# *IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA*

***CASE No: CCT/36/00***

In the matter between:

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|---|---|
| ***GARRETH ANVER PRINCE*** | Applicant/Appellant |
| and | |
| ***THE PRESIDENT OF THE LAW SOCIETY OF THE CAPE OF GOOD HOPE*** | First Respondent |
| ***THE LAW SOCIETY OF THE CAPE OF GOOD HOPE*** | Second Respondent |
| ***THE SECRETARY OF THE LAW SOCIETY OF THE CAPE OF GOOD HOPE*** | Third Respondent |
| ***THE MINISTER OF JUSTICE*** | Fourth Respondent |
| ***THE ATTORNEY-GENERAL OF THE CAPE OF GOOD HOPE*** | Fifth Respondent |

## *FIFTH RESPONDENT'S SUPPLEMENTARY SUBMISSIONS*

## ***IS AN EXEMPTION FOR RASTAFARI CONSTITUTIONALLY PERMISSIBLE?***

1. This Honourable Court seems to accept, in principle, the constitutional permissibility of exemptions. See:

   ***S v LAWRENCE 1997(4) S A 1176 (CC) at para [122] and footnote 90; CHRISTIAN EDUCATION S A v MINISTER OF EDUCATION 2000(4) SA 575 (CC),***

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where this Honourable Court entertained, but dismissed, a prayer for an exemption from the provisions of section 10 of the Schools Act, No 84/1996.

2. Sections 2, 38 and 172(1)(b) of the Final Constitution also give this Honourable Court very wide powers.

3. But it is respectfully submitted that in this particular case this Honourable Court is not constitutionally able to grant the exemption.

***REASONS FOR THIS SUBMISSION:***

4. The scope and extent of the exemption prayed for [to use, possess, cultivate and transport (and by implication, also to purchase, sell and import) cananbis] is so far-reaching -

   (i) that it would require extensive "legalization" of the entire chain of the industry, and this is going to be impossible to control or prevent commercial abuse;

   (ii) that it would endanger and undermine the administration of the Acts, as well as the Drug Master Plan, and be contrary to our international obligations. See further **para 9** ***infra.***

3/..



5. It amounts to this Honourable Court taking over the legislative duties of Parliament - ***COETZEE v GOVERNMENT OF R S A 1995(4) S A 631 (CC) at para [17]; LAWRENCE (supra) at para [80];***

***Note to Section 31*** of the Final Constitution;

See also ***para 6.5 (infra);***

See also ***Annexures 43 - 45*** of the Application for leave to appeal.

6. It would drastically alter the schemes of the Acts.

***Brief summary of the Acts' schemes:***

6.1 ***The Drugs Act 140/1992:***

(a) sec 4(b)(i-ii) provides for medicinal or veterinarian exemptions;

(b) sec 4(b)(iv-v) provides for exemptions for patients, doctors, dentists, veterinarians, nurses, pharmasists, etc, and for employees of such persons;

(c) sec 4(b)(vi) provides an exemption for possession when such possession has come about in a lawful manner;

(d) according to the preamble the purpose of the Act is, *inter alia*, *"To provide for the prohibition of the use or possession of, or the dealing in, drugs....."*;

4/..



(e) The Act was enacted to comply with the U N Convention, 1988 -

***BRIG. VENTER - RECORD: Vol 3 page 159(26)***;

(f) the Act also reflected the concerns of Parliamentarians -

***DEBATES - RECORD: Vol 4 pages 208 - 222.***

6.2 ***The Medicines Act 101/1965:***

(a) Sec 22A(10)(a-b) provides that a permit issued by the Director-General: Health would allow the use, possession, cultivation, etc. of cannabis *"for analytical or research purposes"*.

***DR NTSALUBA at para 6.3.***

(b) The purpose of the Act is to not only regulate the manner in which scheduled substances are made available to the public, but also to control the quality and supply of medicines generally. It also provides for the registration of medicines intended for human and animal use. See -

***ADMINISTRATOR, CAPE v RAATS RÖNTGEN AND ANOTHER 1992(1) S A 245 (A) at 254 B***

***MISTRY v INTERIM MEDICAL AND DENTAL COUNCIL 1998(4) S A 1127 (CC) at paras [17 - 19]***

***DR NTSALUBA (supra) at para 6.3***

***INGRID VAN VUUREN para 14.2***

5/..



(c) The Act was enacted to comply with the Single Convention**,** 1961 -

***DR NTSALUBA (supra) at para 6.5;***
***DEBATES, Annexure 85 of Respondent's documents.***

6.3 The main thrust of the exemptions provided for in these two Acts relates to:

(a) medicinal and veterinarian uses (the Drugs Act);

(b) research and analytical uses, combined with the control of quality and supply, and the registration, of medicines (the Medicines Act);

(c) all of which takes place under strict control and supervision. See -

***VAN VUUREN at paras 3 and 14.2.***

6.4 An exemption based on religious grounds, to be administered by the Rastafari themselves, adds a completely new dimension to the two Acts;

6.5 As ***SACHS J*** said in the ***MISTRY*** case ***(supra)*** (where he was asked to read down sec 28(1) of the Medicines Act) at ***para [32]:***

> *"(the) wording simply does not permit such a solution.... (T)he argument calling for a reading down....contradicts the scheme of the Medicines Act as a whole.... We cannot (rewrite the inspectors' mandate), it would be the responsibility of Parliament to enact legislation....."* (My underlining)



In dealing with severence and reading down in ***CASE AND ANOTHER v MINISTER OF SAFETY AND SECURITY 1996(3) S A 617 (CC), MOKGORO J*** said the following:

At ***para [73]:*** *"For this Court to attempt that textual surgery would entail it departing fundamentally from its assigned role under our Constitution ..... our role is to review, rather than to redraft legislation. This Court has already had occasion to caution against judicial arrogation of an essentially legislative function in the guise of severence."*

*At* ***para [78]:*** *"Any form of 'reading down' will thus require substantial*

*reconstruction of the section, including the.....('reading in') of exemptions..... Given what is clear about the objections of the 1967 Act, that would be.... an impermissible importation of content foreign to the enactment."* (My underlining)

In ***S v MANAMELA 2000(3) S A 1(CC)*** and ***NATIONAL COALITION FOR GAY AND LESBIAN EQUALITY v MINISTER OF HOME AFFAIRS 2000(2) S A 1 (CC)*** certain words were "read in" to the respective statutes because this Honourable Court, in the words of ***ACKERMANN J*** at ***para [75]*** of the ***GAY*** case *supra,* was able *"to be as faithful as possible to the legislative scheme within the constraints of the Constitution".*

7. It would be in direct conflict with sec 4(b)(vi) of the Drugs Act, which only permits possession (but not the use, cultivation, transportation, etc) of dagga when obtained in a lawful manner.

7/..



8. It would be in conflict with our international obligations. In this regard see -

(i) Respondent's written submissions at ***pages 36 - 41.***

(ii) ***S v MAKWANYANA 1995(3) S A 391 (CC) at para [35]; HOFFMAN v S A A 2001(1) S A 1 (CC) at para [51]*** and ***S v BALOYI 2000(2) S A 425 (CC) at para***

***[13]*** on the role played by international obligations;

(iii) Sections 39(1) and 233 of the Constitution.

9. It would hamper and undermine the administration and objectives of the Acts, and would be in conflict with the Republic's strategies, such as the National Drug Master Plan, to combat drug abuse, as well as our international obligations. See -

***ADV KAHN's*** supplementary affidavit at ***paras 40; 69(c)*** and ***Annexure 33*** thereof;

***DR NTSALUBA (supra) at para 7.8.7***;
***VAN VUUREN (supra) at para 14.4*** and
***Act 20/1992.***

10. The exemption would not affect the rights of others to their religious beliefs, but it is submitted that the religious practices allowed by the exemption would affect the fundamental rights of others, and thus be in conflict with the Constitution, in the following respects:

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10.1 The rights of children in terms of sec 28(1)(d) and 24(a). Please see in this regard:

(i) Respondent's written submissions at ***pages 18 - 24; 46 - 50*** and ***page 92;***

(ii) ***Mr KAHN's*** supplementary affidavit at ***paras 8 - 11*** and ***25 - 25.3;***

(iii) Per ***SACHS J*** in ***CHRISTIAN EDUCATION*** *supra,* at ***para [41]:***

*"Courts throughout the world have shown special solicitude for protecting children from....the potentially injurious consequences*

*of their parents' religious practices. It is now widely accepted that in every matter concerning the child, the child's best interests must be of paramount importance. (*Quoting from the Canadian case of ***P v S****)....the Court has reiterated many times, freedom of religion, like any freedom, is not absolute. <u>It is inherently limited by the rights and freedoms of others</u>*.".) (My underlining)

(iv) See also ***Annexure 162*** of Respondent's written submissions.

10.1.1 Please see the following on this aspect of the limitations on the rights and freedoms of others:

(a) the internal limitations imposed by sections 30 and 31(2) of the Constitution;

(b) Respondent's written submissions on foreign constitutions and declarations at ***paras 67 - 75***, and case law at ***paras 77 - 87.2;***

9/..



(c) Article 1.3 of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion and Belief:

*"Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or fundamental rights and freedoms of others."*

10.2 Sections 9(2) and 9(4) of the Equality clause.

(i) The exclusion of women, especially when they are menstruating**,** from

partaking in an *"integral part of the Rastafari religion"* has been dealt with -

***Respondent's written submissions at paras 106 - 107(4)(iv)***.

(ii) Sec 9(2) is very clear: *"Equality includes the full and equal enjoyment of all rights and freedoms...."* (My underlining.) Women certainly do not enjoy *"full and equal enjoyment"* of an integral part of the Rastafari religion.

(iii) No rational reason nor justification has been given for this exclusion of women, and the only logical inference that can be drawn is that they are excluded because they are women.

(iv) This *prima facie* violates sec 9(4) read with sec 9(3), and in the absence of any justification, unfair discrimination has been established in terms of sec 9(5).

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10.3 ***Sec 9(1) of the Constitution.***

This has been dealt with in ***paras 130.1 - 131.3*** of Respondent's written submissions,

11. It is submitted that this Honourable Court would have difficulty in framing the terms of its Order should it grant an exemption. Possible difficulties could be:

(i) The exemption prayed for is in respect of all adult Rastafari [whilst Respondent has submitted that the evidence has disclosed that it is only adult male Rastafari that are affected by the prohibitions]. Can this Honourable Court grant the exemption prayed for when the Order would encompass a group (the women) whose constitutional rights have not been violated? In other words, is it

constitutionally competent for this Honourable Court to make an Order that would include persons in respect of whom there has been no violation of the Bill of Rights? [Or to frame the difficulty in a different manner: is it constitutionally competent for this Honourable Court to grant relief to an applicant who (individually or as a group, such as the Rastafari), in the exercise of his/their rights, violate the protected rights of others?]

(ii) Should the exemption be granted in respect of the use, possession, cultivation, transportation and importation of cannabis, should the Order not also set out safeguards and limitations so as to prevent abuse of the exemption? If so, how are these to be framed?

11/...



(iii) What form of exemption would be granted - a *"blanket"* exemption, or one based on individual permits?

(iv) This then raises the next question - would it not be constitutionally unwise to grant an exemption when there are no mechanisms in place to administer and control the exemption?

12. In the ***LAWRENCE*** case ***(supra)***, it had been submitted that sec 90(1) of the Liquor Act induced a submission to the Christian conception of the Sabbath and certain holidays. The following remarks were made by learned Justices of this Honourable Court in the context of the State (by way of the Liquor Act) endorsing a certain religion (Christianity), but it is submitted that these remarks are of equal application to this Honourable Court in the context that this Honourable Court (in the place of the State) should also not be seen to endorse a particular religion:

(i) Per ***O'REGAN J*** at ***para 123:***

*"The explicit endorsement of one religion over others would not be permitted in our new constitutional order. It would not be permitted, first, because it would result in the indirect coercion that Black J adverted to in* ***Engel v Vitale;*** *and, secondly, because such public endorsement of one religion over another is in itself a threat to the free exercise of religion, particularly in a society in which there is a wide diversity of religions. Accordingly, it is not sufficient for us to be satisfied in a particular case that there is no*



*direct coercion of religious belief. We will also have to be satisfied that there has been no inequitable or unfair preference of one religion over others."*

(ii) Per ***SACHS J*** at ***paras [152 - 153]:***

*"Thus, any endorsement by the State today of Christianity as a privileged religion not only disturbs the general principle of impartiality in relation to matters of belief and opinion, but also serves to activate memories of painful past discrimination and disadvantage based on religious affiliation.*

*Professor Laurence H Tribe points out further, correctly in my view, that any actual or perceived alliance between government and religion can undermine free political discourse."*

13. Lastly, if the laws have been successfully justified (as Respondent submits they have) then it is submitted that that is the end of the matter, and any exemption would not be

constitutionally permissible as such exemptions would be based upon understandable compassion instead of on constitutional grounds.

14. It is thus submitted that although this Honourable Court has the general power to grant exemptions, it is not constitutionally permissible to grant the exemption prayed for in this particular instance.



***<u>IS IT NECESSARY TO EXEMPT RASTAFARI</u>?***

15. It is respectfully submitted that ***SACHS J*** has succintly summed up the whole difficult approach to this case as follows in ***para [35]*** of the ***CHRISTIAN EDUCATION*** case ***(supra):***

> *"The underlying problem in any open and democratic society based on human dignity, equality and freedom in which conscientious and religious freedom has to be regarded with appropriate seriousness, is how far such democracy can and must go in allowing members of religious communities to define for themselves which laws they will obey and which not. Such a society can cohere only if all its participants accept that certain basic norms and standards are binding. Accordingly, believers cannot claim an automatic right to be exempted by their beliefs from the laws of the land. At the same time, the State should, wherever reasonably possible, seek to avoid putting believers to extremely painful and intensely burdensome choices of either being true to their faith or else respectful of the law."*

16. It is submitted that during the enquiry into whether it is *"necessary"* to grant exemptions to Rastafari, the following should be considered:

16.1 The enquiry cannot be divorced from the fact that the removal of the word *"necessary"* from the Interim Constitution's limitation clause has made the burden of proving justification less onerous. See -

***S v MAKWANYANA (supra)*** at ***para [339];***
***FERREIRA v LEVIN 1996(1) S A 984 (CC)*** at ***para [173].***

14/...



[This means, it is submitted, that the determination of whether an exemption is necessary or not is now on a more equal footing than it would have been under the previously more onerous test];

16.2 Although the use of the word *"necessary"* in the learned President's directive to the parties is used in a different context to the use of the word in sec 33 of the Interim Constitution, it is submitted that this Honourable Court's earlier discussions on the meaning of the word *"necessary"* could nevertheless be relevant.

16.2.1 Per ***CHASKALSON P*** in ***S v MAKWANYANA (supra)*** at ***para [104]:***

> *"There is no absolute standard which can be laid down for determining reasonableness and necessity..... (it) can only be done on a case-by-case basis."* And:
>
> *"..... particularly where the limitation has to be necessary, whether the ends could reasonably be achieved through other means less damaging to the right... In the process.... (it must be borne in mind) that....the role of the court is not to second-guess the wisdom of policy choices made by legislators."*

16.2.2 ***ACKERMANN J*** expressed basically the same sentiments of *"acceptable*

*proportionality"* at ***para [127]*** of ***FERREIRA v LEVIN (supra).***



16.2.3 In ***COETZEE (supra) SACHS J*** examined the meaning of the word in the context of international instruments, and came to the conclusion at ***para [60]*** *"....that the term 'necessary' is not made the subject of rigid definition, but rather is regarded as implying a series of interrelated elements in which central place is given to proportionality of the means used to achieve a pressing and legitimate public purpose."*

In a South African constitutional context he said that the term calls for a *"high degree of justification",* and *"(the) public interest served by (sections 65A - 65M) would have to be so compelling or pressing as clearly to outweigh the indignity and loss of freedom..... The question would then have to be asked: could the societal reasons....be said to be sufficiently acute and forceful to pierce the protective constitutional armour provided by the word 'necessary'* (as it appears in sec 33 of the Interim Constitution)."

[The learned Justice affirmed these remarks at ***para [166]*** and ***footnote 152*** in ***S v LAWRENCE (supra).***]

16.3 Despite the different context in which the meaning of the word *"necessary"* was examined *supra,* it is submitted that in the context of the word now used by the learned President the question can still be asked: is the *"public interest so compelling or pressing as clearly to outweigh"* Appellant's necessity for an exemption?

16.4 It is submitted that there are such compelling reasons. Please see -

16/...



(i) Respondent's written submissions on ***pages 111/112,*** and ***paras 89 - 93*** thereof;

(ii) the *"Harm principle"*, discussed in ***paras 38 - 49 infra.***

16.5 This Honourable Court is respectfully once again reminded of especially the grave risk to children (dealt with in ***para 10.1 supra***), and the contravention of the equality clause (***para 10.2*** and ***10.3 supra***).

16.6 Please also see ***paras 8 - 11*** and ***paras 25 - 26.3*** of ***Mr KAHN's*** supplementary affidavit.

***17.*** It is thus submitted that the State's pressing needs (*supra*), satisfy the test laid down by ***SACHS J*** in the ***CHRISTIAN EDUCATION*** case (*supra*) at ***para [32]:***

> *'More precisely, the proportionality exercise has to relate to whether the failure to accommodate the appellant's religious belief and practice by means of the exemption for which the appellant has asked, can be accepted as reasonable and justifiable....."*

18.1 It is submitted that the State's compelling and pressing public interest:

(i) does not allow for other less restrictive means over and above the exemptions already provided for in the Acts;

(ii) satisfies the proportionality exercise;



(iii) outweighs the necessity of granting the exemption prayed for and the failure to provide for this exemption over and above the present exemptions, can be accepted as reasonable and justifiable.

18.2 In conclusion on this leg, it must be stated that those submissions have been made with the full realization of what is at stake for the Appellant in particular and the Rastafari in general.

Respondent is not unfeeling about his fate and realizes that there is much sympathy for his cause. But hard cases make bad law, and it is submitted with the greatest respect to the Appellant and the Rastafari, that sympathy with their cause must not allow sound constitutional principles to be cast aside, and as much as one would like to come to their assistance, it is submitted that the stark reality of this case is such that once the proper constitutional principles have been applied, there can be no constitutional relief for the Appellant.

***THE PRAC TICAL PROBLEMS***

19. The Honourable President has asked the parties to make brief submissions in this regard. Respondent respectfully refers this Honourable Court to the supplementary affidavits and the previous written submissions, for a fuller exposition of Respondent's point of view. These points will be briefly set out hereunder.

***<u>The problem of effective internal control by the Rastafari themselves</u>:***

20. They themselves concede that adolescents and children should not smoke this harmful drug, yet it is clear that children are exposed to it on a daily basis. Their protestations to the contrary, it is difficult to see how children will not be harmed thereby, or how the State and this Honourable Court can eschew their duty to protect the children as best they can.

***KHAN: paras 25 - 26.3.***

21. How is the private cultivation of cannabis going to be controlled -

(i) against commercial and personal abuse by the cultivator?

(ii) against the exemption being hijacked by drug-lords?

(iii) against theft of the crop by gangsters and drug-lords?

***KAHN: paras 42 - 43; 55.2***

*22.* Cannabis can be smoked virtually anywhere whenever a member *"feels the need to be in contact with Jah".*

Please see ***paras 44 - 49 infra*** where this aspect is discussed under the *"Harm Principle".*

23.1 Apart from now admitting that there will be *"teething problems"* (***paras 5.7*** and ***5.33*** of Appellant's Supplementary Replying Affidavit), Appellant is still content

to blandly assert that the RNC *"has expertise to implement and administer any exemption"* - ***para 5.34*** thereof, and ***para 3.11.9*** of his Supplementary Affidavit.

23.2 He does not assist this Honourable Court beyond this bland assertion. See -

> ***KAHN's Supplementary Affidavit at para 62 - 68.2;***
> ***MASON para 21;***
> ***DR NTSALUBA paras 7.4.2; 7.8.6;***
> ***VAN VUUREN para 14.3:*** *"....the Department does not have the support of an independent control organization that could assist in ensuring proper control. The Department...would have to try and control a group of people belonging to a religion - a field outside the Department of Health's scope."*

24. The practical control of the shipment of cannabis from the Transkei, Lesotho or Swaziland to the Western Cape (or anywhere else) and the prevention of commercial abuse *en route,* are problems that are simply ignored or are too easily glossed over by the Appellant.

24.1 In ***para 5.2*** of his Supplementary Affidavit he states that due to the present risks, quantities of 10kg bags are purchased and transported to the Western Cape. If this situation is legalized (by the exemption) it is submitted that one can assume that for the sake of convenience larger quantities would now be purchased and transported, and purchases of 50 - 100kg could reasonably be expected.

20/...



24.2 Appellant has suggested that the prior validation of a route map, together with details of the quantity of cannabis to be purchased, the expected times of arrivals and places of

destination, be given to the driver, which *"permit"* he could produce on demand -

***Appellant's Supplementary Replying Affidavit at para 5.25.***

24.3 Respondent's submissions hereon:

(a) there is no infrastructure (or legislation) in place for such validation;

(b) but even if the route map, etc. could be validated it would need to be monitored, and the following would be the absolutely minimum procedures necessary for proper control:

(i) irrespective of what the *"permit"* states, someone will have to monitor the quantity of dagga loaded and enter the quantity on the *"permit"*, and someone will have to check that this quantity reaches its destination. Who is going to perform these tasks? Who is going to check the quantity loaded in Lesotho or Swaziland, and if it is loaded in the Transkei, would the supplier allow the Police to be present whist checking the quantity loaded, and then allow himself to be arrested for dealing while the truck sets off into the sunset? (Or is the dealer now also free from prosecution?)

21/..



(ii) who is going to monitor the distribution of the dagga at its destination, to make sure that it reaches only the hands of the Rastafari?

(iii) say the *"permit"* allows 100kg of dagga to be transported from Lesotho to Cape Town. The driver is stopped several times *en route* and he flashes his *"permit"*. How are the policemen alongside the road going to determine that the weight allowed on the *"permit"* and the weight of the

dagga on the lorry are the same? If the dagga was loaded in Lesotho how can they check the correctness of the weight endorsed on the *"permit"* by the dealer, and make sure that he did not load 200kg but endorsed 100kg on the *"permit"*; allowing a 100kg bonus to be sold commercially *en route*? (At a street price of R1-00gm, the extra 100kg would allow a profit of R100 000-00, enough to tempt any man of whatever religion);

(iv) the Appellant's suggestion that the *"permit"* would contain a route map, the quantity (for example 100kg) to be purchased as well as the expected times of transport and destinations, is a hijacker's dream come true. Some State official or policeman would be issuing this *"permit"*, and given the levels of corruption present in the country it must surely be a very real risk that this information will be *"leaked"* to a drug-lord, setting the scene for an extremely easy and very profitable hijacking.

22/..



***<u>The problem of effective external control</u>***

***25.*** ***Private homes and private individuals.*** At the moment the Police are able to exercise a measure of control over the situation, but once an exemption permits the use, possession and cultivation of cannabis at the private home, the legalization of the situation, and the entrenched right of privacy (section 14) would make the private home and the individual person virtually untouchable, and personal and commercial abuse would be able to flourish uncontrollably.

***KAHN, para 33.1 - 33.2; Written submissions, para 119 - 122.***

26. ***The Police.*** Apart from private homes and individuals (*supra*), the Police will have further difficulty in -

(i) controlling the importation and transportation of cannabis;

(ii) controlling infiltration by drug-lords;

(iii) identifying *bona fide* Rastafari.

***KAHN, paras 38 - 41; 55 - 55.2;***
***MASON, para 21.***

***27. The Courts.***

(i) The Courts, especially in the rural areas where some Magistrate's Offices have no permanent prosecutors, are seriously understaffed and have heavy daily rolls. Effective control of exemptions and the establishing of *bona*



*fides* are going to place further strain on available resources, and will be virtually impossible to control in some rural areas.

***KAHN's Supplementary Affidavit: paras 55 - 59.***

(ii) The permanent and simultaneous availability of "assessors" countrywide could be a grave practical problem, leading to delays in cases.

***KAHN (supra), paras 68.1 - 68.2.***

27.1 The Appellant has made suggestions on this aspect:

Firstly, Rastafari would *"put up with"* the delays, and secondly, a list of assessors would be given to control prosecutors -

***Supplementary Replying Affidavit at paras 5.32 and 5.36.***

27.2 Respondent's submissions on these aspects:

(a) what happens in the areas where there are no permanent prosecutors at all?

(b) if non-Rastafari A and B are arrested with Rastafari X, why should A and B have their *"speedy trial"* rights violated whilst awaiting X's assessor?

(c) Appellant's solutions are again in general terms, and he has not answered the question as to whether the "assessors" would have the time, money and transport to be available countrywide.

24/...



28. The Appellant is obviously not intent on legalizing the whole illegal dagga industry, and he is opposed to drug abuse and trafficking in drugs:

***Supplementary Affidavit, para 7.1.***

29. But apart from blandly stating that the exemption would create no practical problems, he has nowhere in his papers addressed the very real practical problem of what happens to the dealer and cultivator should the exemption be granted.

29.1 Does the dealer/cultivator enjoy limited protection when he sells to the Rastafari, or is he not exempted at all? If he enjoys limited protection then obviously every such sale must be monitored from start to finish to prevent commercial abuse. Who is going to do that? If such sale is "legal", and in view of its recognized profitability, the dealer/cultivator will have to declare it for income tax purposes. What dealer/cultivator is going to expose his business to the eagle eye of the Receiver?

29.2 If he enjoys no protection from prosecution, then the exemption has unfair and illogical results.

***Respondent's written submissions at paras 104; 119;***
***KAHN's Supplementary Affidavit paras 15.2 and 38.***

30. Another practical problem is the form of the exemption -

***KAHN's Supplementary Affidavit para 59.***

Appellant has not addressed this at all.



***31.*** With respect to the Appellant, he has missed the thrust of the "*Broad Perspective"* [***Mr KAHN'S Supplementary Affidavit paras 2 - 17].***

Although this Honourable Court must be ruled by the Constitution and not by public opinion - (***MAKWANYANA supra at paras [87 - 89]***), the matter under discussion was the practical problems. Public opinion and perceptions, whether unfounded or not, are a reality, and whether or not one has regard for them they nevertheless are a factor in the broader scheme of things and as such can have a practical influence under certain circumstances.

32. The Director of Public Prosecutions, in the exercise of his duties and discretionary powers, plays an important role in the administration of justice and the application of the law. As in the case of this Honourable Court, public opinion and perceptions cannot rule his decisions, and unpopular prosecutions and denial of representations take place all the time, but it would be a foolhardy Director of Public Prosecutions who completely ignores public opinion and perceptions. For instance, long before the law had changed and even before the advent of the Interim Constitution, prosecutions for contraventions of the Immorality Act were halted because public opinion had changed. By the same token, cases involving sexual abuse of women and children are given very close attention because public opinion, spurred on by women's groups, demands it.

33. All that the *"Broad Perspective"* was trying to point out was that the public are fearful of violent crime and general lawlessness, that they have seen what they perceive to be the

application of double standards and the targeting of *"soft targets"*, and that there is a perception of the link between dagga and violent crime.

26/..



34. Seen against this broad perspective, any exemption which absolves Rastafari from prosecution in respect of a drug which has close connections with violent crime and the countless murders of innocents on the Cape Flats, while holding the general population still criminally liable for that drug, in my submission would fortify the public's perception that the law is applied unevenly and reinforce their adverse opinion of the law. While this is not a factor that would sway this Honourable Court, in practice this could affect the Director of Public Prosecutions' discretion in circumstances such as those set out in ***paras 15.2, 33*** and ***38*** of ***Mr KAHN's*** Supplementary Affidavit.

35. It is in this sense that the exemption would result in an indirect practical difficulty.

36. Appellant denies it, but it is submitted that the problem of imposters and frauds is a very real possibility, especially when huge financial considerations are at stake -

***KAHN's Supplementary Affidavit, paras 55.2 and 69(g);***
***Written submissions para 103;***
***MASON para 21.***

37. The problems affecting the Department of Health are respectfully left for their counsel to deal with. Respondent stands by what he said in ***paras 40*** and ***69(c)*** of his Supplementary Affidavit.

***<u>The Harm Principle</u>***

***38.*** This has been dealt with before, but the Appellant has raised it again in his Supplementary Written Submissions at ***para 27.***

27/...

39. It is submitted that cannabis poses harm, or the risk of harm, in the following respects:

***<u>To the user</u>:***

40.1 Psychomotor; cognitive; short-term memory; the brain; psychosis; alteration of time; euphoria and talkativeness. See -

***Respondent's written submissions paras 27 - 38.5;***
***DR ZABOW [Record Vol 3 page 155] and***
***Ms MAPHAI [para 1.10 and para 2] on how dangerously psychotic dagga abusers can become.***

40.2 The grave risk of "graduating" to more dangerous drugs (the "gateway" or "stepping-stone" theory) -

***Respondent's written submissions at paras 26(i) - 26(viii).***

***<u>To Society</u>:***

41. The abuse of drugs and the trafficking therein constitutes a pressing social problem that also affects the public health services -

***S v BHULWANA 1996(1) S A 388 (CC) at para [20];***
***MINISTER OMAR - RECORD, Vol 5, page 344 - 346;***
***Ms MAPHAI, para 4;***
***Dr NTSALUBA, para 7.8.2.***

***42.*** It places children and adolescents at risk ***[para 10.1 supra].***

28/...



43. It has links to violent crime -

***Respondent's written submissions at paras 31 - 37.2;***

***KAHN's Supplementary Affidavit at paras 6.2 - 6.3.***

43.1 Appellant keeps on confusing this issue by stating that cannabis does not lead to violent crime -

***Appellant's Supplementary Replying Affidavit paras 3.3 - 3.4;***
***Appellant's Supplementary Written Submissions paras 31 - 33.***

43.2 It has never been Respondent's case that cannabis causes crime. Our case has been that cannabis has played a role in violent crime, and just reading the extracts from the cases makes it difficult to see how Appellant can deny this with any kind of conviction or credibility -

***Respondent's Written Submissions at Annexures 9 - 36.***

44. It seems that there is consensus on at least the following aspects - cannabis is an hallucinogen and intoxicant; it affects the cognitive powers, psychomotor abilities and short-term memory; it leads to a perception of the alteration of time; the subject becomes euphoric. See -

***Prof AMES - RECORD, Vol 3, page 155;***
***Prof ZABOW - RECORD, Vol 3, pages 146 - 150;***
***RECORD, Vol 4, page 259;***
***Respondent's Written Submissions, pages 24 - 29.***

29/...



45. It has already been seen that Rastafari can smoke dagga at any time or place when they want to communicate with Jah, but Appellant avers that Rastafari will act responsibly in this regard, and transgressors will have the exemption revoked -

***Appellant's Supplementary Replying Affidavit at para 4.7.***

[This raises the question as to who will revoke the exemption, and will that person have

the power to revoke an order of this Honourable Court?]

46. But this is not the point, it is submitted with respect. The point is not whether a Rastafari will have his (only males are in issue) exemption revoked if he mis-behaves, but rather why should society be exposed to, and be placed at risk by, the abuse of a drug which has harmful effects?

47. It is submitted that the legalization of smoking dagga will make it more difficult to control, and the very legalization process will facilitate the abuse of the exemption, human nature being what it is. [X is caught smoking dagga in a quiet spot of the factory, and he says that he is privately communicating with Jah. The foreman suspects that he is getting a quick "fix", but how is he going to disprove X's explanation?]

***Ms VAN VUUREN para 14.5;***
***Adv KAHN (supra) para 69(f).***

48. It is submitted that the following frank questions must be asked: given the widely accepted effects of the drug (***para 44 supra***), would an accused appearing in the Regional Court on charges of rape and murder be comfortable with his attorney having communicated with Jah just before the trial has started? Would the

30/...



passengers of a Golden Arrow bus be comfortable with their driver during peak hours if he has just communicated with Jah? Would paraplegic B busy with settlement negotiations with the insurance company, be comfortable when his counsel arrives at the negotiating table after having communicated with Jah?

49. Respondent is <u>not</u> saying that <u>all</u> Rastafari will abuse the exemption. The issues are, why should society have to be exposed to these risks, and how are the Rastafari going to control abuse?

***COSTS***

50. (a) At the last hearing ***Mr ABEL*** virtually conceded the matter of costs, yet he is now asking for costs.

(b) Despite this about-face 5th Respondent will still not be asking for costs should he be successful.

(c) The submissions made in ***paras 183 - 185*** of Respondent's written submissions are repeated.

31/...



***FINAL PRAYER***

51. ***Para 190*** of the written submissions is repeated.

***DATED*** at ***CAPE TOWN*** this ***th*** day of ***APRIL 2001.***

***J SLABBERT***
COUNSEL FOR 5th RESPONDENT
DEPUTY DIRECTOR OF PUBLIC PROSECUTIONS
OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS:

CAPE OF GOOD HOPE

***---o0o---***