REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 39 OF 2017

IN THE MATTER OF ARTICLES 10, 27, 40 & 201 OF THE CONSTITUTION

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS

UNDER ARTICLE 27, 40, AND 201 OF THE CONSTITUTION OF KENYA

IN THE MATTER OF THE INCOME TAX ACT

IN THE MATTER OF THE FINANCE ACT 2015

BETWEEN

THE LAW SOCIETY OF KENYA.....PETITIONER

VERSUS

THE KENYA REVENUE AUTHORITY…….....1ST RESPONDENT

HONOURABLE ATTORNEY GENERAL…….2ND RESPONDENT

RULING

1. Before me for determination is the application dated 3rd April 2017 filed by the first Respondent (herein referred to as the applicant) seeking orders that this court suspends the declaration of invalidity of paragraph **11A** of the Eighth schedule to the Income Tax Act[1]pending the hearing and determination of the applicants intended appeal.

2. The background information relevant to this determination is that on 14th March 2017, this court rendered a judgment declaring that:-

> **i. That** *Paragraph 11A of the Eight Schedule of the Income Tax Act**[2]**is inconsistent with the provisions of paragraph 2 of the Eight Schedule of the Income Tax Act**[3]** as read with paragraph 6 (1) (a) of the Eighth Schedule of the Income Tax Act**[4]** and is therefore unconstitutional, null and void.*

ii. That *Paragraph 11A of the Eighth Schedule of the Income Tax Act[5] violates the provisions of Article 10 (1) (2) and also Article 40 (2) (a) of the constitution of Kenya 2010 by depriving the public of their right over property and is therefore unconstitutional.*

iii. That *that Paragraph 11A of the Eighth Schedule to the Income Tax Act[6] violates the provisions of Articles 201 (b) (i) of the constitution of Kenya 2010 in that it unfairly imposes a tax burden on the public to the extent that it purports to impose an obligation on a tax payer to pay Capital Gains Tax* ***on or before*** *presenting the transfer instrument for registration* ***instead of upon registration*** *of the transfer instrument in favour of the transferee.*

3. Immediately after the judgment was delivered, counsel for the applicant orally applied for a stay of the implementation of the decision pending taking instructions *"on how long it can take to revert to the manual system and also pending filing of an appeal and a formal application for stay."* The court directed the applicant to file a formal application. No formal application to that effect was filed as directed by the court.

4. Instead, on 17th March 2017, the applicant herein filed an application seeking orders *inter alia* that the court affords the applicant a period of *thirty days to re-configure its computerized tax collection in order to comply with the judgment*. Clearly, at this point in time, the applicant was willing or ready to comply with the court judgment and all that he required was 30 days to re-configure its systems so as to comply with the decision of the court. In my view, had the said application been determined at that point in time, then, the applicant would have complied with the court decision. In fact, after several court attendances, the applicants' counsel informed the court that the parties were to discussing ways of resolving the matter.

5. However, on 3rd April 2017, the applicant filed the present application the subject of this ruling. On 10th May 2017, the applicants counsel applied orally to withdraw the application filed on 17th March 2017 and sought to proceed with the present application.

6. The grounds in support of the application now under determination are:- **(a)** that the applicant desires to pursue his right of appeal, hence seeks the suspension of the declaration of invalidity pending the hearing and determination of the appeal; **(b)** that the court has powers to grant the orders sought; **(c)** that the applicant stands to suffer undue hardship if the orders are not granted in the event of the appeal succeeding; **(d)** that the applicant computerized its systems, **(e)** that the stamp duty module is linked with the capital gains payment module, hence the applicant will be compelled to de-link the two which will affect other tax modules such as the value added tax, pay as you earn, withholding tax, corporate tax and customs duties; **(e)** that if the orders sought are not granted, the applicant will suffer undue hardship; and **(f)** lastly the applicant cited public interest.

7. The application is opposed. The crux of the objection is that the jurisdiction to suspend the declaration of invalidity must be exercised sparingly and in consideration of the supremacy of the constitution; that in granting the orders sought; the court ought to be guided by the need to prevent undue hardship to the parties; that the mere fact that a party has appealed is not a sufficient ground; that the alleged hardship has not been proved; that the general public will suffer greater hardship.

Applicants' Advocates submissions

8. Counsel for the applicant submitted that this court can grant reliefs which are fit and just in the circumstances and that the court has a duty to breathe life in the constitution by fashioning and structuring remedies in constitutional litigation that ensures harmonious running of other arms of the government. And that the court may suspend the declaration of invalidity in order to deal with the consequences of such invalidity.[7]

Respondents' Advocates submissions

9. Counsel for the petitioner/Respondent submitted that the relief sought ought to be granted cautiously and sparingly, most judiciously and ensuring the supremacy of the constitution is not eroded,[8]and that

the remedy of suspension of a declaration is aimed at mitigating the time-span effect of the declaration, and added that suspension of invalidity is generally granted where the matters in question are complex or where the declaration of invalidity would disrupt law enforcement process.[9]

10. Counsel also argued that the operation of the invalidity is suspended so as to allow parliament to cure the defect[10] a position that was also stated by the Canadian Supreme Court[11]and that the applicant has not met the threshold to warrant the grant of the orders sought and that there are no compelling considerations of justice and good governance to warrant the orders sought.[12] Further, the suspension sought will infringe on citizens rights to property, and that the applicant has numerous fall back options. Also there is no lacunae in law as a result of the declaration of the invalidity.

Guiding constitutional provisions

11. Article 2 (4) of the constitution on the supremacy of the constitution provides that "any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of the Constitution is invalid." Article 165 (3) (d) (i) provides that the High court has jurisdiction to determine the question whether any law is inconsistent with or in contravention of the Constitution.

12. It's trite that an unconstitutional law is not law and actions or decisions taken pursuant to the an unconstitutional law would out rightly be illegal. It follows that once a law has been declared unconstitutional it has no business remaining in the law books. The fundamental issue that follows is under what circumstances if at all a court can suspend an order declaring a legislation to be invalid.

Comparative jurisprudence

13. Foreign jurisprudence is of value because it shows how courts in other jurisdictions have dealt with the issues that confront us in this matter. At the same time, it is important to appreciate that foreign case law will not always provide a safe guide for the interpretation of our Constitution. When developing our jurisprudence in matters that involve constitutional rights, as the present case does, we must exercise particular caution in referring to foreign jurisprudence[13]and also take into account the need to develop our common law founded on our transformative constitution.

14. Speaking comparatively, Canadian judges have fashioned for themselves a remedial discretion that the Constitution of South Africa bestows on its judges.[14] Section 172(1)(b)(ii) of the South African constitution contemplates that the judges may make "an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

15. Whether a law is invalid is determined by an objective enquiry into its conformity with the Constitution.[15]The doctrine of objective constitutional invalidity was laid out in the Canadian case of *Ferreira vs Levin* where the Court held that finding a law to be in conflict with the Constitution “does not invalidate the law; it merely declares it to be invalid.”[16]A law that has been found to be inconsistent with the Constitution ceases to have any legal consequences.

16. The constitutional court of South Africa in *Cross-Border Road Transport Agency vs Central African Road Services (Pty) Ltd and Another**[17]*** stated that:-

> *"A court’s decision to suspend the effect of an order of invalidity entails the exercise of a wide power and can be utilized for numerous reasons provided it is just and equitable to do so. This often relates to giving the Legislature time to intervene but could equally relate to concerns of the effect an order might have on the administration of justice."**[18]***

17. In the above decision the court proceeded to hold that a court does not normally have the power to vary its own final order. This is because ordinarily a court’s order should be final and immutable.[19]A court becomes *functus officio* which means that its jurisdiction in the case has been “fully and finally exercised” and its authority over the subject matter has ended.[20] This principle is essential for certainty

and the rule of law. Chaskalson P in *Ntuli* held:-

> *"The principle of finality in litigation which underlies the common law rules for the variation of judgments and orders is clearly relevant to constitutional matters. There must be an end to litigation and it would be intolerable and could lead to great uncertainty if Courts could be approached to reconsider final orders made in judgments declaring the provisions of a particular statute to be invalid."* ***[21]***

18. The constitutional court of South Africa in *Minister of Health and Another vs New Clicks South Africa* at paragraph 16 of the judgment resolved this issue as follows:-

> *"The common law rule that execution of a judgement is suspended pending an appeal has no application to declarations of constitutional invalidity of legislation. If a 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 the law does not breathe life into that law. The objective validity or invalidity of 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 finalization of the appeal process."(Emphasis added).*

19. A suspended declaration is a remedial device by which a court strikes down a constitutionally invalid law, but suspends the effect of its order such that the law retains force for a temporary period.

20. Suspended declarations of invalidity have become a familiar feature of Canadian constitutional jurisprudence.[22] Having originated as an exceptional remedy, enabling courts to temporarily suspend the effect of a declaration invalidating a law on constitutional grounds, a suspended declaration is now included in the majority of Supreme Court of Canada decisions in which the power of statutory invalidation is utilized.[23] As the usage of suspended declarations has grown, the justifications for their use have evolved. No longer are they reserved for instances of "emergency", in which the invalidation of an unconstitutional law would result in imminent danger to the public. Rather, suspended declarations are now used to instantiate a particular conception of the proper roles of legislatures and courts.[24]

21. Suspended declarations engage real consequences for individual litigants and others affected by judicial decisions, as laws found to violate the Constitution are permitted to have continued, temporary effect.[25] A suspended declaration occurs when courts choose to delay the effect of invalidating a law. A court may declare a law to be invalid, but "suspend" the effect of the declaration until a future date. During the interim period, the law continues to apply. At the expiry of the period, the court's declaration takes full effect: unless the law has been replaced or amended to comply with the constitution, it is rendered null.[26]

22. In Canada the origins of suspended declarations lie in the Supreme Court's 1985 decision in the *Manitoba Language Reference*.[27] Upon finding that the Legislative Assembly of Manitoba had, for ninety-five years, ignored the constitutional requirement of the *Manitoba Act, 1870* that all provincial statutes be enacted in both official languages, the Court feared that an immediate declaration of invalidity would plunge the province into a state of lawlessness. Indeed, the immediate nullification of the offending statutes would not simply deny effect to virtually all provincial laws, but would undermine every state action, agency, public and private right constituted under those laws that could not otherwise be saved by the *de facto* doctrine or by *res judicata*. The result would be a "legal vacuum" inimical to the very rule of law. The Court accordingly fashioned a unique remedy. It held:-

> *"The Constitution will not suffer a province without laws. Thus, the Constitution requires that temporary validity and force and effect be given to the current Acts of the Manitoba Legislature from the date of this judgment, and that rights, obligations and other effects which have arisen under these laws and the repealed and spent laws prior to the date of this judgment, which are not saved by the de facto or some other doctrine, are deemed temporarily to have been and continue to be effective and beyond challenge. It is only in this way that legal chaos can be avoided and the*

rule of law preserved.

To summarize, the legal situation in the Province of Manitoba is as follows. All unilingually enacted Acts of the Manitoba Legislature are, and always have been, invalid and of no force or effect.

All Acts of the Manitoba Legislature which would currently be valid and of force and effect, were it not for their constitutional defect, are deemed temporarily valid and effective from the date of this judgment to the expiry of the minimum period necessary for translation, re-enactment, printing and publishing [in both official languages]."

23. Suspended declarations of invalidity were thus introduced to Canadian law for the purpose of averting a constitutional crisis. Recognizing the extremity of this remedial measure, the Court emphasized both the "emergency"[28] circumstances that necessitated it, and circumscribed the duration of the suspended declaration to only the "minimum period necessary" for the legislature to correct the constitutional defect.

24. Thus, in Canada, suspended declarations of invalidity were utilized to avert a harm that would be consequent upon the immediate invalidation of a law.[29] Thus, in *Dixon v. British Columbia*,[30] the British Columbia Supreme Court invalidated a system of provincial electoral boundaries found to violate the *Charter* right to vote, but suspended its declaration so that a functional electoral system would remain in place in the event of an election. The possibility that, in a system of parliamentary democracy, an election could be called at any time was found to constitute an "emergency" justifying a suspended declaration. In *R. v. Swain*, the Supreme Court of Canada issued a six-month suspension of its declaration that then s. 542(2) of the *Criminal Code*,[31] which provided for the automatic detention of persons acquitted of criminal charges on the ground of insanity, violated ss. 7 and 9 of the *Charter*. The Court reasoned that an immediate declaration of invalidity could result in potentially dangerous individuals being released into the public, and as such the suspended declaration was required to preserve public safety while Parliament crafted a more nuanced provision. Importantly, during the period of suspension, the Court imposed an interim regime limiting the detention of individuals to thirty days, subject to *habeas corpus* review by a judge of the Superior Court. As in the *Manitoba Language Reference*, the Court retained jurisdiction to hear applications regarding the extension of the suspension period or modification of the interim regime.[32]

25. In *Schachter v. Canada*[33]Lamer C.J. held that temporarily suspending the declaration of invalidity to give Parliament or the provincial legislature in question an opportunity to bring the impugned legislation or legislative provision into line with its constitutional obligations will be warranted [when]:-

A. *striking down the legislation without enacting something in its place would pose a danger to the public;*

B. *striking down the legislation without enacting something in its place would threaten the rule of law; or,*

C.. *the legislation was deemed unconstitutional because of under inclusiveness rather than over breadth, and therefore striking down the legislation would result in the deprivation of benefits from deserving persons without thereby benefitting the individual whose rights have been violated.*

26. Although these guidelines were not intended to be "hard and fast rules," the Court nevertheless stressed that suspended declarations were to remain an exceptional remedy. Lamer C.J.?s reasons warrant quotation at length:-

"While delayed declarations are appropriate in some cases, they are not a panacea for the problem of interference with the legislature…..

A delayed declaration is a serious matter from the point of view of enforcement of the Charter. A delayed declaration allows a state of affairs which has been found to violate standards embodied in

the Charter to persist for a time despite the violation. There may be good pragmatic reasons to allow this in particular cases. However, reading in is much preferable where it is appropriate, since it immediately reconciles the legislation in question with the requirements of the Charter.

Furthermore, the fact that the court?s declaration is delayed is not really relevant to the question of which course of action, reading in or nullification, is less intrusive upon the institution of the legislature. By deciding upon nullification or reading in, the court has already chosen the less intrusive path. If reading in is less intrusive than nullification in a particular case, then there is no reason to think that delayed nullification would be any better. To delay nullification forces the matter back onto the legislative agenda at a time not of the choosing of the legislature, and within time limits under which the legislature would not normally be forced to act. This is a serious interference itself with the institution of the legislature. Where reading in is appropriate, the legislature may consider the issue in its own good time and take whatever action it wishes. Thus delayed declarations of nullity should not be seen as preferable to reading in cases where reading in is appropriate.

The decision whether to delay the application of a declaration of nullity should therefore turn not on considerations of the role of the courts and the legislature, but rather on considerations listed earlier relating to the effect of an immediate declaration on the public."

*27. In Canada (A.G.) v. Hislop,**[34]* the court addressed its mind on the question of denial of a Suspended Declaration of Invalidity in the following manner:-

[A] temporary suspension of the declaration of invalidity is not appropriate in the present case. As Lamer C.J. noted in Schachter… such suspensions are "serious matter[s] from the point of view of enforcement of the Charter" because they allow an unconstitutional state of affairs to persist. Suspensions should only be used where striking down the legislation without enacting something in its place would pose a danger to the public, threaten the rule of law or where it would result in the deprivation of benefits from deserving persons without benefiting the rights claimant. None of these factors are present in the case at bar."

28. The use of suspended declarations of invalidity in South Africa is condoned by constitutional text. Section 172 of the *Constitution of the Republic of South Africa, 1996* states: -

1. When deciding a constitutional matter within its power, a court

a.must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

b. may make any order that is just and equitable, including

i. an order limiting the retrospective effect of the declaration of invalidity; and

ii. an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

29. In other words, suspended declarations of invalidity were felt necessary in the South African context because it was anticipated that many apartheid-era laws would be struck down during the transition to democracy, creating potential legal lacuna in important areas of public life should the courts not have the power to temper the effects of such declarations. The originating concern that was without suspended declarations, judicial findings of constitutional invalidity could result in fundamental disruption to the rule of law.

Determination

30. In every case, the courts are forced to contemplate the potential effects of an immediate declaration of

invalidity, not just on the parties to a dispute but on broader society, and by association, the courts must consider the limits of their own jurisdiction and abilities to craft comprehensive responses to these challenges. Sometimes, those potential effects will weigh in favour of a suspended declaration, as the case law demonstrates. However, the courts should also give express attention to the prejudicial effects of a suspended declaration, balancing these against the prejudice inflicted by an immediate declaration. That is, the mere presence of a problem or inconvenience arising from an immediate declaration should not create an automatic assumption favouring suspension.

31. As such, I argue that in determining whether or not to issue a suspended declaration, a court should ask:- **(i)** Would issuance of a suspended declaration of invalidity serve a pressing and substantial purpose? **(ii)** Is there a rational connection between the purpose and a suspended declaration;? **(iii)** What impact on *constitutional* rights will arise from the issuance of a suspended declaration, **(iv)** is a suspended declaration the most minimally impairing measure that can be employed to achieve its objective;? **(v)** Will the specific benefits achieved by the suspended declaration outweigh any adversity it inflicts on *constitutional* rights bearing in mind the supremacy of the constitution?

32. It must also be born in mind that a delay or suspension of the declaration of invalidity would be warranted where striking down legislation with nothing in its place would threaten the rule of law or pose a danger to the public or it's imperative to avoid a legal vacuum – in order to deem the legislation valid for the time required to translate and re-enact the statute.

33. There are important reasons of constitutional principle underlying the conclusion that a court is not empowered to resuscitate legislation that has been declared invalid. To do so, a court would, in effect, legislate. Such an exercise would offend both the separation of powers principle, in terms of which lawmaking powers are reserved for the Legislature, and the principle of constitutional supremacy, which renders law that is inconsistent with the Constitution invalid.

34. Guided by the jurisprudence and guiding principles enumerated in the above authorities, the crucial question relevant for the determination of the application before me is whether the applicant has demonstrated sufficient grounds to warrant the court to exercise its discretion and grant the orders sought.

35. The applicant states that it desires to exercise its right of appeal. This point was addressed by the constitutional court of South Africa in *Minister of Health and Another vs New Clicks South Africa* ***[35]*** cited above. The court observed that *"The common law rule that execution of a judgement is suspended pending an appeal has no application to declarations of constitutional invalidity of legislation. If a 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 the law does not breathe life into that law. The objective validity or invalidity of 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 finalization of the appeal process."(Emphasis added).*

36. From the authorities discussed herein above and also from the authorities cited by counsel for the petitioner/Respondent, it is evident that the operation of the invalidity is suspended so as to allow parliament to cure the defect[36] a position that was also stated by the Canadian Supreme Court[37]in the numerous cases cited herein.

37. My analysis of the facts shows that the applicant has not met the threshold to warrant the grant of the orders sought. There are no compelling considerations of justice and good governance to warrant the orders sought.[38] I agree with the petitioners/Respondents counsel that the suspension sought will infringe on citizens rights to property, and that the applicant has numerous fall back options. Also there is no lacunae in law as a result of the declaration of the invalidity.

38. It is an established principle of law that the relief sought ought to be granted cautiously and sparingly, most judiciously and ensuring the supremacy of the constitution is not eroded,[39]and that the remedy of suspension of a declaration is aimed at mitigating the time-span effect of the declaration. Also, suspension

of invalidity is generally granted where the matters in question are complex or where the declaration of invalidity would disrupt law enforcement process.[40] In short, it is granted to grant parliament time to enact the appropriate legislation.

39. The remedy being a discretionary one, the conduct of the applicant is a relevant factor in determining whether or not to allow the application. It will be recalled that the applicant herein filed an application seeking 30 days to comply with the court decision. In fact, the applicants counsel informed the court that they were discussing ways of resolving the matter with the petitioners counsel. During the pendency of the said application, the applicant herein changed its mind and instituted the present application. To me, the said conduct leaves a lot to be desired.

40. Further, the judgment was delivered on 14th March 2017. There is only one letter on record applying for proceedings, and six months later, the appeal has not been filed. In short, there is absence of a serious attempt to pursue the proceedings.

41. A valid question does arise as to whether or not after pronouncing the final orders, six months later as in the present case this court can re-visit the judgment. There is a school of thought that I agree with that holds the view that a court becomes *functus officio* after pronouncing itself and the most appropriate time for making such a suspension is at the time of passing the judgement. In fact, that is position I all the decisions I have cited from Canada and South Africa. For South Africa, there is a constitutional provision permitting it because of their history. For Canada, it was a conscious decision by the courts aware of the consequences of the decision that informed the courts to grant the suspension at the time of passing the judgement.

42. In the Kenyan case, the only provision is the constitutional provision that this court can grant any relief as circumstances permit for the interests of justice.

43. It is an established legal position that a court does not normally have the power to vary its own final order. As stated earlier in this judgement, this is because ordinarily a court's order should be final and immutable.[41]A court becomes *functus officio* which means that its jurisdiction in the case has been "fully and finally exercised" and its authority over the subject matter has ended[42] a principle that is essential for certainty and the rule of law.

44. Discussing the above principle, Chaskalson P in *Ntuli* cited earlier held "The principle of finality in litigation which underlies the common law rules for the variation of judgments and orders is clearly relevant to constitutional matters. There must be an end to litigation and it would be intolerable and could lead to great uncertainty if Courts could be approached to reconsider final orders made in judgments declaring the provisions of a particular statute to be invalid."[43]

45. To me, it would have been appropriate for the applicants to advance the argument during their closing submissions at the hearing of this case, and urge the court in the event of finding for the petitioners to grant a suspension of the declaration of invalidity and cite the consequences of the declaration and purpose of the suspension. That way, they could have created a legal basis for the court if persuaded to make it part of the final decision. At this point, the principle of finality ably argued by Chaskalson P above seems to hold sway.

46. In view of my analysis of the law and authorities enumerated above, and my above conclusions, I find that the applicant has not made a case for granting the orders suspending the invalidity of the statute invalidated by the decision of this court.

47. The upshot is that the application dated 3rd April 2017 fails and the same is hereby dismissed with no orders as to costs.

Orders accordingly.

Dated at Nairobi this 21st day September 2017

John M. Mativo

Judge

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[1]Cap 470, Laws of Kenya

[2] Ibid

[3] Ibid

[4] Ibid

[5] Ibid

[6] Ibid

[7]Counsel cited Institute of Social Accountability & Another {2015}eKLR and Suleiman Shabhal vs Independent Electoral and Boundaries Commission & 3 Others {2014}eKLR

[8] Suleiman Shabhal vs Independent Electoral and Boundaries Commission & 3 Others {2014}eKLR

[9] Moi University vs Council of Legal Education & Another {2016}eKLR

[10] Minister for Transport & Another vs Anele Mvumvu & Others {2-12}ZACC 20

[11] Schachter vs Canada {1992} 2SCR 679, 1992 CanLII 74 (SCC)

[12] The State vs Mbatha CCT 19 of 1995

[13] Ibid

[14] http://www.iconnectblog.com/2014/03/suspended-declarations-of-invalidity-and-the-rule-of-law/

[15] Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others [1995]ZACC 13; 1996 (1) SA 84 (CC); 1996 (1) BCLR 1 (CC)(Ferreira v Levin)at para 26

[16] Ibid para 27

[17] [2015] ZACC 12

[18] Ibid page 25

[19] Mpofu v Minister for Justice and Constitutional Development and Others [2013] ZACC 15; 2013 (2) SACR 407 (CC); 2013 (9) BCLR 1072 (CC) at para 14, referring to the civil case of Evins v Shield Insurance Co Ltd 1980 (2) SA 814 (A). See also Ka Mtuze v Bytes Technology Group South Africa (Pty) Ltd and Others [2013] ZACC 31; 2

013 (12) BCLR 1358 (CC) at para 18

[20] Firestone South Africa (Pty.) Ltd. v Genticuro A.G.1977 (4) SA 298 (A) (Firestone) at 306F-G.

[21] *Minister of Justice v Ntuli* [1997] ZACC 7; 1997 (3) SA 772 (CC); 1997 (6) BCLR 677 (CC) at para 29.

[22] **Grant Hoole**; Proportionality as a Remedial Principle: A Framework for Suspended Declarations of Invalidity in Canadian Constitutional Law .,Master of Laws (LL.M.), Faculty of Law University of Toronto, 2010

[23] Ibid

[24] Ibid

[25] Ibid

[26] See generally Kent Roach, *Constitutional Remedies in Canada* (Aurora: Canada Law Book, 1994) at paras. 14.1480ff ["Roach, *Constitutional Remedies*"].

[27] [1985] 1 S.C.R. 721 ["*Manitoba Language Reference*"].

[28] Ibid

[29] Supra note 21

[30] (1989), 59 D.L.R. (4th) 247 ["*Dixon*"].

[31] Ibid

[32] Ibid

[33] *Schachter v. Canada*, [1992] 2 S.C.R. 679 ["*Schachter*"].

[34] {2007} 1 S.C.R. 429

[35] Supra note

[36] Minister for Transport & Another vs Anele Mvumvu & Others {2-12}ZACC 20

[37] Schachter vs Canada {1992} 2SCR 679, 1992 CanLII 74 (SCC)

[38] The State vs Mbatha CCT 19 of 1995

[39] Suleiman Shabhal vs Independent Electoral and Boundaries Commission & 3 Others {2014}eKLR

[40] Moi University vs Council of Legal Education & Another {2016}eKLR

[41] Mpofu v Minister for Justice and Constitutional Development and Others [2013] ZACC 15; 2013 (2) SACR 407 (CC); 2013 (9) BCLR 1072 (CC) at para 14, referring to the civil case of Evins v Shield Insurance Co Ltd 1980 (2) SA 814 (A). See also Ka Mtuze v Bytes Technology Group South Africa (Pty) Ltd and Others [2013] ZACC 31; 2

013 (12) BCLR 1358 (CC) at para 18

[42] Firestone South Africa (Pty.) Ltd. v Genticuro A.G.1977 (4) SA 298 (A) (Firestone) at 306F-G.

[43] *Minister of Justice v Ntuli* [1997] ZACC 7; 1997 (3) SA 772 (CC); 1997 (6) BCLR 677 (CC) at para 29.