

# **THE POWER OF THE CONSTITUTIONAL COURT TO VARY A PERIOD OF SUSPENSION OF A FINAL ORDER**

**Zondi vs MEC, Traditional & Local Government Affairs 2006(3) SA 1 (CC)**

## **Legal Opinion**

The following principles, relevant to the Fourie and Bonthuys case, emerge from the decision in Zondi:

1. There is no doubt the court has a discretionary power to vary the period of suspension when the interests of justice require it.
2. The court will increase the period of suspension if it is of the view that circumstances have changed since the original order which render the previously fixed period of suspension unjust or inequitable. (Para 39)
3. The power to extend the period of suspension should be ‘very sparingly exercised’ (para 47). Factors which may be relevant to the exercise of the court’s discretions are:
  - (i) Sufficiency of explanation for failing to meet the original deadline. (para 47)
  - (ii) Prejudice to either side if the deadline is/is not extended (para 47).
  - (iii) The need to promote the Constitution (para 47).
  - (iv) The need to prevent chaos and uphold public order (paras 45 & 47).
  - (v) In the case of legislation, the interest of the public as a whole, particularly those likely to be effected by the law, is important (para 59).
4. The application must be made as timeously as possible. The court criticised the applicants for waiting until 15 days before the expiry of the suspension saying they should have anticipated the need for an application much earlier(para 55). The application must comply with Rule 11 of the Court, and when brought near to the date of expiry, it must contain a prayer for the matter to be dealt with as a matter of URGENCY pursuant to Rule 12. The affidavit must contain a detailed explanation of reasons for failing to meet the deadline.

### **What does all this amount to in this case?**

In my view it is by no means a foregone conclusion that an extension would be granted bearing in mind the delay before the Bill was tabled, and the court's concern with the rights of gay couples wishing to get 'married.' One Justice of course dissented on the issue of suspension; she wanted the requisite words written into the Marriage Act forthwith.

Having said that, I think that looking at the picture as a whole and particularly factors (ii), (iv) and (v) above, the Court would find it very hard to refuse an application for an extension provided made by the Minister.

It seems to me that the court having recognised in its original judgement that there are such strong feelings in this matter, and having stated so unequivocally that this is a matter which is more appropriately dealt with by Parliament, it would be very difficult for it to refuse an extension.

The affidavit in support of the application would must set out the findings of the Committee as to the strength of public feeling, and perhaps too that of members of Parliament, against legislating for same-sex unions; in the face of such evidence it would surely promote 'chaos', if not a constitutional crisis, for the court to defy Parliament and insist on allowing gay couples to have not merely civil unions, but marriage, as of December 1<sup>st</sup>.

I so advise.

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