

**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA
(BRAAMFONTEIN)**

CASE NO: CCT 54/2015

In the application of:

THE SPEAKER OF THE NATIONAL ASSEMBLY

Applicant

And

THE TEDDY BEAR CLINIC FOR ABUSED CHILDREN

First Respondent

RAPCAN

Second Respondent

APPLICANT'S HEADS OF ARGUMENT

INTRODUCTION

1. On 3 October 2013, this Honourable Court, in its judgement in the case of *The Teddy Bear Clinic for Abused Children and Others v The Minister of Justice and Constitutional Development and Others* [2013] ZACC 35 CCT

12/13 (*“the Teddy Bear Case”*), declared sections 15 and 16 of the Criminal Law (Sexual offences and Related Matters) Amendment Act, No.32 of 2007 (*“the Act”*) to be inconsistent with the Constitution and therefore invalid to the extent that they impose criminal liability to children under the age of 16.

2. The declaration of invalidity was suspended for a period of 18 months from the date of the judgement (*“the period of suspension”*) in order to allow Parliament to remedy the unconstitutionality of the impugned provisions¹.
3. The period of suspension expired at midnight on 2 April 2015². Accordingly, it became necessary for the applicant to approach this Honourable Court for an order extending the period of suspension.³
4. On 30 April 2015, the applicant instituted this application in which he seeks an order extending the period of suspension by a further period of 6 months, until 5 August 2015. That relief, if granted, would not only afford Parliament sufficient time remedy the unconstitutionality of the impugned provisions but it would also bring the period of suspension in alignment with the period of suspension ordered by this Court in the case of *J v The National Director of Public Prosecutions and Others CCT 114/13 [2014] ZACC 13* (*“the J’s case”*).

¹ Teddy Bear Judgment at para [117](2).

² Ex parte Minister of Social Development 2006 (4) SA 309 (CC) at para [24].

³ Id at paras [27]-[40].

5. Consequent upon the applicant bringing this application, this Court on 31 March 2015:

5.1. granted an order *inter alia* varying paragraph 2 of its order of 3 October 2013 in the *Teddy Bear* case extending the period of suspension until Friday, 15 May 2015; and

5.2. issued directions to the effect that the respondents should file their opposing affidavits by 10 April 2015, and the applicant should file his written submissions by 20 April 2015.

6. On the same day, being 31 March 2015, the first and second respondents filed their opposing affidavit deposed to by Ms Christina Nomdo (“Nomdo”), the Director of the second respondent.

7. Significantly, Nomdo states therein, at paragraph 10⁴, that the first and second respondents do not oppose the application to extend the period of suspension until 5 August 2015 as such an extension is sensible given that the consequences of the *Teddy Bear* case and of the J’s case are being dealt with in a single Bill by Parliament⁵.

⁴ Para 10 - Answering affidavit.

8. Nondo proceeds, having quite properly and correctly acquiesced to the relief sought, to “*record our concerns about last minute developments during the legislative process ... which may delay the legislative process and substantially de-rail it.*”⁶ Based thereupon it is contended by the respondents that they “*do not and would not consent to any further extension of the periods of suspension beyond 5 August 2015...*”

THE JUDGMENT OF THIS COURT IN THE TEDDY BEAR CASE

9. The judgment of this Court in the *Teddy Bear case* concerned the constitutional validity of sections 15 and 16 of the Act.
10. Section 15(1) of the Act creates the offence of statutory rape as regards consensual sexual penetration between an adult or a child who is 16 years or older and an adolescent, or where adolescents engage in consensual sexual penetration with each other. In cases where adolescents engage in sexual penetration with each other, and a prosecution is instituted on a charge of statutory rape, both of the adolescents involved must be prosecuted of statutory rape.
11. Section 16(1) creates the offence of statutory assault as regards the commission of sexual violation. Statutory sexual assault is committed if an adult or a child who is 16 years or older engages in consensual sexual

⁶ Para 11- Answering Affidavit

violation with an adolescent, or adolescents engage in consensual sexual violation with each other. Where a prosecution is instituted on a charge of statutory sexual assault against adolescents who engage in such conduct, both adolescents must be prosecuted.

12. In terms of section 56(2)(b) of the Act, the “*close - in – age*” defence is available to an adolescent who has been charged with statutory sexual assault, but not to an adolescent who has been charged with statutory rape.
13. This Court declared as unconstitutional sections 15 and 16 of the Act, in so far as they impose criminal liability on adolescents for engaging in consensual sexual conduct⁷. In other words, to the extent that sections 15 and 16 of the Act impose criminal liability on an adult for engaging in sexual conduct with a consenting adolescence, the criminalisation of such a conduct remains valid and of force and effect.
14. Further, a moratorium on all investigations into, arrests of, and criminal and ancillary proceedings against adolescents in relation to section 15 and 16 of the Act was imposed pending Parliament remedying the defects⁸.
15. This Court imposed the above safeguards with a view to mitigating prejudice to the public at large during the suspension period. We submit that none will be occasioned by the extension of the suspension period because these safeguards remain in place. Further, none of the parties before this Court has suggested that these safeguards have proven to be inadequate. Indeed, the

⁷ Paragraph [117].1

⁸ Paragraph [117] 3

respondents are in full support of this application as being a sensible one to be made.

THE COURT'S POWER TO EXTEND THE PERIOD OF SUSPENSION

16. In *Minister for Transport v Mvuvu*⁹, this Court recognised that it sometimes occurs, when the operation of the invalidity of the order is suspended so as to allow Parliament to cure the constitutional defect found to be present, that Parliament is unable to correct the defect before the period of suspension lapses.
17. In such instances, so found this Court, it becomes necessary for Parliament to seek relief in the form of the extension of the period of suspension. Such an order is necessary to prevent the coming into operation of the order of invalidity and falls properly to be brought before the lapse of the period of suspension. That was found to be so because once expired, an order of this Court cannot be revived nor extended¹⁰.
18. We submit that this is such a case where Parliament has not been able to correct the defect before the period of suspension lapses. In order to prevent the period of suspension from lapsing it became necessary for the Acting Speaker to approach this Court for relief extending the period of suspension.

⁹ 2011 (5) BCLR 488 (CC) at para [3].

¹⁰ Id at para [4].

19. Further, this Court has, on many occasions prior to the *Mvuvu* judgement, made it clear that it has the power to extend the period of suspension of a declaration of invalidity¹¹. In this regard the following paragraphs from the judgement of this Court in *Nyathi* are apposite:

"[24] This is not the first time that this Court has had to consider, on an urgent basis, an application by the state for an extension of this nature. Indeed this Court was faced with a similar application in Zondi II. That case was a sequel to this Court's order in Zondi I, in which sections 16(1), 29(1), 33, 34 and 37 of the Pound Ordinance (KwaZulu-Natal), were declared unconstitutional and invalid. At issue was whether the Court had the power to vary and extend the period of suspension of a declaration of invalidity. The Court held:

"The power to make an order that is just and equitable is not limited to the time when the Court declares a statutory provision inconsistent with the Constitution and suspends the order of invalidity. 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."

[25] The Court found that the determination of what is "just and equitable" is fact specific, and in view of the principle of finality, the power to extend the period of suspension should, as a general matter, be "very sparingly exercised".

[26] In a separate concurring judgment in Ex Parte of Social Development, Ngcobo J outlined the principles which guided the Court's exercise of the discretion as follows:

"[T]he sufficiency of explanation for failure to comply with the original period of suspension; the potentiality of prejudice being sustained if the period of suspension were

¹¹ In *Zondi v MEC, Traditional and Local Government Affairs and others* 2006 (3) SA 1 (CC); *Ex parte Minister of Social Development n 1 supra*; and *Minister for Justice and Constitutional Development v Nyathi and Others* 2010 (4) BCLR 293 (CC).

extended or not extended; the prospects of complying with the deadline; the need to bring litigation to finality; and the need to promote the project and prevent chaos.

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.” (Footnotes omitted.)

THE REASONS FOR PARLIAMENT’S FAILURE TO COMPLY

20. In his founding affidavit, the Acting Speaker of the National Assembly proffers an explanation for Parliament’s failure to comply with the Court’s order timeously in the following terms:

20.1. The main reason for non-compliance is for Parliament to allow for more public participation and involvement in the amendment of the offending provisions of the Act¹².

20.2. The draft Bill was submitted to the office of the Speaker for introduction to the National Assembly on 2 December 2014. At the time when the draft Bill was submitted to the office of the Speaker, the National Assembly was already in recess, having been in recess since 24 November 2014 until 12 February 2015¹³.

20.3. The editing of the draft Bill was finalised on 3 December 2014, and on 5 December 2014 it was referred to both the JTM and

¹² Founding affidavit, p7, para 7.

¹³ Founding affidavit, p9, para 13 and 14.

the Portfolio Committee on Justice and Correctional Services (“the Committee”) for consideration¹⁴.

20.4. The Committee resolved that the members of the public should be invited for comment and participation, and as from 15 December 2014, the Bill was advertised for public comment on the Parliament’s website and on newspapers. The closing date for submissions was 20 January 2015¹⁵.

20.5. On 3 February 2015, the Committee met to receive an introductory briefing on the draft bill from the Department of Justice and Constitutional Development. During this period, the Committee had already been inundated with requests from the members of the public, as well as civil society formations for an opportunity to be allowed to submit comments on the draft bill outside of the date set as the deadline for such submissions¹⁶.

20.6. Given the complexity and sensitivity of the issues which relate to the protection of children, the Committee resolved that the process to amend the Act should allow for all relevant parties to provide inputs, and the deadline for submission of written comments by the public was extended to 10 February 2015¹⁷.

¹⁴ Founding affidavit, p11, para 18.

¹⁵ Founding affidavit, p11, para 18.

¹⁶ Founding affidavit, p11, para 20.

¹⁷ Founding affidavit, pp 11 -12, para 21.

- 20.7. By 10 February 2015, being the extended deadline for public written comments on the Bill, the Committee had received in excess of 932 submissions¹⁸.
- 20.8. As a result of the volumes of the submissions received by the Committee, the Chairperson of the Committee approached the Speaker with a request to approach the National Assembly for a decision to approach this Honourable Court with a request to extend the period of suspension of the declaration of invalidity of sections 15 and 16 of the Act to 5 August 2015¹⁹.
- 20.9. On 5 March 2014, the National Assembly convened and considered the Committee's request for a decision to approach this Honourable Court to bring this application²⁰.
21. The decision by the National Assembly to approach this Honourable Court for an order extending the period of suspension was taken in order to enable Parliament to fulfil its constitutional obligations imposed by sections 59 and 72 of the Constitution. Parliament could hardly countenance a situation wherein it creates the impression that it is acting in contempt of orders of this Court inter alia because it is the custodian of the Constitution predicated as it is on the Rule of Law. This is a further reason predicated this application.
22. In addition, in the *Teddy Bear*²¹ case this Court recognised the sensitivity of the subject matter of the impugned provisions of the Act, and the high degree

¹⁸ Founding affidavit, p 12, para 22.

¹⁹ Founding affidavit, p12, para 24.

²⁰ Founding affidavit, p 12, para 25.

of public scrutiny it has attracted. As a result thereof, the Court said that Parliament is institutionally best-suited to ensure that the ultimate statutory regime is decided upon in an open, inclusive and transparent manner, with all relevant parties who desire to be given an opportunity to shape the debate and the eventual outcome.

23. If the suspension period is extended little or no prejudice to the public would result since this Court has imposed a moratorium on all investigations into, arrests of, and criminal and ancillary proceedings against adolescents in relation to section 15 and 16 of the Act, pending Parliament remedying the defects²².

CONCLUSION

24. We submit that a proper case for the extension of the suspension period has been made out.
25. Failure by Parliament to cure the defects in sections 15 and 16 of the Act within the 18 months period allowed by this Court was not due to remissness on the part of Parliament: it was in order to allow relevant parties who desire to be given an opportunity to shape the debate and the eventual outcome.
26. As regards the application for a further extension foreshadowed in respondents' answer, it suffices to make three submissions in that regard:

²¹ At para [109].

²²

- 26.1. That contention is speculative in the extreme to warrant any consideration by this Court;
- 26.2. Implicit in the contention is an invitation to this Court to dictate to Parliament how it should go about curing the constitutional defect found by this Court to exist, in complete disregard of the separation of powers doctrine; and
- 26.3. The application for a further extension is not before this Court and any ruling thereupon would thus be incompetent.

L G NKOSI-THOMAS SC

G NGCANGISA

CHAMBERS

20 APRIL 2015

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT: 54/2015

In the matter between:-

THE ACTING SPEAKER

OF THE NATIONAL ASSEMBLY

Applicant

and

TEDDY BEAR CLINIC FOR ABUSED CHILDREN 1st Respondent

RAPCAN 2nd Respondent

RESPONDENTS' HEADS OF ARGUMENT

INTRODUCTION

1. The Acting Speaker seeks to have the period of suspension of the order of invalidity in respect of sections 15 and 16 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, extended to 5 August 2015. This extension would bring the period of suspension in line with the period of suspension set by this Court in *J v National Director of Public Prosecutions and Another* 2014 (7) BCLR 764 (CC) ('*J v NDPP*').

2. In fact, it is clear from paragraph 56 the judgment in ***J v NDPP*** that that this Court saw the suspensions of invalidity in the two cases as being linked to one another, and envisaged that one legislative process might be used to remedy the defects in the law in both cases. The following was noted by the Court:

[56] For these reasons, section 50(2)(a) must be declared constitutionally invalid and Parliament must be instructed to remedy the defect within 15 months, during which period the declaration will be suspended. Given that the rights infringements to child offenders will continue to operate in the interim period, a shorter period for correction of the defect is preferred. Because the constitutionality of certain provisions of the Sexual Offences Act in relation to their effect on children is already under consideration,[\[66\]](#) it is feasible that the Legislature is positioned to move on the correction of the defects.

3. Footnote 66 referred to in the above-quoted paragraph is a reference to the Court's judgment in ***Teddy Bear Clinic v the Minister of Justice and Constitutional Development and Others*** [2013] ZACC 35 CCT12/13.
4. It is therefore logical that, if the Court grants the application for extension sought, it should be granted to same date as the date of expiry of the period set in ***J v NDPP***.

5. The Respondents do not oppose this application for extension, but wish to make it plain that any further applications will be vigorously opposed.
6. This Court set a shorter time period of 15 months for the remedying of the defect in ***J v NDPP***. It did so purposefully, mindful of the fact that ‘the infringements of the rights of child offenders will continue to operate in the interim period’.
7. The Respondents are thus firmly set against a longer period than the period currently being sought, and wish to place on record its intention to oppose further extensions.

THE APPROACH OF THIS COURT TO EXTENSIONS OF ORDERS OF INVALIDITY

8. The Court exercises its power to grant a suspension of invalidity only where it is just and equitable to do and it has held that this power is to be ‘very sparingly exercised’.

***Zondi v MEC, Traditional and Local Government Affairs, and Others* 2006 (3) SA 1 (CC) para 47**

9. The court has delineated several factors that may be relevant to a determination of whether to grant an extension:

The sufficiency of the explanation for failure to comply with the original time period;

The potential prejudice if the time period is to be extended;

The prospects of complying with the deadline;

The need to bring the litigation to finality;

The need to promote the Constitutional project and prevent chaos.

***Zondi v MEC, Traditional and Local Government Affairs, and Others* 2006 (3) SA 1 (CC) para 40**

10. The Court has stressed that extensions are not to be resorted to lightly.

***Minister for Justice and Constitutional Development v Nyathi and Others* 2010 (4) SA 567 (CC) para 27**

THE STANCE OF THE RESPONDENTS IN THIS MATTER

11. In the Answering Affidavit filed by the Respondents on 31 March 2015 in this matter, they set out an account of the progress made thus far in respect of the amendment of sections 15 and 16 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 pursuant to the order of this Court on 3 October 2013 in the ***Teddy Bear Clinic*** matter.
12. The Respondents indicated that after an unexplained delay of one year, the Department of Justice and Correctional Services issued a draft Bill for comment.¹ That Bill was tabled in Parliament on 8 December 2014 and the public hearings and deliberations have proceeded quite quickly since then.²
13. However, the Respondents also brought to the Court's attention that a last minute proposal was presented to the Portfolio Committee on 24 March 2015 by the Department of Justice and Correctional Services law advisors. This was just a week before the Applicants filed this application for extension of time.
14. The Respondents briefly set out their concerns about the far-reaching nature of the law advisor's proposal. The purpose of

¹ Respondent's Answering Affidavit Para 12.

² Respondent's Answering Affidavit Paras 15-23.

doing so was – and remains – to point out the court that a full consideration of this proposal, with the consultation that would be required will be a lengthy process.

15. This raises the spectre that, come the date of 5 August 2015, the Applicant's may not have completed the required task, and there is thus a risk that they request a further extension.

RESPONSE TO APPLICANTS HEADS OF ARGUMENT

16. In the concluding paragraphs of the Applicant's Heads of Argument, it is argued that any concerns that the process may be delayed and that a further extension will be opposed is 'speculative in the extreme'. Furthermore the Applicant suggests that the Respondents are asking this Court to embroil itself in 'curing the constitutional defect'.
17. The Respondents' are not requesting this Court to make any finding about the law drafters proposal – only to note the complexity of the issues the proposals raise. This is relevant because of the time it will take to deal properly with these proposals if they are seriously entertained by the Portfolio Committee.

18. The time it would take is directly relevant to one of the issues that the Court must consider on the **Zondi** formulation: namely ‘the prospects of complying with the deadline’.
19. The other issue that the Respondents have pointed out in their Answering Affidavit, is that while they agree there is no prejudice occasioned by the delay in curing the defects that arose from the **Teddy Bear Clinic** case, this is not the case regarding the matter of **J v NDPP**.
20. It was precisely the concern about the fact that children affected by the impugned provisions under **J v NDPP** would continue to suffer rights infringements that the Court set a shorter time period of 15 months, in order to reduce the prejudice.
21. This goes to the heart of another **Zondi** imperative: The potential prejudice if the time period is to be extended. The Respondents persist in the relevance of their argument on the basis that it is important for this Court to know, at the time of making the decision in the application before them, all the relevant facts and considerations.
22. The manner in which the remedying of the defects in the **Teddy Bear Clinic** case and the **J v NDPP** case are so tied up with one

another makes it impossible to entirely separate issues of prejudice affecting the one matter, from the other matter.

CONCLUSION

23. The application for extension of the period of suspension in this matter to 5 August is not opposed.
24. The Respondents reserve their rights to oppose any and all further application extensions.

A M SKELTON

PRETORIA

28 APRIL 2015