

THE RIGHT TO PRIVACY IN CONTEMPORARY SOUTH AFRICA - MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT AND OTHERS V GARETH PRINCE AND OTHERS

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On 18 September, the Constitutional Court ruled in a landmark judgment concerning the possession, purchase, use and cultivation of cannabis for private use. The case was a confirmation of a previous order of the Western Cape High Court (High Court). The High Court held that the criminalisation of the possession, purchase, use and cultivation of cannabis under the auspices of the *Drugs and Drug Trafficking Act* (Drugs Act) and the *Medicines and Related Substances Control Act* (Medicines Act) was unconstitutional and declared the impugned provisions invalid. The High Court further suspended the order of invalidity for 24 months to allow Parliament to cure the offending legislation.

The High Court had held that the core of the case was whether the infringement of the right to privacy caused by the legislation in dispute was reasonable and justifiable in terms of section 36 of the Constitution (the limitation clause). The High Court found the sections to be inconsistent with the right to privacy because they unjustifiably limited how and when an adult could use, possess, or cultivate cannabis in private. It is important to note that the High Court declared the provisions that prohibited the use or possession of cannabis in a private dwelling invalid, and in addition, those which prohibited the purchase and cultivation of cannabis in a private dwelling or home. This essentially meant that the right to privacy allowed an adult person to use, cultivate or possess cannabis in private for his or her personal consumption.

The order of the High Court was referred to the Constitutional Court (the Court) for confirmation, as required by the Constitution. The State applied for leave to appeal against the High Court order and opposed its confirmation. The respondents applied for leave to cross-appeal against the High Court's failure to inquire whether the rights to equality and human dignity were also infringed upon by the legislation, as had been their argument. In addition, they sought leave to cross-appeal against the High Court's decision to restrict its order to the use, possession, purchase or cultivation of cannabis in a private dwelling. This, they argued, was because the right to privacy extends beyond the boundary of a home. The High Court order had the effect of protecting individuals in their homes, but the moment a person left that private dwelling and was in possession of cannabis, (even not using) they would be committing an offence.

The Court, in its unanimous judgment, confirmed that the concerned provisions were indeed unconstitutional to the extent that they prohibited and criminalised the possession, use and cultivation of cannabis by an adult *in private*. The Court limited its findings to the right to privacy but agreed with the respondents regarding the High Court's limitation of the use, possession and cultivation of cannabis to the home. The Court agreed that the right to privacy does indeed extend beyond the boundaries of a home and concurred that cannabis can be possessed and used in private, in places other than a private dwelling.



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A notable change made by the Court was the removal of the word “purchase” from the High Court’s order. The Court said that because a purchaser of cannabis would be purchasing from a dealer, sanctioning the purchase of cannabis would be endorsing a serious problem in South Africa (dealing in cannabis), which it could not do. It held that that the criminalisation of dealing in cannabis was a justifiable limitation to the right to privacy.

While the Court was clear in decriminalising the above, a few questions arise from the judgment. One concerns the acceptable amount of cannabis one can use, possess or cultivate for private use. The Court declined to pronounce on this matter because of the doctrine of Separation of Powers and left it to Parliament to determine and legislate what a reasonable amount constitutes. In the case of law enforcement encountering an individual with cannabis, the Court said that all the relevant circumstances should be taken into consideration. If a police officer, on reasonable grounds, suspects that a person is in possession of or cultivating for dealing purposes and not for private use, that person must be arrested. The courts will decide whether they were indeed dealing in cannabis. Where the police officer is in doubt, that person must not be arrested.

The Court extended a period of 24 months to the Legislature to cure the impugned provisions and in the interim, read into the Drugs Act and the Medicines Act, to reflect the judgment and prevent the arrest of individuals for the private use, possession and cultivation of cannabis.

Mr Gareth Prince has been petitioning the courts for over a decade to re-examine the laws prohibiting the use of cannabis. When he first approached the courts, he used the freedom of religion as the basis of his arguments, as he is a practicing Rastafarian. Today, he has obtained a victory for many, who, like him, wish to use cannabis privately under the auspices of the right to privacy. This judgment not only speaks to the importance of the right to privacy, but it reflects the interrelatedness and interdependence of human rights. It also reflects the living nature of the Constitution. Thirty-three governments and States that are similarly founded on democratic principles of freedom, equality and human dignity, have decriminalised or legalised the private use cannabis, and the Court was cognisant of these when making its findings.