

MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT AND OTHERS v PRINCE AND OTHERS 2018 (6) SA 393 (CC)

2018 (6) SA 393

Citation	2018 (6) SA 393 (CC) @
Case No	OCT 108/17 [2018] ZACC 30
Court	Constitutional Court
Judge	Zondo ACJ, Cameron J, Froneman J, Jafta J, Kadhoo-Setiloane AJ, Kollapen AJ, Madlanga J, Mhlantla J, Theron J and Zondi AJ
Heard	September 18, 2018
Judgment	September 18, 2018
Counsel	TJ8 Bokaba SC (with S Poswa-Lerotholi, P Mhlana and P Jara) for the applicants. @ G Prince and JD Aston in person. D Mahon (with C Marule) for the first to third intervening parties. R Paschke (with J Foster) as independent amicus curiae requested by court. S Wills (with TR Mafukidze, JA Harwood and K van Heerden) for the amicus curiae.
Annotations	Link to Case Annotations

Flynote : Sleutelwoorde

Criminal law – Drug offences – Gogga – Possession or cultivation for personal @consumption by adult in private – Statutory prohibition of such conduct constituting unjustified limitation of right to privacy – Impugned provisions declared unconstitutional and invalid to the extent it criminalising use or possession in private or cultivation in private place of cannabis by adult for own personal consumption in private – Constitution, ss 14 and 36(1); Drugs and Drug Trafficking Act 140 of 1992, ss 4(b) and 5(b) read with part III @of sch 2 and in s 1 sv ‘deal in’; Medicines and Related Substances Control Act 101 of 1965, s 22A(9)(a)(i) read with sch 7.

Headnote : Kopnota

The High Court declared certain sections of the Drugs and Drug Trafficking Act 140 of 1992 (Drugs Act) and of the Medicines and Related Substances Control Act 101 of 1965 (Medicines Act) “ inconsistent with the constitutional @right to privacy, 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”. In this case – the Constitutional Court’s confirmatory proceedings – the issue was whether the impugned provisions did limit the right to privacy as held by the High Court and, if so, whether that limitation was reasonable and justifiable in an @open and democratic society based on human dignity, equality and freedom, with due regard to the factors listed in s 36(1) of the Constitution.

Held

The right to privacy entitled an adult person to cultivate, possess or use cannabis in private for one’s personal consumption. Therefore, to the extent that the @impugned provisions criminalised such cultivation, possession or use of cannabis, the High Court correctly concluded that they limited the right to privacy entrenched in s 14 of the Constitution. [See [42], [58] and [86].]
The limitation was not reasonable and justifiable: its purpose was ‘replete with racism’ (see [65]); it was quite invasive (see [66]); available data indicated that alcohol caused more social and individual harm than cannabis (at [78]); and less restrictive means than criminalisation were employed by many @societies based on freedom, equality and human dignity (see [79] and [94]).
The following aspects of the High Court’s declaration would, however, not be confirmed –
• that the impugned provisions were inconsistent with the Constitution to the extent that they prohibited the purchase of cannabis, because that would have the effect of sanctioning dealing in cannabis (see [87] – [88]); s

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• @its findings regarding s 22A(10) of the Medicines Act, because that section does not refer to the use, possession, purchase or cultivation of cannabis but only regulated the sale or administration of, among others, cannabis (see [89]); and
• the confinement of the declaration of invalidity to the use or possession of cannabis at a home or a private dwelling, because as long as its @cultivation, use or possession was in private and not in public and was for the personal consumption of an adult, it was protected (see [90] and [100]).
In addition to the High Court’s order relating to s 5(b) of the Drugs Act, this section would be declared unconstitutional as read with the definition of ‘deal in’ in s 1 of the Drugs Act, to the extent that together they prohibited the cultivation of cannabis by an adult in private for their own consumption. @in private (see [83] – [84] and [101]).
The appropriate remedy was reading-in, operating prospectively, and suspending the declaration of invalidity to give Parliament an opportunity to correct the constitutional defect, together with interim relief to avoid charges and prosecution (see [102] – [104]).
The @reading-in (set out see [105] – [107]) would have the following effect – (a) adult persons may use or be in possession of cannabis in private for their 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 would not be permitted; (c) the use or possession of cannabis in private other than by adults for their personal @consumption would not be permitted; (d) the cultivation of cannabis by adults in a private place for their personal consumption in private would no longer be a criminal offence. [See [109].]

Cases cited

Southern Africa
Bernstein and Others v Bester and Others NNO @ 1996 (2) SA 751 (CC) (1996 (4) BCLR 449; [1996] ZACC 2); applied
Case and Another v Minister of Safety and Security and Others; Curtis v Minister of Safety and Security and Others 1996 (3) SA 617 (CC) (1996 (1) SACR 387; 1996 (3) BCLR 609; [1996] ZACC 7); dicta in paras [91] and [99] applied
Khumalo and Others v Holomisa @ 2002 (5) SA 401 (CC) (2002 (8) BCLR 771; [2002] ZACC 12); dictum in para [27] applied

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JS Bruner



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