

SOUTH AFRICA / JUDGMENT

Smit v Minister of Justice and Correctional Services and Others (14655/2015) [2019] ZAWCHC 102; 2019 (2) SACR 516 (WCC) ; [2019] 4 All SA 542 (WCC) (16 August 2019)

[2019] ZAWCHC 102

COURT

Western Cape High Court, Cape Town

BEFORE

Francis, AJ

CASE / FILE NUMBER

14655/2015

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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 14655/2015

In the matter between

JASON SMIT Applicant

and

THE MINISTER OF JUSTICE AND

CORRECTIONAL SERVICES First Respondent

THE MINISTER OF HEALTH Second Respondent

THE DIRECTOR OF PUBLIC PROSECUTIONS,

WESTERN CAPE Third Respondent

THE ADDITIONAL MAGISTRATE, SOMERSET-WEST Fourth Respondent

THE MAGISTRATE, PRETORIA Fifth Respondent

JUDGMENT DELIVERED ON 16 AUGUST 2019

FRANCIS, AJ

INTRODUCTION

1. The Applicant, Mr Jason Smit, a South African citizen, whilst residing in the United Kingdom, was alleged to have committed various criminal offences relating to the production, cultivation, possession, and supply of cannabis.
2. In or about May 2011, the United Kingdom delivered a request for the Applicant's extradition to stand trial in connection with the alleged offences. Also, in about May 2011, the First Respondent ("the Minister") issued a notice in terms of section (5)(1)(a)[1] of the Extradition Act 67 of 1962 ("the Extradition Act") requesting the Magistrate, Pretoria, the Fifth Respondent, to issue a warrant for the Applicant's arrest as a precursor to the conduct of an extradition enquiry. The warrant was duly issued and the Applicant was arrested under the warrant on 18 March 2015 in Somerset-West, near Cape Town. On that same day, the Applicant appeared before the Additional Magistrate, Somerset-West, the Fourth Respondent, where proceedings relating to the extradition inquiry were adjourned sine die. The Applicant was released on bail which has since been extended from time to time.
3. Police Constable Steven John Wilde of the Cumbria Police Constabulary in the United Kingdom attested to an affidavit in support of the Applicant's extradition. His affidavit is annexed to the Applicant's founding affidavit. Police Constable Wilde states that a quantity of cannabis was found in the flat in which the Applicant was residing in the United Kingdom as well as two other residences that were leased out in his name. The Applicant was arrested and taken to the police station for questioning. Thereafter, the Applicant was granted police bail and directed to return to Durranshill Custody Unit, Carlisle Police Station, on 15 May 2008. The Applicant failed to comply with his bail conditions and a warrant for his arrest was issued by the Eden Magistrate's Court, Carlisle, Cumbria, England on 30 January 2009.
4. The arrest warrant is attached as an exhibit to Police Constable Wilde's affidavit and sets out in detail the alleged offences

committed by the Applicant under the United Kingdom's Misuse of Drugs Act, 1971 ("Misuse of Drugs Act"). In summary, the Applicant is alleged to have committed the following offences in respect of which his extradition is sought:

- 4.1 the production of a quantity of a controlled drug of class C (cannabis) – 2 offences;
 - 4.2 the cultivation of plants of the genus cannabis, a controlled drug of class C – 2 offences;
 - 4.3 having in his possession a controlled drug of class C (cannabis) with intent to supply to another – 2 offences; and
 - 4.4 having in his possession a controlled drug of class C (cannabis) – 2 offences.
5. Ms. Allison Claire Riley, a barrister and crown advocate with the Crown Prosecution Services of England and Wales, attested to an affidavit in support of the Applicant's extradition in which she sets out the relevant provisions of the the Misuse of Drugs Act and the law,

relating to the production, intent to supply, and possession of cannabis. The maximum penalty on conviction for an offence of producing or being concerned in the production or the cultivation of cannabis or possessing cannabis with the intent to supply, is 14 years imprisonment or a fine or both, whilst the penalty for the possession of cannabis is 2 years imprisonment. There is no time limit for the institution of proceedings by the prosecution for any of the aforesaid offences.

6. The Applicant denies that the substance found in his flat was cannabis and denies that the two other addresses where the cannabis

was found was rented in his name with his knowledge. He further denies that he was warned to appear in court on 15 May 2008. In any event, the Applicant left the United Kingdom unhindered soon after 15 May 2008.

7. Extraditions in South Africa are regulated by the Extradition Act and any applicable treaty which has been ratified or acceded to by parliament. The relevant treaty in the matter is the European Convention on Extradition, to which the United Kingdom is a party and to which South Africa acceded to on 13 May 2003.[2] Article 2.1 of the European Convention on Extradition provides that “extradition shall be granted in respect of offences punishable under the laws of the requesting party and of the requested party by deprivation of liberty or under a detention order for a maximum period of at least 1 year or by a more severe penalty”.
8. The rule of double criminality – where the offence for which extradition is sought must be an offence under the laws of both the foreign State and South Africa - finds expression in section 1 of the Extradition Act which defines an “extraditable” offence as meaning “any offence which in terms of the laws of the Republic and of the foreign State concerned is punishable with a sentence of imprisonment or other form of deprivation of liberty for a period of six months or more.” When acceding to the European Convention on Extradition, in line with the Extradition Act, South Africa lowered the threshold to six months. The date for determining the application of the double criminality rule is the date when the request for extradition is made by the requesting party[3] which, in this matter, was in or about May 2011.
9. The Applicant challenges his extradition principally on the basis that the Schedule to the Drugs and Drugs Trafficking Act No 140 of 1992 (“the Drugs Act”) proscribing the possession and dealing in cannabis as unconstitutional and invalid since the drug was proscribed as a consequence of the Minister exercising a plenary legislative power conferred on him in terms of section 63 of the Drugs Act; which the applicant contends is a breach of the separation of powers doctrine, a cornerstone of the South African constitutional order. The Applicant contends that the Minister and his predecessors, in terms of the provisions of Section 63 of the Act, after consulting with the Minister of Health (the Second Respondent) and the latter’s predecessors, have repeatedly exercised the power to amend since the commencement of the Act on 30 April 1993. When amending the Schedules to the Act, the

Minister exercised a discretion to retain cannabis as a prohibited drug. Since cannabis was not lawfully retained in the Schedules, so the applicant's contention goes, his alleged conduct could not be held to have been criminal/unlawful. In addition, the Constitutional Court in the most recent decision in the Prince[4] matter declared certain sections of the Act to be inconsistent with the Constitution and invalid to the extent that those sections prohibited the use or possession of cannabis by an adult in private for his or her own consumption. Therefore, according to the Applicant, although the possession of cannabis may be proscribed in the United Kingdom, it is not so in South Africa. As a consequence, the double criminality rule is not satisfied and that directly impacted on the question as to whether or not the Applicant may be lawfully extradited from South Africa to the United Kingdom.

10. The Applicant also seeks to impugn section 5(1)(a) of the Extradition Act in terms of which the warrant was issued to effect his arrest. In terms of the section, a magistrate may issue a warrant of arrest after receipt of a notification from the Minister, and the warrant is issued as a precursor to the conduct of extradition proceedings against the person sought to be extradited. The Applicant argues that the magistrate does not exercise an independent discretion with regard to the issue of the warrant but is merely directed to do so by the Minister. As such, section 5(1)(a) of the Extradition Act unjustifiably infringes upon section 12(1)(a)[5] of the Constitution which affords everyone the right not to be deprived of her or his freedom arbitrarily or without just

cause.

11. Finally, the Applicant seeks to review and set aside the warrant issued against him by the Fifth Respondent, the said warrant having been issued, in part, in terms of section 5(1)(a) of the Extradition Act and on the assumption that cannabis was entirely unlawful in South Africa.
12. The application is opposed by the Minister, who is the relevant Minister for the purposes of both the Drugs Act and the Extradition

Act, and the Director of Public Prosecution, Western Cape, the Third Respondent, who also plays a role in the extradition proceedings.

The Third Respondent filed a short affidavit in support of the submissions advanced by the Minister. The remaining respondents did not formally participate in the proceedings before this Court, with the Second and Fourth Respondents filing notices to abide.

13. The Applicant was represented by Mr Katz SC (with Mr Simonsz) and Mr Breitenbach SC (with Ms Mayosi and Ms Christians) represented the First and Third Respondents. The Court is indebted to Counsel for the comprehensive heads of argument which they submitted.

LOCUS STANDI TO CHALLENGE THE DRUGS ACT

14. The Minister has disputed the Applicant's locus standi to challenge the constitutionality of section 63 of the Drugs Act. It is, therefore, necessary to deal with this issue as a point in limine before considering the merits of the constitutional challenges. I provide a brief overview of the relevant provisions of the Drugs Act and Schedules thereto in order to contextualise the Respondent's objection to the Applicant's standing, and the Applicant's response thereto.

14.1 The Drugs Act is the primary statute in South Africa dealing with what may be termed non-medical drugs such as cannabis, heroin, cocaine, ecstasy, and the like. Although a degree of overlap may exist, the Medicines and Related Substances Act 101 of 1965 ("the Medicine Act") deals generally with medical drugs. The Drugs Act creates a broad legislative regime that controls the production, use, and dissemination of non-medical drugs.

14.2 A "drug" is defined in section 1 of the Drugs Act as "any dependence-producing substance, any dangerous dependence-producing or any undesirable dependence-producing substance".

14.3 In terms of section 1 of the Drugs Act, substances that are "dangerous dependence-producing", "dependence-producing" or "undesirable dependence-producing" are all defined and listed in one of the Schedules to the Drugs Act. The Drugs Act contains three Schedules, of which only Schedules 1 and 2 are relevant for purpose of this matter[6]. Schedule 1 consists of two parts and lists substances that are used in the manufacture of drugs. Schedule 2 consists of three parts:

- (i) Part I lists dependence-producing substances;
- (i) Part II lists dangerous dependence-producing substances; and
- (ii) Part III lists undesirable dependence-producing substances.

Cannabis is listed in Part III of Schedule 2 as an undesirable dependence-producing substance.

14.4 Section 4 of the Drugs Act proscribes the use or possession of cannabis whilst section 5 states that no person shall deal in cannabis unless the person is a medical practitioner or one of a small set of qualified persons. "Deal in", in relation to a drug, is defined in section 1 of the Drugs Act as including "performing any act in connection with the transshipment, importation, cultivation, collection, manufacturing, supply, prescription,

administration, sale, transmission or exportation of the drug". As mentioned earlier, in the Prince judgement, the Constitutional Court declared sections 4(b) and 5(b) of the Drugs Act to be inconsistent with the Constitution and invalid to the extent that the sections prohibit the use or possession of cannabis by an adult in a private place for his or her own consumption.

14.5 Section 3 of the Drugs Act prohibits the manufacture and supply of scheduled substances.

14.6 Section 13(d) of the Drugs Act provides that any person who contravenes section 4(b) shall be guilty of an offence. Likewise, section 13(f) provides that any person who contravenes section 5(b) shall be guilty of an offence. Section 17(d) provides that any person convicted of an offence under section 13(d) shall be liable to, amongst others, imprisonment for a period not exceeding

15 years and section 17(e) provides that any person convicted of an offence under section 13(f) shall be liable to, amongst others, imprisonment for a period not exceeding 25 years. In essence, then, section 13 read with section 17 of the Drugs Act criminalises the use, possession, and dealing in cannabis and such conduct may be visited with a criminal sanction of imprisonment not exceeding 15 years (for the use and possession of cannabis) or a period not exceeding 25 years (for the dealing in cannabis). Of course, in line with the Prince judgement, any adult using cannabis in private for his or her own consumption would not be subject to criminal sanction.

14.7 Section 63 of the Drugs Act provides as follows:

“63 Amendment of Schedules 1 and 2

The Minister may by notice in the Gazette and after 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.”

14.8 The Drugs Act, including the schedules, was enacted by parliament and came into force on 30 April 1993. When initially enacted by parliament, the Drugs Act included Schedules 1 and 2 and cannabis was listed in Part III of Schedule 2 as an undesirable dependence-producing substance. Since the commencement of the Drugs Act on 30 April 1993, Schedules 1 and 2 have been amended six times, namely: (a) GN R1765 of 1 November 1996 which amended Part III of Schedule 2; (b) GN R344 of 13 March 1998 which amended Part I and II of Schedule 1; (c) GN R760 of 11 June 1999 which amended Parts I, II and III of Schedule 2; (d) GN R521 of 15 June 2001 which amended Part I of Schedule 1 and Parts I to III of Schedule 2; (e) GN R880 of 8 October 2010 which amended Part II of Schedule 1; and (f) GN R222 of 28 March 2014 which amended Parts I, II, and III of Schedule 2.

14.9 In summary, then, the Drugs Act is the primary statute in South Africa which proscribes non-medical drugs. The list of drugs that are prohibited are included in the Schedules to the Drugs Act. In terms of Part III of Schedule 2, cannabis is listed as an undesirable dependence-producing substance. The use, possession, or dealing in cannabis that is not sanctioned by the Drugs Act or the Schedules thereto or affected by the Prince judgement, is criminal conduct that may attract a criminal penalty. The Minister, after consulting with the Second Respondent, is empowered to include or delete any drug from Schedule 1 or 2 or otherwise amend the Schedules. The Minister, acting in terms of section 63 of the Drugs Act, has amended the Schedules at least six times after the promulgation of the Act and Schedules thereto.

15. The Constitutional Court has over the years provided ample guidance to assist in determining standing raised as a point in limine where a complainant acts in his or her own interest and asserts a constitutional right. A complainant does not have to show that he or she has a “direct and personal interest” in the relief claimed but must show that he or she has a sufficient interest in the relief sought. [7]. Whilst the constitutional own-interest

standing is broader than the traditional common law standing, this does not mean that litigants,

especially own-interest litigants, have a broad and unqualified capacity to litigate against all claims of illegality. Something more must be shown. After reviewing a number of its previous decisions[8], the Constitutional Court in the Giant Concerts[9] case concluded that the “own-interest litigant must, therefore, demonstrate that his or her interest or potential interests are directly affected by the unlawfulness sought to be impugned”.

16. When it comes to deciding whether a litigant has a sufficient own-interest in the subject matter in dispute, a court must assume

that the litigant’s challenge is justified because standing is a point in limine which has to be decided before the merits of the case[10]. The merits of the case, therefore, must be separated from the issue of standing. One of the consequences of separating the merits of the case from the question of standing is that the litigant must have a sufficient interest in the lawfulness of the act or the decision in question. As a corollary, if an own-interest litigant does not have sufficient standing, he or she will be denied legal standing even though the result could be that an unlawful act or decision stands[11].

17. In his founding affidavit, the Minister disputes the Applicant’s standing to challenge the constitutional validity of “all schedules made in terms of section 63 of the Drugs Act”, and submits that the Applicant’s standing is confined to challenging the listing of cannabis in Part III of Schedule 2 because the Applicant was not adversely affected by the listing of any other substances in the Schedules to the Drugs Act. In his heads of argument, and in argument during this hearing, Mr Breitenbach

submitted that the Applicant does not have any standing at all to challenge the constitutional validity of section 63 of the Drugs Act since cannabis was not inserted in the Schedules to the Drugs Act under section 63. Accordingly, so argued Mr Breitenbach, the Applicant does not have a right or interest that is directly, or potentially, affected by the challenged law or conduct.

18. Given the central thrust of the Applicant’s cause of action, the Minister, in my view, adopts too narrow an approach to the Applicant’s standing.

18.1 The Applicant has contended that section 63 of the Drugs Act constitutes an unlawful delegation of plenary executive power to the executive in breach of the separation of powers doctrine. The extradition proceedings in which the Applicant is involved, and the possible threat to his freedom[12], is primarily based on the content of a Schedule to the Drugs Act, read together with the prohibition contained in the said statute. It is the Drugs Act and the Schedule that is sought to be impugned, and they constitute his cause of action. As Mr Katz has correctly pointed out, the Applicant does not only challenge the cannabis prohibition. He also challenges the statute and the Schedules on the basis of the rule of law and the principle of legality; in my view, the Applicant would have standing in respect of those objective criteria alone.

18.2 Certainly, as an affected person asserting a constitutional right, the Applicant has an interest in ensuring that the process which determines the lawfulness of all drugs in South Africa is both lawful and constitutional[13]. If the Applicant's challenge to section 63 of the Drugs Act is upheld, it potentially affects the manner in which all drugs listed in all the Schedules have been proscribed. As Mr Katz has argued, it is not about the pros and cons of individual drugs but about how section 63 violates the doctrine of the separation of powers. By its very nature, the Applicant's challenge cannot be limited to cannabis.

18.3 Even if Mr Breitenbach is correct that the Applicant should be limited to challenging only the prohibition on cannabis as this is the only prohibition that has a direct impact on him, the Constitutional Court has recognised that a court should be hesitant to dispose of a matter of public interest and importance on standing alone. In this regard, the Constitutional Court stated that,

"the interest of justice under the constitution may require courts to be hesitant to dispose of cases on standing alone where broader concerns of accountability and responsiveness may require investigation and determination of the merits. By corollary, there may be cases where the interest of justice or the public interest may compel a court to scrutinise action even if the applicants standing is questionable. When the public interest cries out for relief an applicant should not fail merely for acting in his or her own interest"[14].

19. The possible usurpation by the executive of plenary legislative powers is a matter of public interest, impacting as it does on the broader concerns of accountability and responsiveness which are the hallmarks of the doctrine of the separation of powers. In my view, the Applicant has sufficient interest in the subject matter of the dispute to clothe him with standing. However, even if I am wrong in this regard, given the gravity of his challenge and the possible consequences thereof, I am loathe to dispose of the Applicant's legal challenge simply on the basis of his alleged lack of standing.

ATTACK ON THE CONSTITUTIONALITY OF SECTION 63 AND THE SCHEDULES PUBLISHED IN TERMS THEREOF

20. Section 63 of the Drugs Act permits the Minister, after consulting with the Second Respondent, to amend Schedules 1 and 2 of the said Act and insert or delete any substances in both Schedules. Schedules to a statute are inseparable from that statute and, as such, form part of the main body of any enactment. Schedules are not simply an adjunct to the clause to which they relate[15].
21. Clearly, section 63 of the Drugs Act contemplates the Minister exercising a plenary legislative power. In other words, the legislature has delegated its plenary law making power to the executive. Given the fact that over the last 25 years the legislature

has not exercised its power to amend the schedules, this delegation is akin to an assignment[16] of its law making power to a member of the executive.

22. South Africa is a constitutional State predicated on the separation of powers and a recognition of the functional independence of the branches of government. Simply stated, the separation of powers doctrine is to the effect that unless constitutionally mandated or incidental to the powers conferred, parliament enacts, amends and repeals laws, the executive executes and enforces laws, and the judicial branch interprets the laws and settles disputes of law[17]. As noted by the Constitutional Court in the First Certification Judgement[18], the distribution of power between, and the functional independence of, the branches of government ensures accountability, responsiveness and openness, and prevents the branches of government from usurping power from each other. Although the distribution of power between the different branches of government is not fixed and immutable, there are certain powers that cannot be delegated. In the Minister of Health[19] case, the court stated the position thus:

“Although there are no bright lines that separate the roles of the legislature, the executive and the courts from one another, there are certain matters that are pre-eminently within the domain of one or other of the arms of government and not the others. All arms of government should be sensitive to and respect this separation.” (emphasis added).

23. The power to enact original legislation and to amend and repeal statutes falls within parliament’s pre-eminent domain and the legislature may not assign plenary legislative power to another body, including the power to amend the statute under which the assignment is made[20]. In the Executive Council of the Western Cape Legislature case, the Constitutional Court recognised, however, that given the demands of the modern state, parliament cannot always be expected to deal with all matters relating to the implementation and regulation of laws and it is, therefore, necessary for effective law-making to read into the constitution the power to delegate certain legislative functions to other bodies. There are, of course, limits to what kind of law-making powers can be delegated and to whom. Parliament may only delegate the making of sub-ordinate legislation such as presidential proclamations and ministerial regulations but it cannot delegate its original law-making power to the executive[21]. The position is the same under the Final Constitution[22].
24. One of the reasons why parliament may not delegate plenary law-making powers to the executive is because this would undermine the “manner and form” provisions of the Constitution. The manner and form provisions are those sections of the Constitution which sets out the procedures that parliament must follow whenever it wants to pass, repeal, or amend a law. As the Court emphasised in Doctors for Life International[23]:

“public participation in the law-making process is one of the means of ensuring that legislation is both informed and responsive. If legislation is infused with a degree of openness and participation, this will minimise dangers of arbitrariness and irrationality in the formulation of legislation...And this enhances our democracy... Under our constitution, therefore, the obligation to facilitate public involvement is a requirement of the law-making process.”

25. In my view, section 63 of the Drugs Act constitutes an impermissible delegation of plenary legislative power to a member of the executive, the Minister (after consulting with the Second Respondent). When the Minister takes a decision to include or delete a substance in the Schedule to the Drugs Act, he is in fact amending plenary legislation. This amendment takes place unilaterally (the Second Respondent only has a consultative role) and certainly does not follow the manner and form provisions relating to the enactment of legislation. The decision of the Minister is not exercised with the oversight of parliament and there does not appear to be any statutory limits on how the Minister ought to exercise his discretion. Instead of public participation, one minister in consultation with another is entitled to determine which substances are proscribed. I, therefore, agree with Mr Katz's argument that this offends the manner and form in which legislation is enacted in South Africa's deliberative constitutional democracy.

26. Furthermore, section 63 falls to be impugned in that it does not impose limits on the Minister's discretion when determining

which substances should be inserted into, deleted from, or retained in any of the Schedules. The Constitutional Court has emphasised that when delegating any of its powers, parliament must provide some guidance on the exercise of such delegated power, which guidance can be provided either in the legislation itself or, where appropriate, by legislating a requirement that delegated legislation be properly enacted by a competent authority[24]. This is so particularly where the limitation of rights is at risk. As noted earlier, the Drugs Act contains criminal sanctions

relating to the prohibition of the use, possession, and dealing in certain drugs which are listed in the Schedules. Thus, in providing

the Minister the power to amend the Schedules, the legislature has also conferred on the Minister the power to create new criminal

offences without the requisite public consultative process that is required when parliament does so.

27. For all the foregoing reasons, section 63 represents a violation of the separation of powers, and a usurpation of the legislative making powers of parliament with regard to plenary law-making, by vesting the Minister with the power to amend legislation through updating, by adding to or deleting from, the schedules to the Drugs Act. In view of the foregoing, I find myself in agreement with the cogent reasoning in the argument of Mr Katz.

28. Whilst section 63 of the Drugs Act may well be invalid as a violation of the Constitution, the question still remains whether or not the Schedules are invalid as well. Given the fact that Schedules are part and parcel of the Drugs Act, it follows that all the amendments to Schedules made by the Minister as a consequence of the exercise of his powers in terms of section 63 of the Drugs Act must also be invalid. Logically, however, this does not assist the Applicant. As pointed out by Mr Breitenbach, when the Drugs Act was first promulgated with its Schedules, cannabis was proscribed in terms of Part III of Schedule 2. This

Schedule, then, to put it colloquially, is “parliament’s” schedule and not the Minister’s. Since cannabis was not inserted in the Schedule to the Drugs Act under section 63, the initial Schedule proscribing cannabis cannot be impugned. What is constitutionally invalid are only those amendments to the Schedules to the Drugs Act which were amended in some manner or form by the Minister from time to time in terms of section 63. Those Schedules are listed in paragraph 2.1.8 of this judgement. Thus, it is only those amendments to the Schedules which fall to be declared invalid.

29. Accordingly, section 63 of the Drugs Act and all amendments to the Schedules made under section 63 are declared to be inconsistent with the Constitution and invalid.

THE CONSTITUTIONALITY OF SECTION 5(1)(a) OF THE EXTRADITION ACT

30. Extradition proceedings are sui generis as they are neither criminal nor civil in the traditional meaning ascribed to these terms[25]. In every request for extradition there is an interplay between South Africa’s international obligations and its compliance with its own domestic law. In Harksen[26], the Constitutional Court characterised extradition as follows:

“An extradition procedure works both on an international and a domestic plane. Although the interplay of the two may not be severable, they are distinct. On the international plane, a request from one foreign State to another for the extradition of a particular individual and the response to the request will be governed by the rules of public international law. At play are the relations between States. However, before the requested State may surrender the requested individual, there must be compliance with its own domestic laws. Each State is free to prescribe when and how an extradition request will be acted upon and the procedures for the arrest and surrender of the requested individual. Accordingly, many countries have extradition laws that provide domestic procedures to be followed before there is approval to extradite.”

31. In this matter, the applicable treaty is the European Convention on Extradition. As to South Africa’s domestic law, before the person whose extradition is sought may be surrendered to a foreign state, the procedure prescribed in the Extradition Act must be completed.
32. The South African domestic extradition domestic process involves at least three distinct phases:
- (i) The first stage encompasses the issue of a warrant by the magistrate to procure the presence of the person in respect of whom an extradition order is sought, to appear before an extradition enquiry. The warrant is initiated by a notification from the Minister who acts in terms of a diplomatic request from a foreign State. A warrant of arrest may be also be issued without a request from the Minister where the magistrate received information of a person accused or convicted of an extraditable offence in a foreign State which would, in his or her opinion, justify the person’s arrest had the offence been committed in South Africa[27].
- (ii) The second phase involves proceedings which take place in a magistrate’s court which determines whether a factual and legal basis for extradition exists[28].

(iii) The third phase involves the Minister exercising his or her discretion whether or not to surrender the person concerned to the requesting State[29].

33. Any person against whom a committal order has been issued may, within 15 days, appeal to the High Court, which may in relation to the appeal make such order as it may deem fit, including an order that such person be discharged from custody[30]. A person may not be surrendered to the foreign State until the period allowed for an appeal has expired (unless the person in writing waived the right to appeal)[31] or, in the event of an appeal, before such appeal has been disposed of.[32]
34. The Applicant contends that section 5(1)(a) of the Extradition Act is unconstitutional because it allows a magistrate to issue a warrant on the mere say-so of the Minister rather than the magistrate being independently satisfied that there is good reason for the person's arrest for the purposes of an extradition enquiry. By acting in this manner, so argues the Applicant, the magistrate unjustifiably deprives the individual of his right to freedom and security which is protected by section 12(1)(a) of the Constitution.
35. In response, the Minister has submitted that this Court should not in fact entertain this objection because the Fifth Respondent issued the warrant both in terms of section 5(1)(a) of the Extradition Act and 5(1)(b) of the Act. From the papers filed of record, the Applicant certainly appears to have had no qualms with regard to the exercise of the Fifth Respondent's discretion in terms of section 5(1)(b) since, on the face of it, it appears that the Fifth Respondent was independently satisfied of the need to issue the warrant.
36. I am not, however, persuaded by the Minister's contention that because the warrant was also issued in terms of section 5(1)(b) of the Extradition Act, it is not necessary to consider section 5(1)(a) of the Extradition Act. In my view, the warrant indicates expressly that the Fifth Respondent issued the warrant on the basis of section 5(1)(a) and, therefore, this Court is obliged to consider this issue as well. In *S v Jordan & Others*[33], the Constitutional Court held that it is incumbent on a High Court when considering a constitutional challenge to express its opinion on all the constitutional challenges raised even though the court may decide to resolve the matter only on one ground.
37. The Applicant's challenge to the constitutionality of section 5(1)(a) of the Extradition Act appears in my view to be based on a fundamental misconception of the purpose behind the issue of a warrant within the context of the extradition process. A warrant is a legal process whereby the person concerned is brought before a magistrate. When issuing a warrant of arrest in terms of section 5(1)(a) of the Extradition Act, all that the magistrate is doing is to issue a legal document that is aimed at securing the presence of a person at an extradition enquiry[34]. At this stage of the process, the magistrate is not concerned with any of the substantive aspects relating to the extradition process or proceedings, such as the guilt or innocence of the person concerned or with issues relating to foreign law, policy, or diplomacy. Indeed, the issuing of a warrant in terms of section 5(1)(a) does not necessary entail a substantive exercise of any discretion by the magistrate but simply depends on the

establishment of an objective fact, namely the issue of a notification by the Minister. It is, of course, always within the powers of a magistrate, depending on the circumstances, to exercise a discretion on whether or not to issue the warrant[35].

38. There has been no attack on the notification received by the Fifth Respondent and the latter was entitled to accept the notification as valid and enforceable in line with the *maxim omnia praesumuntur rite esse acta*[36] (all things are presumed to be done correctly). In *Abel*[37], the court stated that it is doubtful whether the issue of a notification is reviewable if the Minister could reasonably have been

of the opinion that the request had been received in its usual form. I, therefore, find no merit in the argument advanced on behalf of the Applicant that the magistrate must be satisfied independently that the person concerned is indeed liable to be surrendered to the requested State before issuing a warrant in terms of section 5(1)(a) of the Act. Such an enquiry would be tautologous since such enquiry is in any event required in terms of section 9 of the Extradition Act.

39. In *Harksen*[38], Griesel J held that there is no need for a preliminary hearing of the person whose extradition is sought before the magistrate decides to issue a warrant of arrest in terms of section 5(1)(a) of the Extradition Act. The reasoning of the court in the *Harksen* case is persuasive. The decision to issue a warrant of arrest lies fairly closely to the beginning of the extradition process and, as such, it involves a preliminary decision which is immediately followed by an appearance before a magistrate in terms of section 9 of the Extradition Act, where the individual concerned is entitled to be heard with regard to the question of bail. This appearance, in turn, is followed by a full enquiry in terms of section 9(1) of the Extradition Act, where the person concerned likewise enjoys the right to be heard. Accordingly, by virtue of these provisions, any prejudice that may be suffered as a result of a preliminary decision is likely to be limited in nature and brief in duration[39]. In the matter at hand, the Applicant applied for, and was granted, bail which has been extended from time to time since then.
40. I do not agree with the Applicant's contention that the issue of a warrant of arrest by the magistrate in the circumstances

contemplated in section 5(1)(a) of the Extradition Act infringes on his constitutionally protected right to freedom and security not to be deprived of freedom arbitrarily or without just cause. In *Geuking*[40] the Constitutional Court stated that "the deprivation of freedom occasioned by an extradition occurs not when the magistrate concludes an enquiry (in terms of section 9 and 10 of the Extradition Act) but when the Minister decides in terms of section 11 that extradition should take place". The Appellant, in *Geuking*, had argued that he stands to be deprived of his freedom arbitrarily or without just cause in violation of the provisions of section 12(1) of the Constitution because of the provisions of section 10(2) of the Extradition Act. In terms of section 10(2) of the Extradition Act, the magistrate who holds the enquiry in terms of section 9 is obliged to accept as conclusive proof a certificate issued by an appropriate authority in charge of the prosecution in

the foreign State concerned to the effect that there is sufficient evidence at the disposal of that authority to warrant the prosecution of the person concerned. The court held that the certificate meets the constitutional requirement of just cause and the procedure relating to the conduct of the enquiry before the magistrate is fair[41]. By parity of reasoning, the issue of a warrant of arrest cannot be said to be arbitrary or without just cause in the context of section 5(1)(a) of the Extradition Act. It is issued on the basis of a notification received from the Minister acting in fulfilment of the country's international obligations and on the basis of a treaty. Furthermore, there are sufficient and important safeguards built into the extradition enquiry to ensure a procedurally fair enquiry for persons, such as the Applicant, against whom an extradition order is sought. Since there is no limitation on the Applicant's constitutionally protected rights in terms of section 12(1)(a) of the Constitution, it is not necessary for this Court to engage in a justification exercise in terms of section 36 of the Constitution.

REVIEW OF THE FIFTH RESPONDENT'S DECISION

40. Given the conclusion reached in respect of both the constitutional attack on the validity of the Extradition Act and the Drugs Act and Schedules, the Applicant's application to review the issue of the warrant of arrest by the Fifth Respondent must fail. The warrant was validly issued, be it under section 5(1)(a) or 5(1)(b) of the Extradition Act.

RELIEF SOUGHT

41. In terms of section 172(1)(a) of the Constitution, a court must declare any law or conduct that is inconsistent with the Constitution

to be invalid to the extent of its inconsistency.

42. I have indicated that, in my view, section 63 of the Drugs Act is inconsistent with the Constitution and invalid. Accordingly, all purported amendments made to the Schedules by the Minister acting in terms of section 63 of the Drugs Act are also inconsistent with the Constitution and are invalid. This order does not affect the contents of the first Schedule which was promulgated simultaneously with the enactment of the Drugs Act.
43. Both the Minister and the Applicant have submitted that in the event that there is a declaration of invalidity of either one or both of the statutes, it would be just and equitable if such a declaration would operate prospectively and be suspended for a period of 24 months.
44. Section 172(2) of the Constitution provides that "(a)n order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court". Thus, it is neither necessary nor competent for a High Court to suspend an order of constitutional invalidity that relates to a statutory provision or an act of parliament when it grants an order of constitutional invalidity. As the Constitutional Court observed in the Prince judgement, what section 172(2) of the Constitution means is that,

“any order of constitutional invalidity of an Act of Parliament or a provision of an Act of Parliament made by a court other than (the constitutional court) does not take effect for as long as it has not been confirmed by (the constitutional court). Such a suspension order is incompetent because it purports to suspend the operation of an order that is not in operation in any event.”[42]

COSTS

45. In so far as costs are concerned, both parties may claim a measure of success, even though the limited finding in favour of the Applicant does not provide any succour to him. Nonetheless, the Applicant has raised important issues of law, especially in relation to the Drugs Act. Accordingly, I am of the view that the Biowatch[43] principle should apply and each party should be liable for their own costs.

ORDER

46. In the result, I make the following order:

46.1 The application is dismissed, subject to paragraph 46.2 below;

46.2 Section 63 of the Drugs and Drugs Trafficking Act 140 of 1992 and the following amendments made to the Schedules in terms of section 63 by the Minister of Justice and Correctional Services are declared to be inconsistent with the Constitution of the Republic of South Africa, 1996 and 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 Parts I, II and III of Schedule 2;
- (iv) GN R521 of 15 June 2001 which amended Part I of Schedule 1 and Parts I to 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 Parts I, II, and III of Schedule 2.

47. There shall be no order as to costs.

[1]

5. Warrants of arrest issued in Republic.-

- (1) Any Magistrate may, irrespective of the whereabouts or suspected whereabouts of the person to be arrested, issue a warrant for the arrest of any person –
 - (a) upon receipt of a notification from the Minister to the effect that a request for the surrender of such person to a foreign State has been received by the Minister.

[1]

5. Warrants of arrest issued in Republic.-

- [1] Any Magistrate may, irrespective of the whereabouts or suspected whereabouts of the person to be arrested, issue a warrant for the arrest of any person –
 - (a) upon receipt of a notification from the Minister to the effect that a request for the surrender of such person to a foreign State has been received by the Minister.
- [2] GN 66 in Government Gazette 24872 of 13 May 2003.
- [3] Patel v National Director of Public Prosecutions 2017 (1) SACR 456 (SCA) at para [40].
- [4] Minister of Justice and Constitutional Development and Others v Prince (Clarke & Others Intervening); National Director of Public Prosecutions and Others v Rubin; National Director of Public Prosecutions and Others v Acton 2018 (6) SA 393 (CC).
- [5] Section 12(1)(a) of the Constitution states that: “Everyone has the right to freedom and security of the person, which includes the right-
 - (a) not to be deprived of freedom arbitrarily or without just cause.”
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*“Everyone has the right to freedom and security of the person, which includes the right-
 - (a) not to be deprived of freedom arbitrarily or without just cause.”*
- [6] Schedule 3 deals with the repeal of legislation.
- [7] Kruger v President of the Republic of South Africa & Others [2008] ZACC 17; 2009 (1) SA 417 (CC) at para [25].
- [8] Ferreira v Levin NO and Others; Vryenhoek and others v Powell NO and Others 1996 (1) SA 984 (CC), Minister of Home Affairs v Eisenberg & Associates In re: Eisenberg & Associates v Minister of Home Affairs and Others
[2003] ZACC 10; 2003 (5) SA 281 (CC).
- [9] Giant Concerts CC v Rinaldo Investments (Pty) Ltd 2013 (3) BCLR 251 (CC) at para [43].
- [10] Id at para [32]
- [11] Id at para [34].
- [12] See, for example, Alexandra v Minister of Justice (SA32/2008) [2010] NASC 2 (9 April 2010) at para [117], and Geuking, v President of the Republic of South Africa 2003 (3) SA 34 (CC) at para [1].
- [13] Cf. Kruger, fn 7, at para [25] – [27]
- [14] Giant Concerts, fn 9, at para [34].

- [15] See, *De Reuk v Director of Public Prosecutions (Witwatersrand Local Division)* [2003] ZACC 19; 2004 (1) SA 406 (CC). See also, *Executive Council, Western Cape Legislature and Others v President of the Republic of South Africa and Others* [1995] ZACC 8; 1995 (4) SA 877 (CC).
- [16] See, *L Baxter Administrative Law* (1984) at page 432.
- [17] For a useful overview of the philosophical and jurisprudential antecedents of the doctrine of separation of powers see K O'Regan "Checks and Balances Reflections on the Development of the Doctrine of Separation of Powers under South African constitution", 8PELG (2005) pages 1 - 30.
- [18] *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* [1996] ZACC 26; 1996, 1996 (4) SA 744 (CC) ("First Certification Judgement") at paras 108-109.
- [19] *Minister of Health v Treatment Action Campaign* [2002] ZACC 15; 2002 (5) SA 721 (CC) at para [98], and also *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC 11; 2006 (6) SA 416 (CC).
- [20] *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* [1995] ZACC 8; 1995 (4) SA 877 (CC) at para [51].
- [21] *Id* at para 51.
- [22] *Justice Alliance of South Africa v President of Republic of South Africa and Others* 2011 (5) SA 388 (CC).
- [23] *Doctors for Life International*, fn 19 at paras 205 to 208. See also, *Matatiele Municipality v President of the Republic of South Africa (No 2)* [2006] ZACC 12; 2007 (6) SA 477 (CC) at para 55.
- [24] See, *Dawood and Another v Minister of Home Affairs and Others* [2000] ZACC 8; 2000 (3) SA 936 (CC) at para [54].
- [25] *Geuking*, fn 12, at para [50]. See also, *Director of Public Prosecutions, Cape of Good Hope v Robinson* 2005 (1) SACR 1 (CC) at para [33].
- [26] *Harksen v President of the Republic of South Africa and Others* 2000 (2) SA 825 (CC) at para [4].
- [27] Section 5(1)(b) of the Extradition Act.
- [28] Sections 9 and 10 of the Extradition Act.
- [29] Section 11 of the Extradition Act.

- [30] See, section 13(1)(2) read with section 14(c) of the Extradition Act
- [31] Section 14(a) of the Extradition Act.
- [32] Section 14(b) of the Extradition Act.
- [33] *S v Jordan & Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae)* [2002] ZACC 22; 2002 (6) SA 642 (CC) at para [21].
- [34] *S v McCarthy* [1995] ZASCA 56; 1995 (3) SA 731 (AD) at 738G.
- [35] See the comments of Van Heerden JA in *McCarthy*, fn 34, at 750G.
- [36] *Oederkraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA), and *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye Lazer Institute* 2014 (3) SA 481 (CC).
- [37] See, *Abel v Minister of Justice and Others* 2001
- (1) SA 1230 (C) at paras [39] and [68].
- [38] *Harksen v Director of Public Prosecutions, Cape and Others* 2002 (2) SA 563 (C) at 567I – 568A and 569J – 570C.
- [39] See *Harksen*, fn 38, at paras 569J to 570C.
- [40] *Geuking*, fn 12, at para [48].
- [41] *Geuking*, fn 12, para [48].
- [42] *Prince*, fn 4, at 396A.
- [43] *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC).

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Prepared on 13 October 2026 · Esheria