Constitutional application

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Interpretation — right to freedom of expression

In *Phillips v Director of Public Prosecutions, Witwatersrand Local Division* 2003 (1) SACR 425 (CC), the High Court's finding that s 160(*d*) of the Liquor Act 1989 was unconstitutional came to the Constitutional Court for a confirmation of invalidity. Section 160(*d*) 'made it an offence for any holder of an on-consumption licence who allowed any person (i) to perform an offensive, indecent or obscene act; or (ii) who was not clothed or not properly clothed, to perform or to appear, on a part of the licensed premised where entertainment of any nature was presented or to which the public had access' (at 430*g*-*h*).

The court noted, per Yacoob J, that findings of invalidity would not be routinely confirmed (at 432*b*-*c*). The court is obligated to enter into a thorough investigation into the constitutionality of the legislative provision (at 432*d*). The court found it unsatisfactory that the relevant members of the executive provided no reasons for their decision not to oppose the application for confirmation of invalidity (at 432*i*-*j*). Under the separation of powers doctrine, the courts, and not the executive, must decide on the constitutionality of laws.

On the issue of whether the section violated the right to freedom of expression, the court first noted that the s 160(*d*) prohibition 'applies to all entertainment of every description, provided only that the conduct covered by the section is part of it. It covers dramatic performances, including plays and concerts, irrespective of whether they represent serious works of art or the communication of thoughts or ideas essential for positive social development' (at 433*i*-434*a*). The section is, thus, a limitation on the right to freedom of expression, specifically the 'freedom of artistic creativity' and 'freedom to receive or impart information or ideas'. Its impact is on both performers and the audience.

The court moved on to the s 36 limitation enquiry. It noted that the right to freedom of expression is not absolute — it may be limited provided the requirements of s 36 were met. Taking a different approach from the High Court, the Constitutional Court found that the 'absence of evidence and argument from the state does not exempt the court from the obligation to

conduct the justification analysis' in s 36 (at 435*f-g*). The court found that the primary purpose of the Act was to provide for the control of the sale of alcohol and 'for all matters connected therewith'. Further, the court found that the state has a legitimate interest in controlling alcohol consumption as alcohol has a 'negative effect on the behaviour, feelings and thought patterns of consumers' (at 437*f-g*). However, the section went far beyond what was required by this purpose (at 437*h*). The section applied not only to places where the 'primary activity concerns itself with the sale of liquor for consumption' but other places as well. The court found the section's application to theatres to be especially problematic (at 438*d-e*). No representations on tailoring the section to meet the purpose had been put to the court by the state and the court felt itself unable to engage in a tailoring exercise that would result in such an order.

In the only dissenting judgment, Madala J noted that the section applied only to that 'part of the licensed premises where entertainment of any nature is presented or to which the public has access'. He went on to find that, taking into account the dangerous potential of combining alcohol with nudity, requiring theatres to refrain from selling alcohol on the days when such performances are being held is a reasonable and justifiable limitation of the right to freedom of expression (at 442*g-h*). The problem with this idea is that it implies that the combination of alcohol and nudity *always* has 'potentially detrimental consequences'. No distinction is drawn between obscenity and art. Perhaps such a distinction can never be drawn with any accuracy but preventing the sale of alcohol in a theatre performance of a play involving some nudity appears to be very far removed from the legislative purpose in this case.

In a separate, concurring judgment, Ngcobo J noted that the section might not have been a problem if theatres were not included (at 445*d*). The section might then not have affected the core of the right to freedom of expression as striptease dancing might be held not to fall within the ambit of the right. In any event, he agreed with the majority that the section went to far and had to be struck down.

Constitutionality of legislative provisions

Constitutionality of certain provisions of the Extradition Act 67 of 1962

In *Geuking v President of the Republic of South Africa* 2003 (1) SACR 404 (CC), South Africa had received a request for the extradition of Mr Geuking, by this time a South African citizen, to the Federal Republic of Germany.

There are a number of stages to be followed for extradition to a country with which South Africa has no extradition treaty. The process is initiated by s 3(2) of the Extradition Act 1962, which provides that the President of South African must consent to the extradition. The President consented to Geuking's extradition, under s 3(2), without being notified that he was no longer a German citizen. In this case, it was argued that the consent of the President should be reviewed and set aside on the grounds that he did not have the power to grant it and that it was granted on the basis of incorrect information regarding the citizenship of the appellant (411*h*-412*b*). Appellant was also arguing that s 10(2) of the Extradition Act 1962 be declared unconstitutional. That section provides that, 'in extradition proceedings before a magistrate, a certificate from the appropriate authorities in the foreign state must be accepted as conclusive proof that such authority has sufficient evidence to warrant the prosecution of the person concerned' (411*a-b*).

On the issue of whether s 3(2) gave the President the authority to consent to the extradition, counsel for the appellant argued that, whilst the section requires Presidential consent to initiate the proceedings, it does not give the President the power to consent to the extradition. The court dealt with the argument swiftly, finding that the section has always been interpreted to mean that the President can consent to extradition and that there was no substance in the argument (415*a-b*).

On the question of the validity of the President's consent, two issues were raised. First, there was the concern that the decision was based on incorrect information about the citizenship of the appellant. Second, it was argued that the President ought to have taken into account s 21(3) of the Constitution that provides: 'Every citizen has the right to enter, to remain in and to reside anywhere in, the Republic.' The court held that the decision was policy-based and not administrative. The decision may be based on considerations of comity or reciprocity between the states and, in deciding whether to consent to the extradition, the President must be free to take any matter into account if it is considered relevant to this policy decision in the foreign sphere. The courts may only intervene if the President abused the power vested in him or used it in conflict with the Constitution. This finding is consistent with the line of Constitutional Court decisions dealing with review of non-administrative powers: such power is reviewable but on the limited grounds set out above.

The President said that the appellant's citizenship would not have been a relevant consideration and the court found that there was no constitutional ground for attacking that policy-based decision. The court commented that such a policy made sense in light of the fact that, as a common law country,

South Africa's policy was not to prosecute its citizens for criminal acts committed abroad. A policy of not extraditing such citizens would mean that they go unpunished for criminal acts (at 416*d-f*).

The court also held that s 21(3) was not applicable as the decision was not one to extradite but to set in motion extradition procedures under the Act. In other words, Geuking was not being extradited yet (416*g*). This leaves open the possibility (noted by the court) of a s 21(3) challenge being brought when that final decision to extradite is made by the Minister under s 11 of the Act.

On the constitutionality of s 10(2) of the Act, it was argued that the section infringed the appellant's right to a fair public hearing, protected in s 34 of the Constitution, the right to a fair trial (s 35(3)), and the right not to be deprived of his freedom arbitrarily (s 12(1)(*a*)). It was also argued that s 10(2) of the Act conflicted with the separation of powers required by the Constitution. The latter challenge was based specifically on the independence of the judiciary provided for in s 165 of the Constitution (417*a-c*). As the Director of Public Prosecutions had informed the appellant that a s 10(2) certificate would be used and had, in fact, given him a copy of the certificate, the appellant's rights were being threatened and he had standing under s 38 of the Constitution (at 417*d-e*).

The court found that, of all the factual issues which the magistrate has to consider under s 10(2), the question of fact dealt with in the s 10(2) certificate is the only one that 'does not depend on evidence readily available in South Africa' (at 420*a-b*). The factual issue of whether the conduct amounts to an offence in the other country is one that would not usually be 'within the knowledge or expertise of South African lawyers or judicial officers'. The court held that s 10(2) does not deprive the appellant of a fair, public hearing as the magistrate uses the certificate only to ascertain that the conduct is an offence in the other state, not to decide that the individual must be extradited (at 421*a-b*). It is acceptable for the legislature to relieve the magistrate of the duty to decide on this issue of foreign law alone (at 421*d-e*). The court noted that, when the actual decision on whether to extradite is being made by the Minister under s 11, an attack on the conclusion in the s 10(2) certificate may have to be considered (at 421*g-h*).

On whether the section violates the right to a fair trial, the court held that a person in the position of Mr Geuking is not an accused person for the purposes of s 35(3). The magistrate's decision that he is extraditable does not result in a conviction or sentence (at 421*i*). However, the person concerned 'is entitled to procedural fairness at all stages of the extradition enquiry' (at 422*a*). The court's conclusion that the magistrate's decision does not result in a conviction or sentence raises interesting issues. The question of when someone becomes an accused person in the extradition context arises. In

cases where the person has not yet been tried in the foreign state, he or she is an accused person before the courts of that foreign state at all stages of the South Africa extradition proceedings. It is unclear whether a South African court would find that such a person is an accused person in the South African proceedings. In Mr Geuking's case, he had already been tried and sentenced before leaving Germany. It appears that he could not be an accused person for the purposes of s 35(3) even if the Minister makes a decision to extradite him under s 11.

On the arbitrary deprivation of freedom claim, the court held that the right had not been infringed for two reasons. First, deprivation of freedom only occurs when the Minister decides to extradite the individual under s 11, not when the magistrate decides that the person is extraditable under s 10 (at 422*b-c*). Second, the court held that the enquiry, which the magistrate has to undertake, provides sufficient just cause 'in the context of the purpose of the enquiry which is to facilitate extradition'. Thus, any deprivation of freedom is not arbitrary (at 422*d-e*).

The final issue was the independence of the judiciary. The court noted that the enquiry by the magistrate did not amount to a trial determining guilt or innocence and the matter concerned was not a matter of South African domestic law (at 423*e*-g). The court held that 'viewed in this context, the provisions of s 10(2) do not interfere in any way with the independence of the judiciary by rendering conclusive the opinion on foreign law by an appropriate foreign official from the country seeking extradition' (at 423*f-g*).

Constitutionality of certain provisions of the Films and Publications Act 65 of 1996

In *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2003 (1) SACR 448 (W), the applicant had been charged with contravening certain provisions of the Films and Publications Act 1996. He applied for an order that s 27(1) of the Act, read with the s 1 definition of 'child pornography' be declared unconstitutional. The applicant did not object to the prohibition against the possession, production, creation and distribution of child pornography. However, it was argued that s 27(1) was unconstitutional because it applied to bona fide art and did not allow for a 'defence of legitimate purpose or public good or public interest where such material is possessed or imported for the creation of a bona fide documentary, research work, drama or work of art, without involving real children' (455*f-h*). It was also argued that the current vague and open-ended definition of child pornography meant that, when s 27 was applied, the right to privacy 'is at an unjustifiable risk' (455*i*).

The court began with a consideration of s 28 of the Constitution, which

protects the rights of children. Epstein AJ emphasised the fact that the section makes the best interests of the child the paramount consideration in any matter dealing with children (at 457*b*-*c*). The court also examined South Africa's international obligations and international authorities in the area (at 457*d*-458*b*). In addition, the history of the legislation (458-465) and foreign law (465-469) were considered is some detail. Following the discussion of American, Canadian and United Kingdom law, Epstein AJ noted that, whilst 'the prevalence of child pornography and violent sexual crimes in other jurisdictions is not known to me and no evidence in this regard was placed before me', child pornography and violent sexual crimes have reached 'epidemic proportions in South Africa' (469*f*-*h*).

The court held that the 'right to possess and view child pornography is not a protected activity within the boundaries of the right to privacy' (at 475*e*-*f*). The court found that the existence of child pornography in itself meant that the child featured in the material was abused and degraded. The court also found, following a discussion of the large amount of evidence put forward on the impact of child pornography on society, that 'the link between child pornography and paedophilia is inextricable' (at 473*g*-*h*). Child pornography is difficult to police due to the fact that it is usually viewed in private. In order to achieve the Constitutional objectives related to the protection of children, the 'right to privacy must defer to the rights of children who may be harmed' (at 475*e*-*f*).

The court also noted that the Act provided in s 22(1) for individuals to obtain permission to possess material falling within the definition of child pornography if such individuals can show a bona fide purpose. The court held that compelling such a person to make an application was not too much of a burden given the importance of the need to suppress the child pornography industry (at 475*g*-*i*).

Turning to the claim that the relevant provisions of the Act violated the right to freedom of expression, protected in s 16 of the Constitution, the court again noted that s 22(1) allowed for those wishing to possess child pornography for bona fide purposes to make an application (at 476*d*). The court noted that, given the difficulty of distinguishing between art and child pornography, it would be practically impossible to enforce the Act with a 'research or art and science defence' (at 478*d* and 479*d*). In essence, though, the court's decision was not based on the difficulty of making this distinction but on the importance of suppressing child pornography weighed against the value of possessing it 'as an artistic form' (at 479*h*). The latter was simply found not to be sufficiently valuable. Where the possession of child pornography is required for genuine research purposes, s 22(1) could be used (at 479*h*-*i*).

The court rejected the argument that the definition of 'child pornography' was too vague. Examining various terms in the definition, the court concluded (at 484*a-c*) that

> '[m]aterial containing sexual conduct involving children or the display of their genitals is prohibited only where the children depicted therein are used or taken advantage of for the profane benefit of another or where the status, general nature or virtue of children is reduced, dishonoured or debased, and where children are humiliated, which results in a loss of respect towards children.'

These parameters meant that the definition was not too vague. This part of the court's reasoning is not very clear. It appears to merely re-state the definition and other definitions in the Act.

The court went on to address the concern that the definition of 'child pornography' went further than necessary to achieve the legislative goals. In particular, the applicant objected to the inclusion of 'innocuous material' in the definition. Again, the court's reasons for finding that the definition was not overbroad are not very clear. The heinous nature of child pornography was emphasised (at 484*e-g*) and the court noted that the respondent's answer to this issue was to refer to the possibility of a s 22 application for bona fide possession (at 484*d-e*).

A claim that s 27(1) was unconstitutional because it, in effect, treated possessors differently from distributors and therefore violated s 9 of the Constitution, was dealt with briefly by the court. Distributors are dealt with in s 28 of the Act and the section is subject to an exemption and is qualified by the requirement that the material concerned must be judged in context. The court held that it did not have to consider whether there was a rational reason for the differentiation because the constitutionality of s 28 was not in contention (at 485*a-b*). The question of whether the right to equality is actually violated by the Act was, thus, not considered.

The court went on to find that, even had certain of the rights been violated, s 27(1) would be saved by the application of the limitation clause. The limitation clause enquiry does not deal with each of the rights in turn and is quite cursory, simply reiterating the importance of the eradication of child pornography in society (at 485-6). It is also difficult to see why it was entered into at all, given the fact that all the rights were held not to have been violated.

See also R Louw 'Specific Offences' above.

Constitutionality of Chapter 6 of the Prevention of Organised Crime Act 121 of 1998

In *Mohamed NO v National Director of Public Prosecutions* 2002 (2) SACR 93 (W), the High Court found s 38 of the Prevention of Organised Crime Act 1998 to be unconstitutional. This finding went to the Constitutional Court in

confirmation proceedings. However, the Constitutional Court sent the matter back to the High Court, finding that the High Court should have dealt with the attack on the constitutionality of chapter 6 of the Act as a whole (at 291*d*). The High Court dealt with this attack in *Mohamed NO v National Director of Public Prosecutions* 2003 (1) SACR 286 (W).

The applicant argued that, whilst the 'forfeiture of the instrumentalities of crime and the proceeds of crime can be constitutionally justified in light of the prevalence of crime in South Africa and internationally' the legislative provisions in question went too far. The core sections of the chapter were discussed before the court. The court's finding on s 38 was, as in the earlier hearing, that the section was unconstitutional 'to the extent that it requires the National Director of Public Prosecutions to bring an application for a preservation order ex parte in every case and makes no provision for a rule nisi calling upon interested parties to show cause why a preservation of property and seizure order should not be made' (at 290*h*-*i* and 292*h*-293*b*). The section violated ss 14, 25(1) and 34 of the Constitution (at 299*f*-*h*). The court noted that the rights of an innocent party could be permanently damaged if that person is compelled to wait until the application for a forfeiture order is decided (at 293*g*-*h*). The court found that the purpose of the section could be achieved whilst, at the same time, allowing for a hearing for interested parties (at 299*f*-*h*). The court held that the term 'by way of an ex parte order' should be severed from the section and that the provision for the granting of a rule nisi should be read in (at 300*f*).

The court went on to consider the constitutionality of ss 39 and 48 of the Act. Applicants argued that these sections violated the right to remain silent protected in s 35(3)(*h*) of the Constitution. In essence, the problem was that the sections, taken together, forced a person wishing to protect any interest in property subject to a forfeiture hearing to deliver an affidavit stating, amongst other things, the 'basis of the defence upon which he or she intends to rely in opposing the forfeiture order or applying for the exclusion of his or her interests from the operation thereof' (at 301*f*-*g*). The court held that this was constitutional because both the right to remain silent and the privilege against self-incrimination would be protected in any subsequent criminal trial because of the operation of s 35(5) of the Constitution. The matter would be one for the presiding officer at any subsequent criminal trial if the prosecution attempted to use the contents of the affidavit described above (at 302*g*-*h*).

Section 49 of the Act requires a person with an interest in the property to enter an appearance within 14 days of receipt of notice of the forfeiture hearing. The court held that this did not limit the right of access to court because subjective knowledge was relied upon — the period was 14 days

from when the individual was aware of the proceedings and because there was a need to expedite the process (at 303*g-i*). Further, the court found that the use of a balance of probabilities test for forfeiture was constitutional because chapter 6 of the Act was not aimed at criminal punishment of the person concerned (at 304*e*-305*c*).

The applicant also argued that, under s 52 of the Act, the onus should be on the National Director of Public Prosecutions to show why the forfeiture order should not be granted. The court held that the section was procedurally fair as the interested parties were granted a hearing before a forfeiture order was granted. In addition, any obligation on the applicant only arises once the property has been shown, on a balance of probabilities, to have been used as an instrumentality of an offence or the proceeds of crime (at 306*a-b*).

Finally, the court found that there was no arbitrary deprivation of property under s 52 of the Act and that s 25(1) of the Constitution was, therefore, not violated. The High Court only makes a forfeiture order once interested parties have been heard (at 306*a-b*). Further, the reversal of the onus was not a problem because the facts fell within the knowledge (usually exclusive) of the person with an interest in the property (at 307*d-e*).