CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 108/17

In the matter between:

MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	First Applicant
MINISTER OF POLICE	Second Applicant
MINISTER OF HEALTH	Third Applicant
MINISTER OF TRADE AND INDUSTRY	Fourth Applicant
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Fifth Applicant

and

GARRETH PRINCE	Respondent

and

KATHLEEN ("MYRTLE") CLARKE	First Intervening Party
JULIAN CHRISTOPHER STOBBS	Second Intervening Party
CLIFFORD ALAN NEALE THORPE	Third Intervening Party

and

DOCTORS FOR LIFE INTERNATIONAL INC	Amicus Curiae

In the matter between:

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS First Applicant

MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT Second Applicant

MINISTER OF HEALTH Third Applicant

MINISTER OF SOCIAL DEVELOPMENT Fourth Applicant

MINISTER OF INTERNATIONAL RELATIONS AND COOPERATION Fifth Applicant

MINISTER OF TRADE AND INDUSTRY Sixth Applicant

MINISTER OF POLICE Seventh Applicant

and

JONATHAN DAVID RUBIN Respondent

In the matter between:

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS First Applicant

MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT Second Applicant

MINISTER OF HEALTH Third Applicant

MINISTER OF SOCIAL DEVELOPMENT Fourth Applicant

MINISTER OF INTERNATIONAL RELATIONS AND COOPERATION Fifth Applicant

MINISTER OF TRADE AND INDUSTRY Sixth Applicant

MINISTER OF POLICE Seventh Applicant

and

JEREMY DAVID ACTON First Respondent

RAS MENELEK BAREND WENTZEL Second Respondent

CARO LEONA HENNEGIN Third Respondent

Neutral citation: *Minister of Justice and Constitutional Development and Others v Prince; National Director of Public Prosecutions and Others v Rubin; National Director of Public Prosecutions and Others v Acton and Others* [2018] ZACC 30

Coram: Zondo ACJ, Cameron J, Froneman J, Jafta J, Kathree-Setiloane AJ, Kollapen AJ, Madlanga J, Mhlantla J, Theron J and Zondi AJ

Judgments: Zondo ACJ (unanimous)

Heard on: 7 November 2017

Decided on: 18 September 2018

Summary: sections 4(b) and 5(b) of Drugs and Drug Trafficking Act 140 of 1992 read with Part III of Schedule 2 of that Act and section 22A(9)(a)(1) of the Medicines and Related Substances Control Act 101 of 1965 inconsistent with section 14 of the Constitution to the extent that they criminalise the use or possession in private or cultivation in a private place of cannabis by an adult for his or her own personal consumption in private. Interim relief – reading-in order of invalidity granted but suspended for 24 months and interim relief granted.

ORDER

On application for confirmation of an order of constitutional invalidity granted by the Western Cape Division of the High Court, Cape Town (Davis J):

1. The application to stay these proceedings is dismissed.
2. The application brought by King Adam Kok V, the Griqua Nation, Chief Petros Vallbooi and the /Auni San People for leave to intervene as parties is dismissed.

3. Leave to appeal is granted.
4. Leave to cross-appeal is granted.
5. The appeal is dismissed.
6. The cross-appeal is upheld in part to the extent that the reference in the order of the High Court to "in a private dwelling" or "in private dwellings" is replaced with "in private" or in the case of cultivation, "in a private place".
7. The order of the Western Cape Division of the High Court is confirmed only to the extent reflected in this order and is not confirmed in so far as it is not reflected in this order.
8. To the extent that the order of the Western Cape Division of the High Court purported to declare as constitutionally invalid provisions of sections referred to in that order that prohibit the purchase of cannabis, that part of the order is not confirmed.
9. To the extent that the order of the Western Cape Division of the High Court excluded from the ambit of its order of the declaration of invalidity provisions of the sections referred to in that order that prohibit the use or possession of cannabis in private in a place other than a private dwelling by an adult for his or her own personal consumption in private, that part of the order is not confirmed.
10. It is declared that, with effect from the date of the handing down of this judgment, the provisions of sections 4(b) of the Drugs and Drug Trafficking Act 140 of 1992 read with Part III of Schedule 2 of that Act and the provisions of section 22A(9)(a)(i) of the Medicines and Related Substances Control Act 101 of 1965 read with Schedule 7 of GN R509 of 2003 published in terms of section 22A(2) of that Act are inconsistent with right to privacy entrenched in section 14 of the Constitution and, therefore, invalid to the extent that they make the use or possession of cannabis in private by an adult person for his or her own consumption in private a criminal offence.

11. It is declared that, with effect from the date of the handing down of this judgment, the provisions of section 5(b) of the Drugs and Drug Trafficking Act 140 of 1992 read with Part III of Schedule 2 of that Act and with the definition of the phrase "deal in" in section 1 of the Drugs and Drug Trafficking Act 140 of 1992 are inconsistent with the right to privacy entrenched in section 14 of the Constitution and, are, therefore, constitutionally invalid to the extent that they prohibit the cultivation of cannabis by an adult in a private place for his or her personal consumption in private
12. The operation of the orders in 10 and 11 above is hereby suspended for a period of 24 months from the date of the handing down of this judgment to enable Parliament to rectify the constitutional defects.
13. During the period of the suspension of the operation of the order of invalidity:

    (a) section 4(b) of the Drugs and Drug Trafficking Act 140 of 1992 shall be read as if it has sub-paragraph (vii) which reads as follows:

        "(vii) , in the case of an adult, the substance is cannabis and he or she uses it or is in possession thereof in private for his or her personal consumption in private."

    (b) the definition of the phrase "deal in" in section 1 of the Drugs and Drug Trafficking Act 140 of 1992 shall be read as if the words "other than the cultivation of cannabis by an adult in a private place for his or her personal consumption in private" appear after the word "cultivation" but before the comma.

    (c) the following words and commas are to be read into the provisions of section 22A(9)(a)(i) of the Medicines and Related Substances Control Act 101 of 1965 after the word "unless":

", in the case of cannabis, he or she, being an adult, uses it or is in possession thereof in private for his or her personal consumption in private or, in any other case,"

14. The above reading-in will fall away upon the coming into operation of the correction by Parliament of the constitutional defects in the statutory provisions identified in this judgment.
15. Should Parliament fail to cure the constitutional defects within 24 months from the date of the handing down of this judgment or within an extended period of suspension, the reading-in in this order will become final.
16. Subject to paragraph 17 below, no order as to costs is made.
17. The Minister of Justice and Constitutional Development must pay all disbursements and expenses reasonably incurred by Mr Gareth Prince, Mr Jeremy David Acton, Mr Ras Menelek Barend Wentzel and Ms Caro Leona Hennegin in opposing the appeal and in confirmatory proceedings.

JUDGMENT

ZONDO ACJ (Cameron J, Froneman J, Jafta J, Kathree-Setiloane AJ, Kollapen AJ, Madlanga J, Mhlantla J, Theron J and Zondi AJ):

Introduction

[1] These are confirmatory proceedings brought in terms of section 167(5) of the Constitution[1] read with Rule 16 of the Rules of this Court. They follow upon the lodgement by the Registrar of the Western Cape Division of the High Court of South Africa with the Registrar of this Court of the order of constitutional invalidity made by that Court in this matter. The order was in relation to sections 4(b) and 5(b) of the Drugs and Drug Trafficking Act 140 of 1992 (Drugs Act) read with Part III of Schedule 2 to that Act and sections 22A(9)(a)(i) and 22A(10) of the Medicines and Related Substances Control Act 101 of 1965 (Medicines Act) read with Schedule 7 of GN R509 of 2003 published in terms of section 22A(2) of the Medicines Act.

[2] The High Court suspended the order of invalidity for a period of 24 months from 31 March 2017. It said that that was to allow Parliament to correct the constitutional defects in the Drugs Act and Medicines Act set out in the judgment. It is neither necessary nor competent for a High Court to suspend an order of constitutional invalidity that relates to a statutory provision or an Act of Parliament when it grants such an order of constitutional invalidity. It is unnecessary because section 172(2) of the Constitution provides that "an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court". That means that any order of constitutional invalidity of an Act of Parliament or a provision of an Act of Parliament made by a court other than this Court does not take effect for as long as it has not been confirmed by this Court. Such a suspension order is incompetent because it purports to suspend the operation of an order that is not in operation in any event. That order of invalidity is not in operation because in terms of section 172(2) of the Constitution which I have just quoted above.

[3] The order of invalidity was made in favour of various persons to whom the High Court referred as applicants. Three proceedings under different case numbers had been instituted by different persons in the High Court. In respect of

[1] Constitution of the Republic of South Africa, 1996.

case no 8760/2013 the applicant was Mr Garreth Prince. Those were motion proceedings. The respondents in those proceedings were various Ministers including the Minister of Justice and Constitutional Development who was the first respondent, the Minister of Police who was the second respondent, the Minister of Health who was the third respondent and the Minister of Trade and Industry who was the fourth respondent. The Directorate of Public Prosecutions was also cited. Mr Jonathan David Rubin was the plaintiff in case no 7295/2013. The defendants that he cited were the respondents in case no 8760/2013 but he added the National Director of Public Prosecutions, the Minister of Social Development and the Minister of International Relations and Cooperation. The third proceedings related to an action instituted under case no 4153/2012. It had four plaintiffs, namely, Jeremy David Acton, Ras Menelek Barend Wentzel and Caro Leona Hennegin. The defendants in that action were the same as those cited under case no 7295/2013.

[4] The High Court consolidated all the cases referred to above and heard them as one matter. The papers lodged in the High Court were not prepared by practising lawyers. That made it difficult for the High Court to understand the case that the applicants or plaintiffs wanted to put before it. The respondents / defendants in the High Court proceedings have brought an application for leave to appeal against the decision of the High Court. They also oppose confirmation of the High Court's order of constitutional invalidity.

Counsel requested by this Court

[5] Mr Ron Paschke and Ms Jessica Foster of the Cape Bar appeared and presented argument at the request of this Court. They had done so at the High Court as well. We are grateful to them for their assistance.

Amicus Curiae

[6] Doctors for Life International Inc (Doctors for Life) applied for, and, was admitted as amicus curiae. It submitted written and oral argument. It supported the

State in seeking to have the order of the High Court not confirmed. Doctors for Life is an association incorporated in terms of section 21 of the Companies Act 61 of 1973. It is the eighth defendant in a trial pending in the High Court of South Africa, Gauteng Division, Pretoria, to which reference is made later. That trial was referred to simply as the *Stobbs* trial as Mr Julian Christopher Stobbs is one of the plaintiffs in that matter. Fields of Green For All NPC (Fields of Green) also brought an application for admission as an amicus curiae but it is convenient to deal with its application together with the application for leave to intervene that is dealt with immediately below.

Intervening parties

[7] Fields of Green brought an application for admission as amicus curiae. Ms Kathleen ("Myrtle") Clarke, Mr Julian Christopher Stobbs and Mr Clifford Alan Neale Thorpe brought an application but theirs was one for leave to intervene as parties in this matter. Fields of Green and these three individual applicants brought a joint application.

[8] Prior to the hearing we dismissed Field of Green's application for admission as amicus curiae but granted the other joint applicants' application for leave to intervene. Here are our reasons for those decisions.

[9] Fields of Green is an NGO established to deal with all hindrances to the legalisation of the use of cannabis in South Africa. It is a non-profit company registered under the Companies Act, 2008. It advocates the decriminalisation and regulation of cannabis for responsible adult use, industrial, therapeutic, medicinal and cultural use. It said that it brought its application for admission as amicus curiae in the public interest generally and in the interests of anyone adversely affected by the provisions of both the Drugs Act and Medicines Act which criminalise the use of cannabis.

[10] Ms Clarke, Mr Stobbs and Mr Thorpe are plaintiffs in the *Stobbs* trial before Ranchod J in the High Court, Pretoria, where the constitutional validity of the statutory provisions challenged in this matter are also being challenged. Certain criminal proceedings have been stayed where they are charged with contravening the same statutory provisions. Ms Clarke and Mr Stobbs are involved in one criminal trial and Mr Thorpe is involved in another. The *Stobbs* trial has been adjourned and will resume sometime this year.

[11] Ms Clarke, Mr Stobbs and Mr Thorpe clearly have a direct and substantial interest in this matter because, if this Court were to confirm the High Court's order of constitutional invalidity, they may be acquitted of certain of the charges they are facing in their respective criminal trials. The applicants in the main application opposed the application for admission as an amicus curiae and application for leave to intervene. With regard to Fields of Green, the applicants in the main application stated that Ms Clarke and Mr Stobbs are directors of Fields of Green and that basically Fields of Green is them and they are Fields of Green because they are the controlling minds of Fields of Green. The applicants in the main application pointed out that Ms Clarke and Mr Stobbs did not disclose in their application their relationship with Fields of Green but should have. They also contended that the submissions that Fields of Green intends to make will be no different from those that Ms Clarke, Mr Stobbs and Mr Thorpe intended making if they were granted leave to intervene as intervening parties.

[12] Ms Clarke, Mr Stobbs and Mr Thorpe made out a case to be granted leave to intervene because they have a direct and substantial interest in these proceedings. Accordingly, it was appropriate to grant them leave to intervene. Once we had reached this conclusion, it stood to reason that we should refuse Fields of Green's application for admission as amicus curiae because its submissions were to be no different from those of Ms Clarke, Mr Stobbs and Mr Thorpe.

[13] The three intervening parties supported the conclusion reached by the High Court but sought to expand the case beyond that dealt with by the High Court. In this regard they sought to rely on rationality and legality to challenge the constitutional validity of the whole criminalisation of cannabis by various statutory provisions. It would not be in the interests of justice to widen the scope of this matter beyond the right of privacy as decided by the High Court. In any event, the three intervening parties may pursue their other challenge in the *Stobbs* trial. Therefore, to the extent that these intervening parties urged this Court to widen the case, in the above sense, we decline to do so.

[14] Shortly before the hearing of this matter, an application was launched in this Court for an order that King Adam Kok V, the Griqua Nation, Chief Petrus Vaalbooi and the / Auni San People be admitted as intervening parties in this matter. Although these parties may have an interest in this matter, their application falls to be dismissed. The first point is that they brought their application too late. They lodged their application with the Registrar on 1 November 2017 when the matter was set down for hearing on 7 November 2017. This did not give everybody enough time to deal with their application prior to the hearing. Their application also falls to be dismissed in any event because they sought to pursue a case based on the infringement of their cultural rights as entrenched in sections 30[2] and 31[3] of the Constitution which was

[2] Section 30 reads:

> "Language and culture
>
> 30. Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights."

[3] Section 31 reads:

> "Cultural, religious and linguistic communities
>
> 31. (1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community—
>
> (a) to enjoy their culture, practice their religion and use their language; and
>
> (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.
>
> (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights."

never canvassed in the High Court. Such a case must first be brought and canvassed in the High Court before it can be adjudicated by this Court. That is in a case where no direct access is sought and it is not a matter in which this Court has exclusive jurisdiction. In the circumstances, their application is dismissed.

Stay of proceedings

[15] During the hearing in this Court a question arose whether the proceedings in this matter should be stayed pending the outcome of the *Stobbs* trial. We were told that an important feature of that matter is that a number of experts would be called to give evidence. The reason for the idea of a stay of proceedings was that it would be in the interests of justice for this Court to decide all issues involved in the two matters in one matter rather than have issues decided piece-meal. It was also said that this Court would benefit from the evidence of the experts that will be called in the *Stobbs* trial if the proceedings in this matter were to be stayed until the *Stobbs* trial reached this Court and both were decided together.

[16] The State supported the notion that the present proceedings be stayed. So did Doctors for Life. I am of the view that the present proceedings should not be stayed pending the *Stobbs* trial. This is because the State was given more than enough time to place expert evidence before the High Court to show that, to the extent that the impugned provisions limited the right to privacy, the limitation was reasonable and justifiable in an open and democratic society but it failed to do so. Furthermore, it is not clear whether the expert evidence that will be led in the *Stobbs* trial will cover the areas in this matter in which the evidence presented by the State is unsatisfactory. In other words, we could stay these proceedings only to discover later that the expert evidence presented in the *Stobbs* trial does not assist us in this matter. In these circumstances, the present proceedings should not be stayed.

Order of the High Court

[17] Since these are confirmatory proceedings, it is appropriate to quote the order granted by the High Court. This is because it is that order that I must consider and decide whether to confirm, decline to confirm, or confirm in part. The order of the High Court reads as follows:

> "1. The following provisions are declared inconsistent with the Constitution of the Republic of South Africa Act 108 of 1996 and invalid, only to the extent that they prohibit the use of cannabis by an adult in private dwellings where the possession, purchase or cultivation of cannabis is for personal consumption by an adult:
>
> 1.1 sections 4(b) and 5(b) of the Drugs and Drug Trafficking Act 140 of 1992 (the Drugs Act) read with Part III of Sch 2 to the Drugs Act; and
>
> 1.2 section 22A(9)(a)(i) of the Medicines and Related Substances Control Act 101 of 1965 (the Medicines Act) and s 22A(10) read with schedule 7 of GN R509 of 2003 published in terms of s 22A(2) of the Medicines Act.
>
> 2. This declaration of invalidity is suspended for a period of 24 months from the date of this judgment in order to allow Parliament to correct the defects as set out in this judgment.
>
> 3. It is declared that until Parliament has made the amendments contemplated in paragraph 1 or the period of suspension has expired, it will be deemed to be a defence to a charge under a provision as set out in paragraph 1 of this order that the use, possession, purchase or cultivation of cannabis in a private dwelling is for the personal consumption of the adult accused."

[18] It must be noted that the provisions that the High Court declared inconsistent with the Constitution are not all the provisions of sections 4(b) and 5(b) of the Drugs Act and sections 22A(9)(a)(i) and 22A(10) of the Medicines Act. The order of the

High Court declared the provisions of those sections constitutionally invalid *"only to the extent that they prohibit the use of cannabis by an adult in private dwellings where the possession, purchase or cultivation of cannabis is for personal consumption by an adult".*

[19] The order of the High Court declared constitutionally invalid not only the provisions of the sections referred to therein that prohibit the use or possession of cannabis in a private dwelling but also the purchase and cultivation of cannabis in a private dwelling or home. The High Court's basis for declaring the provisions constitutionally invalid to the extent that it did was that they were inconsistent with the right to privacy when an adult uses or is in possession of, or, cultivates, cannabis in a private dwelling or at home for his or her consumption in private. For reasons that will appear later, I shall deal with the issues in this judgment on the basis that the relevant provisions prohibited the use, cultivation or possession of cannabis in private by an adult for his or her own personal consumption in private. This means that the judgment is written within the context of only the use or possession or cultivation of cannabis by an adult in private for his or her personal consumption in private. I exclude the issue of "purchase" because I deal with it separately later in this judgment.

Impugned provisions

[20] The provisions of the Drugs Act which the High Court declared invalid are sections 4(b) and 5(b) read with Part III of Schedule 2 to that Act. The provisions of the Medicines Act which were declared invalid are sections 22A(9)(a)(i) and 22A(10) read with Schedule 7 of GN R509 of 2003 published under section 22A(2) of that Act. Section 4(b) of the Drugs Act reads:

> "No person shall use or have in his possession—
>
> . . .
>
> (b) any dangerous dependence-producing substance or any undesirable dependence-producing substance,
>
> unless—

(i) he is a patient who has acquired or bought any such substance—

(aa) from a medical practitioner, dentist or practitioner acting in his professional capacity and in accordance with the requirements of the Medicines Act or any regulation made thereunder; or

(bb) from a pharmacist in terms of an oral instruction or a prescription in writing of such medical practitioner, dentist or practitioner,

and uses that substance for medicinal purposes under the care or treatment of the said medical practitioner, dentist or practitioner;

(ii) he has acquired or bought any such substance for medicinal purposes—

(aa) from a medical practitioner, veterinarian, dentist or practitioner acting in his professional capacity and in accordance with the requirements of the Medicines Act or any regulation made thereunder;

(bb) from a pharmacist in terms of an oral instruction or a prescription in writing of such medical practitioner, veterinarian, dentist or practitioner; or

(cc) from a veterinary assistant or veterinary nurse in terms of a prescription in writing of such veterinarian,

with the intent to administer that substance to a patient or animal under the care or treatment of the said medical practitioner, veterinarian, dentist or practitioner;

(iii) he is the Director-General: Welfare who has acquired or bought any such substance in accordance with the requirements of the Medicines Act or any regulation made thereunder;

(iv) he, she or it is a patient, medical practitioner, veterinarian, dentist, practitioner, nurse, midwife, nursing assistant,

> pharmacist, veterinary assistant, veterinary nurse, manufacturer of, or wholesale dealer in, pharmaceutical products, importer or exporter, or any other person contemplated in the Medicines Act or any regulation made thereunder, who or which has acquired, bought, imported, cultivated, collected or manufactured, or uses or is in possession of, or intends to administer, supply, sell, transmit or export any such substance in accordance with the requirements or conditions of the said Act or regulation, or any permit issued to him, her or it under the said Act or regulation;
>
> (v) he is an employee of a pharmacist, manufacturer of, or wholesale dealer in, pharmaceutical products, importer or exporter who has acquired, bought, imported, cultivated, collected or manufactured, or uses or is in possession of, or intends to supply, sell, transmit or export any such substance in the course of his employment and in accordance with the requirements or conditions of the Medicines Act or any regulation made thereunder, or any permit issued to such pharmacist, manufacturer of, or wholesale dealer in, pharmaceutical products, importer or exporter under the said Act or regulation; or
>
> (vi) he has otherwise come into possession of any such substance in a lawful manner."

[21] Briefly, section 4(b) prohibits the use or possession of any dangerous dependence-producing substance or any undesirable dependence-producing substance unless one or more of the exceptions listed therein applies.

[22] Section 5(b) prohibits dealing in any dangerous dependence–producing substance or any undesirable dependence-producing substance unless one or more of the exceptions listed in that provision applies. Section 5(b) reads:

> "No person shall deal in—

…

(b) any dangerous dependence-producing substance or any undesirable dependence producing substance, unless—

(i) he has acquired or bought any such substance for medicinal purposes—

(aa) from a medical practitioner, veterinarian, dentist or practitioner acting in his professional capacity and in accordance with the requirements of the Medicines Act or any regulation made thereunder;

(bb) from a pharmacist in terms of an oral instruction or a prescription in writing of such medical practitioner, veterinarian, dentist or practitioner; or

(cc) from a veterinary assistant or veterinary nurse in terms of a prescription in writing of such veterinarian, and administers that substance to a patient or animal under the care or treatment of the said medical practitioner, veterinarian, dentist or practitioner;

(ii) he is the Director-General: Welfare who acquires, buys or sells any such substance in accordance with the requirements of the Medicines Act or any regulation made thereunder;

(iii) he, she or it is a medical practitioner, veterinarian, dentist, practitioner, nurse, midwife, nursing assistant, pharmacist, veterinary assistant, veterinary nurse, manufacturer of, or wholesale dealer in, pharmaceutical products, importer or exporter, or any other person contemplated in the Medicines Act or any regulation made thereunder, who or which prescribes, administers, acquires, buys, tranships, imports, cultivates, collects, manufactures, supplies, sells, transmits or exports any such substance in accordance with the requirements or conditions of the said Act or regulation, or

> any permit issued to him, her or it under the said Act or regulation; or
>
> (iv) he is an employee of a pharmacist, manufacturer of, or wholesale dealer in, pharmaceutical products, importer or exporter who acquires, buys, tranships, imports, cultivates, collects, manufactures, supplies, sells, transmits or exports any such substance in the course of his employment and in accordance with the requirements or conditions of the Medicines Act or any regulation made thereunder, or any permit issued to such pharmacist, manufacturer of, or wholesale dealer in, pharmaceutical products, importer or exporter under the said Act or regulation."

[23] Paragraphs 1 and 3 of the order of the High Court includes the prohibition of the cultivation of cannabis in a private dwelling by an adult for his or her personal consumption in private as one of the provisions that are inconsistent with the right to privacy entrenched in the Constitution and invalid. Indeed, paragraph 3 of the order of the High Court is to the effect that it will be a defence to a charge of cultivation of cannabis that the cultivation is in a private dwelling and is for the personal consumption of the adult accused person concerned.

[24] A reading of the judgment of the High Court does not reveal what statutory provision the High Court understood to prohibit the cultivation of cannabis in a private dwelling by an adult for his or her personal consumption in private. On the face of it, section 5(b) does not itself seem to prohibit that activity when it is carried out for the purpose just mentioned. I say this notwithstanding the reference to cultivation in section 5(b)(iii) and (iv). However, it is only when one reads the definition of the phrase "deal in" in section 1 of the Drugs Act that one realises that in relation to a drug the definition includes "performing any act in connection with" cultivation. The definition reads: "'deal in', in relation to a drug, includes performing any act in connection with the transhipment, importation, cultivation, collection, manufacture, supply, prescription, administration, sale, transmission, or exportation of

the drug". One of the effects of section 5(b) read with the definition of the phrase "deal in" is that the performance of any act in connection with the cultivation of cannabis in a private dwelling or in private by an adult for his or her personal consumption in private is prohibited. The High Court judgment must be taken to have intended to declare this prohibition to be inconsistent with the right to privacy entrenched in the Constitution and, therefore, invalid.

[25] Section 22A(9)(a)(i) of the Medicines Act reads:

> "No person shall—
>
> (i) acquire, use, possess, manufacture or supply any Schedule 7 or Schedule 8 substance, or manufacture any specified Schedule 5 or Schedule 6 substance unless he or she has been issued with a permit by the Director-General for such acquisition, use, possession, manufacture, or supply: Provided that the Director-General may, subject to such conditions as he or she may determine, acquire or authorise the use of any Schedule 7 or Schedule 8 substance in order to provide a medical practitioner, analyst, researcher or veterinarian therewith on the prescribed conditions for the treatment or prevention of a medical condition in a particular patient, or for the purposes of education, analysis or research."

The conduct prohibited by this provision that is relevant to the present matter is the use and possession of any Schedule 7 substance. Cannabis is one of the substances listed in Schedule 7. When read with Schedule 7 of GN R509 of 2003 published in terms of section 22A(2) of the Medicines Act, section 22A(9)(a)(i) is a prohibition of the acquisition, use, possession, manufacture or supply of, among others, cannabis.

[26] Section 22A(10) reads:

> "Notwithstanding anything to the contrary contained in this section, no person shall sell or administer any Scheduled substance or medicine for [any purpose] other than medicinal purposes: Provided that the Minister may, subject to the conditions or requirements stated in such authority, authorise the administration outside any

> hospital of any Scheduled substance or medicine for the satisfaction or relief of a habit or craving to the person referred to in such authority."

The conduct prohibited by section 22A(10) is the sale or administration of any "Scheduled substance or medicine" for any purpose other than medicinal purposes. This is subject to the exceptions given in the provision. In its order the High Court did not include the sale or administration of cannabis. The order of the High Court did not declare invalid any provision prohibiting the sale or administration of cannabis. However, it did declare invalid provisions that relate to purchase of cannabis that could be found in any of the sections referred to in the order. Of course, there can be no purchase without a sale. If the order of the High Court is not confirmed in so far as it related to provisions prohibiting the purchase of cannabis, there will be no need to deal with section 22A(10) in this judgment. This is because the sale or administration of cannabis – which are the activities prohibited by section 22A(2) were not included in the order of the High Court.

High Court

[27] This matter was heard by a Full Bench of the High Court consisting of Davis J, Saldanah J and Boqwana J. Davis J wrote the Court's unanimous judgment. The High Court dealt with the matter on the basis that "the core of the case brought before [it]" was "whether the infringement of the right to privacy caused by the impugned legislation [could] be justified in terms of section 36 of the Constitution". The High Court based its understanding of the case brought before it on a passage in Mr Prince's founding affidavit. That passage reads:

> "The substantive questions in this matter are to what extent and in what way government may dictate, regulate or proscribe conduct considered to be harmful as well as what is the threshold the harm must cross in order for government to intervene? Can government legitimately dictate what people eat, drink or smoke in the confines of their own home or in properly designated places? Privacy concerns

> dictate and our constitution recognises that there should be an area of autonomy that precludes outside intervention."[4]

[28] The High Court dealt with the right to privacy entrenched in section 14 of the Constitution and referred to certain decisions of this Court dealing with the right to privacy to indicate the content and scope of that right.[5] It then said that the question to be asked was "whether the legislative framework, as I have outlined it, places limitations on this right to privacy".[6] The High Court concluded that the impugned provisions limited the right to privacy. It said:

> "I should again emphasise that this particular right and breach thereof in the present circumstances were not contested in the written submissions of the respondents and received a very tepid treatment, at best, during oral argument. For these reasons therefore, the present dispute must ultimately be determined in terms of the justification for the limitation of privacy as advanced by the respondents."[7]

[29] The High Court went on to conduct a justification analysis in terms of section 36 of the Constitution in respect of the impugned provisions to determine whether the limitation of the right to privacy was reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The High Court pointed out that the State bore "the burden" to justify the limitation of the right to privacy. It said that the State had offered "very little further evidence of persuasion and weight to counter the report by Professor Shaw *et al*".[8] The High Court continued: "Furthermore, the approach adopted by the Central Drug Authority of South Africa together with the comparative medical evidence set out above have to be taken into account in formulating a conclusion as to whether

[4] *Prince v Minister of Justice* [2017] ZAWCHC 30; 2017 (4) SA 299 (WCC) (High Court Judgment) at para 20.

[5] Id at paras 21-5.

[6] Id at para 25.

[7] Id at para 27.

[8] Id at para 91.

[the State] [has] discharged the burden placed upon them".[9] Professor Shaw and his team were asked by the High Court to assist the Court and they submitted a report to the Court dealing with various aspects of cannabis. Professor Shaw is a professor of criminology at the University of Cape Town.

[30] It was pointed out in the judgment of the High Court that the State's evidence was "singularly unimpressive, particularly in that a considerable period of time was offered to [the State] in order to respond comprehensively to the Shaw report". The Court continued: "All that was forthcoming was a further affidavit by Captain Smit, and an affidavit by a general practitioner, whose expertise is surely open to doubt in this specific area and who made a number of unsubstantiated claims. On its own this was a disappointing answer to the persuasive arguments made by Professor Shaw *et al*." [10]

[31] There was also reference in the High Court judgment to the evidence in an affidavit by Mr William Hofmeyr who is Deputy National Director of Public Prosecutions. Based on Mr Hofmeyr's affidavit, the High Court stated:

> "In summary, if the NPA considers that a policy of diversion may be the more appropriate approach to personal consumption use in the context of cannabis in South Africa, this adds weight to the broader argument that the criminalisation of cannabis for personal use and consumption is open to significant doubt".[11]

The High Court went on to say:

> "Diversion and other policy choices as opposed to the blunt use of the criminal law and, in particular, imprisonment, support the conclusion that the state cannot justify the prohibition as contained in the impugned legislation as it stands".[12]

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[9] Id.

[10] Id at para 92.

[11] Id at para 101.

[12] Id.

[32] According to the High Court both sections 4 and 5 of the Drugs Act needed to be amended to ensure that they did not apply to persons "who use small quantities of cannabis for personal consumption in the privacy of a home as the present position unjustifiably limits the right to privacy".[13] The Court stated that it is Parliament that should determine the extent of what would constitute small quantities in private dwellings.[14]

[33] Even if it could be shown, said the High Court, that there was "a legitimacy to the objectives of the limitation and further that this legitimate objective is rationally connected to the means employed by way of the impugned legislation, this is not sufficient to prove a justification required in terms of section 36(1) of the Constitution".[15] The High Court took the view that, even if it could be said that the objectives of the prevention of crime, a reduction in crime, prevention of negative effects on driving ability and detrimental neurological, cardiovascular and respiratory effects are met by the impugned provisions, the State would still need to "show why a less restrictive means to achieve that purpose does not exist".[16] It went on to say:

> "In other words, even if the Court finds that the evidence of Prof Shaw et al, the further evidence cited in their report, including the views of the Central Drug Authority of South Africa, does not carry sufficient evidential weight, if the respondents wish to restrict so important a right as a private act of consuming cannabis in the intimacy of a home, they should attempt to employ means of doing so which are the least restrictive of the rights being infringed. The limitation should in other words be narrowly tailored to achieve its purpose, should be carefully focused, and should not be overbroad."[17]

[13] Id at para 102.

[14] Id.

[15] Id at para 103.

[16] Id at para 104.

[17] Id at para 104.

The High Court then quoted the dissenting judgment of LeBel J in *R v Malmo Levine*[18].

[34] In the end the High Court concluded:

> "The evidence, read as a whole, cannot be taken to justify the use of criminal law for the personal consumption of cannabis. The present prohibition contained in the impugned legislation does not employ the least restrictive means to deal with a social and health problem for which there are now a number of less restrictive options supported by a significant body of expertise. The additional resources that may be unlocked for use of policing of serious crimes cannot be over emphasised."[19]

Later on, the Judge in the High Court explained his judgment in these terms:

> "The point of this judgment is that there are a multitude of options available to fight this problem as opposed to the blunt use of the criminal law. It is precisely for this reason that this Court contends that less restrictive means must be employed to deal with the problem, a conclusion clearly advocated in the positon articulated by the Central Drug Authority cited earlier."[20]

He also said:

> "The evidence, holistically read together with the arguments presented to this Court, suggests that the blunt instrument of the criminal law employed in the impugned legislation is disproportionate to the harms that the legislation seeks to curb in so far as the personal use and consumption of cannabis are concerned. This conclusion is supported by the importance of the core component of the right to privacy, and, further, by the cautious approach that must be taken to the evaluation of the criminalisation of cannabis which, as indicated earlier in this judgment, is certainly characterised by the racist footprints of a disgraceful past."[21]

[18] [2003] 3 SCR 571 2003 SCC 74.

[19] High Court Judgment above n 4 at para 106.

[20] Id at para 107.

[21] Id at para 108.

[35] The High Court held that "it would be practical and objectively possible for legislation to distinguish the use of cannabis and the possession, purchase or cultivation of cannabis for personal consumption from other uses".[22] It held that it was not for the court "to prescribe alternatives to decriminalisation of the use of cannabis for personal use and consumption. It is for the legislature and the executive to decide on a suitable option or alternatives which can be made after these have been the subject of a deliberative process which is inherent in the idea of Parliament."[23]

[36] The High Court drew attention to the fact that the Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988[24] (1988 Convention) "establishes a fundamental distinction between the 'possession, purchase or cultivation of narcotic drugs or psychotropic substances for personal consumption' (article 3(2)) and trafficking and dealing conduct (article 3(1)), conduct which is described as 'serious'. This distinction is reflected in the differential regulation in the Drugs Act for possession for personal use (section 4) and dealing (section 5)".[25] The High Court went on to say in this regard:

> "The Drugs Act recognises, for example, that when it comes to possession for purposes of personal use, smaller quantities are involved. Hence, the Act created a presumption that a person found in possession of cannabis exceeding the prescribed mass was presumed to be dealing. Section 21(1)(a)(i) of the Drugs Act had a presumption that a person possessing more than 115 grams of cannabis is dealing. The provision has, however as noted, been declared unconstitutional in *S v Bhulwana; S v Gwadiso* 1996 (1) SA 388 (CC). The quantity of cannabis in a person's possession constitutes an objective, established and readily enforceable basis upon which to distinguish possession for personal consumption from dealing or other, more serious conduct. Whether the existing prescribed quantity should remain

[22] Id at para 110.

[23] Id at para 112.

[24] Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 20 December 1988.

[25] High Court Judgment above n 4 at para 109.

> applicable in the light of the finding of this Court is for the legislature to determine, hence any reading in of words into the Drugs Act is not an appropriate approach in this case. If follows, unlike the majority in Prince 2, who were dealing with a regime, that I find that it would be practical and objectively possible for legislation to distinguish the use of cannabis and the possession, purchase or cultivation of cannabis for personal consumption from other uses."[26]

[37] The Court concluded that the State respondents had failed to show that the limitation was reasonable and justifiable in an open and democratic society as required by section 36 of the Constitution. That conclusion meant that the impugned provisions were inconsistent with the Constitution to the extent indicated in the judgment and were, therefore, constitutionally invalid.

[38] In the result, the High Court made the order quoted earlier in this judgment.

In this Court

[39] In confirmatory proceedings this Court is required to satisfy itself whether the High Court was correct in declaring invalid the statutory provisions that it declared invalid. If this Court is satisfied that the statutory provisions were correctly declared invalid, it confirms the order of invalidity made by the High Court. If, however, this Court concludes that the High Court erred in holding the impugned provisions inconsistent with the Constitution and in declaring them invalid, it does not confirm the order. Where this Court does not confirm an order of invalidity made by a High Court, the statutory provisions in question continue in operation.

[40] The issue for determination by this Court is, therefore, whether the impugned provisions limit the right to privacy as held by the High Court and, if they do, whether that limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account the factors listed in section 36(1) of the Constitution. If the limitation is reasonable and justifiable, this

[26] Id at paras 109-10.

will mean that the impugned provisions are consistent with the Constitution and are, therefore, valid. In such a case this Court will not confirm the High Court's order of invalidity. If, however, the limitation is held not to be reasonable and justifiable in an open and democratic society as contemplated in section 36, this will mean that the impugned provisions are inconsistent with the Constitution and are, therefore, invalid to the extent of that inconsistency.

[41] The applicants and plaintiffs before the High Court are respondents before us. For convenience, I shall refer to them as applicants when I need to refer to them collectively. Those who were respondents before the High Court are applicants before this Court. For convenience, I shall refer to them collectively as the State. There are other parties who featured in the proceedings before us who did not feature in the High Court. Those are the organisations and individuals who applied either for admission as amicus curiae (friends of the court) or as intervening parties. I have already dealt with them above.

[42] Earlier on, I quoted the impugned provisions. I do not propose to quote them again. Since the order of invalidity made by the High Court was made on the basis that the impugned provisions constituted an infringement of the right to privacy, it is appropriate to make a few observations about the scope and content of the right to privacy.

Scope and content of the right to privacy

[43] In our law the right to privacy is entrenched in section 14 of the Constitution. Section 14 reads:

> "14. Privacy – Everyone has the right to privacy which includes the right not to have—
>
> (a) their person or home searched;
>
> (b) their property searched;

(c) their possessions seized; or

(d) the privacy of their communications infringed."[27]

[44] In *Bernstein*[28] this Court undertook an extensive discussion of the right to privacy. Ackermann J said:

> "Use of this term [namely, the right to privacy] has not been unproblematic, since in terms of a resolution of the Consultative Assembly of the Council of Europe this right has been defined as follows:
>
> > 'The right to privacy consists essentially in the right to live one's own life with a minimum of interference. It concerns private, family and home life, physical and moral integrity, honour and reputation, avoidance of being placed in a false light, non-revelation of irrelevant and embarrassing facts, unauthorised publication of private photographs, protection from disclosure of information given or received by the individual confidentially.'"[29]

[45] Ackermann J also referred to the approach of Canadian courts. He pointed out that the Canadian Charter of Rights and Freedoms does not specifically provide for the protection of personal privacy. He then stated:

> "As in the United States, the issue arises in connection with the protection of persons against unreasonable search and seizure, which in Canada is afforded by section 8 of the Charter. In defining the scope of this protection the Canadian Courts have adopted an approach similar to that followed in United States jurisprudence. In *McKinley Transport Ltd et al v The Queen* Wilson J quoted with approval the following exposition of Dickson J in *Hunter et al v Southam Inc*:
>
> > 'The guarantee of security from *unreasonable* search and seizure only protects a *reasonable* expectation. This limitation on the right guaranteed by section 8, whether it is expressed negatively as

[27] Constitution above n 1 at section 14.

[28] *Bernstein v Bester* [1996] ZACC 2, 1996 (2) SA 751 (CC), 1996 (4) BCLR 449 (CC) (*Bernstein*).

[29] Id at para 73.

> freedom from "unreasonable" search or seizure, or positively as an entitlement to a "reasonable" expectation of privacy, indicates that an assessment must be made as to whether in a particular situation the public's interest to be left alone by government must give way to government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement.'"[30]

With the last part of this excerpt in mind, it can legitimately be said that the right to privacy is a right to be left alone.

[46] Ackermann J went on to say:

> "Wilson J pointed out that one of the purposes underlying the section 8 right is the 'protection of the individual's reasonable expectation of privacy'. Since an enquiry into privacy constitutes an important component in determining the scope of an unreasonable search or seizure, the Courts have had to develop a test to determine the scope and content of the right to privacy. The 'reasonable expectation of privacy' test comprises two questions. First, there must at least be a subjective expectation of privacy and, secondly, the expectation must be recognised as reasonable by society."[31]

[47] Ackermann J referred to the approach of the United States Courts in determining the existence of "a reasonable expectation of privacy". Ackermann J then said:

> "The question corresponding to determining the 'scope of the right to privacy' in United States' constitutional inquiry, is whether a search or seizure has occurred. The US Supreme Court has defined 'search' to mean a 'governmental invasion of a person's privacy' and it has constructed a two part test to determine whether such an invasion has occurred. The party seeking suppression of the evidence must establish both that he or she has a *subjective expectation* of privacy and that the society has

[30] Id at para 76.

[31] Id.

recognised that expectation as *objectively reasonable*. In determining whether the individual has lost his / her legitimate expectation of privacy, the Court will consider such factors as whether the item was exposed to the public, abandoned, or obtained by consent. It must of course be remembered that the American constitutional interpretative approach poses only a single inquiry, and does not follow the two stage approach of Canada and South Africa. Nevertheless it seems to be a sensible approach to say that the scope of a person's privacy extends *a fortiori* only to those aspects in regard to which a legitimate expectation of privacy can be harboured."[32]

[48] In *Bernstein* this Court also had this to say about the right to privacy:

"A very high level of protection is given to the individual's intimate personal sphere of life and the maintenance of its basic preconditions and there is a final untouchable sphere of human freedom that is beyond interference from any public authority. So much so that, in regard to this most intimate core of privacy, no justifiable limitation thereof can take place. But this most intimate core is narrowly construed. This inviolable core is left behind once an individual enters into relationships with persons outside this closest intimate sphere; the individual's activities then acquire a social dimension and the right of privacy in this context becomes subject to limitation."[33]

[49] In *National Coalition*[34] this Court elaborated on the right to privacy in these terms:

"This Court has considered the right to privacy entrenched in our Constitution on several occasions. In *Bernstein v Bester*, it was said that rights should not be construed absolutely or individualistically in ways which denied that all individuals are members of a broader community and are defined in significant ways by that membership:

> 'In the context of privacy this would mean that it is only the inner sanctum of a person, such as his/her family life, sexual preference and home environment, which is shielded from erosion by conflicting

[32] Id at para 75.

[33] Id at para 77.

[34] *National Coalition for Gay and Lesbian Equality v Minister Of Justice* [1998] ZACC 15; 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) (*National Coalition*).

> rights of the community . . . Privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly.'"[35]

[50] In *Khumalo*[36] O'Regan J had occasion to say something about the relationship between the right to privacy and the right to human dignity. She said:

> "It should also be noted that there is a close link between human dignity and privacy in our constitutional order. The right to privacy, entrenched in section 14 of the Constitution, recognises that human beings have a right to a sphere of intimacy and autonomy that should be protected from invasion. This right serves to foster human dignity. No sharp lines then can be drawn between reputation, *dignitas* and privacy in giving effect to the value of human dignity in our Constitution."[37]

[51] The case which is before us as decided by the High Court is whether the prohibition by the impugned provisions of the mere possession, use or cultivation of cannabis by an adult in private for his or her personal consumption in private is inconsistent with the right to privacy provided for in section 14 of the Constitution and, therefore, invalid.

[52] In *Case*[38] the matter concerned the possession of material that was said to be hit by the Indecent or Obscene Photographic Matter Act.[39] Didcott J pointed out that all that that Act dealt with in its penal provisions was "the possession of material which it call[ed] 'indecent or obscene photographic matter'" and nothing else. With the concurrence of the majority, Didcott J then had this to say about the right to privacy in the context of the case:

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[35] Id at para 31.

[36] *Khumalo v Holomisa* [2002] ZACC 12; 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC) (*Khumalo*).

[37] Id at para 27.

[38] *Case v Minister of Safety and Security; Curtis v Minister of Safety and Security* [1996] ZACC 7; 1996 (3) SA 617 (CC); 1996 (5) BCLR 609 (CC) (*Case*).

[39] 37 of 1967.

> "What erotic material I may choose to keep within the privacy of my home, and only for my personal use there, is nobody's business but mine. It is certainly not the business of society or the State. Any ban imposed on my possession of such material for that solitary purpose invades the personal privacy which section 13 of the interim Constitution (Act 200 of 1993) guarantees that I shall enjoy."[40]

[53] With the concurrence of Didcott J and the majority in *Case*, in his separate judgment in the same case Langa J qualified this excerpt from Didcott J's judgment. He said:

> "My understanding is that this statement is subject to the qualification that the right referred to, as is the case with other Chapter 3 rights, is not necessarily exempt from limitation. That the limitation may extend to possession even in the privacy of one's home in certain circumstances is a possibility acknowledged by Didcott J in paragraph [93]. The precise circumstances are not a matter we are called upon to delineate here and I agree that it is wise to refrain from attempting to do so in this matter. What is clear is that an intrusion into such privacy cannot, as was the case in the past, be permissible unless it can be adequately justified on the basis of section 33(1) of the Constitution."[41]

That was section 33(1) of the interim Constitution which is now catered for in section 36 of the final Constitution.

[54] There are cases elsewhere where statements along the lines of Didcott J's statement are to be found. In *Stanley*[42] the Supreme Court of Georgia had to consider the question whether "a statute imposing criminal sanctions upon the mere (knowing) possession of obscene matter"[43] was constitutional. The Court stated that the rights which Mr Stanley was asserting included the right that Brandeis J called in his dissent

[40] *Case* above n 38 at para 91.

[41] Id at para 99.

[42] *Stanley v Georgia* 394 U. S. Reports 557 (*Stanley*).

[43] Id page 559.

in *Olmstead v United States*[44], "the right to be let alone". In *Stanley* the Court said that Stanley was asserting—

> "the right to satisfy his intellectual and emotional needs in the privacy of his own home. He is asserting the right to be free from state inquiry into the contents of his library. Georgia contends that the appellant does not have these rights, that there are certain types of materials that the individual may not read or even possess. Georgia justifies this assertion by arguing that the films in the present case are obscene. But we think that mere categorization of these films as 'obscene' is insufficient justification for such a drastic invasion of personal liberties guaranteed by the First and Fourteenth Amendments. Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. *If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch.* Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds."[45]

Later, the Court said: "we hold that the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime".[46]

[55] In *Ravin v State of Alaska*[47] the Supreme Court of Alaska had to consider the constitutionality of Alaska's statute prohibiting possession of marijuana. Ravin had been arrested and charged with violating AS 17.12.010. In the trial Ravin challenged the constitutionality of AS 17.12.010 on the basis that it violated his right to privacy under both the federal and Alaska constitutions. In that case Rabinowitz CJ said:

> "It is appropriate in this case to resolve Ravin's privacy claims by determining whether there is a proper governmental interest in imposing restrictions on marijuana use and whether the means chosen bear a substantial relationship to the legislative

[44] *Olmstead v United States* 277 U.S 438 (*Olmstead).*

[45] *Stanley* above n 44 page 565.

[46] Id page 568.

[47] *Ravin v State of Alaska* 537 P.2d 494 (*Ravin*).

> purpose. If governmental restrictions interfere with the individual's right to privacy, we will require that the relationship between means and ends be not merely reasonable but close and substantial."[48]

The Chief Justice went on to say:

> "Thus, our undertaking is two-fold: we must first determine the nature of Ravin's rights, if any, abridged by AS 17.12.010, and, if any rights have been infringed upon, then resolve the further question as to whether the statutory impingement is justified."[49]

[56] After a discussion of the special place that a home enjoys in the protection of certain rights in Alaska's constitution, Rabinowitz CJ said:

> "Thus, we conclude that citizens of the State of Alaska have a basic right to privacy in their homes under Alaska's constitution. This right to privacy would encompass the possession and ingestion of substances such as marijuana in a purely personal, non-commercial context in the home unless the state can meet its substantial burden and show that proscription of possession of marijuana in the home is supportable by achievement of a legitimate state interest."[50]

[57] The Chief Justice later said:

> "Further, neither the federal nor Alaska constitution affords protection for the buying or selling of marijuana, nor absolute protection for its use or possession in public. Possession at home of amounts of marijuana indicative of intent to sell rather than possession for personal use is likewise unprotected."[51]

Against the above discussion of the scope and content of the right to privacy, it is now necessary to consider whether the impugned provisions limit that right.

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[48] Id page 498.

[49] Id page 498.

[50] Id page 504.

[51] Id page 511.

Do the impugned provisions limit the right to privacy?

[58] It seems to me that, with changes dictated by the context, what Didcott J said in the excerpt quoted earlier from *Case* as qualified by Langa J in the same case applies with equal force to the case of the possession, cultivation and use of cannabis by an adult in private for his or her personal consumption in private and in the absence of children. What this means is that the right to privacy entitles an adult person to use or cultivate or possess cannabis in private for his or her personal consumption. Therefore, to the extent that the impugned provisions criminalise such cultivation, possession or use of cannabis, they limit the right to privacy. The High Court pointed out that the State did not plead that the impugned provisions did not limit the right to privacy. During the hearing, I did not understand counsel for the State to argue that the impugned provisions did not limit the right to privacy. However, even if that was the State's case, not much was said in support of such a contention. In my view, the High Court correctly concluded that the impugned provisions limited the right to privacy.

Is the limitation reasonable and justifiable?

[59] Given the conclusion that the impugned provisions limit the right to privacy, the next question for consideration is whether that limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom as required by section 36 of the Constitution. In this regard, it is the State that must satisfy the Court that the limitation is reasonable and justifiable in an open and democratic society.

[60] Section 36 requires that certain factors be taken into account in determining whether the limitation of a right entrenched in the Bill of Rights is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. These are—

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.

This list is not exhaustive as, ultimately, the question is whether the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The impugned provisions must be part of a law of general application. In the present case, that this is the position is not in dispute.

[61] The justification analysis required by section 36(1) need not be dealt with on the basis of a check list approach. The High Court relied on a report prepared by Professor Shaw *et al* in regard to the justification analysis. It did not put much weight on affidavits deposed to by Dr Gous and Dr Naidoo who put up affidavits in support of the State's case.

The nature of the right to privacy

[62] The discussion of the right to privacy earlier in this judgment included a discussion of the nature of that right. It is, therefore, not necessary to discuss the nature of the right to privacy again for the purpose of the justification analysis required by section 36(1) of the Constitution.

The importance of the purpose of the limitation

[63] Counsel for the State argued that the purpose of the prohibition is the protection of "the health, safety and psychological well-being of persons affected by the use of cannabis". Counsel also pointed out in the written submissions that in *Prince II*[52] both the minority and the majority judgments accepted that "the provisions

[52] *Prince v President of the Law Society of the Cape of Good Hope* [2002] ZACC 1; 2002 (2) SA 794; 2002 (3) BCLR 231 (*Prince II*).

serve an important governmental purpose in the war against drugs". That is correct but it must also be borne in mind that in *Prince II* what was in issue was not whether a prohibition of the cultivation or possession or use of cannabis by an adult in private for his or her own personal consumption unreasonably and unjustifiably limited the right to privacy. The question in that case was whether the prohibition of the use or possession of cannabis when inspired by religion was constitutionally valid. Counsel for the State also pointed out that in *Prince II* the majority said that "the prohibition against the possession and use of cannabis was part of a worldwide attempt to curb its distribution of which the present government is fully supportive".

[64] In *Prince II* Ngcobo J accepted that the goal of the impugned provisions was to prevent the abuse of dependence-producing drugs and trafficking in those drugs. He also accepted that this was a legitimate goal.[53] In *Prince II* the majority said that the legislation served an important governmental purpose in the war against drugs.[54] Later, they said that "the general prohibition seeks to address the harm caused by the drug problem by denying all possession of prohibited substances (other than for medical and research purposes) and not by seeking to penalise only the harmful use of such substances".[55] The majority also said: "South Africa has an international obligation to curtail that trade".[56]

[65] In its discussion of the importance of the purpose of the limitation, the High Court, *inter alia*, referred to the fact that much of the history of cannabis use in this country "is replete with racism". In this regard the High Court quoted part of what was said in *S v Nkosi*.[57] In part the Court said in *S v Nkosi* :

[53] Id at para 26.

[54] Id at para 114.

[55] Id at para 116.

[56] Id at para 131.

[57] 1972 (2) SA 753 (T).

"For example (1) it is also relevant to consider the traditions and attitude of different groups of the population towards the use of a drug such as dagga; (2) it is general knowledge that some sections of the [Black] population have been accustomed for hundreds of years to the use of dagga, both as an intoxicant and in the belief that it has medicinal properties, and do not regard it with the same moral repugnance as do other sections of the population. Thus, in the standard work, Watt and Breyer-Brandwijk, The Medicinal and Poisonous Plants of South Africa, at p. 35, on reads:

> 'Cannabis sativa 1., Cannabis indica, Indian hemp, hemp, hashish, ganjah, dagga, Xhosa umya, Sutho matakwane, matokwane, matekwane, mmoana, is smoked as an intoxicant among South African natives. The Fingoes use the leaves as a snake-bite remedy, and the Xhosas as part of the treatment of bots in horses. The 'oil' from a dagga pipe has been used by European 'cancer curers' as an external application. In Southern Rhodesia, natives use the plant, among others, as a remedy for malaria, blackwater fever, Blood-poisoning, anthrax and dysentery, and as a 'war medicine'. The Suthos administer the ground-up seeds with bread or mealiepap to children during weaning. Sutho women smoke cannabis to stupefy themselves during childbirth …'

In making these observations, we do not, of course, intend to minimise the fact that the use of dagga is a great social evil in South Africa. Nevertheless the long-standing indulgence in the use of the substance by a group of which an accused person belongs may well constitute a circumstance to be taken into account in mitigation at any rate where he has been convicted of the use or possession of a small quantity."[58]

Nature and extent of the limitation

[66] The impugned provisions criminalise, among others, the cultivation of cannabis in private by an adult for his or her personal consumption in private. In *Prince II* this Court was split 5:4. In the minority judgment it was said that the medical evidence in that case showed that there was a level of consumption of cannabis which was not

[58] Id at 762A-B.

harmful but it was not known what that level was.[59] The impugned provisions also criminalise possession of cannabis by an adult in private for his or her personal consumption. This is quite invasive.

The relation between the limitation and its purpose and the less restrictive means to achieve the purpose

[67] The State relied on Dr Gous' affidavit as its main answering affidavit to justify the limitation. Dr Gous is a pharmacist and the Registrar of Medicines. She holds five degrees including a PhD in pharmacology. In the State's answering affidavit, Dr Gous made, among others, the following points:

(a) the psychoactive effects of cannabis, known as a "high", are subjective and can vary, based on the person and the method of use. Cannabis produces euphoria and relaxation, perceptual alterations, time distortion and the intensification of ordinary sensory experiences, such as eating and listening to music. When used in a social setting, it may produce infectious laughter and talkativeness. Short-term memory and attention, motor skills, reaction time and skilled activities are impaired while a person is intoxicated.

(b) the most common unpleasant side-effects of occasional cannabis use are anxiety and panic reactions.

(c) chronic heavy cannabis smoking is associated with increased symptoms of chronic bronchitis, such as coughing, production of sputum and wheezing. Lung function is significantly poorer and there are significantly greater abnormalities in the large airways of marijuana smokers than in non-smokers.

(d) the short-term effects of cannabis use on the cardiovascular system can include increased heart rate, dilation of blood vessels and fluctuations in blood pressure. The cardiovascular effects of cannabis are not

[59] *Prince II* above n 52 at 77.

associated with serious health problems for most young, healthy users. Cannabis use by older people, particularly those with some degree or coronary artery or cerebronvascular disease, may pose greater risks.

(e) cannabis use in pregnancy is associated with restrictions in the growth of the foetus, miscarriage and cognitive deficits in offspring.

(f) although tobacco, alcohol and prescription drugs also have harmful effects, research has shown beyond reasonable doubt that their effects are far less than those of cannabis on the user.

(g) the harmful effects caused by cannabis are incomparable to food, alcohol and tobacco. The harmful effects of cannabis have been well documented.

[68] In *Prince II* the medical evidence on record was dealt with by Ngcobo J in the minority judgment in, among others, paragraphs 25, 26 and 61. These paragraphs read:

> "[25] Medical evidence on record indicates that cannabis is a hallucinogen. Although the medical experts who deposed to affidavits on the harmful effects of cannabis differed in their emphasis, on their evidence it is common cause that: the abuse of cannabis is considered harmful because of its psychoactive component, tetrahydrocannabinol (THC); the effects of cannabis are cumulative and dose-related; prolonged heavy use or less frequent use of a more potent preparation is associated with different problems; acute effects are experienced most quickly when it is smoked; present clinical experience suggests that cannabis does not produce physical dependence or abstinence syndrome; and the excessive use of cannabis will result in a hypermanic or other psychotic state. However, 'one joint of dagga, or even a few joints' will not cause harm.
>
> [26] *The harmful effect of cannabis which the prohibition seeks to prevent is the psychological dependence that it has the potential to produce. On the medical evidence on record, there is no indication of the amount of cannabis that must be consumed in order to produce such harm. Nor is there any evidence to indicate whether bathing in it or burning it as an incense poses the risk of harm that the*

> *prohibition seeks to prevent. The medical evidence focused on the smoking of cannabis and its harmful effects*.
>
> …
>
> [61] On the medical evidence on record there can be no question that uncontrolled consumption of cannabis, especially when it is consumed in large doses poses a risk of harm to the user. An exemption that will allow such consumption of cannabis would undermine the purpose of the prohibition. *However, on the medical evidence on record it is equally clear that there is a level of consumption that is safe in that it is unlikely to pose any risk of harm. The medical evidence on record is silent on what that level of consumption is. Nor is there any evidence suggesting that it would be impossible to regulate the consumption of cannabis by restricting its consumption to that safe level. All that the medical evidence on this record tells us is that the effects of cannabis are dose-related and cumulative and that while 'prolonged heavy use or less frequent use of a more potent preparation are associated with many different problems', 'one joint of dagga or even a few joints' will not cause any harm.* Without further information, it is not possible to say whether or not the religious use of cannabis can be allowed without undermining the prohibition."

[69] A report published by the World Health Organisation (WHO) on the health and social consequences of non-medical cannabis use said this about the adverse health and social consequences of cannabis use and alcohol use:

> "The adverse health and social consequences of cannabis use reported by cannabis users who seek treatment for dependence appear to be less severe than those reported by persons dependent on alcohol or opioid. (Hall & Pacula, 2010; Degenhardt & Hall, 2012). However, rates of recovery from cannabis dependence among those seeking treatment are similar to those treated for alcohol dependence (Florez-Salamanca et al, 2013)." [60]

The first sentence in this passage of the WHO report contradicts a point made by Dr Gous as recorded earlier that the harmful effects caused by cannabis are

[60] World Health Organisation *The Health and Social Effects of Nonmedical Cannabis Use* (WHO report) page 24 at para 3.1.3.

incomparable to those caused by tobacco. Dr Gous' point is also contradicted by a position statement issued by the South African Central Drug Authority which I will be quoting later in this judgment.[61]

[70] On treatment trends, the WHO report said in part: "According to WHO data, 16% of countries included in the recent ATLAS survey (Atlas 2015 in press) reported cannabis use as the main reason for people seeking substance abuse treatment. This puts cannabis second only to alcohol as a reason for treatment entry".[62] Again here, the WHO report suggests that alcohol is more harmful than cannabis use. The report had this to say about the risk posed by the use of cannabis to traffic injury:

> "The existing evidence points to a small impact of cannabis on traffic injury. There are plausible biological pathways, and the pooling of studies found significant effects for cannabis. Overall, even though the effect is small compared to the effects of alcohol, traffic-injury may be the most important adverse public health outcome for cannabis in terms of mortality in high-income countries."[63]

The WHO report also states that "[t]he existing case reports raise a suspicion, but provide limited support for the hypothesis that cannabis use can cause upper respiratory tract cancers."[64]

[71] In *Stanley* the Supreme Court of Georgia held that "the mere private possession of obscene matter cannot constitutionally be made a crime".[65] The Court said that: "in the context of this case - a prosecution for mere possession of printed or filmed matter in the privacy of a person's own home - that right takes on an added dimension. For also fundamental is the right to be free, except in very limited circumstances, from

[61] See [78] below.

[62] WHO report above n 60 page 23 at para 3.1.3.

[63] Id at para 5.1.6.

[64] Id at para 7.1.3.

[65] *Stanley* above n 42 at 559.

unwanted governmental intrusions into one's privacy."[66] In his dissent in *Olmstead* Brandeis J said:

> "The makers of our Constitution undertook to secure conditions favourable to the pursuit of happiness . . . They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. *They conferred, as against the government, the right to be let alone – the most comprehensive of rights and the right most valued by civilized man*."[67]

[72] In *Ravin* the Supreme Court of Alaska also said:

> "Thus we conclude that no adequate justification for the state's intrusion into the citizen's right to privacy by its prohibition of possession of marijuana by an adult for personal consumption in the home has been shown. The privacy of the individual's home cannot be breached absent a persuasive showing of a close and substantial relationship of the intrusion to a legitimate governmental interest."[68]

[73] The Supreme Court of Alaska also pointed out in *Ravin* that the National Commission on Marihuana and Drug Abuse had recommended that private possession for personal use no longer continue to be an offence.[69] It is interesting to note that, as stated by the High Court in the present case, in this country, too, the Drug Authority expressed the view in its position statement in 2016 that possession of small amounts of cannabis for personal consumption in one's home should be decriminalised. The relevant part of that position statement is quoted later in this judgment.[70]

[74] In *Ravin* the Supreme Court of Alaska referred to the belief that marijuana use directly causes criminal behaviour and particularly violent and aggressive behaviour. It pointed out that the experts in that case were generally agreed that this belief was

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[66] Id at 564.

[67] *Olmstead* above n 44 at 478.

[68] *Ravin* above n 47 at 511.

[69] Id at 512.

[70] High Court Judgment above n 4 at para 59 and [78] below.

not valid.[71] In the present case, too, there is no cogent evidence supporting the notion that the use of cannabis causes criminal behaviour or leads its users to behaving violently or aggressively. In *Ravin* the Supreme Court of Alaska said: "[T]he [National] Commission [on Marihuana and Drug Abuse] and most other authorities agree that there is little validity to the theory that marijuana use leads to use of more potent and dangerous drugs. Although it has been stated that the more heavily a user smokes marijuana, the greater the probability that he has used or will use other drugs, it has been suggested that such use is related to drug use proneness and involvement in drug subcultures rather than to the characteristics of cannabis, *per se*."[72]

[75] The Supreme Court of Alaska continued:

> "We glean from these cases the general proposition that the authority of the state to exert control over the individual extends only to activities of the individual which affect others or the public at large as it relates to matters of public health or safety or to provide for the general welfare. We believe this tenet to be basic to the free society. The state cannot impose its own notions of morality, propriety, or fashion on individuals when the public has no legitimate interest in the affairs of those individuals. The right of the individual to do as he pleases is not absolute, of course: It can be made to yield when it … infringe[s] on the rights and welfare of others."[73]

[76] Referring to the effect of the impugned provisions in *Prince II,* Ngcobo J said:

> "The net they cast is so wide that uses that pose no risk of harm and that can effectively be regulated and subjected to government control, like other dangerous drugs, are hit by the prohibition. On that score they are unreasonable and they fall at the first hurdle. This renders it unnecessary to consider whether they are justifiable."[74]

[77] In the next paragraph Ngcobo J said:

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[71] *Ravin* above n 47 at 507.

[72] Id.

[73] Id at 509.

[74] *Prince II* above n 52 at para 81.

> "It follows, therefore, that the prohibition contained in the impugned provisions is constitutionally bad because it proscribes the religious use of cannabis even when such use does not threaten government interest."[75]

[78] The High Court's conclusion that the limitation was not reasonable and justifiable was based on, amongst others, the position taken by the South African Central Drug Authority as reflected in its position statement issued in 2016 in the South African Medical Journal.[76] In that statement the South African Central Drug Authority said:

> "The national drug master plan emphasises the importance of an integrated approach to supply reduction, demand reduction and harm reduction strategies for combatting alcohol, tobacco, cannabis and other psychoactive substance use and abuse in SA. For any particular substance the balance between these three strategies and the precise nature of the approach should be evidence based.
>
> *An assessment of currently available data in other countries indicates that alcohol is the substance that causes the most individual and societal harm and is therefore key to put particular efforts into implementing the most evidence based policies and interventions for combatting such harm. This would encompass addressing a range of upstream drivers of alcohol use as well as prevention and intervention efforts.*
>
> Efforts at harm reduction have been particularly poorly resourced in South Africa and given the enormous profits made by the liquor industry there is a need and obligation for this industry to be substantially more involved in evidence based harm reduction efforts.
>
> In terms of cannabis, local schools survey data suggests high rates of experimentation during early adolescence; hence evidence based interventions that include a strong focus on harm reduction are also needed in this population which comprises a large proportion of South Africans.
>
> *There are few data to indicate that supply reduction via criminalisation is effective in reducing cannabis abuse. At the same time there are insufficient data to indicate that*

[75] Id at para 82.

[76] At 569.

> *the legalisation of cannabis would not be harmful. The immediate focus should therefore be decriminalisation rather than legalisation.*
> With regard to medical marijuana products based on the ingredients of the cannabis plants should undergo standard evaluation by the Medicines Control Council to assess their benefits and risks with treatment of particular medical conditions."[77].

Two points made in this statement need to be emphasised. The first is that the South African Central Drug Authority said that an assessment of available data in other countries indicates, *inter alia,* that, among alcohol, tobacco and cannabis "alcohol causes the most individual and social harm …". The second point is that the immediate focus should be on decriminalisation.

[79] The High Court's conclusion was also influenced by, among others, the fact that there are many democratic societies based on freedom, equality and human dignity that have either legalised or decriminalised possession of cannabis in small quantities for personal consumption.[78] These are reflected in an addendum to this judgment. The addendum has the name of the jurisdiction, the legislation involved and the year in which the decriminalisation or legalisation, as the case may be, occurred. The addendum reflects 33 jurisdictions. They include:

(a) Austria where decriminalisation or legalisation occurred in 2016 through the Narcotic Substances Act SMG - Suchtmittelgesetz of 1998;

(b) Capital territory in Australia where decriminalisation or legalisation took place in 1992 through the Drugs of Dependence Act 1989;

(c) Northern territory in Australia where decriminalisation or legalisation occurred in 1996 through the Drugs of Dependence Act 1990;

[77] High Court Judgment above n 4 para 59.

[78] Id paras 85-8

(d) Canada where legalisation or decriminalisation occurred in 2018;

(e) Chile where decriminalisation or legalisation occurred in 2007 through law 20 000.00;

(f) Czech Republic where decriminalisation or legalisation occurred in 2010 through Government decree 467/2009;

(g) Portugal where decriminalisation or legalisation occurred in 2000 through Law 30/2000 - Art 2;

(h) Switzerland where decriminalisation or legalisation occurred in 2013 through The Federal Narcotics and Psychotropic Substances Act (BetmG; SR 812.121) of 1951;

(i) California where legalisation occurred in 2016;

(j) Uruguay where legalisation occurred in 2013;

(k) Spain where decriminalisation or legalisation occurred in 2015 through Law 1/1992, Art 25-28; and

(l) New York where legalisation or decriminalisation took place in 2014.

[80] In the jurisdictions referred to above and in others included in the addendum, different amounts have been fixed as "small amounts". In the present case, like the Judge in the High Court, I would leave the determination of the amount to Parliament.

[81] In *Prince II* this Court, *inter alia*, said that the harmful effect of cannabis which the prohibition sought to prevent was the psychological dependence that cannabis has

the potential to produce.[79] This Court pointed out that on the medical evidence on record in that case there was no indication of the amount of cannabis that must be consumed in order to produce such harm.[80] In *Prince II* this Court also stated that on the medical evidence on record in that case there could be no question that uncontrolled consumption of cannabis, especially when consumed in large doses posed a risk of harm to the user.[81] However, in the minority judgment in *Prince II*, Ngcobo J pointed out that on the medical evidence on record it was "equally clear that there is a level of consumption [of cannabis] that is safe in that it is unlikely to pose any risk of harm. The medical evidence on record is silent on what that level of consumption is. Nor is there any evidence suggesting that it would be impossible to regulate the consumption of cannabis by restricting its consumption to that safe level. All that the medical evidence on record tells us is that . . . while 'prolonged heavy use or less frequent use of a more potent preparation are associated with many different problems', 'one joint of dagga or even a few joints' will not cause any harm."[82]

[82] Counsel for the State referred to various international agreements to which South Africa is a signatory and submitted that South Africa is obliged to give effect to these international agreements. The answer to the submission is that South Africa's international obligations are subject to South Africa's constitutional obligations. The Constitution is the supreme law of the Republic and, in entering into international agreements, South Africa must ensure that its obligations in terms of those agreements are not in breach of its constitutional obligations. This Court cannot be precluded by an international agreement to which South Africa may be a signatory from declaring a statutory provision to be inconsistent with the Constitution. Of course, it is correct that, in interpreting legislation, an interpretation that allows South Africa to comply with its international obligations would be preferred to one that does not, provided this does not strain the language of the statutory provision. Before I conclude the

[79] *Prince II* above n 52 at para 26.

[80] Id.

[81] Id para 61.

[82] Id.

justification analysis required by section 36 of the Constitution, it is necessary to deal with a few issues. These are section 5(b) of the Drugs Act, "purchasing" of cannabis, section 22A(10) of the Medicine Act, section 40(1)(h) of the Criminal Procedure Act[83] as well as the application for leave to cross-appeal.

Section 5(b) of the Drugs Act

[83] One of the sections referred to in the order of the High Court as a section that contains provisions declared by that Court as constitutionally invalid was section 5(b) of the Drugs Act. That provision prohibits anyone from dealing in any dangerous dependence producing substance or any undesirable dependence–producing substance. Those include cannabis. The order of the High Court said in effect that the provisions of section 5(b) of the Drugs Act were "declared inconsistent with the Constitution of the Republic of South Africa Act 108 of 1996 and invalid, *only to the extent that they prohibit the use of cannabis by an adult in private dwellings where the possession, purchase or cultivation of cannabis for personal consumption by an adult*…" In its judgment, the High Court did not anywhere discuss dealing in cannabis nor did it discuss the activity of cultivation of cannabis. Even in paragraph 2 of its judgment where the High Court stated what the case was about, it did not refer to the issue of dealing in cannabis or the cultivation of cannabis.

[84] The High Court did not give any reasons why section 5(b) could not be said to constitute a reasonable and justifiable limitation of the right to privacy. However, the definition of the phrase "deal in" in section 1 of the Drugs Act throws light on why the High Court may have declared section 5(b) constitutionally invalid to the extent that it declared it. The definition of the phrase "deal in" provides in part that dealing in includes, in relation to drug, "the performance of any activity in connection with" the "cultivation…" of a dangerous dependence producing substance or an undesirable dependence producing substance. When section 5(b) is read with the definition of the phrase "deal in" in section 1 of the Drugs Act, one of its effects is that the

[83] 51 of 1977.

performance of any activity in connection with the cultivation by an adult of cannabis in a private place for his or her personal consumption in private is criminalised.

[85] The issue of the cultivation of cannabis in private by an adult for personal consumption in private should not be dealt with on the basis that the cultivation must be in a dwelling or private dwelling. It should be dealt with simply on the basis that the cultivation of cannabis by an adult must be in a private place and the cannabis so cultivated must be for that adult person's personal consumption in private. An example of cultivation of cannabis in a private place is the garden of one's residence. It may or may not be that it can also be grown inside an enclosure or a room under certain circumstances. It may also be that one may cultivate it in a place other than in one's garden if that place can be said to be a private place.

[86] I am of the view that the prohibition of the performance of any activity in connection with the cultivation of cannabis by an adult in private for his or her personal consumption in private is inconsistent with the right to privacy entrenched in the Constitution and is constitutionally invalid. The reasons for this conclusion are the same as those given in this judgment as to why the prohibition of the use or possession of cannabis by an adult in private for his or her personal consumption in private is inconsistent with the right to privacy and, therefore, invalid. Therefore, to that extent, section 5(b) read with the definition of the phrase "deal in" in section 1 of the Drugs Act is constitutionally invalid.

"Purchase"

[87] It will have been seen from the order of the High Court that the provisions that were declared inconsistent with the Constitution included provisions that prohibited the purchase of cannabis. At this stage it is necessary to deal with the issue of whether the order of the High Court should be confirmed in so far as it relates to provisions of the sections referred to therein that were said to prohibit the "purchase" of cannabis.

[88] Although the provisions that the order of the High Court invalidated included provisions that prohibit the purchase of cannabis, in its judgment the High Court did not anywhere advance reasons why those provisions could not be said to constitute a reasonable and justifiable limitation of the right to privacy. A purchaser of cannabis would be purchasing it from a dealer in cannabis. Therefore, if this Court were to confirm the order declaring invalid provisions that prohibit the purchase of cannabis, it would, in effect, be sanctioning dealing in cannabis. This the Court cannot do. Dealing in cannabis is a serious problem in this country and the prohibition of dealing in cannabis is a justifiable limitation of the right to privacy. I will, therefore, not confirm that part of the order of the High Court because we have no intention of decriminalising dealing in cannabis.

Section 22A(10)

[89] Section 22A(10) is also another section that was referred to in the order of the High Court. The order of the High Court declared section 22A(10) inconsistent with the Constitution and, therefore, constitutionally invalid to the extent that it prohibits the use, possession, purchase or cultivation of in effect cannabis by an adult in a private dwelling for personal consumption. Section 22A(10) has been quoted above. It does not anywhere refer to the use, possession, purchase or cultivation. It prohibits the sale and administration of, among others, cannabis for any purpose other than medicinal purposes unless one of the exceptions given in the provision applies. In the order of the High Court there is no reference to the sale or administration of cannabis. There is mention of purchase but purchase is mentioned elsewhere as well.

[90] Since there is no reference in the order of the High Court to any activity prohibited by section 22A(10) nor are there reasons in the judgment of the High Court why section 22A(10) was declared constitutionally invalid, I propose not to confirm the part of the order of the High Court that relates to it. In any event, no case relating to the administration of cannabis seems to have been made out in Mr Prince's affidavit in the High Court.

Section 40(1)(h) of the Criminal Procedure Act

[91] It is necessary to deal with section 40(1)(h) of the Criminal Procedure Act. It reads:

> "40. Arrest by peace officer without warrant
>
> (1) A peace officer may without warrant arrest any person-
>
> …
>
> (h) who is reasonably suspected of committing or of having committed an offence under any law governing the making, supply, possession or conveyance of intoxicating liquor or of dependence-producing drugs or the possession or disposal of arms or ammunition."

[92] This provision was not one of the provisions that the High Court declared in its order to be inconsistent with the Constitution to the extent indicated in its order. However, it was one of the provisions that the applicants in that Court sought to have declared constitutionally invalid. There is nothing in the judgment of the High Court that indicates why the High Court decided not to declare section 40(1)(h) constitutionally invalid.

[93] Section 40(1)(h) simply confers power on a peace officer to arrest without a warrant any person who is reasonably suspected of committing or having committed an offence under any law governing, for example, the "possession or conveyance. . .of dependence-producing drugs." One of the effects of this judgment is that it is no longer a criminal offence for an adult to use or be in possession of cannabis in private for his or her own personal consumption in private. That means that, after the handing down of this judgment, there will be no law governing possession of cannabis by an adult in private for his or her own personal consumption in private that makes such possession a criminal offence. If that conduct will no longer be a criminal offence, there can be no basis for a peace officer to reasonably suspect an adult in that situation to be committing or to have committed an offence by being in possession of cannabis. There is therefore no need for this provision to be declared constitutionally invalid.

[94] It seems to me that, when all of the above is taken into account including the increasing number of open and democratic societies in which possession of cannabis for personal use has either been legalised or decriminalised and the inadequate evidence put up by the State, the conclusion is inevitable that the State has failed to show that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

Application for leave to cross-appeal: Limitation of case to right to privacy

[95] The High Court decided this matter solely on the basis of the right to privacy. Mr Prince criticised this. He submitted that it should have based its conclusion on the infringement of other rights as well on which he said that he and his co-respondents (co-applicants or plaintiffs in the High Court) had relied. For this reason they sought leave to cross-appeal against the High Court's failure to declare that the impugned provisions are also invalid in the light of those other rights. The other rights included the right to equality, the right to human dignity and others. We were urged to decide this matter on the basis of the infringement of the other rights as well.

[96] In my view, it is not in the interests of justice that we go beyond the right to privacy in deciding this matter because the other rights were not properly canvassed in Mr Prince's founding affidavit in the High Court. This is not to say that they were not alluded to at all. It is to say that more needed to have been put into the affidavit about how the impugned provisions infringed those rights than was done. In regard to the infringement of other rights, Mr Prince simply listed a number of rights and said that "the blanket prohibition on cannabis" violated those rights without saying how each one of those rights was infringed by the impugned provisions.

[97] Mr Jeremy David Acton, Mr Ras Menelek Barend Wentzel and Ms Caro Leona Hennegin as well as Mr Jonathan David Rubin had all instituted actions in the High Court. Therefore, whatever they may have alleged in the particulars of claim was not evidence. In the circumstances, I cannot fault the High Court for deciding the

case on the basis of the right to privacy only. Leave to cross-appeal in regard to this aspect of the matter is refused.

Application for leave to cross-appeal: Limitation of right to privacy to home or private dwelling

[98] Paragraph 1 of the order of the High Court contains the phrase "in private dwellings". Paragraph 3 of the order contains the phrase "in a private dwelling". Paragraph 3 of the High Court order throws light on the introductory part of paragraph 1. The High Court's intention was to declare as inconsistent with the Constitution the provisions of the sections referred to in the order in so far as they related to the use, possession, purchase and cultivation of cannabis in a home or dwelling for personal consumption of an adult. The effect of the order of the High Court is that an adult would not be committing any crime by using or possessing or cultivating cannabis in a private dwelling or in a home for his or her consumption but the moment he or she steps out of the private dwelling or home, he or she would be committing a criminal offence. This means that an adult who has cannabis in his or her pocket for his or her personal consumption within the boundaries of a private dwelling or home would not be committing an offence but he or she would be committing an offence if, for example, he or she were to step outside of the boundary of the home or private dwelling while such cannabis remained in his or her pocket and he or she possesses it for his or her personal consumption.

[99] Mr Prince and those who were applicants or plaintiffs in the High Court have applied for leave to cross-appeal against the High Court's decision to confine its order to the use and possession of cannabis at home or in a private dwelling. In their application for leave to cross-appeal they, among other things, said:

> "617 The [applicants] also make appeal against the judgment in terms of section 14, in that it clearly only respected the section 14(a) aspect of the *home* but entirely disregarded the right to privacy of the 'PERSON' of the Cannabis user."

They went further and said:

> "8.4 The High Court erred in only permitting the possession of Cannabis by adults at HOME and thus left them vulnerable to continued prosecution without a scientifically legitimate reasons…"

> "8.5 The High Court judgment did not recognise that our right to Human Dignity, and our right to Freedom of Movement RETAINS a personal 'sanction' as we move in ANY chosen space, whether public or private or communal, in relation to our private carrying of Cannabis on my person in any place I choose."

[100] It seems to me that, indeed, there was no persuasive reason why the High Court confined its declaration of invalidity to the use or possession or cultivation of cannabis at a home or in a private dwelling. In my view, as long as the use or possession of cannabis is in private and not in public and the use or possession of cannabis is for the personal consumption of an adult, it is protected. Therefore, provided the use or possession of cannabis is by an adult person in private for his or her personal consumption, it is protected by the right to privacy entrenched in section 14 of our Constitution.

Remedy

[101] Since I have concluded that the limitation is not reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, an order will have to be made declaring the relevant provisions constitutionally invalid to the extent that they criminalise the use or possession of cannabis in private by an adult for his or her personal consumption in private. Indeed, that order should also declare invalid the provisions of section 5(b) read with definition of "deal in" in section 1 of the Drugs Act to the extent that they prohibit the cultivation of cannabis by an adult in private for his or her own consumption in private.

Should the order of invalidity operate with retrospective effect?

[102] Another issue which must be decided is whether the order of invalidity that we make in this matter should operate with retrospective effect. I think it should not because it could have a disruptive effect on, and, cause uncertainty in, our criminal justice system. Accordingly, the order of invalidity in this case will operate prospectively.

Should the order of invalidity be suspended?

[103] The next question is whether the operation of the order of invalidity should be suspended. In my view, it should be suspended in order to afford Parliament an opportunity to correct the constitutional defect in the impugned provisions as identified in this judgment. If the order of invalidity were to come into operation immediately, that could cause many challenges in the criminal justice system in the country. With regard to the period of suspension, the High Court expressed the view that 24 months would be an appropriate period of suspension. I consider 24 months to be an appropriate period of suspension in this case.

Should we grant interim relief?

[104] The next question to consider is whether we should grant interim relief that will operate during the period of the suspension of the declaration of invalidity. If at all possible, this Court should grant interim relief so as to ensure that the applicants and other people in circumstances similar to theirs are granted effective relief. In this case, if no interim relief is granted, there are many adult people who will continue to be arrested by the police and who will face criminal charges and, if convicted, possible imprisonment for the use or possession or cultivation of cannabis in private for personal consumption in private – something that this judgment says nobody should be arrested for or charged with.

[105] It seems to me that we should grant interim relief. The interim relief we should grant should be a reading-in. We should read a new sub-paragraph (vii) into section 4(b) of the Drugs Act. The new sub-paragraph (vii) should read:

> "(vii) ,in the case of an adult, the substance is cannabis and he or she uses it or is in possession thereof in private for his or her personal consumption in private."

After the reading-in, the new sub-paragraph (vii), which is in italics, would read like this:

> "No person shall use or have in his possession—
>
> . . .
>
> (b) any dangerous dependence-producing substance or any undesirable dependence-producing substance,
>
> unless
>
> . . .
>
> *(vii) ,in the case of an adult, the substance is cannabis and he or she uses it or is in possession thereof in private for his or her personal consumption in private.*"

[106] As to section 5(b) of the Drugs Act, it seems to me that we should read into the definition of the phrase "deal in" in section 1 of the Drugs Act after the word "cultivation" but before the comma the words "other than the cultivation of cannabis by an adult in a private place for his or her personal consumption in private". With this reading-in, which is italics, the definition of the phrase "deal in" would read:

> " 'deal in', in relation to a drug, includes performing any act in connection with the transshipment, importation, cultivation *other than the cultivation of cannabis by an adult in a private place for his or her personal consumption in private*, manufacture, supply, prescription, administration, sale, transmission or exportation of the drug."

[107] As to section 22A(9)(a)(i) of the Medicines Act, we should read the following words and commas into that provision after the word "unless":

> "in the case of cannabis, he or she, being an adult, uses it or is in possession thereof in private for his or her personal consumption in private or, in any other case,"

With the reading-in, which is in italics, section 22A(9)(a)(i) would read like this:

> "(9)(a) No person shall—
>
> "(i) acquire, use, possess, manufacture or supply any Schedule 7 or Schedule 8 substance, or manufacture any specified Schedule 5 or Schedule 6 substance unless, *in the case of cannabis, he or she, being an adult, uses it or is in possession thereof in private for his or her personal consumption in private or, in any other case*, he or she has been issued with a permit by the Director-General for such acquisition, use, possession, manufacture, or supply: Provided that the Director-General may, subject to such conditions as he or she may determine, acquire or authorise the use of any Schedule 7 or Schedule 8 substance in order to provide a medical practitioner, analyst, researcher or veterinarian therewith on the prescribed conditions for the treatment or prevention of a medical condition in a particular patient, or for the purposes of education, analysis or research."

[108] The effect of the reading-in adopted above is that whenever the impugned provisions prohibit the use or possession or cultivation of cannabis, an exception is created with the result that the use or possession of cannabis in private or cultivation of cannabis in a private place for personal consumption in private is no longer a criminal offence. All the time this is so only in respect of an adult and not a child. This judgment does not confine the permitted use or possession or cultivation of cannabis to a home or a private dwelling. This is because there are other places other than a person's home or a private dwelling where the prohibition of the use or possession or cultivation of cannabis would be inconsistent with the right to privacy if the use or possession or cultivation of cannabis was by an adult in private for his or

her personal consumption in private. Using the term "in private" instead of "at home" or "in a private dwelling" is preferable.

[109] The effect of the above reading-in is the following:

(a) an adult person may, use or be in possession of cannabis in private for his or her personal consumption in private.

(b) the use, including smoking, of cannabis in public or in the presence of children or in the presence of non-consenting adult persons is not permitted.

(c) the use or possession of cannabis in private other than by an adult for his or her personal consumption is not permitted.

(d) The cultivation of cannabis by an adult in a private place for his or her personal consumption in private is no longer a criminal offence.

[110] In determining whether or not a person is in possession of cannabis for a purpose other than for personal consumption, an important factor to be taken into account will be the amount of cannabis found in his or her possession. The greater the amount of cannabis of which a person is in possession, the greater the possibility is that it is possessed for a purpose other than for personal consumption. Where a person is charged with possession of cannabis, the State will bear the onus to prove beyond a reasonable doubt that the purpose of the possession was not personal consumption.

[111] The above reading-in means that, if a police officer finds a person in possession of cannabis, he or she may only arrest the person if, having regard to all the relevant circumstances, including the quantity of cannabis found in that person's possession, it can be said that there is a reasonable suspicion that a person has committed an offence

under section 40(1)(b) or (h) of the Criminal Procedure Act.[84] I think that the references to possession of cannabis, "for personal use," or "for personal consumption" help to ensure that we do not have to specify the amount or quantity of cannabis that may be possessed. We only need to say that the amount that may be possessed is an amount for personal consumption.

[112] The High Court had this to say about the distinction between the use or possession of cannabis for personal consumption and the use or possession thereof for other purposes:

> "[109] In this connection the 1988 Convention against Illicit Traffic and Narcotic Drugs and Psychotropic Substances establishes a fundamental distinction between 'the possession, purchase or cultivation of narcotic drugs or psychotropic substances for personal consumption (article 32 (2)) from trafficking and dealing conduct (article 3(1), conduct which is described as 'serious'). This distinction is reflected in the differential regulation in the Drugs Act of possession for personal use (s 4) and dealing (s 5). The Drugs Act recognises, for example, that when it comes to possession for purposes of personal use, smaller quantities are involved. Hence, the Act created a presumption that a person found in possession of cannabis exceeding the prescribed mass was presumed to be dealing. Section 21(1)(a)(i) of the Drugs Act presumes that a person possessing more than 115 grams of cannabis is dealing. The provision has, however as noted, been declared unconstitutional in *S v Bhulwana; S v Gwadiso* 1996 (1) SA 388 (CC). The quantity of cannabis in a person's possession constitutes an objective, established and readily enforceable basis upon which to distinguish possession for personal consumption from dealing or other, more serious conduct. Whether the existing prescribed quantity should remain applicable

[84] Section 40(1)(a) and (h) reads:

> "40. Arrest by peace officer without warrant
>
> (1) A peace officer may without warrant arrest any person—
>
> (a) who commits or attempts to commit any offence in his presence;
>
> …
>
> (h) who is reasonably suspected of committing or of having committed an offence under any law governing the making, supply, possession or conveyance of intoxicating liquor or of dependence-producing drugs or the possession or disposal of arms or ammunition".

> in the light of the finding of this Court is for the legislature to determine, hence any reading in of words into the Drugs Act is not an appropriate approach in this case."[85]

Of course, I do not agree with the view in the last sentence that any reading-in of words into the Drugs Act would be inappropriate unless, of course, the High Court was referring to a reading-in of the amount of cannabis that would be for personal consumption in which case I would agree.

[113] At a practical level, a question that arises is: if a police officer finds someone in possession of cannabis, how will he or she know whether that person is in possession of that cannabis for personal consumption? Will he or she rely on that person's word? Will he or she ask questions aimed at establishing that? Obviously, a police officer will ask the person questions but his or her answers will not be decisive. The police officer will need to have regard to all the relevant circumstances and take a view whether the cannabis possessed by a person is for personal consumption. If he or she takes the view, on reasonable grounds, that that person's possession of cannabis is not for personal consumption, he or she may arrest the person. If he or she takes the view that the cannabis in the person's possession is for that person's personal consumption, he or she will not arrest him or her.

[114] It is true that there will be cases where it will be clear from all the circumstances that the possession of cannabis by a person is for personal use or consumption. There will also be cases where it will be clear from all the circumstances that the possession of cannabis by a person is not or cannot be for personal consumption or use. Then, there will be cases where it will be difficult to tell whether the possession is for personal consumption or not. In the latter scenario a police officer should not arrest the person because in such a case it would be difficult to show beyond reasonable doubt later in court that that person's possession of cannabis was not for personal consumption.

[85] High Court Judgment above n 4 at para 109.

[115] The above reading-in may be criticised on the basis that it does not provide either a police officer or anyone with certainty as to when the possession of cannabis can be said to have crossed the line of personal use or consumption and will, therefore, have become prohibited. However, that criticism can equally be levelled at our law in regard to, for example, the crime of negligent driving. A police officer who sees a car that is being driven in a certain manner forms a view whether or not the driver of that car is driving negligently. That view will be based on the police officer's observation of the manner in which the car is being driven.

[116] If the police officer takes the view that the driver is not driving negligently, he or she will not arrest the driver. If, on the other hand, the police officer takes the view that the car is being driven negligently and he or she thinks that his belief is based on reasonable grounds, he or she may arrest the driver for negligent driving. That driver will be charged with negligent driving and the Court will decide whether he or she was driving negligently. If the Court concludes that the State has proved beyond reasonable doubt that the driver was driving negligently, it will convict the driver of negligent driving. Whether or not a driver is driving or drove his or her car negligently depends upon whether a reasonable driver in his or her position could have driven the way he drove. In other words, it depends on whether he or she has fallen short of the standard of driving expected from a reasonable driver in his or her position.

[117] To the extent that the reading-in I have adopted in this judgment may be criticised on the basis that it creates uncertainty, the uncertainty that it may create is no worse than the uncertainty in our law connected with the crime of negligent driving. Just as a police officer would look at the facts in regard to how a driver is driving his or her motor vehicle and take a view whether the driver should be arrested for negligent driving, so, too, will a police officer take a view of the facts in the case of possession of cannabis whether or not the person concerned is in possession of the cannabis for personal consumption in private. If he takes the view that it is not being

possessed for personal consumption or use, he or she will arrest the person and cause him to be charged criminally. If, however, he is satisfied that the person is in possession of cannabis for personal consumption or use, he or she will not arrest that person.

[118] There are statutory offences which also require a police officer to take a view on given facts and then decide whether to arrest a person or not. In those cases, too, ultimately, the Court decides.

[119] Section 36 of the General Law Amendment Act[86] provides:

> "Any person who is found in possession of any goods, other than stock or produce as defined in section one of Stock Theft Act, 1959 (Act 57 of 1959), in regard to which there is reasonable suspicion that they have been stolen and is unable to give a *satisfactory account of such possession*, shall be guilty of an offence and liable on conviction to the penalties which may be imposed on a conviction of theft." (emphasis added).

[120] Sections 2 and 3 of the Stock Theft Act[87] provides:

> "2.Failure to give satisfactory account of possession of stock or produce
>
> Any person who is found in possession of stock or produce in regard to which there is reasonable suspicion that it has been stolen and is *unable to give a satisfactory account of such possession* shall be guilty of an offence.
>
> 3.Absence of reasonable cause for believing stock or produce properly acquired
>
> (1) Any person who, in any manner, otherwise than at a public sale, acquires or receives into his or her possession from any other person stolen stock or stolen produce without having reasonable cause for believing, at the time of such acquisition or receipt, that such stock or produce is the property of the person

[86] 62 of 1955.

[87] 57 of 1959.

> from whom he or she acquires or receives it or that such person has been duly authorized by the owner thereof to deal with it or dispose of it shall be guilty of an offence.
>
> (2) In the absence of evidence to the contrary which raises a reasonable doubt, proof of possession as contemplated in subsection (1) shall be sufficient evidence of the absence of reasonable cause."

[121] It is clear from these provisions that an essential element of the offence of possession of stolen goods is that the person found in possession of the goods must be "unable to give a satisfactory account of such possession." If he or she is able to give a satisfactory account of his or her possession of the goods, his or her possession of the goods does not constitute a criminal offence. If, however, he or she is unable to give a satisfactory account of his or her possession of the goods, his or her possession of the goods is a criminal offence provided that the other elements of the offence are satisfied.

[122] Before a police officer arrests a person in connection with the crime created by section 36, he or she must first ask the person for an account of his or her possession of the goods. That means that the person would give his or her account of the possession of the goods to the police officer and the police officer will have to weigh it up together with all other information and decide whether the account is satisfactory or not. If the police officer thinks that the account is satisfactory, he or she would not arrest the person. If he or she thinks that the account is unsatisfactory, he or she would arrest the person and, ultimately, the court would decide at the trial whether the account is satisfactory or not.

[123] To me, that is no different from what will have to happen on the above reading-in if a police officer finds a person in possession of cannabis and he or she thinks it is not for personal consumption. He or she will ask the person such questions as may be necessary to satisfy himself or herself whether the cannabis he or she is in possession of is for personal consumption. If, having heard what the person has to say, the

police officer thinks that the explanation is not satisfactory, he or she may arrest the person. Ultimately, it will be the court that will decide whether the person possessed the cannabis for personal consumption.

[124] Section 36 of the General Law Amendment Act and section 2 and 3 of the Stock Theft Act are not the only examples that are based on existing statutory provisions. In terms of the Liquor Act[88] the sale of liquor by a person who is not a holder of a liquor licence is a criminal offence. Section 167 of that Act then provides as follows in so far as it is relevant:

> "167. Evidence in any criminal proceedings that any person who is not the holder of a licence –
>
> …
>
> (c) had on his or her premises *more liquor than was reasonably required for his or her personal use* and *for the use of any person residing thereon*; or
>
> (d) bought or procured or had in his or her possession or custody or under his or her control more liquor than *was reasonably necessary for consumption by himself or herself, his or her family or his or her bona fide* employees or guests,
>
> shall be *prima facie* proof of sale of liquor by the first mentioned person."

From this it can be seen that the Liquor Act already deals with a situation where, initially a police officer must, in a particular case, take a view whether a person had more of something than is reasonably required for his or her personal use. That is liquor.

[125] There is also paragraph 53 of the Eighth Schedule of the Income Tax Act[89]. It reads:

[88] 59 of 2003.

[89] 58 of 1962.

"53. Personal-use assets

(1) A natural person or a special trust must disregard a capital gain or capital loss determined in respect of the disposal of a personal-use asset as contemplated in subparagraph (2).

(2) *A personal-use asset is an asset of a natural person or a special trust that is used mainly for purposes other than the carrying on of a trade*.

(3) *Personal use assets do not include-*

(a) a coin made mainly from gold or platinum of which the market value is mainly attributable to the material from which it is minted or cast;

(b) immovable property;

(c) an aircraft, the empty mass of which exceeds 450 kilograms;

(d) a boat exceeding ten metres in length;

(e) a financial instrument;

(f) any fiduciary, usufructuary or other like interest, the value of which decreases over time;

(g) any contract in terms of which a person, in return for payment of a premium, is entitled to policy benefits upon the happening of a certain event and includes a reinsurance policy in respect of such a contract, but excludes any short-term policy contemplated in the Short-term Insurance Act;

(h) any short-term policy contemplated in the Short-term Insurance Act to the extent that it relates to any asset which is not a personal-use asset; and

(i) a right or interest of whatever nature to or in an asset envisaged in items (a) to (h).

(4) For the purposes of subparagraph (2), an asset of a natural person or a special trust to whom an allowance is or was paid or payable in respect of the use of that asset *for business purposes, must be treated as being used mainly for purposes other than the carrying*".

[126] The regulations to the National Environment Management: Biodoversity Act[90], define a possession permit as "a permit for keeping or conveying a specimen of a

[90] 10 of 2004.

listed threatened or protected species for *personal use* in a person's possession without carrying out any other restricted activity".[91]

[127] I have addressed above the question of how a police officer will know whether an adult who is in possession of cannabis is in possession thereof for personal consumption or not. In regard to cultivation the question also arises as to how a police officer who comes across cannabis that is being grown in a garden or in a private place will know whether the adult person growing it is growing it for his or her personal consumption. In my view all the considerations I have discussed above in relation to how a police officer will determine whether cannabis is possessed for personal consumption apply with equal force to the cultivation of cannabis in a private place for personal consumption and they need not be repeated here.

[128] The reading-in that I have adopted in this judgment will apply until such time that Parliament cures the constitutional defect. If Parliament fails to cure the constitutional defect within the period of the suspension of the order of invalidity, the reading-in will continue to be part of the legislation.

[129] In all the circumstances I make the following order:

1. The application to stay these proceedings is dismissed.
2. The application brought by King Adam Kok V, the Griqua Nation, Chief Petros Vallbooi and the /Auni San People for leave to intervene as parties is dismissed.
3. Leave to appeal is granted.
4. Leave to cross-appeal is granted.
5. The appeal is dismissed.
6. The cross-appeal is upheld in part to the extent that the reference in the order of the High Court to "in a private dwelling" or "in private

[91] GN R152 of 2007 of Act 10 of 2004.

dwellings" is replaced with "in private" or in the case of cultivation, "in a private place".

7. The order of the Western Cape Division of the High Court is confirmed only to the extent reflected in this order and is not confirmed in so far as it is not reflected in this order.
8. To the extent that the order of the Western Cape Division of the High Court purported to declare as constitutionally invalid provisions of sections referred to in that order that prohibit the purchase of cannabis, that part of the order is not confirmed.
9. To the extent that the order of the Western Cape Division of the High Court excluded from the ambit of its order of the declaration of invalidity provisions of the sections referred to in that order that prohibit the use or possession of cannabis in private in a place other than a private dwelling by an adult for his or her own personal consumption in private, that part of the order is not confirmed.
10. It is declared that, with effect from the date of the handing down of this judgment, the provisions of sections 4(b) of the Drugs and Drug Trafficking Act 140 of 1992 read with Part III of Schedule 2 of that Act and the provisions of section 22A(9)(a)(i) of the Medicines and Related Substances Control Act 101 of 1965 read with Schedule 7 of GN R509 of 2003 published in terms of section 22A(2) of that Act are inconsistent with right to privacy entrenched in section 14 of the Constitution and, therefore, invalid to the extent that they make the use or possession of cannabis in private by an adult person for his or her own consumption in private a criminal offence.
11. It is declared that, with effect from the date of the handing down of this judgment, the provisions of section 5(b) of the Drugs and Drug Trafficking Act 140 of 1992 read with Part III of Schedule 2 of that Act and with the definition of the phrase "deal in" in section 1 of the Drugs and Drug Trafficking Act 140 of 1992 are inconsistent with the right to privacy entrenched in section 14 of the Constitution and, are, therefore,

constitutionally invalid to the extent that they prohibit the cultivation of cannabis by an adult in a private place for his or her personal consumption in private.

12. The operation of the orders in 10 and 11 above is hereby suspended for a period of 24 months from the date of the handing down of this judgment to enable Parliament to rectify the constitutional defects.

13. During the period of the suspension of the operation of the order of invalidity:

(a) section 4(b) of the Drugs and Drug Trafficking Act 140 of 1992 shall be read as if it has sub-paragraph (vii) which reads as follows:

> "(vii) , in the case of an adult, the substance is cannabis and he or she uses it or is in possession thereof in private for his or her personal consumption in private."

(b) the definition of the phrase "deal in" in section 1 of the Drugs and Drug Trafficking Act 140 of 1992 shall be read as if the words "other than the cultivation of cannabis by an adult in a private place for his or her personal consumption in private" appear after the word "cultivation" but before the comma.

(c) the following words and commas are to be read into the provisions of section 22A(9)(a)(i) of the Medicines and Related Substances Control Act 101 of 1965 after the word "unless":

> ", in the case of cannabis, he or she, being an adult, uses it or is in possession thereof in private for his or her personal consumption in private or, in any other case,"

14. The above reading-in will fall away upon the coming into operation of the correction by Parliament of the constitutional defects in the statutory provisions identified in this judgment.
15. Should Parliament fail to cure the constitutional defects within 24 months from the date of the handing down of this judgment or within an extended period of suspension, the reading-in in this order will become final.
16. Subject to paragraph 17 below, no order as to costs is made.
17. The Minister of Justice and Constitutional Development must pay all disbursements and expenses reasonably incurred by Mr Gareth Prince, Mr Jeremy David Acton, Mr Ras Menelek Barend Wentzel and Ms Caro Leona Hennegin in opposing the appeal and in confirmatory proceedings.

	Country/Jurisdiction	Applicable Legislation	Year of decriminalisation or legalisation
1.	Austria	Narcotic Substances Act SMG - Suchtmittelgesetz of 1998	2016
2.	Australia (Capital territory)	Drugs of Dependence Act 1989	1992
3.	Australia (Northern territory)	Drugs of Dependence Act 1990	1996
4.	Australia (South Australia)	The Controlled Substances Act 1984. Expiation of Offences Act 1996 (SA) s 15(4).	1987
5.	Canada	Legalised with the Cannabis Bill (Bill C – 45)	2018
6.	Chile	LEY NUM. 20.000	2007
7.	Czech Republic	Government decree 467/2009	2010
8.	Estonia	The Act on Narcotic Drugs and Psychotropic Substances Act 1997 – Art 31 & Art 151 Penal Code – Ar184	2002
9.	Jamaica	The Dangerous Drugs (Amendment) Act 2015	2015
10.	Portugal	Law 30/2000 - Art 2	2000
11.	Spain	Law 1/1992, Art 25-28	2015
12.	Switzerland	The Federal Narcotics and Psychotropic Substances Act (BetmG; SR 812.121) of 1951	2013

13.	Alaska (USA)	Case: *Ravin v. State*, 537 P.2d 494 (1975)	Legalised in 2015
14.	California (USA)	The Adult Use of Marijuana Act Proposition 64	Legalised in 2016
15.	Colorado (USA)	The Colorado Amendment 64	Legalised in 2012
16.	Connecticut (USA)	Senate Bill 1014	Legalised in 2014
17.	Delaware (USA)	HB 39	Legalised in 2015
18.	Illinois (USA)	Bill 2228	2016
19.	Maine (USA)	The Maine Marijuana legalisation Act	Legalised in 2016
20.	Massachusetts (USA)	Massachusetts Marijuana Legalisation, Question 4	Legalised in 2016
21.	Maryland (USA)	SB 364	2014
22.	Minnesota (USA)	The Minnesota statute Code 152.01, et seq.	1976
23.	Mississippi (USA)	Code 41-29-101, et seq.; 41-29-139	1978
24.	Missouri (USA)	HB 512	2017
25.	Nevada (USA)	Initiative to Regulate and Tax Marijuana	Legalised in 2017
26.	New York (USA)	New York Penal Law Article 221.	2014
27.	North Carolina (USA)	North Carolina Controlled Substances Act	1977
28.	Ohio (USA)	Ohio Rev. Code Ann. § 2925.11	2016

29.	Oregon (USA)	Measure 91	Legalised in 2014
30.	Washington (USA)	Initiative 502 (I-502)	Legalised in 2012
31.	Rhode Island (USA)	Code 21-28-1.01, et seq	2013
32.	Vermont (USA)	HB.511 (Act 86)	Legalised 2018
33.	Uruguay	Law 19.172	Legalised in 2013

For the Applicants:	T J B Bokaba SC, S Poswa-Lerotholi, P Mhlana and P Jara instructed by the State Attorney, Cape Town.
For the Respondents:	G Prince per se and J D Acton per se.
For the First to Third Intervening Parties:	D Mahon and C Marule instructed by Schindlers Attorneys.
Independent Amicus Curiae:	R Paschke and J Foster.
For the Amicus Curiae:	R S Willis, T R Mafukidze, J A Harwood and K van Heerden instructed by Marshall Attorneys.