



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 47/21

In the matter between:

GREGORY CRAIG AYRES

First Applicant

VALERI LAZANOV NIKOLOV

Second Applicant

and

**MINISTER OF JUSTICE AND
CORRECTIONAL SERVICES**

First Respondent

MINISTER OF HEALTH

Second Respondent

Neutral citation: *Ayres and Another v Minister of Justice and Correctional Services and Another* [2021] ZACC 12

Coram: Zondo ACJ, Madlanga J, Madondo AJ, Mhlantla J, Majiedt J, Pillay AJ, Rogers AJ, Theron J, Tlaletsi AJ and Tshiqi J

Judgments: Tlaletsi AJ (unanimous)

Decided on: 25 March 2022

Summary: Constitutional law — Foundational values — Rule of law — Doctrine of Precedent

ORDER

On appeal from the High Court of South Africa, KwaZulu-Natal Local Division, Durban:

1. Leave to appeal on the merits is refused.
2. Leave to appeal against the order of costs is granted.
3. The appeal against the order of costs is upheld.
4. The costs order of the High Court is set aside and replaced with the following:
“The respondents must pay the applicants’ costs, including the costs of two counsel”.
5. Each party must pay their own costs in this Court.

JUDGMENT

TLALETSI AJ (Zondo ACJ, Madlanga J, Madondo AJ, Mhlantla J, Majiedt J, Pillay AJ, Rogers AJ, Theron J and Tshiqi J concurring)

[1] This is an application for leave to appeal directly to this Court against a judgment and order of the KwaZulu-Natal Local Division of the High Court, Durban, in terms of which that Court¹, through Radebe J, dismissed the applicants’ challenge to the constitutional validity of section 63 of the Drugs and Drug Trafficking Act² (Drugs Act). The application is not opposed.

Factual background

[2] The applicants, Mr Gregory Ayres and Mr Valeri Nikolov, were arrested in November 2014 after allegedly being found in possession of a substance described as

¹ *Ayres v Minister of Justice and Correctional Services*, unreported judgment of the KwaZulu-Natal High Court, Durban, Case No 5491/2016 (25 January 2021) (High Court judgment and High Court order).

² 140 of 1992.

methylenedioxymetamphetamine (MDMA)³ in contravention of the Drugs Act. They were charged in the Middelburg Magistrates' Court with the unlawful dealing in or, alternatively, possession of, MDMA.

[3] Before pleading to the charges brought against them, the applicants applied to the High Court for an order declaring section 63 of the Drugs Act, as well as the reference to MDMA in Part III of Schedule 2 to the Drugs Act, to be inconsistent with the Constitution and invalid. Section 63 of the Drugs Act provides:

“Amendment of Schedules 1 and 2

The Minister may by notice in the Gazette and after consultation with the Minister of National Health—

- (a) include any substance or plant in Schedule 1 or 2;
- (b) delete any substance or plant included in that Schedule; or
- (c) otherwise amend that Schedule.”

[4] MDMA was inserted into the list of “Undesirable Dependence-Producing Substances” in Schedule 2 of the Drugs Act in 1999 by way of Regulation GN 760 of 1999.⁴

Litigation history

In the High Court

[5] Before the High Court, the applicants argued that the power to include, delete or otherwise amend the substances listed in the Schedules to the Drugs Act is a plenary legislative power and, when exercised by a member of the executive, constitutes a breach of the doctrine of separation of powers.⁵ As already stated, in the High Court

³ The substance is commonly known as ecstasy.

⁴ Drugs and Drug Trafficking Act, 1992 (Act 140 of 1992) Amendment of Schedule 2, GN 760 GG 20194, 11 June 1999.

⁵ In *Smit v Minister of Justice and Correctional Services* [2020] ZACC 29; 2021 (1) SACR 482 (CC); 2021 (3) BCLR 219 (CC), this Court explained the term “plenary legislative power” thus in para 31: “Plenary power is the

the applicants attacked the constitutional validity of section 63 of the Drugs Act insofar as it included MDMA in Schedule 1 and 2. The applicants contended that the delegation of the power involved here is the delegation of plenary legislative power to a member of the Executive, which offends the doctrine of the separation of powers.

[6] The High Court stated that the applicants' attack was mainly directed at the inclusion of MDMA in part III of Schedule 2 of the Drugs Act. The High Court went on to say:

“The applicants contend that such inclusion, which the First Respondent affected by the virtue of Section 63 of the Act, is unlawful, unconstitutional and invalid since the inclusion in the Schedule was brought into effect through the mechanism contained in Section 63 of the Act and the legislature has impermissibly delegated its law-making function to the First Respondent, who is a member of the Executive.”

The High Court rejected the applicants' attack and concluded that the application fell to be dismissed. It pointed out that the applicants had not argued that the Minister had abused his power. The Court held that it was permissible for Parliament to delegate the power it delegated to the Minister in this case. It, accordingly, dismissed the application with costs of two counsel.

In this Court

[7] The applicants apply for leave to appeal directly to this Court, against the whole judgment and order of the High Court. The applicants have asked for the order to be set aside on the basis that the High Court was bound by the decision of this Court in *Smit*⁶ handed down on 18 December 2020 which declared that section 63 of the Drugs

authority to pass, amend or repeal an Act of Parliament. Rabie and Erasmus define plenary legislative power as follows:

‘Plenary means of full scope or extent; complete or absolute in force or effect. Plenary legislative power, in the full sense of the phrase would be the power enjoyed by Parliament’.

⁶ Id in Order.

Act is unconstitutional and invalid to the extent that it purported to delegate plenary legislative powers to the Minister.⁷

[8] We invited the parties to file written submissions on the implications of this Court's judgment in *Smit*. The applicants and respondents agreed that, unless this Court directs otherwise, there is no need for an oral hearing in this matter. We have dispensed with the hearing of oral argument.

Parties' submissions

[9] The applicants submit that the interests of justice weigh in favour of granting them leave to appeal directly to this Court. They argue that the matter implicates important considerations related to the rule of law and the doctrine of *stare decisis*. The doctrine of *stare decisis* requires that courts "stand or abide by cases already decided".⁸ The applicants further submit that they tried to bring the judgment in *Smit* to the attention of the High Court and the respondents' attorneys. They said that, once they became aware of the *Smit* judgment, they forwarded a copy thereof to the State Attorney with a specific request that it be brought to the attention of the Judge as the judgment was still reserved at the time.

[10] The respondents do not oppose the application. They agree with the applicants that it is in the interests of justice for this Court to grant the applicants leave to appeal directly. They also support the setting aside of the costs order of the High Court and concede that the High Court was bound by the decision in *Smit*. They submit that the High Court's decision was wrong.

⁷ Id at para 155.

⁸ Claasen Claassen's *Dictionary of Legal Words and Phrases* Service 24 (2021).

Jurisdiction

[11] This is clearly a constitutional matter because the applicants seek leave to appeal against a decision refusing to declare a statutory provision inconsistent with the Constitution and, therefore, invalid.

Leave to appeal

[12] The applicants apply for leave to appeal directly to this Court against a judgment and order of the High Court. Whether leave to appeal will be granted is determined on the basis of whether or not it is in the interests of justice to grant such leave. In this matter it is in the interests of justice to grant leave because:

- a) there are reasonable prospects of success since this Court has already given a judgment declaring section 63 of the Drugs Act constitutionally invalid and the judgment sought to be appealed against is in conflict with that judgment.
- b) there is no need to insist that the applicants should first approach the Supreme Court of Appeal as this Court has already pronounced on the issue.

[13] I am, therefore, of the view that this matter warrants the granting of leave to appeal directly to this Court.

The appeal

[14] In *Smit* this Court considered the constitutionality of the impugned provisions. The first judgment held that section 63, which confers on the Minister plenary legislative power to amend the Schedules which are part of the Drugs Act, is in itself a delegation of original power to amend the Drugs Act, amounting to a complete delegation of legislative power to the executive.⁹ The majority affirmed the first judgment and declared, among other things, that section 63 of the Drugs Act, as well as

⁹ *Smit* above n 5 at para 36.

the reference to MDMA in Part III of Schedule 2 to the Drugs Act, are invalid and unconstitutional.¹⁰ The majority held:

“I agree with my colleague’s conclusions that: section 63 of the Drugs Act is inconsistent with the Constitution to the extent that it purports to delegate to the Minister the plenary legislative power to amend Schedules 1 and 2 to the Drugs Act; only the amendments to the Schedules listed in paragraph 3 of the order in the first judgment are invalid; the applicant cannot rely on the *Prince* judgment to escape extradition; the declaration of constitutional invalidity must be prospective; this declaration must be suspended for 24 months; and the warrant issued for the arrest of the applicant is, in fact, valid.”¹¹

[15] It is, therefore, clear that the High Court’s reasoning and finding that section 63 of the Drugs Act is constitutional is in direct and irreconcilable conflict with the binding precedent of this Court in *Smit*. The High Court’s judgment did not deal with or seek to distinguish *Smit*. Neither did it consider whether MDMA was included in Schedule 2

¹⁰ The relevant part of the order issued by this Court reads:

- “1. The declaration of invalidity made by the High Court of South Africa, Western Cape Division, Cape Town is confirmed in the terms set out in paragraph 2.
2. Section 63 of the Drugs and Drug Trafficking Act 140 of 1992 is declared to be inconsistent with the Constitution and invalid to the extent that it purports to delegate plenary legislative power to amend Schedules 1 and 2 to the Drugs and Drug Trafficking Act to the Minister of Justice and Correctional Services.
3. The following purported amendments to Schedules 1 and 2 to the Drugs and Drug Trafficking Act are declared invalid:
 - (i) GN R1765 of 1 November 1996, which amended Part III of Schedule 2;
 - (ii) GN R344 of 13 March 1998, which amended Part I and II of Schedule 1;
 - (iii) GN R760 of 11 June 1999, which amended Part I, II and III of Schedule 2;
 - (iv) GN R521 of 15 June 2001, which amended Part I of Schedule 1 and Part I, II, and III of Schedule 2;
 - (v) GN R880 of 8 October 2010, which amended Part II of Schedule 1; and
 - (vi) GN R222 of 28 March 2014, which amended Part I, II, and III of Schedule 2.
4. The declarations of invalidity in paragraphs 1, 2 and 3 of the order take effect from the date of this order.
5. The order of invalidity is suspended for a period of 24 months to allow Parliament to cure the defect.”

¹¹ *Smit* above n 5 at para 97.

when the Drugs Act was originally enacted by the Legislature, to distinguish it from other substances included in the Schedule by the Minister. While the High Court matter was heard well before *Smit*, we can only assume that the High Court was not aware of *Smit* when it handed down its judgment. In this regard, it is significant that the respondents have not countered the averment made by the applicants that the applicants' attorneys sent them the judgment in *Smit* for them to bring to the attention of the Judge. This aspect is simply not dealt with in the answering affidavit filed by the respondents' attorney. I am satisfied as to the credibility of the applicants' averments on this score and, based on the rule set out in *Plascon-Evans*,¹² the version put forward by the applicants must therefore be accepted.

[16] As this Court noted in *Camps Bay Ratepayers' and Residents' Association*, the doctrine of precedent is "not simply a matter of respect for courts of higher authority. It is a manifestation of the rule of law itself, which in turn is a founding value of our Constitution".¹³

[17] Similarly, in *Ruta*, this Court held:

"[R]espect for precedent, which requires courts to follow the decisions of coordinate and higher courts, lies at the heart of judicial practice. This is because it is intrinsically functional to the rule of law, which in turn is foundational to the Constitution. Why intrinsic? Because without precedent, certainty, predictability and coherence would dissipate. The courts would operate without map or navigation, vulnerable to whim and fancy. Law would not rule."¹⁴

¹² The rule in *Plascon-Evans* is still that in proceedings where disputes of fact have arisen on affidavits, a final order, whether an interdict or some other form of relief, may be granted if the facts averred in the applicant's affidavits, which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. See *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; [1984] (3) SA 623 (A) (*Plascon-Evans*).

¹³ *Camps Bay Ratepayers' and Residents' Association v Harrison* [2010] ZACC 19; 2011 (4) SA 42 (CC); 2011 (2) BCLR 121 (CC) at para 28.

¹⁴ *Ruta v Minister of Home Affairs* [2018] ZACC 52; 2019 (2) SA 329 (CC); 2019 (3) BCLR 383 (CC) at para 21.

Accordingly, the doctrine of precedent should have meant that the declaration of invalidity in *Smit* would have informed the High Court’s decision in this matter.

[18] Although the High Court was wrong to conclude in its judgment that section 63 was constitutional, it did not issue a declarator in this regard. It simply made an order dismissing the application. It is settled law that an appeal lies against the order of a court and not against the reasons underpinning the order.¹⁵ Given this Court’s judgment in *Smit* the order granted by the High Court in respect of the merits is correct even if the reasons provided by that Court are not. The application ought to have been dismissed because once this Court had declared legislation invalid, it was not competent for the High Court to make the order that the applicants wanted. Such an order had already been made by this Court.¹⁶ Accordingly, leave to appeal on the merits must be refused.

Costs

[19] The High Court ordered the applicants to pay the respondents’ costs, including the costs of two counsel. However, because the applicants asked the respondent’s attorneys to bring *Smit* to the attention of the Judge dealing with the matter, and the respondents failed to do so, it would be unfair to expect the applicants to carry their costs in the High Court. I have no doubt that, had the Judge been aware of *Smit*, she would not have made the costs order that she made. The dismissal of the applicants’ application would have been for different reasons. The applicants’ approach to the High Court to seek a declaration of constitutional invalidity of the impugned provision was justified and correct. The applicants’ position was vindicated by this Court’s judgment in *Smit*. Therefore, as far as the costs order of the High Court is concerned, the appeal must be upheld. Accordingly, the High Court’s costs order must be set aside.

¹⁵ *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue* 1992 (4) SA 202 (A) at 214F-G; *Sentrale Kunsmis Korporasie (Edms) Bpk v NKP Kunsmisverspreiders (Edms) Bpk* 1970 (3) SA 367 (A) at 395G-H. *Zuma v Democratic Alliance and Another* [2021] ZASCA 39; [2021] 3 All SA 149 (SCA); 2021 (5) SA 189 (SCA) at para 85

¹⁶ In terms of section 172(2)(a) of the Constitution, an order of constitutional invalidity “has no force unless it is confirmed by the Constitutional Court”. However, once an order of constitutional invalidity has been confirmed by this Court, it will cease to have any legal consequences unless this Court relies on its powers in terms of section 172(1)(b) to regulate the consequences of a declaration of invalidity. See *Ferreira v Levin N.O.*; *Vryenhoek v Powell N.O.* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) at para 26.

Order

[20] The following order is made:

1. Leave to appeal on the merits is refused.
2. Leave to appeal against the order of costs is granted.
3. The appeal against the order of costs is upheld.
4. The costs order of the High Court is set aside and replaced with the following:
“The first respondent must pay the applicants’ costs, including the costs of two counsel”.
5. Each party must pay their own costs in this Court.

For the Applicants:

A Katz SC, D Simonsz and
K Perumalsamy instructed by Carl Van
Der Merwe and Associates Incorporated

For the Respondents:

A A Gabriel SC instructed by State
Attorney, Durban