



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: 15793/13

Reportable

In the matter between:

JEREMY DAVID ACTON

Applicant

And

JEFFREY THAMSANQA RADEBE N.O

First Respondent

DIRECTORATE OF PUBLIC PROSECUTIONS

Second Respondent

THE MAGISTRATE FOR MONTAGU, WC

Third Respondent

JUDGMENT DELIVERED ON 27 JUNE 2014

BOQWANA, J

Introduction

[1] This case concerns an application for stay of prosecution of all cases involving persons facing charges of possession of and dealing in dagga. The complete order sought by the applicant specifically reads as follows:

1. That matters in the Montagu Magistrate's Court for which he is being accused on charges of possession of dagga, be postponed pending the outcome of a High Court application and/or action, and of possible appeals thereto, to be instituted by the applicant against the respondents, in which action the applicant challenges the constitutionality of certain provisions of the Illicit Drugs and Trafficking Act(*sic*),(Act 140 of 1992)and in addition, certain provisions of the Medicines and Related Substances Control Act (*sic*), (Act No 101 of 1965)and in particular in so far as these acts deal with the uses and possession of, and dealing in dagga, and the presumptions that arise in respect of possession thereof;
2. That unless the applicant institutes the aforesaid action within 60 days from date of this order, the order will automatically lapse and the respondents will be entitled to proceed with the criminal action against the applicant;
3. That unless the respondents oppose this application, the applicant will not ask for costs of this application against the respondents;
4. That the rights granted in the legal precedents cited in this application, which are claimed by the Applicant, and which are rights of all citizens, may be also extended by this order to enable the postponement of all cases involving citizens facing charges of possession of, or dealing in, dagga, in application of the right of citizens to equal benefit before the law, in terms of Section 9 Equality of the Bill of Rights...'

[2] The respondents did not oppose prayers 1 to 3 of the notice of motion which solely dealt with the stay of the applicant's own prosecution for charges he faced in the Montagu Magistrates Court. The second respondent however opposed prayer 4 which involved all cases involving other citizens facing charges of dealing in or possession of dagga. The applicant appeared in person and upon consideration of the application on 18 March 2014, the Court granted relief sought under prayers 1 to 3, as amended and postponed the remainder of the application for the

appointment of the *amicus curiae* and to afford the applicant an opportunity to obtain legal representation. It was the Court's view that although the applicant had attempted to draft his own papers and heads of argument, he was unable to assist the Court to properly adjudicate the matter. The Cape Bar appointed Advocate S Van Zyl as *amicus curiae* upon the Court's request. The applicant however advised the Court that he was unable to obtain legal representation and wished to continue appearing in person.

Issue before the Court

[3] At the outset it is important to state what this case is not about. The Court in this application is not called upon to decide on the constitutionality of the impugned provisions of the Drugs and Drug Trafficking Act¹ ('Drugs Act') and the Medicines and Related Substances Act² ('Medicines Act').

[4] That inquiry sits in another court or other courts where the applicant and/or various other individuals have issued summons or intend to do so, challenging the constitutional validity of the prohibition of dealing in or possession of dagga.

[5] In this application, the Court has to determine whether the remedy sought by the applicant is competent and appropriate in the circumstances and whether the applicant has made out a case that entitles him to such an order.

[6] In essence the issue is whether a blanket stay of prosecution of all cases of persons charged with use or possession of dagga in contravention of sections 4(a) and (b) and section 5(b) of the Drugs Act and S22A of the Medicines Act read with Schedule 8 of the Medicines Act and Section 40(1) (a) of the Criminal Procedure Act³ can be granted pending an outcome of the constitutional challenge of these provisions.

¹ Act No. 140 of 1992

² Act No. 101 of 1965. The previous name was substituted by s28 of Act 90 of 1997

³ Act No. 51 of 1977

Factual background

[7] The applicant is a self-proclaimed regular user of dagga and an activist involved in various activities promoting the use of and legalisation of dagga. He professes to smoke, eat and to use dagga for its medical benefits and as part of his own personal spiritual beliefs and practises. He also describes himself as a small scale farmer and an activist in various formations and most notably as the leader of the Dagga Party of South Africa, also known as iQela Lentsangu. He states that he has done extensive research on the medical and economic benefits of dagga which he alleges could be beneficial to the South African economy and citizenry at large.

[8] The applicant first appeared before the Montagu Magistrate's Court on charges of possession of dagga during the period of March to May 2011. He apparently brought an application similar to this before Weinkove AJ in 2012 which was struck from the roll. His application for leave to appeal and subsequent petition to the Supreme Court of Appeal ("SCA") were refused. All the charges against him were withdrawn by the prosecutor on 30 November 2012.

[9] One of the charges was however re-instated on 28 August 2013. I was concerned about whether or not the issue raised in prayer 1 had not been decided by Weinkove AJ. I am however satisfied that the stay of prosecution sought in the current application related to the re-instated charge of August 2013.

[10] The applicant seems to challenge the general prohibition of dagga. He contends the following in his 'motivating affidavit': 'the illegality of Cannabis is unconstitutional and therefore invalid, and that, in the interest of human rights and Justice, there is good reason for the High Court and Constitutional Court to reconsider the facts about Dagga (*Cannabis sativa*) and to find that the prohibition of Cannabis must come to an end'

[11] The status of the action proceedings is unclear save to state that the applicant submitted a copy of the summons he instituted against the government in 2012 together with various other plaintiffs. In their particulars of claim the applicant and others list various fundamental rights which they claim have been infringed.

Discussion

[12] The applicant cites a number of cases where orders staying prosecution of individual criminal matters were granted⁴, which he uses as a basis to support his case. Recently, a number of individuals facing prosecutions for use and/or possession of dagga have apparently been applying for stay of their individual prosecutions in various courts pending the outcome of the actions they brought or were seeking to bring in various High Courts challenging the constitutionality of the impugned Drugs Act and the Medicines Act provisions.

[13] The applicant contends that the granting of those orders staying prosecution established legal precedent which, as of right, should be extended to ‘all citizens facing prosecution for use and possession of dagga’ by application of section 9 of the Bill of Rights.

Legal standing

[14] The relief sought by the applicant extends far beyond his direct and substantial interest. He brings an application on behalf of other citizens who have not authorised him to act on their behalf. The applicant does not deal with the basis of bringing an application on behalf of others in his founding affidavit. It can be deduced from his papers that this application is intended to be brought in terms of section 38(c) of the Constitution⁵ which provides that:

‘Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are –

....

(c) anyone acting as a member of, or in the interest of, a group or class of persons.’

⁴Examples of those matters as cited by the applicant are: *Gareth Anver Prince and 2 Others v Magistrate NP Venter N.O. and the Directorate of Public Prosecutions*, Case Number: 3298/13; *Gareth Anver Prince and 2 Others v Magistrate McKenna N.O. and the Directorate of Public Prosecutions*, Case Number: 20996/12; *Manelek Barend Abraham Wenzel*, Case number 8658/13, all from this division and *Stobbs and Myrtle Clarke* Case number 27601/11 from the North Gauteng High Court.

⁵Act 108 of 1996

[15] Section 38(c) recognises a class action specifically in relation to infringements of or threats to rights guaranteed in the Bill of Rights.⁶ A number of decisions, most recently the SCA decision of **Children's Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others**⁷ and the Constitutional Court judgment of **Mukaddam v Pioneer Foods (Pty) Ltd and Others**⁸, have determined the requirements of what an applicant should show when bringing a class action, and in particular whether certification is required. In **Children Resources** the SCA set out some prerequisites which ought to be met to certify an action as a class action before issuance of the summons, which are inter alia: the class on whose behalf the action is brought must be identifiable; the applicant must show that the class has a cause of action which results in a triable issue; the various claims must raise common issues of facts and law; the representative in whose name the class action is brought must be identified; his interest as a representative must not be in conflict with those of the members of the class; and he/she must have the capacity to prosecute the class action including having the necessary funds. The Constitutional Court held in **Mukaddam** that these requirements should not be rigidly applied. The key consideration would be what the interests of justice require in a particular case.⁹ The majority decision of the Constitutional Court seemed to suggest that where relief is sought against the state, certification was not required. In this regard Jafta J held as follows:

[40] What is said in this judgment about certification that must be obtained before instituting a class action must not be construed to apply to class actions in which the enforcement of rights entrenched in the Bill of Rights is sought against the state. Proceedings against the state assume a public character which necessarily widens the reach of orders issued to cover persons who were not privy to a particular litigation. Class actions in those circumstances are regulated by s 38 which confers, as of right, the authority to institute a class action on certain persons, defined in the section.

⁶ Children's Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others 2013 (2) SA 213 (SCA) at paragraph 19

⁷Children Resource Centre supra

⁸2013 (5) SA 89 (CC)

⁹Mukaddam supra at paragraphs 34 to 39

Moreover, claims for enforcing rights in the Bill of Rights may even be brought in the wider public interest without certification. (Own underline)

[16] The Court however left open the question of whether institution of a class action to enforce a right in the Bill of Rights against a private litigant required prior certification.¹⁰

[17] Mhlantla AJ however held a different view to that of the majority on this issue. She expressed a view that given the rationale and the benefits of the certification process, she saw no reason, in principle or practise, for mandating certification in some class actions and not others.¹¹ Mhlantla AJ also recognised that the certification process is also significant in protecting the interests of persons whose rights may be extinguished by the outcome of the class action. The right of the members of a class to raise the dispute again might be limited by the application of the *res judicata* principle.¹²

[18] The applicant in this matter has not brought an application to consider certification of a class action. Even if certification was not a requirement in the present circumstances, members of the class that the applicant seeks to represent in this application must be clearly defined. The group of people, defined in prayer 4 as ‘all citizens facing charges of possession of, or dealing in dagga’ is too broad. An order of the kind sought by the applicant has a potential to bind not only citizens whose cases are pending in the magistrate courts, but also those who may still face charges or are arrested for possession of or dealing in dagga. This is so because every time a person is arrested his or her case would have to be stayed pending the outcome of the constitutional challenge. Some of these citizens might want to have their cases speedily dealt with. Some might wish to challenge the charges for reasons different to those of the applicant.

¹⁰Mukaddam supra at paragraph 41

¹¹Mukaddam supra at paragraphs 59

¹²Mukaddam supra at paragraph 62

[19] The applicant has a further hurdle to overcome in that he has to show that a right entrenched in the Bill of Rights has been infringed. Section 38 (c) allows a class action in relation to infringement of rights guaranteed in the Bill of Rights.

Stay of Proceedings

Has a right in the Bill of Rights been infringed?

[20] The applicant mentions in prayer 4:

‘that the rights granted in the legal precedents cited in this application, which are claimed by the Applicant, and which are rights of all citizens, may be also extended by this order to enable the postponement of all cases involving citizens facing charges of possession of, or dealing in, dagga, in application of the right of citizens to equal benefit before the law, in terms of Section 9 Equality of the Bill of Rights’ (Own emphasis)

[21] The first issue is that the granting of a stay of any Court proceedings is not a right but a matter of discretion exercised by the Court based on individual circumstances and the merits of a particular case before it.¹³ In **Sanderson v Attorney-General, Eastern Cape**¹⁴ where a stay of prosecution was sought on the ground that there had been an unreasonable delay in the prosecution, the Court found that:

‘the relief the appellant seeks is radical, both philosophically and socio-politically. Barring the prosecution before the trial begins -- and consequently without any opportunity to ascertain the real effect of the delay on the outcome of the case -- is far-reaching. Indeed it prevents the prosecution from presenting society's complaint against an alleged transgressor of society's rules of conduct. That will seldom be warranted in the absence of significant prejudice to the accused.

¹³ See *Brown v National Director of Public Prosecutions & Others*[2012] 1 All SA 61 (WCC) at paragraphs 21 to 24

¹⁴1998 (2) SA 38(CC)

....A bar is likely to be available only in a narrow range of circumstances, for example, where it is established that the accused has probably suffered irreparable trial prejudice as a result of the delay.¹⁵

[22] Although the issue in the **Sanderson** case was different, the principles enunciated in that decision find application in the present matter. The granting of the stay of proceedings will seldom be warranted in the absence of significant prejudice to the accused. Most importantly, proceedings are stayed by the Courts in the exercise of their discretion based on the merits of a particular case not by application of a general rule, which discretion is exercised sparingly and in exceptional circumstances.¹⁶

[23] Flowing from the above, it is clear that the granting of a stay by a single judge in one division cannot establish legal precedent binding on all divisions as is suggested by the applicant in prayer 4 of his notice of motion. Such order could at best have persuasive force in the consideration of similar matters. Furthermore, the fact that the respondents chose to abide by the Court's decision in various applications for stay of prosecution, brought by the individuals in cases the applicant has cited, including his own, does not give rise to legal precedent and to a right. There is no such right entrenched in the Constitution.

[24] The applicant attempts to locate this right under the equality clause, i.e. section 9 of the Bill of Rights. There are no averments in the founding papers to substantiate these claims. There is no indication who violated these rights, and when and how those rights were violated. It is also not clear whether or not what is being challenged is the decision of the second respondent to prosecute for the infringement of the impugned provisions in contravention of section 9 of the Constitution. In **Minister of Safety and Security v Sekhoto and Another**¹⁷, the court held that: 'a party who alleges that a constitutional right has been infringed bears the onus. The general rule is also that a party who attacks the exercise of discretion where the

¹⁵Sanderson supra at paragraph 38 – 39.

¹⁶Brown v National Director of Public Prosecutions & Others[2012] 1 All SA 61 (WCC) at paragraph 23

¹⁷2011 (1) SACR 315 (SCA) ; [2011] 2 All SA 157 (SCA); 2011 (5) SA 367 (SCA)

jurisdictional facts are present bears the onus of proof. This is the position whether or not the right to freedom is compromised. For instance, someone who wishes to attack an adverse parole decision bears the onus of showing that the exercise of discretion was unlawful. The same would apply when the refusal of a presidential pardon is in issue.’¹⁸

[25] I am in agreement with Bokaba SC who appeared for the second respondent that in order for the Court to extend any right to the persons the applicant claims to represent, the Court must find that there has been discrimination in violation of section 9 of the Bill of Rights. No averments have been made at all regarding any discrimination in support of prayer 4. Be that as it may, I have found that stay of prosecution, whether by a Court, or at the decision of the second respondent, is discretionary having regard to the particular circumstances of a case and does not constitute a right in terms of the Constitution.

The effect of staying all prosecutions

[26] The relief sought is also incompetent for various other reasons, the most important being the effect that the granting of such an order would have. The second respondent contends that the order prayed for would effectively lead to the immediate decriminalisation of dagga, this being in the face of a Constitutional Court decision that confirmed the validity of the impugned provisions.¹⁹ In the **Prince** matter at paragraphs 139 to 142 the majority of the Constitutional Court held that:

‘[139] The use made of cannabis by Rastafari cannot in the circumstances be sanctioned without impairing the state’s ability to enforce its legislation in the interests of the public at large and to honour its international obligation to do so. The failure to make provision for an exemption in respect of the possession and use of cannabis by Rastafari is thus reasonable and justifiable under our Constitution.

...

¹⁸ Minister of Safety and Security *supra* at paragraph 49

¹⁹ *Prince v President, Cape Law Society and Others* 2002 (2) SA 794 (CC).

[142] . . . The granting of a limited exemption interferes materially with the ability of the state to enforce its legislation, yet, if the use of cannabis were limited to the purpose of the exemption, it would fail to meet the needs of the Rastafari religion.’

[27] The effect of the stay sought would bring to a halt all prosecutions and suspend the application of the impugned provisions, which would effectively amount to a moratorium being placed on all investigations, arrests, prosecutions, and criminal and ancillary proceedings arising out of any alleged contraventions of the provisions of the Drugs Act and the Medicines Act, and would be to prevent the State from carrying out its obligations. This would not be a desirable situation. In the decision of **S v Basson**,²⁰ the Constitutional Court observed that criminal law plays an important role in protecting constitutional rights and values in our constitutional state. The Constitution obliges the state to prosecute offences and this duty to prosecute crime is placed on the state in terms of section 179(2) which provides that: ‘The prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings’

[28] Chapter 5 of the Criminal Procedure Act²¹ also makes it plain that the purpose of arrest is to bring suspects before court for trial. It would serve no purpose for police officers to arrest people who may not be prosecuted pending the outcome of the constitutional challenge, which may or may not favour the applicants. The order the applicant seeks would in my view not only bind the Courts but it would also prevent the second respondent and the police from executing any prosecutions or arrests arising out of any alleged contravention of the impugned provisions of the Drugs Act and the Medicines Act. What the applicant seeks cannot be done without the Court having declared the impugned provisions unconstitutional, which is not the issue before this Court. Furthermore the Constitutional Court would have to confirm such an order. Legislation would also need to be changed by Parliament after such pronouncement has been made.

²⁰2004 (6) BCLR 620 (CC).

²¹ Act No. 51 of 1977

In the matter of **Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another**²², the Constitutional Court restated this principle when it declared sections 15 and 16 of the **Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007** to be unconstitutional. It stated that justice and equity warranted that the invalidity of these provisions be suspended for 18 months in order to allow Parliament to remedy the defects in the statute. The Court further ordered a moratorium on all investigations into, arrests of, and criminal and ancillary proceedings against, adolescents in relation to sections 15 and 16 of the Sexual Offences Act, pending Parliament's remedying of the defects in the statute.

[29] Ngcobo J, who wrote the minority decision in the **Prince** matter raised the danger that would be posed by the immediate declaration of invalidity of the provisions of section 4(b) of the Drugs Act and section 22A(10) of the Medicines Act even if an exemption was granted for dealing in dagga for religious purposes.²³

[30] It follows therefore that the relief sought by the applicant in prayer 4 is not competent for reasons discussed above and even if it were, it is premature and does not follow the sequence followed by the Constitutional Court in various decided cases.

Jurisdiction

[31] The applicant argued that this Court had powers to grant an order which will affect areas beyond its jurisdiction, by virtue of the provisions of the Superior Courts Act,²⁴ which according to him created one High Court. His argument seems to be based on section 6 of that Act which deals with the restructuring of the Court system. In terms of Section 6 of the Superior Courts Act, High Courts are now essentially restructured in a manner in which they become High Court divisions and in each division, if there is more than one existing court, one will become the

²²(12) BCLR 1429 (CC); 2014 (2) SA 168 (CC); 2014 (1) SACR 327 (CC)

²³ See *Prince v President of the Law Society* supra at paragraphs 86 and 87 read with footnote 83

²⁴ Act No. 10 of 2013

main seat with jurisdiction over the whole province, and the others will become local with jurisdiction over a restricted area.

[32] Section 6 of the Act merely provides for the restructuring of the courts, and does not amend the jurisdiction of the Superior Courts, in my view.²⁵ By reason of my findings above, I find it not necessary to decide on this point.

Conclusion

[33] In conclusion, the relief sought by the applicant is incompetent for the reasons outlined above, namely, the applicant lacks legal standing, stay of proceedings does not qualify as a right enshrined in the Constitution, the suspending of prosecution will have a negative effect, for the reasons outlined above, on the work of the prosecution authorities, and suspension of the application of the impugned provisions, i.e. decriminalisation of dagga, cannot take place before the sections dealing with the possession of or dealing in dagga have been held to be inconsistent with the Constitution.

[34] The second respondent has also not asked for costs, rightly so in my view. It would not have been in the interests of justice to award costs against the applicant in this matter.

[35] In the result I make the following order:

The application is dismissed.

N P BOQWANA

Judge of the High Court

²⁵ Jurisdiction of the High Courts is regulated by section 21 of the Superior Courts Act

APPEARANCES:

For the Applicant: In person

For the Second Respondent: Advocate T J B Bokaba SC with S Poswa – Lerotholi

Instructed by: State Attorney, Cape Town

Amicus Curiae: Advocate S Van Zyl