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Prince v President of the Law Society, Cape of Good Hope and Others
1998 (8) BCLR 976 (C)

Division: High Court, Cape of Good Hope Provincial Division

Date: 23 / 03 / 1998

Case No: 7236 / 97

Before: G Friedman, Judge President; FDJ Brand and MJ Hlophe, Judges

Flynote

Religion and belief, freedom of

section 15(1) of the Final Constitution – scope and ambit of the right – the guarantee of the freedom of religion means that, subject to such limitations as are necessary to protect public safety, order, health, or morals and the fundamental rights and freedoms of others, nobody is to be forced to act in a way contrary to his her beliefs or conscience – possession and use of drugs for religious purposes – Applicant challenging the constitutionality of the provisions of section 4(b) of the Drugs and Drug Trafficking Act 140 of 1992 in so far as those provisions prohibit the possession and use of dagga for religious purposes or fail to provide an exemption from the prohibition in the case of persons requiring to possess and use dagga for religious purposes – Applicant an adherent of the Rastafari religion in which religion the use of dagga for spiritual, medicinal, culinary and ceremonial purposes forms an integral part of religious practice – constitutional challenge failing – provisions of section 4(b) held to serve a compelling State interest to which the right of a Rastafari to practise his religion must be subordinate – limitation of the right to freedom of religion justified in terms of the limitations clause.

Drugs

possession – prohibition contained in section 4(b) of the Drugs and Drug Trafficking Act 140 of 1992 – constitutional challenge to the validity of the provisions of section 4(b) in so far as they prohibit the possession and use of dagga for religious purposes or fail to provide an exemption from the prohibition in the case of persons requiring to possess and use dagga for religious purposes – Applicant an adherent of the Rastafari religion in which religion the use of dagga for spiritual, medicinal, culinary and ceremonial purposes forms an integral part of religious practice – constitutional challenge failing – provisions of section 4(b) held to serve a compelling State interest to which the right of a Rastafari to practise his religion must be subordinate – limitation of the right to freedom of religion justified in terms of the limitations clause.

Editor's Summary

Applicant desired to qualify himself to be admitted as an attorney and had fulfilled most of the statutory requirements save for a period of community service in terms of section 2A(a)(ii) of the Attorneys Act 53 of 1979. The Law Society of the province in question declined to register his contract to perform community service with his principal adopting

the view that Applicant was not a fit and proper person to be admitted as an attorney, as he had two previous convictions for the possession of dagga and had made it clear that he intended to continue to use dagga in the future. Applicant was an adherent of the Rastafari religion. The use of dagga for spiritual, medicinal, culinary and ceremonial purposes forms an integral part of the religious practice of adherents of that religion. Applicant accordingly adopted the stance that the Law Society's decision had the effect of violating the constitutional guarantee of the right to freedom of religion in terms of section 15(1) of the Final Constitution as well as the guarantee contained in section 31(1) of the Final Constitution not to be denied the right with other members of a religious community to practice their religion. The decision in question also, so it was contended, infringed Applicant's right under section 22 of the Final Constitution freely to choose his own profession, and brought about unfair discrimination against Rastafarians in contravention of section 9(3) of the Final Constitution.

Applicant launched the instant proceedings in which he sought an order reviewing and setting aside the Law Society's decision and directing it to register his contract of community service. The Minister of Justice and the Attorney-General sought leave and were granted such to intervene as Respondents in the application.

It was contended on behalf of Applicant that his possession and use of dagga for purposes of religious worship was constitutionally protected under the constitutional guarantees mentioned above. This had the effect, so it was argued, that his possession and use of dagga for religious worship was permitted in terms of the exemption contained in section 4(b)(vi) of the Drugs and Drug Trafficking Act 140 of 1992. The latter provides an exception to the prohibition contained in section 4 of the Act if the possessor "has otherwise come into possession of (the) substance in a lawful manner". As an alternative to this argument, it was contended that if Applicant's possession and use of dagga for religious purposes was prohibited by section 4 of the Act, that provision was unconstitutional and invalid in so far as it failed to exempt the possession and use for religious worship which was protected under the Constitution. As a final alternative argument, it was contended that if the prohibition were not unconstitutional, Applicant's possession and use did not in the circumstances render him unfit to be an attorney.

In opposing the relief sought, Fourth and Fifth Respondents (the Minister and the Attorney-General respectively) pointed to the body of expert opinion that regarded dagga as a potentially dangerous drug and also pointed to various United Nations conventions, to one of which the RSA was a party, which obliged contracting States to adopt measures to regulate and control the possession and use of that substance strictly. They also pointed to the fact that the Drugs and Drug Trafficking Act had been specifically enacted to bring the RSA into line with international norms in respect of the control of dependence-producing substances. Its terms had been formulated after careful consideration of the problems posed by the drug traffic in South Africa. In enacting the statute there had also been an attempt to bring the drugs law into line with the requirements of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna 1988). The RSA was obliged to adopt measures to ensure that the possession of certain drugs including dagga would be a punishable offence. On this basis Fourth and Fifth Respondents argued that the prohibition contained in section 4 of the Act in so far as it related to dagga was justifiable and accordingly valid and constitutional.

The Court observed that the Constitutional Court had approved a dictum from Canadian authority defining the main attributes of religious freedom as being "the right to entertain such religious beliefs as a person chooses, to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination". The same Canadian decision had held that the freedom of religion guarantee meant that, subject to such limitations as

were necessary to protect the public safety, order, health or morals and the fundamental rights and freedoms of others, nobody was to be forced to act in a way contrary to his beliefs or conscience. The prohibition against the use and possession of dagga had the effect of restricting the right of Rastafarians to practise their religion, but in the view of the Court that right was outweighed by the evils which the legislature sought to combat in enacting section 4. The right of Rastafarians to practise their religion had to be subordinate to the provisions of the Act. The prohibition served a compelling State interest. In most jurisdictions of the world the use and possession of dagga was a criminal offence. Both in the United States and Canada the courts had affirmed the right of the State to pass generally applicable laws banning its possession and use even for religious purposes. In the United States in particular there was a large body of case law arising from claims by various religious sects to be permitted to use drugs in religious practice. In no reported case had any such claim prevailed, save in the case of the religious use of peyote. Section 39(1)(c) of the Final Constitution entitled the Court to consider foreign case law in construing the fundamental rights provisions. The strong body of foreign judicial decisions on the question bolstered the finding of the Court that the inroad made by section 4(b) of the Drugs and Drug Trafficking Act into the exercise by Applicant of his religious observances was a limitation on the right which was justified by the limitations clause of the Final Constitution. The same considerations on which such justification was based applied equally to limitations of the other rights relied on by Applicant in so far as the prohibition against the use and possession of dagga might limit those rights. Such limitations were justifiable in terms of the limitations clause.

As to the argument that Applicant's use or possession of dagga was exempted from the prohibition by the provisions of section 4(b)(vi) of the Act, the Court set out its reasons for finding that on a proper construction of the provisions in question that exemption did not assist Applicant. The exemption in question was in any event limited to possession and did not cover use. Nor could it be held that the provisions of section 4 were unconstitutional because they failed to exempt the possession and use of dagga for purposes of religious worship.

As to the question of the fitness of Applicant to be admitted as an attorney, the provisions of the Attorneys Act made the Law Society the arbiter of that question. The Society had come to the conclusion that Applicant was not a fit and proper person. Its decision would only fall to be set aside if it could be shown that the Society had not applied its mind to the relevant issues in accordance with the behests of the Attorneys Act and the requirements of natural justice, had acted arbitrarily or capriciously or *mala fide*, or that its decision could be regarded as so unreasonable as to warrant

interference by the Court. On the facts placed before the Court there was no basis for finding the existence of any of these grounds.

Accordingly, the application fell to be dismissed. As the application had been one in the nature of a test case, no order as to costs was made.

Judgment

Friedman JP

The applicant has a B Juris and an LLB degree. He is employed by the Legal Aid Clinic of the University of Cape Town and is registered for his final year of part-time study for his LLM degree. He wishes to qualify as an attorney. His only outstanding requirement is a period of community service in terms of section 2A(a)(ii) of the Attorneys Act No 53 of 1979. On 9 January 1997 he entered into a contract of community service for one year with his principal at the Legal Aid Clinic. The Secretary of the Law Society of the Cape of Good Hope ("the Law Society") declined to register his contract in terms of

section 5(2) of the Attorneys Act. Her reason for so declining was that the Council of the Law Society was not satisfied in terms of section 4A(b) of the Attorneys Act that applicant was a fit and proper person. The Council reached this decision because applicant has two previous convictions for the possession of cannabis and has made it clear that he intends to continue to use cannabis in the future.

In the present application applicant seeks an order:

(1) reviewing and setting aside the decision of the Law Society to object to the registration of his contract of community service and,

(2) directing the secretary of the Law Society to register his contract with effect from 15 February 1997.

The Minister of Justice and the Attorney-General applied for and were both granted leave to intervene as respondents in the application. They were both represented by counsel. Mr *Heunis*, with him Mr *Jaga*, appeared for the Minister. Mr *Slabbert* appeared for the Attorney-General. Both the Minister and the Attorney General oppose the application.

In his founding affidavit applicant states that he is a proponent of the Rastafari religion which he says is a continuation of the Judaeo-Christian faith which dates back millennia and has been observed since time immemorial. He explains the origins of the Rastafari religion as follows:

> "The Rastafari religion can be traced to Ethiopia, one of the oldest countries, referred to in the Bible, Genesis, chapter 2, verse 13. Ethiopia is recorded in history as having received the Old Testament and then the New Testament earlier than most countries of the world. Orthodox Christianity became the official religion of Ethiopia in 330 AD although the laws of Moses were observed and practised from the time of Menelik I (circa 900BC) and even before that period religion was practised by the Ethiopians.
>
> In the 1920's, Marcus Garvey prophesied in Jamaica that a king would be crowned in Africa and would be the redeemer of Africans. On 2 November 1930 Haile Selassie (translated as "power of the trinity" and known as king of kings, lord of lords, conquering lion of the tribe of Judah) was crowned as emperor of Ethiopia, thus fulfilling biblical prophecy. Haile Selassie is the 225th descendant in the line of King Solomon, who is the son of King David. King Solomon married Makeda, queen of Sheba and had a son called Menelik. Menelik returned to Ethiopia and subsequently became emperor of Ethiopia. Haile Selassie is a descendant in lineage of Menelik. Ethiopia is regarded by Rastafari as an expression of the freedom and redemption of the African continent and the African people because of its political and religious autonomy and independence in the period of colonialism. The invasion of Ethiopia in 1935 gave great impetus to the groundswell of the Rastafari followers and displaced Africans in the colonies, particularly Jamaica, which resulted in a period of assertive identity with Ethiopia.
>
> Haile Selassie, before his crowning, was known as Rastafari, "Ras" being the Ethiopian translation for king and "Tafari" being the translation for "head creator". Hence, the followers are called by his name "Rastafari"; biblical prophecy also alludes to the fact that the followers of God will be called by his name."

Cannabis is regarded by the Rastafari followers as the "Holy Herb" and forms an integral part of the Rastafari religion. It is used *inter alia* for spiritual, medicinal and culinary purposes and is regarded as the "tree of life" by Rastafari

followers. At religious ceremonies it is burnt as an incense and smoked through a chalice which is a symbol of the Rastafari religion.

Applicant became interested in the Rastafari religion in 1988. In 1989 he adopted the vow of the Nazarene and as a symbol of his conversion to the religion he started to wear his hair in dreadlocks and to observe the dietary commands of the religion.

He partakes of the use of cannabis at religious ceremonies. He also uses cannabis by "burning it as incense or smoking, drinking or eating it in private at home as part of [his] religious observance."

In an answering affidavit the secretary of the Law Society points out that at a meeting attended by applicant, his principal (Mr RJ de Kock of the University of Cape Town Legal Aid Clinic), the then vice-president of the Law Society, a member of the Society's council and the Society's assistant director, applicant confirmed that he would continue to possess and use cannabis in the future. After that meeting the Secretary wrote to applicant explaining the Council's reasons for its decision to refuse to register his contract. The Council's attitude is that the possession and/or use of cannabis is prohibited by law and that a person who states that his intention is to continue to break the law cannot be regarded as a fit and proper person to have his contract of community service registered as his conduct may bring the profession into disrepute. The Secretary confirms that the Council's decision was –

> "based solely on (applicant's) previous convictions for possession of cannabis and his stated intention to continue to use cannabis in spite of the fact that it is a criminal offence to do so."

The Council's decision is attacked in these proceedings on the following four grounds:

(1) Applicant's possession and use of cannabis for purposes of religious worship is constitutionally protected under:

(a) the right to freedom of religion in terms of sections 15(1) and 31(1)(a) of the 1996 (final) Constitution;

(b) the prohibition against discrimination in terms of section 9(3) of the Constitution; and

(c) the right freely to choose one's profession in terms of section 22 of the Constitution.

(2) Applicant's possession and use of cannabis for religious worship is constitutionally protected and is therefore permitted in terms of section 4(b)(vi) of the Drugs and Drug Trafficking Act 140 of 1992 ("the Drugs Act").

(3) Alternatively, if applicant's possession and use of cannabis for purposes of religious worship is prohibited by section 4 of the Drugs Act, the latter provision is unconstitutional and invalid insofar as it fails to exempt the possession and use of cannabis for purposes of religious worship protected under the Constitution.

(4) In the further alternative, even if the prohibition against the possession and use of cannabis for purposes of religious worship is prohibited, applicant's possession and use of cannabis for those purposes does not render him unfit to be an attorney.

I proceed to deal with each of these grounds of attack seriatim.

Freedom of Religion

In terms of section 15(1) of the Constitution "everyone has the right to freedom of conscience, religion, thought, belief and opinion." Section 31(1) of the Constitution provides that –

> "Persons belonging to a ... religious ... community may not be denied the right, with other members of that community –
>
> (a) to ... practise their religion ..."

The concept of freedom of religion has been considered by the Canadian Supreme Court in the leading case of *Regina v Big M Drug Mart Ltd* [1985] 13 CCR 64. Section 1 of the Canadian Charter of Rights and Freedoms provides that everyone has "the freedom of conscience and religion". In the *Big M Drug Mart* case the Canadian Supreme Court set aside the Lord's Day Act as being in conflict with the right to freedom of religion. Dickson CJC, who delivered the judgment of the court, described the right as follows at page 97:

> "The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination."

In *S v Lawrence et al* 1997 (4) SA 1176 (CC) at 1208 (paragraph 92) Chaskalson P, with reference to this quotation, stated:

> "I cannot offer a better definition than this of the main attributes of religious freedom."

In the *Big M Drug Mart* case Dickson CJC stated further at page 93:

> ". . . both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation."

At page 95 the learned Chief Justice proceeded as follows:

> "Thus, if a law with a valid purpose interferes by its impact, with rights or freedoms, a litigant could still argue the effects of the legislation as a means to defeat its applicability and possibly its validity. In short, the effects test will only be necessary to defeat legislation with a valid purpose; effects can never be relied upon to save legislation with an invalid purpose."

A similar approach to that of the Canadian Supreme Court was followed by the minority in the United States Supreme Court in *Employment Division Department of Human Resources of Oregon,* et al *v Smith* [1990] 494 US 872; 108L Ed 2 (d) 876 ("the Peyote case"). In that case the United States Supreme Court was called upon to decide whether an Oregon state prohibition of the possession and use of the hallucinogenic drug, Peyote, by members of the North American Church for sacramental purposes violated the First Amendment to the Constitution which provides that Congress shall make no law prohibiting the free exercise of religion. The majority held that the prohibition was not unconstitutional. In delivering the majority opinion, Scalia J with whom Rehnquist CJ and White, Stevens and Kennedy JJ concurred, held that a law violated the guarantee of religious freedom only if that was its purpose; a generally applicable law with a neutral purpose did not violate that guarantee even if its effect was to restrict certain persons in the exercise of their freedom of religious observance.

The minority, however, took a different view. O'Connor J, with whom Brennan, Marshall and Blackmun JJ concurred, held that a generally applic able law may impose a burden on the freedom of religious observance if its effect is to restrict the rights of some subjects in the exercise of that free dom. Such a restriction will, however, be upheld if it is shown to serve "a compelling state interest" and does so "by means narrowly tailored to achieve that interest".

Our Constitutional Court has followed the approach of the Canadian Supreme Court which is similar to that adopted by the minority of the United States Supreme Court in the Peyote case. Thus our Constitutional Court has held that a law infringes the Constitution if either its purpose or effect is to invade a constitutional right. See *President of the Republic of South Africa & Another v Hugo* 21997 (4) SA 1 (CC) where Goldstone J at paragraph 42 stated:

> ". . . the fact that the President, in good faith, did not *intend* to discriminate unfairly . . . is not sufficient to establish that the *impact* of the discrimination . . . was not unfair." (Emphasis supplied.)

Again in *Harksen v Lane NO & Others* 31998 (1) SA 300 (CC) Goldstone J at paragraph 51 stated:

> "In the final analysis, it is the *impact* of the discrimination on the complainant that is the determining factor regarding the unfairness of the discrimination." (Emphasis supplied.)

Our Constitution envisages a two-stage enquiry. The first stage of the enquiry is to ascertain whether a law, by its intent or impact, infringes a right guaranteed by the Constitution. If it does, the second stage of the enquiry ensues, namely whether the infringement is protected by the limitation section of the Constitution, section 36. That section provides that the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including those set out in paragraphs (a) to (e) of the section. In this respect our Constitution is similar to the Canadian Charter.

Section 1 of the Canadian Charter –

> "guarantees the rights and freedoms set out in it *subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society*." (Emphasis supplied.)

Thus in the *Big M Drug Mart* case, Dickson CJC stated at pages 97–98:

> "Freedom (of religion) means that, subject to such limitations as are necessary to protect public safety, order, health, or morals and the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience."

Section 4 of the Drugs Act provides as follows:

> "4. **Use and possession of drugs.** – "No person shall use or have in his possession –
>
> (a) any dependence-producing substance; or
>
> (b) any dangerous dependence-producing substance or any undesirable dependence-producing substance.

unless –

(i) he is a patient who has acquired or bought any such substance –

(aa) from a medical practitioner, dentist or practitioner acting in his professional capacity and in accordance with the requirements of the Medicines Act or any regulation made thereunder; or

(bb) from a pharmacist in terms of an oral instruction or a prescription in writing of such medical practitioner, dentist or practitioner,

and uses that substance for medicinal purposes under the care or treatment of the said medical practitioner, dentist or practitioner;

(ii) he has acquired or bought any such substance for medicinal purposes –

(aa) from a medical practitioner, veterinarian, dentist or practitioner acting in his professional capacity and in accordance with the requirements of the Medicines Act or any regulation made there under;

(bb) from a pharmacist in terms of an oral instruction or a prescription in writing of such medical practitioner, veterinarian, dentist or practitioner; or

(cc) from a veterinary assistant or veterinary nurse in terms of a prescription in writing of such veterinarian,

with the intent to administer that substance to a patient or animal under the care or treatment of the said medical practitioner, veterinarian, dentist or practitioner;

(iii) he is the Director-General: Welfare who has acquired or bought any such substance in accordance with the requirements of the Medicines Act [No 101 of 1965] or any regulation made thereunder;

(iv) he, she or it is a patient, medical practitioner, veterinarian, dentist, practitioner, nurse, midwife, nursing assistant, pharmacist, veterinary assistant, veterinary nurse, manufacturer of, or wholesale dealer in, pharmaceutical products, importer or exporter, or any other person contemplated in the Medicines Act or any regulation made thereunder, who or which has acquired, bought, imported, cultivated, collected or manufactured, or uses or is in possession of, or intends to administer, supply, sell, transmit or export any such substance in accordance with the requirements or conditions of the said Act or regulation, or any permit issued to him, her or it under the said Act or regulation;

(v) he is an employee of a pharmacist, manufacturer of, or wholesale dealer in, pharmaceutical products, importer of exporter who has acquired, bought, imported, cultivated, collected or manufactured, or uses or is in possession of, or intends to supply, sell, transmit or export any such substance in the course of his employment and in accordance with the requirements or conditions of the Medicines Act or any regulation made thereunder, or any permit issued to such pharmacist, manufacturer of, or wholesale dealer in, pharmaceutical products, importer or exporter under the said Act or regulation; or

(vi) he has otherwise come into possession of any such substance in a lawful manner."

Cannabis is listed in part 3 of schedule 2 to the Drugs Act as an undesirable dependence-producing substance.

Mr *Trengove* who, with *Jacobs*, appeared for the applicant, submitted that applicant fell within the terms of the exemption listed in sub-paragraph (vi) of section 4(b) of the Drugs Act. I shall deal with that submission later, but for the

purposes of discussion at this stage I shall assume that applicant is not protected by any of the exceptions listed in paragraphs (i) to (vi) of section 4(b) of the Drugs Act. That being so, the impact of section 4(b) of the Drugs Act is to limit applicant's freedom to practise his religion. Section 4(b) will therefore be unconstitutional unless it is protected by the limitation section, section 36 of the Constitution.

Is section 4(b) of the Drugs Act justified by section 36 of the Constitution?

Section 36(1) of the Constitution reads as follows:

"Limitation of rights

36.(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose."

As to the nature of the right (of religious freedom)

The Attorney-General has annexed to his application for leave to intervene, an affidavit by Brigadier CJD Venter, the National Head of the South African Narcotics Bureau. Brigadier Venter states that the purpose of the Drugs Act was to bring South Africa into line with international norms and in particular with the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna 1988). Brigadier Venter points out that the Drugs Act was formulated after careful consideration of the problems imposed by drug trafficking in South Africa and the problems of adequately protecting society from what he described as a menace. Brigadier Venter states that in his experience young people begin with dagga (the colloquial term for cannabis) and then "graduate" to other drugs such as mandrax and cocaine. Cannabis is therefore a dangerous "stepping stone" to other drugs and ultimate abuse and addiction.

Both the Minister and the Attorney-General have annexed to their papers an affidavit deposed to by Dr Tuviah Zabow, an associate professor of psychiatry at the University of Cape Town and head of the Forensic Psychiatry Unit at Valkenberg Hospital, Cape Town. Dr Zabow states:

> "The use of dagga (cannabis) is considered to be harmful due to its psycho-active component (tetrahydrocannabinol). This hallucinogen has intoxicating effects and has been observed to produce intoxication, panic attacks, memory deficits and psychosis. The disturbed behaviour is frequently observed in persons presenting for psychiatric evaluation in emergency clinical situations as well as in the hospital population. The chronic usage of cannabis has, by my personal observation, produced cognitive, emotional and volitional deterioration.
>
> The use of dagga within certain cultural/cult groups (such as Rastafarians) has resulted in behavioural problems being referred to this hospital. In those who are not

> floridly psychotic the evaluation reveals that they are aware of the wrongfulness of their habit in law."

Dr Zabow refers to an article entitled "Cannabis sativa – 'deceptive weed'?" which he wrote for the South African Medical Journal (volume 85 no. 12 December 1995) in which he spoke of "the considerable potential hazards of cannabis in its various forms".

The article ends as follows:

> "Cannabis is a potentially dangerous drug and as such a public health concern, especially with regard to the increased use evident in adolescents."

Section 39 (1)(b) of the Constitution enjoins the court, when interpreting the Bill of Rights, to consider international law. That includes both non-binding as well as binding law. See *S v Makwanyane* 41995 (3) SA 391 (CC) at paragraph 35. Although South Africa is not yet a party to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, South Africa is a party to the Single Convention on Narcotic Drugs (1961) and the United Nations Convention on Psychotropic substances (1971).

Cannabis is listed as a drug in two of the schedules to the Single Convention. The Convention obliges the parties to it to adopt any special measures of control which in their opinion are necessary, having regard to the particularly dangerous properties of a drug included in the schedules. One of the principal features of the controls required to be implemented by the Single Convention is that the parties to it are required to implement provisions aimed at limiting the possession and use of drugs (including cannabis) to medical and scientific purposes. The Convention further requires each party to adopt such measures as will ensure that, *inter alia*, possession of those drugs shall be a punishable offence.

In the United Nations Convention on Psychotropic Substances cannabis is listed as a psychotropic substance in schedule 1. In terms of the Convention the parties to it shall prohibit all use except for scientific and very limited medicinal purposes.

The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988) also lists cannabis as a psychotropic substance. That convention requires the parties to it to adopt such measures as may be necessary to establish as a criminal offence under its domestic law the possession of psychotropic substances for personal consumption.

Having regard to these instruments it is clear that cannabis is regarded internationally as a drug, the possession and use of which should be strictly regulated and controlled.

Section 36(1) of the Constitution involves, as Chaskalson P stated in *Makwanyane*'s case (*supra*), paragraph 104, "the weighing up of competing values, and ultimately an assessment based on proportionality". In the balancing process the relevant considerations will include those enumerated in section 36(1). Cf *Makwanyane*'s case (*supra*) at paragraphs 104, 105.

Mr *Trengove* submitted that the rights violated by the prohibition (and in this regard he referred not only to the right to religious freedom, but also the other

rights which he contended were violated by the Drugs Act) are rights which lie at the heart of the values underlying the Constitution. Any violation of those rights, he submitted, should be closely scrutinised and not easily justified. He pointed to the fact that freedom of religion, including the practice of religion, was entrenched in all leading international human rights instruments. He referred in this regard to article 18 of the Universal Declaration of Human Rights which provides that freedom of religion includes the right to "manifest his religion or belief in teaching, practice worship and observance". He referred further to article 18(1) of the International Covenant of Civil and Political Rights which provides that the right to freedom of religion includes the right "to manifest his religion or belief in worship, observance, practice and teaching". He also referred to article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms which provides that freedom of religion includes the right to "manifest his religion or belief in worship, teaching, practice and observance". Finally he referred to article 8 of the African Charter on Human and Peoples' Rights to which South Africa is a party. Article 8 of the African Charter provides as follows:

> "Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms. "

As to the importance of the purpose of the limitation

As far as the importance of the purpose of the Drugs Act is concerned, namely to control the use of dependence-producing substances which include cannabis, Mr *Trengove* very fairly conceded that this was "an important objective".

As to the nature and extent of the limitation

With regard to the nature and extent of the limitation Mr *Trengove* submitted that the prohibition constitutes a serious limitation in so far as it criminalises a central feature of Rastafarian religious observance. The prohibition undoubtedly inhibits the use of cannabis, which is internationally recognised as a harmful drug, by Rastafarians in the practice of their religion. However, having regard to the extent to which the eradication of the use of cannabis is in keeping with international standards, the nature and extent of the limitation is in my judgment not unreasonable.

As to the relation between the limitation and its purpose

As far as the relation between the limitation and its purpose is concerned, here again Mr *Trengove* has very fairly conceded that the prohibition advances the purpose sought to be achieved.

As to whether less restrictive means could have achieved the

Mr *Trengove* argued strongly that less restrictive means could have been used to achieve the legislature's purpose. He submitted that the constitutional violation of applicant's right to religious freedom could be avoided by a very limited exemption permitting adherents of the Rastafarian religion to possess and use cannabis for purposes of their *bona fide* religious observance. The exemption

could also be subject to regulation to prevent abuse. The purpose sought to be achieved by the prohibition would, Mr *Trengove* submitted, not be significantly undermined by a limited exemption along the lines suggested by him.

According to the memorandum on the objects of the Drugs and Drug Trafficking Bill, 1992, the bill emanated from a

decision taken by the government in 1990. The government was concerned at the increasing national and international dimension of the scale of the production of, demand for and traffic in drugs which posed a serious threat to the health and welfare of human beings and adversely affected the economic, political and cultural foundations of society. This concern led to the appointment of an interdepartmental task group to examine existing legislation and to advise the government on the signing of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic substances. The memorandum submitted to the cabinet by this task group led to the introduction of the Drugs Act in 1992.

The documents annexed to the Attorney-General's application for leave to intervene, indicate that the Government's concern was well-founded. The task group reported *inter alia* that there appeared to be a worldwide tendency towards an increase in drug abuse with a concomitant increase in drug trafficking. There were also indications of a substantial increase in drug abuse and drug trafficking in South Africa. The statistics supplied by the task group showed that in 1990/1991 there were 39 796 convictions for cannabis offences.

A document published by the International Criminal Police Organisation (INTERPOL) in 1993 entitled "Trends and patterns of illicit drug traffic" includes the report furnished to the 37th session of the Commission on Narcotic Drugs held in Vienna from 13–22 April 1994. The report states that

> "Cannabis is one of the oldest known hallucinogens and is the most widely cultivated and abused drug world wide... World wide, there has been a steady increase in the number of persons who abuse cannabis in combination with alcohol, organic solvents and pharmaceuticals."

In a document published by the United States Department of Justice in December 1993 entitled "South Africa: Drug Intelligence Fact Sheet", the situation with regard to drugs is dealt with under various headings. Under the heading "Cannabis" the following statistics are given: Cannabis cultivation produces 2000 metric tons of marijuana per year. Between 1988 and 1992 an average of 15 600 persons were arrested for being in possession of or for trafficking in dagga. In 1990 almost 5000 metric tons of cannabis were seized and over 4000 tons were destroyed in 1991 and 1992. In January to July 1992, 292 metric tons with a street value of U$88 654 545 were destroyed by spraying.

In his replying affidavit applicant disputes that the use of cannabis results in severe damage to its users. He also denies that cannabis plays a role in the commission of crime and that it is responsible for domestic misery. In support of these averments he refers to the affidavit of Professor Frances Ames, Emeritus associate professor of neurology at the University of Cape Town. In a replying affidavit she states that she has since 1958 conducted research on the effects and use of cannabis. She confirms what she wrote in an article entitled "Cannabis sativa – a plea for decriminalisation" which was published in the *South African Medical Journal* in December 1995. In that article she stated that

the use of cannabis has been banned in western countries for approximately 60 years "but it remains the most widely used illicit recreational drug in the world". The following are extracts from the article:

> "... cannabis affects predominantly mood, memory and perception."
>
> "Cannabis. like all intoxicants, obviously causes an acute encephalopathy, the manifestations of which vary according to the potency of the drug. Dagga, (marijuana) provokes mild and hashish severe intoxication. Mild intoxication cannot be detected by observers unless the characteristic defect in short-term memory retention is specifically sought. Allied to this is an alteration of time sense: seconds are perceived as an eternity. The subject is euphoric and the pulse rate is increased. Some subjects become very anxious as they become aware of weakening of their ego defences.
>
> Severe intoxication augments these effects and a hypomanic state may develop."
>
> "Studies of communities where the use of cannabis is endemic have not shown any convincing evidence that it causes intellectual decline. It should be remembered, however, that young people who abuse cannabis for prolonged periods during critical periods of learning may jeopardise their emotional and cognitive maturation."

She goes on to point out that:

> "There have been many claims for the therapeutic efficacy of cannabis, and it is reputed to be used in a wide variety of traditional medicines in South Africa."

She states that –

> "the effects of cannabis in improving mood may make it a useful antidepressant."

The article ends as follows:

> "Careful, well controlled studies of cannabis have been much hampered by legislation prohibiting its use. Surely South Africa should follow the example of Australia, which has recently decriminalised it for medical use."

In her affidavit she states that –

> "The use of cannabis is dose-related, the same as the use of alcohol, and it is the heavy use of cannabis which results in a hypomanic or other psychotic state. The use of cannabis apparently does not lead to cognitive impairment. My view is supported by several other writers and documented in several other articles.
>
> It is clear from my clinical experience and observation that the use of cannabis does not cause violence: in fact, it reduces violence and may even be used in controlling patients who suffer from rage attacks and episodic dyscontrol. The opinion of prof. Zabow that the use of cannabis results in or causes crime is not supported by existing clinical and scientific data and I therefore disagree with his opinion."

It is not insignificant that although Professor Ames disputes Professor Zabow's views on the serious effects of cannabis, her plea for decriminalisation with which she concluded her article in the *South African Medical Journal*, was a limited one. She urged that South Africa should follow Australia's example which has decriminalised the use of dagga "for medical use".

Balancing the right to religious freedom against the evils which the legislature sought to combat through the enactment of section 4 of the Drugs Act, applicant's right to practise his religion must, in my judgment, be subordinate to the provisions of the Drugs Act.

Mr *Trengove*'s argument that less restrictive means could have been used to achieve the purpose of the Drugs Act, namely by excluding Rastafarians from the operation of section 4(b), founders, in my view, on two grounds.

Firstly, to allow such an exception would be contrary to South Africa's obligations in terms of international conventions to which it is a party. Secondly, as Mr *Slabbert* argued, allowing an exception along the lines suggested by Mr *Trengove* would place an additional burden on the police and the courts, both of which are operating under heavy pressure because of the general crime situation in this country. Every case in which the defence to a charge in terms of section 4(b) of the Drugs Act is raised that the accused is a Rastafarian who was in possession of or was using cannabis for religious purposes, would involve an investigation first by the police and then by the court as to whether or not the defence was genuine.

As the Minister has stated in his affidavit: the Act has been placed on the statute book "for compelling reasons". The Minister points out that "throughout the jurisdictions of the world the use and possession of cannabis is a criminal offence.

In terms of section 39(1)(c) of the Constitution when interpreting the Bill of Rights the court "may consider foreign law". In both the United States and Canada the courts have affirmed the right of the state to pass generally applicable laws banning the possession and use of cannabis even for religious purposes. See in this regard the opinion of Blackmun J in the Peyote case where the learned judge at page 911 drew a distinction between Peyote and other drugs and stated –

> "Almost half the States, and the Federal Government, have maintained an exemption for religious peyote use for many years, and apparently have not found themselves overwhelmed by claims to other religious exemptions."

In a footnote to this passage Blackmun J pointed out that –

> "Over the years, various religious sects have raised free exercise claims regarding drug use. In no reported case, except those involving claims of religious peyote use, has the claimant prevailed."

The footnote then refers to, *inter alia*, the following cases:

"*Olsen v Iowa*, 808 F2d 652 (CA 1986) (Marijuana use by Ethiopian Zion Coptic Church);

Commonwealth v Nissenbaum, 404 Mass 575, 536 NE 2d 592(1989) (marijuana use by Ethiopian Zion Coptic

State v Blake, 5 Haw App 411, 695 P 2d 336 (1985) (marijuana use in practice of Hindu Tantrism);

Whyte v United States, 471 A 2d 1018 (DC App 1984) (marijuana use by Rastafarians);

State v Rocheleau, 142 Vt 61, 451 A2d 1144 (1982) (marijuana use by Tantric

State v Brashear, 92 NM 622, 593 P2d 63 (1979) (marijuana use by non-denominational Christians).

In *Regina v Kerr* [1986] 75 NSJ (2d) 305 (CA) the Nova Scotia Supreme Court, Appeal Division, upheld a conviction for possession of marijuana despite the defence which was raised that the possession of marijuana was in accordance with the appellant's religious beliefs.

For all these reasons, including the strong body of foreign judicial decisions, the inroad made by section 4(b) of the

Drugs Act into the exercise by applicant

of his religious observances, is in my judgment justified by section 36(1) of the Constitution.

Prohibition against discrimination

In terms of section 9(3) of the Constitution the State may not unfairly discriminate directly or indirectly against anyone on one or more grounds including religion. Section 9(5) provides that discrimination on any of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair. The prohibition against direct and indirect discrimination makes it clear that the prohibition is not limited to laws by which the State intends to discriminate, but includes laws which have a discriminatory impact on some or all of the persons to whom it applies (see *The City Council of Pretoria v Walker* 5(Constitutional Court, 17 February 1998, not yet reported).

Mr *Trengove* argued that in insofar as section 4(b) of the Drugs Act prohibits any possession or use of cannabis, it discriminates against the adherents of the Rastafarian religion because its effect is to restrict them in their religious observance while not imposing the same burden on the adherents of other religions who do not make use of cannabis for purposes of their religious observance. Consequently, so it was argued, the impact of the prohibition is to discriminate against Rastafarians on the ground of their religion. As the discrimination is on the ground of religion that is a ground specified in subsection 3, the differentiation is, in terms of section 9(5), deemed to be unfair.

The presumption of unfairness may of course be rebutted. In *Harksen v Lane NO* (*supra*) Goldstone J, in paragraph 52, enumerated some of the factors to be considered in order to determine the unfairness or otherwise or a discriminatory provision. Thus he listed the following:

(a) *The position of the complainants in society and whether they have suffered in the past from patterns of disadvantage.*

In this regard Mr *Trengove* argued that the applicant is an adherent of the Rastafari religion and that as a small minority in a society organised and regulated on the basis of Christian-European values, he and other Rastafarians have in the past been marginalised and have suffered from patterns of disadvantage. I do not agree. There is no indication on the papers of the extent of the Rastafari movement, nor that its adherents have been marginalised in the past or that they have suffered from patterns of disadvantage. Nor is there any basis upon which a court could possibly take judicial notice of the allegations forming the basis of these submissions.

(b) *The nature of the provision and the purpose sought to be achieved by it.*

The provision in question, section 4(b) of the Drugs Act, is aimed at controlling the possession and use of dependence-producing substances. As indicated above Mr *Trengove* has conceded that "that is undoubtedly a worthy object".

(c) *The extent to which the discrimination has affected the rights and interests of complainants and whether it has led to an impairment of their fundamental*

human dignity or constitutes an impairment of a comparatively serious nature.

The undisputed evidence is that cannabis is used by adherents of the Rastafarian religion as part of their religious observance. The prohibition in section 4(b) of the Drugs Act clearly has a serious impact on the rights of Rastafarians to practice their religion. It does, as Mr *Trengove* submitted, force them to choose between following their religious convictions or obeying the law.

These factors, as Goldstone J pointed out, do not constitute a closed list. Mr *Trengove* submitted that a further relevant factor is that the integrity of the Drugs Act would not be impaired by a very limited exemption which applies only to Rastafarians and only to their *bona fide* use of cannabis for purposes of religious observance. The absence of such an exemption, so he argued, rendered section 4(b) of the Drugs Act unfair.

Assuming that section 4(b) of the Drugs Act does amount to unfair discrimination against applicant and other Rastafarians, it is still necessary to consider whether the section could be justified by section 36 of the Constitution. It is unnecessary to set out again the consideration to which reference has been made above in relation to religious freedom. Suffice it to say that those considerations apply, in my judgment, equally to the question whether the violation against discrimination is justified. In my judgment it is so justified.

Choice of Profession

In terms of section 22 of the Constitution every citizen has the right to choose his or her profession freely. Mr *Trengove* argued that the criminalisation of the use or possession of cannabis in terms of section 4(b) of the Drugs Act, even if such use or possession is for religious purposes, coupled with the attitude of the Law Society that anyone who intends to use cannabis in contravention of section 4(b) of the Drugs Act even if that is for religious purposes only, has the effect of excluding Rastafarians from the attorneys profession. It impairs their right to choose their profession freely, so it was argued, because it requires them to forsake their religious convictions in order to do so.

Once again, assuming that the Drugs Act does have that effect, section 4(b) is, for the reasons set out above in regard to religious freedom, justified in terms of the limitation section of the Constitution.

Is applicant's use or possession of cannabis exempted by section 4(b)(vi) of the Drugs Act?

In terms of section 4 of the Drugs Act no person may possess or use cannabis unless " he has otherwise come into possession" of the cannabis "in a lawful manner." Mr *Trengove* argued that as possession by applicant of cannabis is lawful in terms of the Constitution on any one or other of the grounds relied on by him, applicant came into possession of cannabis in a lawful manner. His possession and use of cannabis is therefore, so Mr *Trengove* argued, exempted from the provisions of sections 4 by the exemption contained in sub-paragraph (vi). Section 39(2) of the Constitution requires the court when interpreting any

legislation, to do so in a manner which promotes the spirit, purpose and object of the Bill of Rights. To interpret section 4 (b)(vi) more narrowly than contended for on behalf of applicants, would – so the argument ran – run counter to section 39(2) of the Constitution.

Prima facie the possession of cannabis is rendered unlawful in terms of section 4(b) of the Drugs Act. Such possession could only be lawful if it were not unlawful to possess cannabis for religious purposes by reason of the provisions of sections 15(1) and 31(1)(a) of the Constitution (religious freedom) or section 9(3) (unfair discrimination) or section 22 (free choice of profession).

For the reasons set out above in respect of each of these provisions, the possession of cannabis for religious purposes is not protected by the Constitution, having regard to the provisions of section 36. Mr *Trengove* argued, however, that for the purposes of deciding whether possession and use of cannabis is exempted in terms of section 4(b)(vi) of the Drugs Act, a court is not entitled to have regard to the provisions of the limitation section of the Constitution. I do not agree. In considering whether a law is contrary to any of the provisions of the Bill of Rights the Court cannot disregard section 36. Section 36 is an integral part of the Bill of Rights. If any law of general application infringes one or more of the rights in the Bill of Rights, that infringement would not be unconstitutional if the limitation imposed by such infringement were justified in terms of the provision of section 36.

As the constitutional infringements relied on by applicant have all, for the reasons indicated herein, been found to be justified in terms of sections 36, the constitutional right which applicant is said to possess because of his stated intention to possess and use cannabis for purposes of his religion, do not render him free from prosecution in terms of section 4(b)(vi) of the Drugs Act. His possession and use of cannabis would therefore not be lawful.

There are other reasons why section 4(b)(vi) does not assist applicant. The exemption in sub-paragraph (vi) refers to any person who has "otherwise come into possession" of cannabis in a lawful manner. The word "otherwise" implied that the person concerned has come into possession in a manner other than in terms of one or other of the exemptions listed in paragraphs (i) to (v). The section starts with a general prohibition against the use and possession of cannabis. The exemption in 4(vi) is limited to possession. It does not cover use. Thus if, say, a policeman were to seize cannabis in the course of a raid or an arrest, his *possession* would be lawful but he would not be entitled to *use* the cannabis so seized. The exemptions differentiate between use and possession. Thus paragraphs (i) and (iv) cover both possession and use for the specific purpose mentioned in those paragraphs. Paragraphs (ii), (iii) and (vi) do not refer to use at all; they relate solely to possession. Had the legislature intended in sub-paragraph (vi) to refer to use as well as possession it would have said so. There is accordingly no way in which sub-paragraph (vi) of section 4(b) can be interpreted to include the use of cannabis. The *use* of cannabis by applicant, even if such use were for the purposes of his religion, could not be said to fall within the ambit of the exemption contained in paragraph (vi) of section 4(b) of the Drugs Act.

Even if paragraph 4(b)(vi) of the Drugs Act could be construed as entitling applicant to use and possess cannabis, which I have found is not the case, there

is a further legislative provision which prohibits the possession and use of cannabis. I refer to the Medicine and Related Substances Control Act 101 of 1965 ("the Medicines Act"). Section 22A(10) of the Medicines Act provides that no person shall use or have in his possession any schedule 8 substance except for the purposes mentioned in the section and then only if that person has a permit. The purposes mentioned are "for analytical or research purposes". Cannabis is a substance listed in schedule 8 of the Medicines Act. Although this Act has not been referred to in the affidavits forming part of this application, its relevance is a matter of law and the Court is therefore entitled to have regard to it.

When Mr *Trengove*'s attention was drawn to this Act he contended that for the same reasons as those which he advanced in regard to section 4(b) of the Drugs Act, section 22A(10) of the Medicines Act was also unconstitutional. I do not agree. For the same reasons indicated above in regard to section 4(b) of the Drugs Act, section 22A(10) of the Medicines Act is saved by section 36(1) of the Constitution.

Is Section 4 of the Drugs Act unconstitutional because it fails to exempt the possession and use of cannabis for purposes of religious worship?

This question has already been dealt with above. It is unnecessary to say anything further except that for the reasons already stated, the failure to exempt the possession and use of cannabis for religious purposes is not, in my judgment, unconstitutional.

Does the use and the possession of cannabis by applicant for religious purposes render him unfit to be an attorney?

Mr *Trengove* argued that applicant's possession and use of cannabis does not render him unfit to be an attorney even if it should be held that the prohibition in terms of section 4(b) of the Drugs Act is a valid one. He submitted that the Law Society does not suggest that the applicant's possession and use of cannabis for religious purposes is in itself morally reprehensible; its objection is based solely on applicant's failure to obey the law and his expressed intention to continue to do so in the future. Mr *Trengove*'s argument ran as follows: The applicant's dilemma is that he is forced to choose between his deeply felt religious convictions, on the one hand, and obedience to the law, on the other; the decision which he has made does not reflect on his integrity as a human being; on the contrary, it is a manifestation of his integrity.

Section 4(b) of the Attorney's Act provides that any person intending to serve an attorney under articles of clerkship, shall submit to the secretary of the society "proof to the satisfaction of the society that he is a fit and proper person". In terms of section 5(2) of that Act, the secretary shall examine any contract of service lodged with him or her and shall, if satisfied that the contract of service is in order, "and that the Council has no objection to the registration thereof", register the contract in question.

It follows from these provisions that it is the council of the Law Society which has to make a decision as to whether it is satisfied that the person who

applies for his/her contract of service to be registered, is a fit and proper person. The Law Society in the present case came to the conclusion that the applicant was not a fit and proper person. The applicant now seeks to review that decision. As this is a review and not an appeal, the question is whether the Law Society, in coming to the decision which it did, applied its mind to the relevant issues in accordance with the behests of the Attorneys Act and the tenets of natural justice, or whether it acted arbitrarily or capriciously or *mala fide* or whether its decision could be regarded as so unreasonable as to warrant interference by this Court. See, for example, *Johannesburg Stock Exchange v Witwatersrand Nigel Ltd* 1988 (3) SA 132 (A) at 155A–E and *Theron en Andere v Ring van Wellington van die NG Sendingskerk in SA* 1976 (2) SA 1 (A). In any event the decision is, in my judgment, justifiable in relation to the reasons given by the Law Society as required by the Constitution. See section 33(3) read with Schedule 6, item 23(2)(b).

The Law Society's reasons for arriving at its decision are that the applicant has committed offences under the Drugs Act and has expressed his intention of continuing to do so, albeit that the reason for this is that he contends that he is doing so in accordance with his religious beliefs. The attitude of the Law Society is that a person who commits offences of this kind and whose expressed intention is to continue to do so, is not a fit and proper person to join the legal profession. On the facts placed before the Court in this application and for the reasons set out above, it cannot, in my judgment, be said that the Law Society has acted in a manner which justifies the conclusion that it has failed to apply its mind properly or that it has acted so unreasonably that the inference is warranted that it did not apply its mind. There is accordingly no basis on which this Court can interfere with the Law Society's decision.

Costs

That leaves the question of costs.

Mr *Slabbert*, on behalf of the Attorney-General did not ask for costs. Mr *Heunis* argued that if the Court found that the Minister's intervention was necessary, he should be awarded his costs. Mr *Breitenbach*, for the Law Society, submitted that costs should follow the result.

As this application is in the nature of a test case, it would, in my judgment, be fair and reasonable that each party should pay his, her or its own costs.

The Order

In the result, the application is dismissed. No order is made as to costs.

(The other members of the Court concurred in the judgment of Friedman JP)

For the applicant:

W Trengove SC and *D Jacobs* instructed by The Legal Resources Centre, Johannesburg

For the first, second and third respondents:

AM Breitenbach instructed by *Bisset, Moehmke and McBlain,* Cape Town

For the fourth respondent:

JC Heunis SC and *R Jaga* instructed by the State Attorney

For the fifth respondent:

J Slabbert instructed by the Attorney-General

Cases referred to

Southern Africa

Canada

United States of America