the threats by the Department of Health to prosecute pharmacists who do not continue to adhere to the Medicine Pricing Regulations are unfounded and without legal merit."

According to the PSSA respondents, this advertisement was a necessary response to the repeated comments in the media by the department to the effect that the regulations remained in force and that failure to comply with them was unlawful and subject to prosecution.

[4] The position in respect of the first respondent (New Clicks) is less clear. In correspondence addressed to the State Attorney on 28 December 2004, New Clicks pointed out that its legal advice was to the effect that the order of the SCA remained valid until such time as this Court granted leave to appeal to the applicants and their appeal was noted. At the same time, however, New Clicks published advertisements stating its intention to charge the 26% or R26 dispensing fee and no more. In his

answering affidavit in this application, Mr Hoeben, one of New Clicks' attorneys, suggests that these advertisements related only to pharmacies situated in Clicks stores, that other pharmacies in the New Clicks stable have not been complying with the regulations and, to the extent that the New Clicks pharmacies have been complying, this is only because market pressures compel them to do so.

[5] As a consequence of the advertisements placed by the PSSA respondents and what they describe as the confusion and uncertainty surrounding the status of the regulations, the applicants lodged a notice of motion seeking urgent relief. Because of a slight error in their initial notice of motion, the applicants thereafter lodged an application to amend their notice of motion. The amended notice of motion sought an order in the following terms:

> "1. Dispensing with forms and services prescribed by the Rules of Court and directing that this matter be heard as one of urgency in terms of the provisions of Rule 12.
> 2. Declaring that the judgment and order of the Supreme Court of Appeal (the SCA) in the matter between the Respondents (Appellants in the SCA) and the Applicants (Respondents in the SCA), under case nos.: 542/2004 and 543/2004, on 20th December 2004 has automatically been suspended upon the bringing of the application for leave to appeal to this Court.
> 3. Alternatively to paragraph 2 above, declaring that the judgment and order of the Supreme Court of Appeal (the SCA) in the matter between the Respondents (Appellants in the SCA) and the Applicants (Respondents in the SCA), under case nos.: 542/2004 and 543/2004, on 20th December 2004 has automatically been suspended upon the parties complying with the directions 2, 3, and 4 of the Chief Justice dated 4th January 2005.
> 4. Alternatively to paragraphs 2 and 3 above, granting the Applicants leave to appeal against the whole of the judgment of the SCA while judgment on the appeal by this Court is pending.

5. Ordering that any of the Respondents that oppose this application pay the costs of the Applicants jointly and severally.
6. Further and/or alternative relief."

[6] Together with their answering affidavit, the PSSA respondents lodged a conditional counter-application. In terms of this counter-application, if this Court were to grant the declaratory relief sought by the applicants and declare that the judgment and order of the SCA was suspended upon the application for leave to appeal, this Court was requested to issue an interim order declaring that the regulations are suspended until such time as this Court gives final judgment in the main application.

[7] The hearing in the main application was set down for 15 and 16 March 2005. In their founding affidavit in the application for declaratory relief, the applicants asked that argument on the question of the declarator be heard at the same time as the main application. The basis for this request was that the question of the declarator was incidental to the main issues and, as such, it would be convenient to hear the matters together. The thrust of the respondents' opposition to the relief sought was that the question of declaratory relief was not incidental to the main relief sought and that the application properly considered was for direct access. In this context the PSSA respondents in particular objected to the hearing of the application together with the main application. However, for the sake of convenience and to avoid drawing the matter out any further, this Court set the matter down for argument on the same dates as the main application.

[8] It should be noted that, although these disputes between the parties were aired in public only during January 2005, the parties were aware in late December that they adopted different attitudes to the status of the SCA's judgment and order. In response to media statements by Dr Zokufa on 20 and 21 December 2004, an attorney for the New Clicks respondents wrote to the State Attorney to indicate that their legal advice was to the effect that the regulations were null and void at least until such time as this Court granted leave to appeal to the applicants. The applicants were therefore aware from late December that the PSSA respondents took a different view to them on the enforcement of the regulations. No explanation has been given as to why it took the applicants until 18 February 2005 to lodge their application in this matter or why, notwithstanding this delay, the application should be treated as urgent.

Application for direct access

[9] The applicants allege that their application is "incidental to the application for leave to appeal". It is, however, a substantive application for a declaration of rights and is in substance an application for direct access to this Court for the relief claimed in the notice of motion.

[10] The rules of this Court dealing with applications for direct access require an application to be launched on notice of motion setting out:

> a) "the grounds on which it is contended that it is in the interests of justice that an order for direct access be granted;

b) the nature of the relief sought and the grounds upon which such relief is based;

c) whether the matter can be dealt with by the Court without the hearing of oral evidence and, if it cannot,

d) how such evidence should be adduced and conflicts of fact resolved".

The rule contemplates that if notice to oppose is given, directions will then be issued by the Chief Justice as to how the matter shall be disposed of.[3]

[11] The notice of motion lodged by the applicants does not formally seek direct access or rely on the provisions of rule 18. The applicants contend, however, that the issue raised by them is urgent and that the normal forms and services prescribed by the rules of court should be dispensed with to enable the matter to be heard as one of urgency in terms of the provisions of rule 12.[4]

[12] We have already drawn attention to the unexplained delay in bringing the application for the declaration of rights. It was, however, convenient for this matter to be dealt with at the same time as the hearing of the main application, as the two applications were set down for hearing on the same day. The arguments thus addressed not only the substance of the relief claimed, but also whether the application was in the correct form, and whether this was a proper case for direct access.

[3] Rule 18(2) of the Constitutional Court Rules.

[4] Rule 12 provides:

"(1) In urgent applications, the Chief Justice may dispense with the forms and service provided for in these rules and may give directions for the matter to be dealt with at such time and in such manner and in accordance with such procedure, which shall as far as is practicable be in accordance with these rules, as may be appropriate.

(2) An application in terms of subrule (1) shall on notice of motion be accompanied by an affidavit setting forth explicitly the circumstances that justify a departure from the ordinary procedures."

[13] This Court has stressed on more than one occasion that applications for direct access should be granted only in exceptional circumstances. As stated by Yacoob J in *Mkontwana v Nelson Mandela Metropolitan Municipality*:[5]

> "The saving of time and costs, the importance of the issue or the existence of conflicting judgments on an issue in a case do not, without more, constitute exceptional circumstances and justify this Court being a court of first and last instance. Indeed the importance and complexity of the issues raised would weigh heavily against this Court being a court of first and final instance. As a general rule, the more important and complex the issues in a case, the more compelling the need for this Court to be assisted by the views of another court."[6]

[14] The issue in the present case is whether the regulations are enforceable pending the outcome of the appeal to this Court. The applicants contend that in the circumstances of the present case the subject matter of the application is one of public importance, affecting as it does the price of medicines, and that it is in the interest of good government for the matter to be resolved by this Court as a matter of urgency. This is a relevant factor which needs to be taken into account.[7] So too is the question whether any other court would have jurisdiction to hear the matter, a question that is

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[5] *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng and Others (Kwazulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* 2005 (1) SA 530 (CC); 2005 (2) BCLR 150 (CC).

[6] Id at para 11.

[7] See, *Transvaal Agricultural Union v Minister of Land Affairs and Another* 1997 (2) SA 621 (CC); 1996 (12) BCLR 1573 (CC) at para 18; *Bruce and Another v Fleecytex Johannesburg CC and Others* 1998 (2) SA 1143 (CC); 1998 (4) BCLR 415 (CC) at para 19.

far from clear in the present case. We need not consider that question, however, for there are countervailing considerations that point in a different direction.

Objective invalidity

[15] Section 2 of the Constitution provides that:

> "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."

Any law inconsistent with the Constitution is therefore invalid. When a court considers and upholds a challenge to the validity of a law, it then declares the law to be invalid, but the law's fundamental invalidity flows from its inconsistency with the Constitution, not from the court order. As this Court held in *Ferreira v Levin NO;*[8]

> "The Court's order does not invalidate the law; it merely declares it to be invalid. It is very seldom patent, and in most cases is disputed, that pre-constitutional laws are inconsistent with the provisions of the Constitution. It is one of this Court's functions to determine and pronounce on the invalidity of laws, including Acts of Parliament. This does not detract from the reality that pre-existing laws either remained valid or became invalid upon the provisions of the Constitution coming into operation. In this sense laws are objectively valid or invalid depending on whether they are or are not inconsistent with the Constitution. The fact that a dispute concerning inconsistency may only be decided years afterwards, does not affect the objective nature of the invalidity."

[16] The common law rule that execution of a judgment is suspended pending an appeal has no application to declarations of constitutional invalidity of legislation. If a

[8] *Ferreira v Levin No and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) at para 27, see also paras 28 – 30.

law is objectively invalid, a declaration of invalidity made by a competent court that is subsequently set aside on appeal does not validate the law. For the same reason, an appeal against a declaration of constitutional invalidity of a law does not breathe life into that law. The objective validity or invalidity of a law will ultimately be determined at the end of the appeal process. That does not mean, however, that courts have no power to temper the effect of orders of constitutional invalidity made pending the finalisation of the appeal process.

[17] The ordinary effect of the constitutional doctrine of objective invalidity would be that a law declared invalid will have been invalid from the date upon which its inconsistency with the Constitution arose. Ordinarily, this would be the date of promulgation of the law, or the date upon which the Constitution came into force.[9] The inexorable effect of this, however, is mediated by Section 172(1)(b) which provides that once a court has made an order of invalidity, it also:

> "(b) may make any order that is just and equitable, including –
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> (i) an order limiting the retrospective effect of the declaration of invalidity; and
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> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

[18] This power has been invoked by this Court when it has considered it to be just and equitable to do so.[10] The effect of suspending the order of invalidity is that the

[9] See *Ex parte Women's Legal Centre: In re Moise v Greater Germiston Transitional Local Council* 2001 (4) SA 1288 (CC) at para 11.

[10] *S v Steyn* 2001 (1) SA 1146 (CC); 2001 (1) BCLR 52 (CC) at para 46; *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v*

law will be deemed to be valid for the period of suspension.[11] In addition, a court may make the suspension subject to such conditions as may be just and equitable to regulate affairs during the period of suspension.[12]

[19] Next it should be noted that in terms of section 172(2)(a) of the Constitution, no order declaring an Act of Parliament, or provincial legislation, or conduct of the President shall have any force until is confirmed by this Court.[13] Section 172(2)(b) vests in a court making such an order a power to make a temporary order to regulate conduct pending the determination of the confirmation proceedings.[14] The corollary of these provisions is that declarations of constitutional invalidity, other than those referred to in section 172(2)(a), made by courts other than this Court, in the absence of any appeal against those orders, have effect without the need to be confirmed by this Court. Similarly, such courts when making declarations of constitutional invalidity within their power have the remedial powers conferred by section 172(1), which means that an order of constitutional invalidity may be suspended for a period and on

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Minister of Home Affairs and Others 2000 (3) SA 936; 2000 (8) BCLR 837 (CC) at paras 64-65*; Fraser v Children's Court, Pretoria North, and Others* 1997 (2) SA 261 (CC); 1997 (2) BCLR 153 (CC) at paras 50-51; *S v Ntuli* 1996 (1) SA 1207 (CC); 1996 (1) BCLR 141 (CC) at para 28.

[11] See *De Kock and Others v Van Rooyen* 2005 (1) SA 1 (SCA) at para 27.

[12] See *Janse van Rensburg No and Another v Minister of Trade and Industry and Another NNO* 2001 (1) SA 29 (CC); 2000 (11) BCLR 1235 (CC) at para 28; *Dawood* above n 10 at para 60.

[13] Section 172(2)(a) reads as follows:

> "The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court."

[14] Section 172(2)(b) reads as follows:

> "A court which makes an order of constitutional invalidity may grant a temporary interdict or other temporary relief to a party, or may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of that Act or conduct."

conditions as are just and equitable. The remedial powers conferred by section 172 apply to all orders of constitutional invalidity including orders of constitutional invalidity in relation to delegated legislation, such as made by the SCA in the present case. Ordinarily, that order would have immediate effect.

[20] The Constitution however contemplates expressly in section 172 that when a court makes an order of invalidity, that otherwise might have an immediate effect it may temper that effect by suspending the order on conditions that are just and equitable. This provision enables a court to regulate the effect of an order of invalidity pending an appeal. A litigant who considers that it would be just and equitable for an order of invalidity to be suspended pending an appeal, should make timeous and appropriate application to the court considering the application for a declaration of constitutional invalidity and draw the court's attention to the relevant considerations of justice and equity.

[21] An appellate court, including this Court, that confirms an order of invalidity on appeal must determine whether its order should be suspended or not. In doing so it will take into careful account the terms of the order made by the court below, including any just and equitable orders that may have been made to mitigate the consequences of an order of constitutional invalidity.

[22] The relief that the applicant effectively seeks in this application, although not formulated as such, is an order suspending the operation of the declaration of

invalidity made by the SCA pending the appeal. In our view, this is not an order that should be made by this Court on an application for direct access. It is an order that should be made, as the Constitution contemplates, by the court making the declaration of invalidity. In this case, the order could have been made by the SCA. The court that makes the declaration of invalidity is the court that is best placed to determine what is just and equitable in the circumstances and whether an order suspending the declaration of invalidity should be made pending the appeal or any other event or period of time, and, if an order of suspension should be made, on what conditions, if any.

[23] In the circumstances the application for direct access must be dismissed. The conditional counter-application therefore falls away. There is no reason why the applicants should not pay the costs occasioned by this application. The following order is made:

(a) The application for direct access for an order declaring that the judgment and order of the Supreme Court of Appeal in the main application has automatically been suspended is dismissed.

(b) The applicants must pay the costs of both respondents occasioned by this application, including in respect of each respondent the costs of two counsel.

Chaskalson CJ, Langa DCJ, Madala J, Mokgoro J, Moseneke J, Ngcobo J, O'Regan J, Sachs J, Skweyiya J, Van der Westhuizen J, Yacoob J.

For the applicants:	MTK Moerane SC, P Coppin and B Vally instructed by the State Attorney.
For the first respondent:	JJ Gauntlet SC and AE Bham instructed by Sonnenberg Hoffman Gallombik.
For the second respondent:	Wim Trengove SC, Alfred Cockrell And Max du Plessis instructed by Webber Wentzel Bowens.