

SOUTH AFRICA / JUDGMENT

Brass and Others v National Director of Public Prosecutions and Another (73283/2017) [2018] ZAGPPHC 660 (30 August 2018)

[2018] ZAGPPHC 660

COURT

North Gauteng High Court, Pretoria

BEFORE

Raulinga

CASE / FILE NUMBER

73283/2017

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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1)

NOT REPORTABLE

(2)

NOT OF INTEREST TO OTHER JUDGES

(3)

REVISED.

CASE NO: 73283/2017

30/8/2018

In

the matter between:

BRASS,
JARED
First Applicant
SWANEPOEL,
JACOBUS NAUDE
Second Applicant
BRASS,
JUSTIN DEVAN
Third Applicant
BRASS,
PATRICK FITZGERALD
Fourth Applicant
BRASS,
VANESSA EILEEN
Fifth Applicant
TEXEIRA,

LARA FILIPA
Sixth Applicant
TEXEIRA,
TIAGO
ALEXANDRE
Seventh Applicant
ROQUE,
DAVID JOHN JESSE
Eighth Applicant
BRASS,
WADE DAVID
Ninth Applicant
ANGEL,
DONOVAN
Tenth Applicant
And
NATIONAL
DIRECTOR OF PUBLIC PROSECUTIONS
First Respondent
DIRECTOR
OF PUBLIC PROSECUTIONS
GAUTENG
LOCAL DIVISION JOHANNESBURG
Second Respondent

JUDGMENT

RAULINGA J,

- [1] The first applicant together with the other applicants seek an order staying the criminal prosecution instituted in the Gauteng Local Division of the High Court of South Africa under case number SS 133/2015, pertaining to charges of contravening section 4(b) and 5(b) of Act 140 of 1992, Money Laundering and contravening sections 2 and 6 of Act 121 of 1998 ("POCA"), pending the outcome (and possible appeals) of proceedings that have been instituted by Julian Christopher Stobbs and Cathleen "Myrtle" Clark in the North Gauteng High Court under case number 58668/2011 and/ or the finalisation of the matter of Minister of Justice and Constitutional Development and others v G Prince referred to the Constitutional Court and to be determined under case number CCT 108/2017.
- [2] In the alternative the applicants seek an order that the criminal prosecution against them be stayed affording them the opportunity to launch their own constitutional challenge.
- [3] The second respondent opposes the relief sought contending that the matter is *res judicata* in that Magardie AJ has already decided on the matter. The second respondent also opposes the application on the basis that the Prince case deals with possession of small quantities of cannabis and that the Stobbs and Clark's case challenges the validity of possession and use of cannabis by adults. Further, that the Constitutional challenges of the aforesaid parties

does not include a scenario of cultivating or manufacturing of cannabis on a large scale such as the case that the applicants are facing.

- [4] The applicants record that Stobbs and Clark have in the interim brought an application to intervene in the Constitutional case of Prince, and their application was granted on 7 November 2017 . The said matter deals with a variety of issues relating to the constitutionality of the offending provisions of Act 140 of 1992.
- [5] The requirements of res judicata were that the cause of action, relief and parties be the same in the earlier and later proceedings. The expression 'res judicata' literally means that the matter has already been decided. The gist of the plea is that the matter or question raised by the other side had been finally adjudicated upon in proceedings between the parties and that it therefore cannot be raised again.[1]
- [6] It is also a trite principle that issue estoppel or res judicata, and an order for the dismissal of a claim is equivalent to an order for absolution from the instance, in which event it is open to an applicant to set the matter down again. The correct position is stated in Herbststein and Van Winsen.[2] The term absolution from the instance is not usually used in motion proceedings; the order is almost always to dismiss applications. In that scenario, dismissal of an action amounts to the same thing as absolution from the instance.[3]
- [7] It is also a trite practice that in motion proceedings, if a matter is decided on procedure, res judicata does not arise.[4] It seems to me that in the present matter Magardie AJ did not dismiss the matter on the merits, but made an order on procedural

issues.

In the result res judicata does not arise. The point in limine must be dismissed.

- [8] The contention by the second respondent that the Prince matter only deals with private possession of small quantities of cannabis is of no moment. Also the reliance on the Stobbs and Clark matter, that it challenges the constitutional validity of the prohibition (only in as far as it applies to the possession and use of cannabis by adults), also has no merit. Whether the scenario of cultivating or manufacturing cannabis on a large scale is dealt with or not, the issue is whether the issues concerning dagga/ cannabis pertaining to small quantities or larger quantities are being dealt with. The applicants are charged with dealing in large quantities of cannabis and also face charges than contraventions of the provisions of Act 140 of 1992. The second respondent has failed to either challenge or demonstrate that the Constitutional Court will find the impugned provisions to be unconstitutional. Moreover, the applicants are not likely to suffer any prejudice if the application is granted.
- [9] The maxim "justice delayed is justice denied" and the maxim "justice must not only be done but seen to be done" are not necessarily in opposition of each other, but do complete each other.

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

10.1 The application is granted in terms of prayer A of the Notice of Motion.

J RAULINGA

JUDGE OF THE GAUTENG

HIGH COURT DIVISION

APPEARANCES

For Applicant:

Mr S W van der Merwe

Instructed by:

Ehlers Fakude Incorporated

For Respondent:

Adv W Vos

Instructed by:

State Attorney Pretoria

[1] Prinsloo N.O. and others v Goldex 15 {Pty} Ltd and another 2014

(5) SA 297 (SCA)

[2] The Civil Practice of the Supreme Court of South Africa (5 ed) at 684

[3] See Vena v Vena and another N.O. 2010 (2) SA 248 (ECP)

[4] Vena supra

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