



**CONSTITUTIONAL COURT OF SOUTH AFRICA**

CCT 194/16

In the matter between:

**MINISTER OF JUSTICE AND  
CORRECTIONAL SERVICES**

Applicant

and

**MATODZI RAMUHOVHI**

First Respondent

**THINAMAANO EDSON NETSHITUKA**

Second Respondent

**THOKOZANI THEMBEKILE MAPHUMULO**

Third Respondent

**PRESIDENT OF THE REPUBLIC OF  
SOUTH AFRICA**

Fourth Respondent

**ESTATE: MUSENWA JOSEPH NETSHITUKA**

Fifth Respondent

**MUNYADZIWA JOYCE NETSHITUKA**

Sixth Respondent

**MASTER OF THE HIGH COURT,  
THOHOYANDOU**

Seventh Respondent

**MINISTER OF HOME AFFAIRS**

Eighth Respondent

**SIMISO SIPHOSETHU MAPHUMULO**

Ninth Respondent

**TRUSTEES OF THE WOMEN'S  
LEGAL CENTRE TRUST**

Tenth Respondent

**SPEAKER OF THE NATIONAL ASSEMBLY**

Eleventh Respondent

**CHAIRPERSON OF THE NATIONAL  
COUNCIL OF PROVINCES**

Twelfth Respondent

**Neutral citation:** *Minister of Justice and Correctional Services v Ramuhovhi and Others* [2019] ZACC 44

**Coram:** Khampepe ADCJ, Froneman J, Jafta J, Madlanga J, Majiedt J, Mathopo AJ, Mhlantla J, Theron J, Tshiqi J and Victor AJ

**Judgment:** Mhlantla J (unanimous)

**Decided on:** 26 November 2019

**Summary:** suspended declaration of constitutional invalidity — application for extension — compliance with court orders — extension application dismissed

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## ORDER

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The following order is made:

1. The application for an extension is dismissed.

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## JUDGMENT

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MHLANTLA J (Khampepe ADCJ, Froneman J, Jafta J, Madlanga J, Majiedt J, Mathopo AJ, Theron J, Tshiqi J and Victor AJ):

### *Introduction*

[1] This application is a sequel to *Ramuhovhi I*.<sup>1</sup> On 30 November 2017, this Court in *Ramuhovhi I* held that section 7(1)<sup>2</sup> of the Recognition of Customary

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<sup>1</sup> *Ramuhovhi v President of the Republic of South Africa* [2017] ZACC 41; 2018 (2) SA 1 (CC); 2018 (2) BCLR 217 (CC) (*Ramuhovhi I*).

Marriages Act<sup>3</sup> (Act) unjustifiably limited the right to dignity as well as the right not to be discriminated against unfairly, and declared the section constitutionally invalid.<sup>4</sup>

[2] The declaration of constitutional invalidity was suspended for a period of 24 months to afford Parliament the opportunity to correct the defect. This Court declared that the following regime would apply during the period of suspension to polygamous customary marriages concluded before the Act came into operation:

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<sup>2</sup> Section 7(1) provides that “[t]he proprietary consequences of a customary marriage entered into before the commencement of this Act continue to be governed by customary law”.

<sup>3</sup> 120 of 1998.

<sup>4</sup> The full order of *Ramuhovhi I* above n 1 reads:

- “1 Ms Thokozani Thembekile Maphumulo is granted leave to intervene.
2. Condonation is granted for the late filing of the written submissions of the third, fourth and seventh respondents.
3. The declaration of constitutional invalidity of section 7(1) of the Recognition of Customary Marriages Act 120 of 1998 by the High Court of South Africa, Limpopo Local Division, Thohoyandou is confirmed.
4. The declaration of constitutional invalidity is suspended for 24 months to afford Parliament an opportunity to correct the defect giving rise to the constitutional invalidity.
5. During the period of suspension referred to in paragraph 4, the following regime will apply to polygamous customary marriages concluded before the Act came into operation:
  - a. Wives and husbands will have joint and equal ownership and other rights to, and joint and equal rights of management and control over, marital property, and these rights shall be exercised as follows—
    - i. in respect of all house property, by the husband and the wife of the house concerned, jointly and in the best interests of the family unit constituted by the house concerned; and
    - ii. in respect of all family property, by the husband and all the wives, jointly and in the best interests of the whole family constituted by the various houses.
  - b. Each spouse retains exclusive rights to her or his personal property.
6. In the event that Parliament fails to address the defect referred to in paragraph 4 during the period of suspension, the orders in paragraphs 5(a) and 5(b) will continue to apply after the period of suspension.
7. In terms of section 172(1)(b) of the Constitution, this order does not invalidate a winding up of a deceased estate that has been finalised or the transfer of marital property that has been effected.
8. Paragraph 7 of this order does not apply to any transfer of marital property where, at the time of transfer, the transferee was aware that the property concerned was subject to a legal challenge on the grounds upon which the applicants brought the challenge in this case.
9. Any interested person may approach this Court for a variation of this order in the event that she or he suffers harm not foreseen in this judgment.
10. The second respondent must pay the applicants’ costs, including costs of two attorneys.”

- “(a) Wives and husbands will have joint and equal ownership and other rights to, and joint and equal rights of management and control over, marital property, and these rights shall be exercised as follows—
- (i) in respect of all house property, by the husband and the wife of the house concerned, jointly and in the best interests of the family unit constituted by the house concerned; and
  - (ii) in respect of all family property, by the husband and all the wives, jointly and in the best interests of the whole family constituted by the various houses.
- (b) Each spouse retains exclusive rights to her or his personal property.”<sup>5</sup>

[3] This Court further ordered that in the event that Parliament failed to address the defect, this regime would continue to apply after the period of suspension.<sup>6</sup> That period of suspension is due to expire on 29 November 2019.

*Application for extension*

[4] On 15 October 2019 and only six weeks before the expiry of the suspension period, the Minister of Justice and Correctional Services approached this Court seeking an extension of the suspension period for another 12 months until 30 November 2020. In the alternative, the Minister asked for an interim extension whilst this Court considers and determines whether the extension should be granted. The application was not opposed. In this regard, the first, second, third and tenth respondents have filed notices to abide.

[5] This matter was determined without oral argument or written submissions. The issue to be determined is whether the application should be granted having regard to the trite principles relating to applications of this nature and the terms of the order in *Ramuhovhi I*.

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<sup>5</sup> Id at paragraph 5 of the order.

<sup>6</sup> Id at paragraph 6 of the order.

[6] In support of the application, the Minister submitted that the Department of Justice and Correctional Services and Parliament have been unable to timeously enact new legislation and it is unlikely they will do so before 29 November 2019. He contended that 2018 and 2019 were atypical years in the legislative process due to the 2019 elections which caused inevitable interruptions and changed the ordinary deadlines for government departments to submit Bills to be passed. He explained further that the bulk of the work has been done by the Department and that the legislative process now largely rests with Parliament. He, however, noted that because the Recognition of Customary Marriages Amendment Bill (Bill) deals with customary law (a functional area of concurrent legislative competence in terms of schedule 4 of the Constitution) it will be required to follow the processes set out in section 76 of the Constitution. The Minister also expects further input from the National House of Traditional Leaders given the public interest in the Bill.

[7] The Minister anticipates that an extension of 12 months would be sufficient. He submitted that there will be no prejudice to any party if the extension is granted as the suspension will remain intact. The Minister explained that even though the Bill has now reached Parliament, the Department deemed it prudent to approach this Court soon after it became apparent that the 29 November 2019 deadline would not be met. He submitted that the Department has acted reasonably and diligently in attending to the administrative procedure required before Parliament continues with the process.

[8] It is now for this Court to determine whether the extension should be granted.

#### *Assessment*

[9] Indeed, this Court can grant an extension pursuant to its powers to grant a just and equitable remedy.<sup>7</sup> In *Sibiya II*, this Court held that applications for extensions of time “must be granted if that course is considered by this Court to be in the interests of

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<sup>7</sup> *Sibiya v Director of Public Prosecutions, Johannesburg* [2006] ZACC 22; 2006 (1) SACR 220 (CC); 2006 (2) BCLR 293 (CC) (*Sibiya II*) at paras 8-9; *Zondi v MEC, Traditional and Local Government Affairs* [2005] ZACC 18; 2006 (3) SA 1 (CC); 2006 (3) BCLR 423 (CC) (*Zondi II*) at para 45; and *Minister of Justice v Ntuli* [1997] ZACC 7; 1997 (3) SA 772 (CC); 1997 (6) BCLR 677 (CC) at paras 30-1.

justice”.<sup>8</sup> This Court has ascribed certain factors which should be taken into account when exercising this discretionary remedial power, including: the sufficiency of the explanation for failing to correct the defect in the prescribed time; the potential prejudice if the extension is not granted; prospects of remedying the defect during the extended period of suspension; and the need to ensure functional and orderly state administration for the benefit of the general public.<sup>9</sup> However, the power to extend the period of suspension of a declaration of invalidity should be exercised sparingly.<sup>10</sup>

[10] It is now necessary to consider the application. The point of departure is this Court’s reasoning in *Ramuhovhi I*. The reasoning and order of the judgment in *Ramuhovhi I* is clear and unequivocal. There was a specific purpose for the inclusion of paragraph 6 of the order and this is articulated in the judgment where Madlanga J stated:

“I think it best to leave it to Parliament to finally decide how to regulate the proprietary regime of pre-Act polygamous customary marriages. I consider appropriate relief to be a suspension of the declaration of invalidity accompanied by interim relief. This twin-relief has the effect of granting immediate succour to the vulnerable group of wives in pre-Act customary marriages whilst also giving due deference to Parliament. In the event that Parliament finds the interim relief unacceptable, it is at liberty to undo it as soon as practically possible. Should Parliament fail to do anything during the period of suspension, the interim relief must continue to apply until changed by Parliament.”<sup>11</sup>

[11] Paragraph 6 of the order reflects this reasoning:

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<sup>8</sup> *Sibiya II* id at para 7.

<sup>9</sup> *Acting Speaker of the National Assembly v Teddy Bear Clinic for Abused Children* [2015] ZACC 16; 2015 JDR 1198 (CC); 2015 (10) BCLR 1129 (CC) at para 12. See also *Minister for Transport v Mvumvu* [2012] ZACC 20; 2011 (2) SA 473 (CC); 2012 (12) BCLR 1340 (CC) at para 6 and *Zondi II* above n 7 at para 47.

<sup>10</sup> This was recently reiterated by this Court in *Speaker of the National Assembly v Land Access Movement of South Africa* [2019] ZACC 10; 2019 JDR 0548 (CC); 2019 (5) BCLR 619 (CC) at para 34. See also *Cross-Border Road Transport Agency v Central African Road Services (Pty) Ltd* [2015] ZACC 12; 2015 (5) SA 370 (CC); 2015 (7) BCLR 761 (CC) at para 50; *Zondi II* above n 7 at para 47; and *Firestone South Africa (Pty) Ltd v Genticuro AG* [1977] 4 All SA 600 (A); 1977 (4) SA 298 (A) at 309A.

<sup>11</sup> *Ramuhovhi I* above n 1 at para 50.

“In the event that Parliament fails to address the defect referred to in paragraph 4 during the period of suspension, the orders in paragraphs 5(a) and 5(b) will continue to apply after the period of suspension.”

[12] It is trite that court orders must be complied with. It is imperative to the rule of law and the functioning of our constitutional democracy that court orders are respected. Parliament was given sufficient time to address the issue. This Court took a precautionary measure and made provision in the event that Parliament failed to do so. It is now clear that Parliament will not be able to remedy the defect in time as the suspension period is due to expire at the end of November. This has been confirmed by the Minister who has indicated that the deadline will not be met. The lapsing of the period of suspension will not change anything. Therefore, in compliance with paragraph 6 of the order, from 29 November 2019, the regime in terms of paragraph 5 of the order will continue to apply to polygamous customary marriages concluded before the RMCA came into operation.

[13] In any event, Parliament is still at liberty to engage with the legislative process further and amend the Bill at will. The Minister did not allege that there are grave concerns with the proposed scheme – it is merely about having more time to ensure compliance with the order. The Legislature can, at any time, follow its processes and amend the legislation.<sup>12</sup>

[14] Lastly, there are two aspects that I wish to address. The first relates to the explanation provided. While the Minister has attempted to justify the need for an extension, the explanation does not change the fact that *Ramuhovhi I* was clear in that paragraph 5 of the order would continue to apply should Parliament not effect legislative amendments in time. The second relates to the timing of the extension application, which was lodged a mere six weeks before the expiry of the suspension. Failing to approach this Court timeously for an extension application is not desirable.

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<sup>12</sup> Id.

[15] In this case, it is not necessary to conduct an in-depth evaluation of the explanation for the extension. This is because the explanation or the timing of the application will not be of any assistance. The order sought by the Minister to keep the suspension alive will not serve any practical purpose. Therefore there is no basis for this Court to exercise its discretionary power.

*Conclusion*

[16] Accordingly, the application for an extension of the suspension of invalidity must be dismissed. This means that paragraphs 5(a) and 5(b) of the order in *Ramuhovhi I* will continue to apply after 29 November 2019.

*Costs*

[17] There should be no order as to costs.

*Order*

[18] In the result the application for an extension is dismissed.