CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 36/00

GARRETH ANVER PRINCE	Appellant
versus	
THE PRESIDENT OF THE LAW SOCIETY OF THE CAPE OF GOOD HOPE	First Respondent
THE LAW SOCIETY OF THE CAPE OF GOOD HOPE	Second Respondent
THE SECRETARY OF THE LAW SOCIETY OF THE CAPE OF GOOD HOPE	Third Respondent
THE MINISTER OF JUSTICE	Fourth Respondent
THE ATTORNEY-GENERAL OF THE CAPE OF GOOD HOPE	Fifth Respondent

Heard on : 16 November 2000

Decided on : 12 December 2000

JUDGMENT

NGCOBO J:

Introduction

[1] This matter comes to this Court by way of an appeal from the Supreme Court of Appeal (the SCA). This judgment addresses two questions that arose during the hearing of the matter that need to be answered at this stage of the appeal. The first is whether there is sufficient

evidence in the record to enable this Court to decide the constitutional issue presented; if not, whether this Court should call for further evidence. The second is whether the proceedings in the SCA were a nullity for lack of a quorum.

Background

[2] The appellant, who alleges that he is a practising Rastafari, sought to register his contract of community service with the Law Society of the Cape of Good Hope (the Law Society), the second respondent in this matter, as required by section 5(2) of the Attorneys Act, 1979.[1] The Law Society refused to register his contract because the appellant had two previous convictions for possession of cannabis and had expressed his intention to continue using cannabis, as the practice of the Rastafari religion required him to. It took the view that a person who declares his intention to continue breaking the law is not a fit and proper person to be admitted as an attorney.

[3] The appellant, in motion proceedings brought in the Cape of Good Hope High Court (the High Court), challenged the constitutionality of the decision of the Law Society, alleging that the decision infringed his rights to freedom of religion, to dignity, to pursue the profession of his choice and not to be the subject of unfair discrimination. The Law Society took the view that as long as the possession and use of cannabis remained a criminal offence, and the appellant persisted in his intention to continue using cannabis, he could not be said to be a fit and proper person to be admitted as an attorney.

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1 Act 53 of 1979.

[4] In his heads of argument before the High Court, the appellant, for the first time, raised the constitutionality of the Drugs and Drug Trafficking Act, 1992 (the Drugs Act),[2] which prohibits the use and possession of cannabis.[3] In view of this, it became necessary to serve the papers

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2 Act 140 of 1992.

3 Section 4 reads as follows:

"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

upon the Minister of Justice (the Minister) and the Attorney-General of the Cape of Good Hope (the A-G), the fourth and fifth respondents respectively. Both applied for, and were granted, leave to intervene. Both resisted the application. In his affidavit, the A-G drew attention to the provisions of section 22A(10) of the Medicines and Related Substances Control Act, 1965 (the

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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."

Cannabis is included in the list of "undesirable dependence-producing substances" in part III of schedule 2.

Medicines Act),[4] which contains a similar prohibition.[5]

[5] It is apparent from the affidavit of the Minister that he intervened in his capacity as the

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4 Act 101 of 1965.

5 Section 22A(10) reads as follows:

> "No person shall—
>
> (a) acquire, use, have in his possession, manufacture or import any Schedule 8 substance except for analytical or research purposes and unless a permit for such acquisition, use, possession, manufacture or importation has been issued to him by the Director-General on the recommendation of the council; or
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> (b) acquire, import, collect, cultivate, keep or export any plant or any portion thereof from which any such substance can be extracted, derived, produced or manufactured, unless a permit to acquire, import, collect, cultivate, keep or export such plant or any portion thereof, has been issued to him by the Director-General on the recommendation of the council."

Cannabis is one of the substances listed in schedule 8.

member of Cabinet responsible for the administration of justice, because he considered it to be within his "duties and responsibilities to take appropriate steps to ensure that the persons involved in the administration of justice, particularly officers of the Courts of this country, are fit and proper persons" to be admitted as attorneys. Although the Minister sought to justify the Drugs Act, it is nevertheless clear from his affidavit that he did not consider it necessary to defend the constitutionality of that Act. He took the view that the constitutionality of section 4(b) of the Drugs Act was not in issue, as the appellant had neither raised the issue in his founding affidavit nor sought an order declaring it unconstitutional in his Notice of Motion. Although the A-G took a similar view to the Minister, he nevertheless went on to defend the constitutionality of the impugned provisions. On the issue of exemption for religious purposes, the A-G alleged that he "would have grave practical difficulties in applying the Act" and that "the situation could slip out of control". No facts were put forward to substantiate this bare allegation. The appellant made no attempt to supplement his papers so as to raise the constitutionality of the impugned provisions nor to amend his Notice of Motion to include an appropriate prayer declaring the impugned provisions unconstitutional and contented himself with the contentions made in his heads of argument.

The judgment of the High Court

[6] The High Court found that the impact of section 4(b) of the Drugs Act was to limit the appellant's freedom to practise his religion.[6] However, it found that the limitation was justifiable in terms of section 36 of the Constitution. In concluding that the limitation was justifiable, the

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6 The judgment of the High Court is reported as *Prince v President of the Law Society, Cape of Good Hope and Others* 1998 (8) BCLR 976 (C). The Minister and the A-G were each represented in the High Court by counsel.

High Court found, amongst other things, that a religious exemption for Rastafari "would place an additional burden on the police and the courts, both of which are operating under heavy pressure because of the general crime situation in this country."[7] It concluded that section 4(b) of the Drugs Act was not unconstitutional. It also concluded that the same considerations applied to section 22A(10) of the Medicines Act.[8]

The judgment of the SCA

[7] With the leave of the High Court, the appellant appealed to the SCA. To formalise the attack on section 4(b) of the Drugs Act and section 22A(10) of the Medicines Act, the SCA allowed the appellant to amend the Notice of Motion by inserting paragraph 4, which reads:

> "4(a) Declaring section 4(b) of the Drugs and Drug Trafficking Act, No 140 of 1992 (as amended) ("the Drugs Act") and section 22A(10) of the Medicines and Related Substances Control Act, No 101 of 1965 ("the Medicines Act") to be

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7 Id at 989A-B.

8 At 993C. In relation to the additional constitutional attack on section 4(b) of the Drugs Act, based on the prohibition against discrimination and the right to choose a profession, the Court assumed that section 4(b) limited these rights, but found that the limitation was justifiable in terms of section 36 of the Constitution, on the same basis as the limitation on the right to freedom of religion.

inconsistent with the Constitution of the Republic of South Africa, Act 108 of 1996 ("the Constitution") and accordingly invalid.

ALTERNATIVELY, declaring section 4(b) of the Drugs Act and section 22A(10) of the Medicines Act to be inconsistent with the Constitution, to the extent that they fail to provide an exemption applicable to the use, possession and transportation of *cannabis sativa* by a Rastafarian for a *bona fide* religious purpose, and accordingly invalid.

(b) Suspending the aforesaid declarations of invalidity for a period of twelve (12) months from the date of confirmation of this order by the Constitutional Court to enable Parliament to correct the inconsistencies which have resulted in the declarations of invalidity."

[8] In the course of argument before the SCA it became clear that the appellant's constitutional challenge was only directed at the failure of the impugned provisions to allow for a religious exemption. The SCA found that to allow for a religious exemption would undermine the purpose of the Drugs Act and the Medicines Act to prevent drug abuse and to protect society as a whole.[9] In addition, and relying upon the allegation by the A-G, it found that it would be impossible to police the exemption. The SCA concluded that "[t]he alternative prayer cannot be granted in its present form and the available evidence does not enable [the court] to fashion a suitable order with adequate precision."[10] Consequently, the SCA dismissed the constitutional

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9 The judgment of the SCA is reported as *Prince v President, Cape Law Society and Others* 2000 (3) SA 845 (SCA); 2000 (7) BCLR 823 (SCA).

10 Id at para 13.

challenge.[11]

Proceedings in this Court

[11] The SCA also dealt with the other challenges to the decision of the Law Society and dismissed them.

[9] With leave, the appellant appealed to this Court. In addition, the appellant sought leave to have admitted certain material in terms of rule 30 of the Constitutional Court Rules.[12] This material consists of reports[13] and editorials from two medical journals.[14] The President of this Court issued directions that the record in the appeal should consist of the record before the SCA and an affidavit by Professor Yawney, an associate professor of Anthropology in Canada who has written extensively on Rastafari.[15] The A-G, who was the only respondent who appeared and filed written argument in this Court, was given leave to file material in response to the affidavit by Professor Yawney. In addition, the parties were directed to address the issue of the relevance and admissibility of the material sought to be introduced by the appellant in their written heads of argument. In response to the affidavit by Professor Yawney, the A-G submitted a number of

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12 Rule 30 provides that:

> "(1) Any party to any proceedings before the Court and an *amicus curiae* properly admitted by the Court in any proceedings shall be entitled, in documents lodged with the registrar in terms of these rules, to canvass factual material which is relevant to the determination of the issues before the Court and which do not specifically appear on the record: Provided that such facts—
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> (a) are common cause or otherwise incontrovertible; or
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> (b) are of an official, scientific, technical or statistical nature capable of easy verification.
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> (2) All other parties shall be entitled, within the time allowed by these rules for responding to such document, to admit, deny, controvert or elaborate upon such facts to the extent necessary and appropriate for a proper decision by the Court."

13 Three reports were submitted: Joy *et al* "Marijuana and Medicine: Assessing the Science Base" (National Academy Press, Washington 1999) a report by the Institute of Medicine in the United States, at the request of The White House Office of National Drug Control Policy, "to assess the potential health benefits and risks of marijuana and its constituent cannabinoids"; Le Dain *et al* "Cannabis: The Report of the Canadian Government Commission of Inquiry into the Non-Medical Use of Drugs" (Information Canada, Ottawa 1972) chapters 1, 2 and 6; and Hall *et al* "WHO Project on Health Implications of Cannabis Use: A Comparative Appraisal of the Health and Psychological Consequences of Alcohol, Cannabis, Nicotine and Opiate Use" (1995).

14 "Deglamorising cannabis" 346 *The Lancet* 1241 (November 1995) and "The War on Drugs: Prohibition Isn't Working: Some Legalisation Will Help" 311 *British Medical Journal* (December 1995).

15 The A-G did not object to the admission of Professor Yawney's affidavit.

documents. He objected to the admission of some of the material filed by the appellant in terms of rule 30. It is not clear precisely to which material the objection related as the A-G also said that the contents of some of the material to which he objected provided useful information. Indeed, in his written argument, the A-G relied upon some of that material.

Issues on appeal

[10] In this Court, the appellant contended that section 4(b) of the Drugs Act and section 22A(10) of the Medicines Act are unconstitutional to the extent that they do not exempt from prohibition the use, possession and transportation of cannabis for *bona fide* religious purposes by adult Rastafari. The A-G approached the matter on the footing that the impugned provisions limit the appellant's rights to practise his religion, but contended nevertheless that such limitation is justifiable under section 36 of the Constitution. He contended, amongst other things, that there would be grave difficulties in policing such an exemption.

[11] Should the Court find that any of these provisions limit the rights to religious freedom, one of the key questions which will have to be decided is whether a religious exemption to Rastafari would undermine the government's efforts to fight drug abuse and trafficking. In particular, the Court will have to decide whether there will be practical difficulties in policing such exemptions, and if so, whether they justify the denial of the religious exemption.

[12] To answer the constitutional question presented in this appeal, it is necessary to have information on how, where, when and by whom cannabis is used within the Rastafari religion in South Africa, how cannabis is obtained and whether the religion regulates the use and possession

of cannabis by its members. There is no evidence currently on the record concerning the institution of the Rastafari religion in South Africa, including whether there are different sects or branches of the religion; whether there are structures of leadership or authority within the religion; the number of adherents or practising Rastafari in South Africa and the extent of the geographical spread of the religion in South Africa. Such information is important to a determination of the constitutional question presented in this matter.

[13] The Court needs to know precisely how cannabis is used in the practice and exercise of the Rastafari religion: whether communal religious ceremonies or services are held and, if so, whether they are held at places designated specifically for such purposes; whether such ceremonies are presided over, or led, or controlled by a particular person or persons; what precisely the extent of the use is that is required by the practice or exercise of the religion; whether its use in the exercise of the religion is limited to liturgical or ceremonial use or whether it extends to private use and, if the latter, whether any restriction is placed on such private use; whether certain uses are obligatory in terms of the doctrines of the religion, or merely desirable or completely optional; and what reasonably practical methods exist, compatible with the exercise of the religion contended for, for exempting practitioners of the Rastafari religion from criminal prohibitions against the possession or use of cannabis.

[14] In addition, it is necessary to have facts to substantiate the bare allegation by the A-G that there would be grave practical difficulties in policing a religious exemption. This information goes to the scope of the invasion of the appellant's constitutional rights and the scope of the justification necessary for such invasion to pass constitutional muster.

[15] The evidence put forward by the appellant as to the nature of the Rastafari religion and the use of cannabis, primarily in the affidavit of Professor Yawney, is neither comprehensive nor specific enough as to the South African context to resolve the issues confronting us. For example, Professor Yawney alludes to the fact that while cannabis has a central role in religious ceremonies conducted by Rastafari, it is also used extensively outside of these ceremonies. She refers to cannabis as being used in bathing, eating, drinking and for medicinal purposes.[16] She makes the point that all of these uses are seen as part of the religious practices of Rastafari in that cannabis as a plant is regarded as sacred. However, the various uses by Rastafari of cannabis have not been explicitly set out in the papers before us nor is it clear how much cannabis is used by Rastafari or how it is obtained by them.[17]

[16] In his founding affidavit, the appellant states that cannabis is used by Rastafari "*inter alia* for spiritual, medicinal and culinary purposes", and that he himself uses cannabis not only ceremonially but also "by either burning it as incense or smoking, drinking or eating it in private at home as part of my religious observance." This further illustrates the diverse uses of cannabis by Rastafari and the need for more detailed information on whether all Rastafari use cannabis in

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16 In an unpublished paper written by Pauline Herbst entitled "Identity, Protest and Healing: The Multiple Uses of Marijuana in Rastafari" which was included as an annexure to the application for leave to appeal, the point is also made that cannabis is not only smoked communally but may also be taken by individuals in a tea, as a tonic or curative, or in a resin, as a topical application to treat infections.

17 There is a suggestion by Herbst that cannabis is considered more sacred if cultivated personally.

a similar manner to the appellant.

[17] There is also no evidence as to the existence, if any, of any internal restriction on, or supervision of, the use of cannabis by adherents to the religion, so as to address the concern of the government on the abuse of drugs. All this information is relevant to the determination of whether reasonable accommodation for the use of cannabis for religious purposes is possible. The bare allegation by the A-G that there would be grave difficulties in policing an exemption is also not sufficient. Without facts in support of that allegation it amounts to speculation. It is necessary to produce evidence in support of this allegation, particularly in light of the fact that both the Drugs Act and the Medicines Act allow an exemption for the use and possession of cannabis for research and scientific purposes.[18]

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[18] Section 4(b)(i) - (vi) of the Drugs Act, quoted above in n 3, allows various exemptions from the general prohibition on possession and use of cannabis, including exemptions for patients to acquire cannabis from medical practitioners, pharmacists, veterinarians or dentists. In addition, subsection (iv) makes provision for the issuing of permits for the cultivation, importation and sale of cannabis.

Section 22A(10) of the Medicines Act, quoted in full above at n 5, also makes provision for the issuing of permits for the possession, cultivation, manufacture and import of cannabis for "analytical or research purposes".

[18] Lack of this relevant evidence in the record is due to the course which the litigation took in this matter. It will be recalled that the initial challenge was directed at the refusal of the Law Society to register the appellant's contract of community service. There was no frontal challenge to section 4(b) of the Drugs Act and section 22A(10) of the Medicines Act. The constitutionality of the impugned provisions was raised for the first time in the appellant's heads of argument in the High Court. The Minister and the A-G took the view that the constitutionality of the impugned provisions was not in issue and that therefore it was not necessary for them to deal in any detail with this issue in their respective affidavits. Although the A-G and the Minister sought to justify the constitutionality of section 4(b), this must be viewed against their expressed attitude that the constitutionality of the provision was not in issue in the High Court. Despite the position taken by the Minister and the A-G, the appellant neither supplemented his papers so as to raise the constitutionality of the impugned provisions and provide a basis for such a challenge nor sought to amend the Notice of Motion to include an order declaring the impugned provisions unconstitutional. The Minister saw no need to deal with the justification of section 4(b)of the Drugs Act. This resulted in the information relevant to the determination of the constitutional issue presented in this appeal not being placed before the High Court.

[19] We must now decide whether further evidence should be received.

Should further evidence be received?

[20] Rule 29 of the Constitutional Court Rules makes certain sections of the Supreme Court

Act, 1959[19] applicable to the proceedings of this Court. These sections include section 22, which deals with powers of courts on hearing of appeals and provides:

> "The appellate division or a provincial division, or a local division having appeal jurisdiction, shall have power—
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> (a) on the hearing of an appeal to receive further evidence, either orally or by deposition before a person appointed by such division, or to remit the case to the court of first instance, or the court whose judgment is the subject of the appeal, for further hearing, with such instructions as regards the taking of further evidence or otherwise as to the division concerned seems necessary; and
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> (b) to confirm, amend or set aside the judgment or order which is the subject of the appeal and to give any judgment or make any order which the circumstances may require."

[19] Act 59 of 1959.

[21] Although section 22 confers wide discretion on the appeal court to receive further evidence on appeal, it is clear that courts do not readily grant leave to do so. They will, as a general matter, grant such leave where special grounds exist, there will be no prejudice to the other side and further evidence is necessary in order to do justice between the parties.[20] They have understandably refrained from attempting to frame an exhaustive definition of the special grounds on which a court ought to accede to an application for leave to lead further evidence. They have emphasised that the fact that the matter at issue is of great importance to a litigant does not in itself constitute a special ground.[21] What has generally been accepted as constituting a special ground is the fact that the evidence sought to be led was either not in possession of the party at the time of the trial or by proper diligence could not have been obtained.[22] The evidence

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20 *Shein v Excess Insurance Co Ltd* 1912 AD 418 at 429; *Staatspresident en 'n Ander v Lefuo* 1990 (2) SA 679 (AD) at 691C-J.

21 *Shein v Excess Insurance* above n 20 at 429.

22 *Deintje v Gratus & Gratus* 1929 AD 1 at 6-7.

sought to be led must be credible, material and conclusive.[23]

[23] *Colman v Dunbar* 1933 AD 141 at 162.

[22] Parties who challenge the constitutionality of a provision in a statute must raise the constitutionality of the provisions sought to be challenged at the time they institute legal proceedings. In addition, a party must place before the court information relevant to the determination of the constitutionality of the impugned provisions. Similarly, a party seeking to justify a limitation of a constitutional right must place before the court information relevant to the issue of justification. I would emphasise that all this information must be placed before the court of first instance.[24] The placing of the relevant information is necessary to warn the other party of the case it will have to meet, so as allow it the opportunity to present factual material and legal argument to meet that case. It is not sufficient for a party to raise the constitutionality of a statute only in the heads of argument, without laying a proper foundation for such a challenge in the papers or the pleadings. The other party must be left in no doubt as to the nature of the case it has to meet and the relief that is sought. Nor can parties hope to supplement and make their case on appeal.

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[24] *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 7.

[23] That said, the considerations applicable to allowing further evidence on appeal in constitutional matters are not necessarily the same as the considerations applicable in other matters. It is undesirable to attempt to lay down precise rules when leave to adduce further evidence on appeal will be granted by this Court. For the purposes of the present case, the relevant factors, which I consider more fully below, are: the validity of Acts of Parliament that serve an important public interest is in issue; the constitutional right asserted is of fundamental importance and it goes beyond the narrow interest of the appellant; the validity of the impugned provisions has been fully canvassed by a full bench of the High Court and that of five judges of the SCA; the course which the litigation took in the High Court and the SCA; and the appellant is a person of limited resources. These factors, moreover, must be viewed against the power of this Court to grant direct access.[25]

[24] At issue in this appeal is the validity of statutes that serve an important public interest, namely, the prevention of drug trafficking and drug abuse. A declaration of invalidity will have far-reaching consequences for the administration of justice. We were informed by Mr Slabbert, who appeared on behalf of the A-G, that there are a number of cases in which the Rastafari religion has been raised as a defence to the charge of possession of cannabis, and that these cases are awaiting the outcome of this case.

[25] The constitutional right to practise one's religion asserted by the appellant here is of fundamental importance in an open and democratic society. It is one of the hallmarks of a free

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[25] See rule 17 of the Constitutional Court Rules, read with section 167(6)(a) of the Constitution and section 16(2)(a) of the Constitutional Court Complementary Act 13 of 1995.

society. In *Christian Education South Africa v Minister of Education*[26] we said so:

> "There can be no doubt that the right to freedom of religion, belief and opinion in the open and democratic society contemplated by the Constitution is important. The right to believe or not to believe, and to act or not to act according to his or her beliefs or non-beliefs, is one of the key ingredients of any person's dignity. Yet freedom of religion goes beyond protecting the inviolability of the individual conscience. For many believers, their relationship with God or creation is central to all their activities. It concerns their capacity to relate in an intensely meaningful fashion to the sense of themselves, their community and their universe. For millions in all walks of life, religion provides support and nurture and a framework for individual and social stability and growth. Religious belief has the capacity to awake concepts of self-worth and human dignity which form the cornerstone of human rights. It affects the believer's view of society and founds the distinction between right and wrong. It expresses itself in the affirmation and continuity of powerful traditions that frequently have an ancient character transcending historical epochs and national boundaries." (Footnotes omitted)

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26 2000 (10) BCLR 1051 (CC) at para 36.

[26] In addition, the appellant belongs to a minority group. The constitutional right asserted by the appellant goes beyond his own interest ― it affects the Rastafari community. The Rastafari community is not a powerful one. It is a vulnerable group. It deserves the protection of the law precisely because it is a vulnerable minority. The very fact that Rastafari use cannabis exposes them to social stigmatisation. They are perceived as associated with drug abuse and their community is perceived as providing a haven for drug abusers and gangsters. During argument it was submitted on behalf of the A-G that if a religious exemption in favour of the Rastafari were to be allowed this would lead to an influx of gangsters and other drug abusers into their community. The assumption which this submission makes demonstrates the vulnerability of this group. Our Constitution recognises that minority groups may hold their own religious views and enjoins us to tolerate and protect such views. However, the right to freedom of religion is not absolute. While members of a religious community may not determine for themselves which laws they will obey and which they will not, the state should, where it is reasonably possible, seek to avoid putting the believers to a choice between their faith and respect for the law.[27]

[27] The initial challenge in this case was directed at the constitutionality of the decision of the Law Society and not at the constitutionality of the impugned provisions. In view of this, the Minister and the A-G did not seek to justify the constitutionality of the impugned provisions in any detail. As a result, no detailed information was placed before the High Court that was necessary to determine the scope of the invasion of the appellant's constitutional right and the justification or otherwise of the limitation, if any. The course taken by the litigation, though

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[27] *Christian Education v Minister of Education* above n 26 at para 35.

undesirable, is in a sense understandable. Constitutional litigation is a relatively new area in our law.

[28] Notwithstanding the paucity of information, the constitutionality of the impugned provisions has been traversed fully in the judgments of the full bench of the High Court and five judges of the SCA. Notably though, both judgments were delivered prior to our judgment in *Christian Education*[28] where we considered the right to freedom of religion and the justification for the limitation of such a right. In the circumstances, no purpose would be served by requiring the appellant to commence proceedings afresh in the High Court. Moreover, the appellant is clearly not a person of means and the dismissal of the appeal on procedural grounds would more likely than not inhibit him from instituting proceedings afresh in order to seek vindication of his constitutional rights. In addition, the appellant needs to know his fate. The decision in this appeal will have an impact on his future career.

[29] Finally, there can be no prejudice to the parties if both are granted leave to adduce further evidence necessary in order for this Court properly to decide the issues presented in this appeal. We were informed by Mr Slabbert from the bar that, to his knowledge, the question of granting a religious exemption for the religious possession and use of cannabis has not been investigated. Moreover, further evidence is required on a narrow issue, namely, the scope of the alleged invasion of the appellant's constitutional rights and the practical difficulties, if any, that would arise in policing a religious exemption. To prepare and furnish such further evidence should not take long and it is unlikely that a conflict of a nature that cannot be resolved on the affidavits will

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[28] Above n 26.

arise in such evidence.

[30] For all these reasons, and having regard to our power to grant direct access, there is good reason in the circumstances of the present case to have evidence placed before the Court that is necessary to resolve the constitutional issues presented. I am accordingly satisfied that the interests of justice demand that the parties be allowed the opportunity to submit further evidence, which must be done by way of affidavit.

[31] In view of the need for further evidence, it is apparent that this matter is unlikely to be finalised soon. One of the issues that has arisen in this appeal is whether the proceedings before the SCA were a nullity because the SCA did not sit as a bench of eleven judges, as the provisions of section 12(1)(b) of the Supreme Court Act, 1959[29] require. If the SCA did not sit in accordance with the Supreme Court Act it would clearly have infringed the provisions of section 168(2) of the Constitution. If the proceedings before the SCA were a nullity, there would be no appeal before this Court. It is necessary, therefore, to decide this issue.

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[29] Section 12(1)(b) reads as follows:

> "The quorum of the appellate division shall . . . be five judges in all criminal and civil matters: Provided that —
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> . . .
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> (b) on the hearing of an appeal, whether criminal or civil, in which the validity of an Act of Parliament (which includes any instrument which purports to be and has been assented to by the State President as such an Act) is in question, eleven judges of the appellate division shall form a quorum".

Were the proceedings in the SCA a nullity?

[32] In his written argument, counsel for the appellant very properly drew our attention to the provisions of section 12(1)(b) of the Supreme Court Act which provides that when the SCA considers a question of the validity of an Act of Parliament, it shall sit as a quorum of eleven judges. The issue is whether proceedings before the SCA were a nullity because that Court did not sit as a bench of eleven judges when determining the constitutional question presented in this appeal. This issue was not drawn to the attention of the SCA.

[33] Section 168(2) of the Constitution provides that the quorum of the SCA shall be determined by an Act of Parliament. The question for determination is whether it was incumbent on the SCA to sit as a bench of eleven judges when considering the constitutionality of the impugned provisions as determined by section 12(1)(b) of the Supreme Court Act. If it was, failure to do so ran foul of the provisions of section 168(2) of the Constitution and the ensuing proceedings would have been a nullity.

[34] Section 12(1)(b) has its genesis in the Appellate Division Quorum Act, 1955,[30] which increased the quorum of judges from five to eleven when the validity of an Act of Parliament was in issue.[31] This was followed by an amendment of the South Africa Act, 1909[32] to include a

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30 Act 27 of 1955.

31 This statute was part of the process whereby the former government deprived coloured people of their right to vote, which was until then entrenched in the Constitution. See Dugard *Human Rights and the South African Legal Order* (Princeton University Press, Princeton 1978) at 31; Loveland *By Due Process of Law? Racial Discrimination and the Right to Vote in South Africa 1855 - 1960* (Hart Publishing, Oxford 1999) at 340.

provision which prevented the Supreme Court from enquiring into or pronouncing upon the validity of any law passed by Parliament other than a law which repealed or altered sections 137 or 152 of the South Africa Act.[33] Section 59 of the subsequent Constitution, the Republic of South Africa Constitution Act, 1961[34] contained a substantially similar provision. Section 34(2) of the 1983 Constitution[35] gave the Supreme Court the power to enquire into and pronounce upon the question as to whether the provisions of the Constitution were complied with in the passing of an Act of Parliament. However, section 34(3) expressly precluded the Supreme Court from enquiring into and pronouncing upon the validity of an Act of Parliament. Thus, on the eve

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32 The South Africa Act Amendment Act 9 of 1956.

33 Section 2 of the Amendment Act. Sections 137 and 152 of the South Africa Act entrenched English and Dutch (which included Afrikaans) as the official languages and the procedure to be followed in amending the Constitution, respectively. These provisions were referred to as the entrenched provisions.

34 Act 32 of 1961.

35 The Republic of South Africa Constitution Act 110 of 1983.

of the present constitutional democracy, the SCA had constitutional jurisdiction, but this was limited.

[35] Section 101(5) of the interim Constitution provided that "[t]he Appellate Division shall have no jurisdiction to adjudicate any matter within the jurisdiction of the Constitutional Court." In terms of section 98(2), the Constitutional Court was made "the court of final instance over all matters relating to the interpretation, protection and enforcement of the provisions of [the] Constitution". In terms of section 98(2)(c), the jurisdiction of the Constitutional Court included "any inquiry into the constitutionality of any law, including an Act of Parliament, irrespective of whether such law was passed or made before or after the commencement of [the] Constitution". The powers of this Court under section 98(2)(c) embraced the entire jurisdiction relating to the validity of Acts of Parliament previously enjoyed by the SCA. The effect of section 101(5), therefore, read with section 98(2)(c) of the interim Constitution, was to deprive the SCA of all constitutional jurisdiction including the jurisdiction to determine the validity of Acts of Parliament passed before the interim Constitution came into force. The interim Constitution therefore not only denied the SCA constitutional jurisdiction under that Constitution, but deprived it of a jurisdiction it had previously enjoyed in respect of pre-1994 statutes.

[36] Section 12(1)(b) rested on the premise that the SCA had jurisdiction to enquire into the validity of an Act of Parliament and it regulated the exercise of that jurisdiction by providing for a special quorum. That was its only purpose. The premise on which it was based fell away when the interim Constitution came into effect as that Constitution deprived the SCA of its substantive jurisdiction to enquire into the validity of any Act of Parliament. As section 12(1)(b) was a

provision aimed at regulating jurisdiction that was taken away by the interim Constitution, it cannot be said to be a provision which was consistent with the interim Constitution. It was manifestly inconsistent with section 101(5).

[37] Section 4(1) of the interim Constitution, the supremacy clause, provided that "any law or act inconsistent with its provisions shall, unless otherwise provided expressly or by necessary implication in this Constitution, be of no force and effect to the extent of the inconsistency". The effect of section 4(1) is that from the moment the interim Constitution came into operation any law which was inconsistent with the provisions of the interim Constitution ceased to have legal effect.[36] Section 12(1)(b) having as its sole purpose the regulation of a jurisdiction inconsistent with the provisions of the interim Constitution was inconsistent with the interim Constitution and became invalid when the provisions of that Constitution came into operation.[37]

[38] Once section 12(1)(b) became invalid because of its inconsistency with the interim Constitution, it could not be validated simply by the fact that under the Constitution the SCA now has constitutional jurisdiction. Section 168(2) of the Constitution which stipulates that the quorum of the SCA shall be determined by an Act of Parliament must therefore, in the absence of the proviso in section 12(1)(b), refer, at present, to section 12(1) of the Supreme Court Act which determines that the ordinary quorum of that Court shall be five judges. This result is consistent with the new constitutional order. Section 12(1)(b) of the Supreme Court Act was enacted at a

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36 *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) at paras 26 and 28.

37 Id at para 27.

time when the SCA was the highest court of appeal. That is no longer the case. Its decisions on the constitutionality of an Act of Parliament or conduct of the President have no force or effect unless confirmed by this Court. Its powers in this regard are therefore no different from those conferred upon the High Court.

[39] I conclude therefore that section 12(1)(b) was inconsistent with section 101(5), read with section 98(2)(c), of the interim Constitution and therefore invalid to the extent of such inconsistency. It follows that it was not necessary for the SCA to sit as a bench of eleven judges when considering the constitutionality of the impugned provisions of the Drugs Act and the Medicines Act.

[40] The Minister was not represented in this Court, but abided its decision. As the validity of section 12(1)(b) arose in the course of the hearing and the Minister was not aware that this Court would consider the validity of the section, he was invited to make representations on the validity of the section. The Minister declined to do so.

Order

[41] In the result, I make the following order:

1. Section 12(1)(b) of the Supreme Court Act 59 of 1959 is inconsistent with the Constitution of the Republic of South Africa 200 of 1993 and is declared invalid with effect from 27 April 1994.

2. The appellant is granted leave to deliver, on or before 24 January 2001, evidence on affidavit setting out:

   (a) how, where, when and by whom cannabis is used within the Rastafari religion in South Africa;

   (b) how cannabis is obtained by Rastafari;

   (c) whether the Rastafari religion regulates the use and possession of cannabis by its members;

   (d) whether there are any internal restrictions on, and supervision of, the use of cannabis by members of the Rastafari religion; and

   (e) any other facts relating to the matters set forth in paragraphs 12 - 17 of the judgment.

3. The respondents are granted leave to deliver, on or before 14 February 2001, evidence on affidavit setting out:

   (a) their response, if any, to the evidence submitted by the appellant;

   (b) what practical difficulties, if any, will be encountered if an exemption for the sacramental use of cannabis is allowed; and

   (c) how a religious exemption for the personal use of cannabis would differ, in its administration and the overall enforcement of the Drugs and Drug Trafficking Act 140 of 1992 and the Medicines and Related Substances Control Act 101 of 1965, from the medical and scientific exemptions currently to be found in section 4(b) of the Drugs Act and section 22A(10) of the Medicines Act, if at all.

4. The appellant shall file his response, if any, to the evidence submitted by the respondents, on or before 21 February 2001.

5. The further disposal of this matter will take place in accordance with directions to be issued by the President.

Chaskalson P, Langa DP, Ackermann J, Goldstone J, Kriegler J, Mokgoro J, O'Regan J, Sachs J, Yacoob J and Madlanga AJ concur in the judgment of Ngcobo J.

For the appellant:	JL Abel instructed by the Dison Ndlovu Attorneys
For the fifth respondent:	J Slabbert instructed by the Director of Public Prosecutions, Cape of Good Hope