

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT36/00

In the matter between:

GERRETH ANVER PRINCE

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

MINISTER OF HEALTH'S HEADS OF ARGUMENT

1.

INTRODUCTION.

1.1 The Minister of Health has joined the proceedings at a fairly late stage. The primary reason for joining is the fact that one of the statutes from which exemption is sought viz. the

Medicines and Related Substances Control Act 101 of 1965 is administered by the Department of Health.

1.1 Having read the various documents and submissions before this Honourable Court it is noted that many of the issues in dispute in this matter have already been dealt with. Those issues involve, *inter alia*,

1.1.1 The absolute protection of a right to believe;

1.1.2 The limited protection of a right to exercise that belief;

1.1.3 The dependency producing effect of cannabis; and

1.1.4 The effect the exemption applied for will have on other related rights.

1.2 Notwithstanding all the scientific evidence presented in this Honourable Court by both parties and various international instruments referred to, what still needs to be argued is whether having regard to the provisions of section 36(1) of the Constitution of the Republic of South Africa Act no 108 of 1996 (the South African Constitution) and the stated objectives of the Department of Health, the limitation of the right of the Rastafari to the freedom of religion by denying

them the use or possession of cannabis or dagga is reasonable or justifiable. That is a question of law. Basically that is what this case is all about – a development of an acceptable principle in limiting the right to freedom of religion. Further, it will be argued that having regard to the manner in which cannabis is supposedly used by the Rastafari during worship there is no need for any exemption in terms of the Medicines Act.

1.3 Not much jurisprudence has developed on the limitation clause of the South African Constitution. To arrive at a principled decision in this matter new waters will have to be charted with the help of the wisdom gathered from foreign jurisdictions. Both Canadian and American Court decisions have been referred to by both parties in this matter. In this argument only the decision in *Employment Division v Smith* (1990) 494 US 872, 108 L Ed 2ed 87G, 110 SG 1595 will be considered and the Court will be requested to adopt a modified approach of the dissenting judgment.

1.4 The argument will therefore be structured under the following headings: -

1.4.1 The origin and nature of the Rastafari religion;

1.4.2 The smoking of ganja (cannabis or dagga) by the Rastafari;

1.4.3 Relevant Considerations in terms of section 36:-

1.4.3.1 The majority approach of the Supreme Court of America.

1.4.3.2 The minority approach of the Supreme Court of America (The Blackmun approach).

1.4.4 The stated objectives of the Department of Health.

1.4.5 The reasonableness and justification of the limitation.

1.4.6 Conclusion.

1.5 The above structure will be followed as it has been said in this Honourable Court that once a violation of the right has been proved by the Applicant or complainant, the State must demonstrate 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.

See: *S v Mankwanyane & Another* 1995(3) SA 391(CC) at para 104 et seq.

See also: Mathew Chaskalson et al *Constitutional Law of South Africa* (1999) 1- 6.

1.6 Indeed, that there is a violation of the rights of the Rastafari to the freedom of religion is undeniable and needs not be argued.

1.7 Due to the fact that some of the authorities referred to in these Heads of Argument have already been annexed to the various submissions before this Honourable Court only the Rastafari literature is annexed hereto.

2.

THE ORIGIN OF THE RASTAFARI RELIGION.

2.1 The discussion of the origin of the Rastafari religion is relevant in this matter in order to show that this Honourable Court is not dealing with a foreign or strange god but is dealing with the same God worshipped by Christians and the Jews. Further, it is relevant especially to determine whether the Rastafari are sincere in their allegation that they worship God in smoking cannabis. Further, this sincerity is relevant in determining the reasonableness and justification of the

limitation imposed on the right of the Rastafari to the freedom of religion viz. the free exercise thereof.

2.2 Apart from what has been set out as the origin of the Rastafari religion by the Applicant in his founding papers the following quotation is instructive:-

2.3 *“To outside observers, Rastafari is virtually a kind of mystic movement which has survived over half a century of unrestrained armed aggression, political opportunism, economic strangulation, as well as social and religious intolerance and discrimination, to emerge stronger than ever today.*

One of the main reasons for this survival is that the roots of the people, from whom I and I the Rastafari emerged, are deeply embedded in the noteworthy history of the “Black experience”. These roots, which grew up from the Hebrew history of African Peoples in general and Ethiopian People in particular, can be traced through the legendary legacy of the Koramantee Tribe, who came to Jamaica during slavery and continued up through the epic experiences of the Eastern Blue Mountain Maroons especially. These were a people in whom was inherently embodied the self – reliant independence, versatility and creativity of those who came to

be and are still called Maroons: the nobility, fearlessness and strength of mind and physical constitution said to be the hallmarks of the true Koramantee; in addition to the historical destiny and spiritual identity prophesied for the Hebrews of the African extract. Out of these people came Nanny the Mountain Matriach, Tacky, Sam Sharpe, Paul Bogle, Alexander Bedwordand Marcus Mosiah Garvey – the great international Black (African) Power Advocate, Philosopher and Organizer. These were the same people from whom the Rastafari emerged to take over, build up and ultimately to complete the international work begun by Garvey.

So it was, that in 1930 an ancient Nation was re – born with the emergence of I and I the Caribbean Mau – Mau on the streets of Kingston (Jamaica), coinciding with celebrations christening the Coronation in Addis Ababa, Ethiopia of Rastafari as His Imperial Majesty Emperor Haile Selassie the First, King of Kings, Lord of Lords, conquering Lion of the Tribe of Judah.”

See: I JABULANI TAFARI “Rastafari – successor of Marcus Garvey” JAHUG vol 6. (A Rastafari publication)at page 3 of the Annexures.

2.4 The above quotation reveals the following: -

2.4.1 The Rastafari movement originated in, and can only be traced to, Jamaica. This is contrary to what the Applicant seeks to make the Court to believe viz. that the Rastafari religion can be traced to Ethiopia.

See also: Prof GC Oosthuizen *Rastafarian* (1989) 1 – 18 at page 30 – 39 of the Annexures.

2.4.2 The Rastafari are an off – shoot of the Universal Negro Improvement Association (UNIA) founded by Marcus Garvey in 1917 in Harlem. Marcus Garvey was a Jamaican who later returned to Jamaica.

See: Oosthuizen op cit et 2 at page 31 of the Annexures.

2.4.3 The UNIA was an association strongly based on Christian religion. In fact, Marcus Garvey was a Roman Catholic. However, he refused that the UNIA should be a church on its own and also forbade his followers from leaving their respective churches and denominations. He encouraged them to continue attending their respective church services on Sunday

mornings and to attend the UNIA meetings during the evening.

See: Oosthuizen op cit et 6 – 7 at page 33 of the Annexures.

2.4.4 Further, the UNIA preached “Negro Consciousness” and “Negro Theology” both aimed at instilling in the “Negro” mind a self – respect and an identification with the Almighty God. “For Garvey, God was black and black men were coequal sons of God”.

See: Ooshuizen op cit et 5 at page 32 of the Annexues.

2.4.5 In the terminology of today, Marcus Garvey was preaching Black or Contextual Christian Theology.

2.4.6 One of the central objectives of the UNIA was the repatriation of Negroes to Africa especially to Ethiopia.

See: Osthuizen op cit at 3 at page 31 of the Annexures.

Jahug Vol 4 (A Rastafari Publication) at page 58 et seq of the Annexures.

2.4.7 Marcus Garvey even prophesied: -

*“Look to Africa, when a Black king shall be crowned,
for the day of deliverance is near”.*

**See: Oosthuizen op cit at 4 at page 32 of the
Annexures.**

2.4.8 Up to this point we learn of a Christian movement not associated with Ganja (dagga or Cannabis).

2.5 The crowning of Ras Tafari as emperor of Ethiopia in 1930 and his change of name from Ras Tafari to Haile Selassie I (meaning the Power of the Trinity), whose wife was Queen Omega, was seen by many followers of Marcus Garvey as the fulfillment of the prophecy. Even though Ras Tafari had changed his name, these followers of Marcus Garvey called themselves Rastafari.

Ibid

2.6 Be that as it may, Haile Selassie I maintained that he was a direct descendant from King David, the 225th in the line of

Ethiopian Kings, in unbroken succession from the time of King Solomon and the Queen of Sheba. Haile Salissie I was a direct descendant of a son born of King Solomon and the Queen of Sheba. It must be pointed out that the Queen of Sheba never married King Solomon as the Applicant alleges. She returned to her country after the unforgettable visit to King Solomon.

(Sheba is in Ethiopia).

See also: Oosthuizen op cit at 5 at page 32 of the Annexures.

John Moodie *Hath... The Lion Prevailed...?* (1999) at 8 – 12 at 103 - 105 of the Annexures.

THE BEGINNING OF SMOKING GANJA.

2.7 “Ras Tafari (Haile Selassie I) became the very symbol of liberation for the Rastafari movement when, he was crowned in 1930. Many Jamaicans referred to their Bibles as a result of this event. Since then the Rastafari movement has become an important sub – culture of Jamaica. It is a religion, an ideology, a cultural movement - but not a political innovation. As a religion it is based upon the ancient and fundamental disposition of the Jewish theocracy. Therefore,

every Rastafari is an Israelite, a descendant from the twelve tribes of Israel. Culturally, it has many African and Jamaican facets, with some Anglo – Spanish contents added. Politically, there was some connection with forces of the black liberation movement which rebelled against Jamaica's neo – colonialism. The movement has much to do with deprived economic circumstances.

“ Leipold Howell was the most influential person in spreading the Rastafari doctrine. He stated that blacks were the true descendants of Israel but that they were enslaved by the whites, the agents of Babylon. Rastafari, he believed, would soon end the rule of the white man and would send ships to return the children of Africa in Ethiopia... Howell was charged with instigation and used his appearance in Court as a platform from which to proclaim his message. He was sentenced to two years in jail, after which he established the Ethiopian Salvation Society and emphasized that he was Haile Selassie. *His group openly used Marijuana...*

“... Rastafarian violence continued and was especially ascribed to the use of ganja, their name for marijuana. This harmed the movement in many quarters and members were seen mainly as lazy, violent and lawless scoundrels who used religious phrases to hide their laziness and bad habits.”

See: Oosthuizen op cit at 10 – 11 at page 35 of the Annexures.

2.8 Jabulani Tafari writes: -

“ In addition countless more professions and trades, there are Rasta Basic, Primary, Secondary and High School students, as well as Rasta University and Commercial College graduates, Rasta footballers and athletes, not to speak of Chinese, East Indian and European converts to the Rasta faith. In contrast, for imposters and impersonators, “*turning Rasta*” has now become something of a fad, a bandwagon fashion. The adoption of the Rasta way of dressing (which isn't dirty or untidy), Rasta speech patterns and the use of the international herb (cannabis) by all sections of the Society has served to infiltrate the *Pride of Lions* (Rastafari) with *wolves* (criminals), *goats* (hypocrites) *foxes* (tricksters) and *jack – asses* (fad followers). However, it has also served to protect and camouflage the time and disciplined roots disciples of Selassie I in a kind of safety of numbers, allowing I and I to remain relatively un – molested up to now amongst the mass of *leaves, branches and stems.*”

2.9 From the above two quotations the following is clear: -

2.9.1 The Rastafari religion is Christian in nature. Indeed, having taken root from the Christian UNIA it based its belief that Haile Selassie I is a God from the book of Revelations.

See: *Haile Selassie and the Opening of the Seven Seals* (1997) writings of the Scribe Kalin Ray Salassi Edited by Shango Baku Editor in Chief Rastafari Speaks especially the Preface thereof and pages 2 – 21 at page 126 – 135 of the Annexures.

See also: *Prince v President of the Law Society, Cape of Good Hope and Others* 1998(8) BCLR 976 (C) at 979D where the Court asserts that Rastafari is a continuation of the Judaeo - Christian faith.

2.9.2 The smoking of ganja by these Christians only came about during the leadership of Leipold Howell when he started the Rastafari movement. In other words, the Rastafari founders, were wayward Christians who introduced a practice of smoking ganja to a Christian religion during worship.

2.9.3 From the onset the smoking of ganja was repugnant to the Jamaican Society.

2.9.4 Universally, the Rastafari are unable to control the influx of the movement by “wolves”, “goats”, “foxes” and “jack – asses”. This fact is very important and relevant in this matter. The Honourable Court has requested the parties to investigate and suggest ways of controlling the exemption in favour of the Rastafari to smoke dagga as part of worship.

2.9.5 The God worshipped by the Rastafari, whom they call Jah, is the same God who is being worshipped by the Jews and the Christians. In the New Testament this God, through the Apostles, demands sobriety from his followers.

See: Roman 13:12 – 14

Corinthians 5:11

Galatians 5:16 – 24

1 Timoty 3:1 – 3

Titus 1:7

1 Peter 4:1 – 6

for the Christian preachings of St Paul and St Peter.

In the Old Testament the same God prescribes the manner and procedures to be followed in worshipping Him.

See: *Exodus* Chapter 20 et seq

***Deuteronomy* Chapters 5 - 30**

***Leviticus* (the whole book)**

***Numbers* Chapters 1 – 10, 18 – 19, 28 – 29.**

2.9.6 His Son, Jesus Christ, declared: -

“God is the Spirit and those who worship Him should worship Him in spirit and in truth”.

See: *John* 4:24

Further, He instituted the sacrament of the holy communion for His worshipers and which consists of bread and wine.

See: *Luke* Chapter 22: 14 – 20

Nowhere does Jah prescribe dagga as a sacrament.

2.9.7 The Court, therefore, is not seized with a matter relating to a foreign or strange God or religion. Jah is

the same God worshipped by the majority of the inhabitants of South Africa, viz. Jews, Indians, Coloureds, Africans, English, Afrikaners, etc. With Africans there are those who know Him and worship Him through, or in communion with, their ancestors. He is known by different names, by different races and by different people of our country. There are those who know him as Qamata, Velinqali, Jehovah, Yhaweh etc. All these people will disagree that their God is worshipped through smoking dagga.

2.9.8 The importance of this fact is that this Honourable Court is able to take a judicial notice that a Jewish God or a Christian God demands purity during worship. Further, dagga is not central to His worship and thus the sincerity of the Rastafari in worshipping God through smoking dagga is highly questionable.

3.

RELEVANT CONSIDERATIONS

Having discussed the origin nature of the Rastafari religion it is now opportune to examine the legal principles suggested in determining

considerations which are relevant towards the finding that a limitation of a right to the free exercise of religion is reasonable and justifiable.

THE SUPREME COURT OF THE UNITED STATES MAJORITY APPROACH.

3.1 The Supreme Court of the United States of America, whose decisions have been referred to at length by my colleague Adv Slabbert, has a different approach from that of this Court in matters of this nature.

See: Employment Division v Smith (1990) 494 US 872, 108 L Ed 2ed 876, 110 SG 1595.

This approach first identifies a 'compelling State interest' and then tests or measures the individual Constitutional right sought to be protected against the 'compelling State interest'.

The primary reason for this approach is that the American Constitution has no limitation clause similar to section 36 of the South African Constitution.

3.2 The Supreme Court of America is tasked with the function of developing criteria by which the validity of the allegedly offending laws should be tested against the Constitution. The criterion developed has been " the compelling state

interest” which the state seeks to protect or promote. In the process the Supreme Court has held: -

3.2.1 ‘ “Laws” we, said, “ are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices... Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.’

See: Employment Division v Smith 108 L Ed 2 ed 876 at 886.

3.2.2 “Nor is it possible to limit the impact of respondent’s proposal by requiring a “ compelling state interest” only when the conduct prohibited is “central” to the individual’s religion... It is no more appropriate for judges to determine the “centrality” of religious beliefs before applying a “compelling interest” test in the free exercise field, than it would be for them to determine the “importance” of ideas before applying the “compelling interest” test in the free speech field. What principle of law or logic can be brought to bear to

contradict a believer's assertion that a particular faith is "central" to his personal faith? Judging the centrality of different religious practices is akin to the unacceptable "business of evaluating the relative merits of differing religious claims"... As we reaffirmed only last Term, "It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creed"... Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim".

See: Employment Division v Smith at 108 L Ed 2 ed 876 at 891.

3.2.3 The warning may be appropriate in some cases especially when one deals with an unfamiliar deity. However, it will **NOT** be wise for the South African Court to ignore, or to shun away from investigating, the centrality of a religious belief or practice. Such an investigation as already said above is relevant in determining the reasonableness and the justifiability of the limitation in compliance with Section 36 (1) of the South African Constitution.

3.3 It is worthy to note that Justice O' Connor, concurring in the majority judgment in *Employment Division v Smith* case, however, did say, *obiter dictum* that avoiding the determination of the centrality of the belief and practice,

“does not mean, of course, that courts may not make factual findings as to whether a claimant holds a sincerely held religious belief that conflicts with, and thus is burdened by, the challenged law. The distinction between questions of centrality and questions of sincerity and burden is admittedly fine, but it is one that is an established part of our free exercise clause... and one that Courts are capable of making”.

at 904.

Be that as it may the majority decision was only based on the determination of the compelling State interest.

THE BLACKMUN APPROACH

3.4 Perhaps the best approach which should be followed by this Honourable Court is that of Justice Blackmun who was joined by Justices Brennan and Marshall in dissenting. After

identifying the compelling State interest, Justice Blackmun went on to investigate: -

3.4.1 The use of the peyote drug by the members of the Native American Church. He found that its use was isolated to specific ceremonial occasions.

at 908.

3.4.2 The restrictions on the use of the peyote drug by the members of the church. He found that the church doctrine forbade the non-religious use of peyote.

at 909

3.4.3 The popularity of the peyote drug. He found that it was unpopular and was not used for recreation.

Ibid

3.4.4 The centrality of the peyote drug in the church. He held: -

“ Respondents believe, and their sincerity has *never* been at issue, that the peyote plant embodies their deity, and eating it is an act of worship and

communion. Without peyote, they could not enact the essential ritual of their religion... (To the members, peyote is consecrated with powers to heal body, mind and spirit. It is a teacher; it teaches the way to spiritual life through living in harmony and balance with the forces of the creation. The rituals are an integral part of the life process. They embody a form of worship in which the sacrament Peyote is the means for communicating with the Great Spirit”).

at 912.

3.5 Having regard to the above observations, Justice Blackmun concluded: -

“For these reasons, I conclude that Oregon’s interest in enforcing its drug laws against religious use of peyote is not sufficiently compelling to outweigh Respondent’s right to the free exercise of their religion”.

at 913

It is submitted that the Blackmun approach is the best approach to follow in matters of this nature when considering the reasonableness and the justifiability of the limitation in terms of Section 36 (1) of the South African Constitution.

4.

APPLICATION OF THE BLACKMUN APPROACH.

4.1 The best approach, therefore, in this matter seems to not only to look at the interest of the state – the compelling state interest, but also at the interests of the Rastafari. In that regard the following are important: -

4.1.1 the use of cannabis by the Rastafari;

4.1.2 the restrictions in place on the use of cannabis by the Rastafari;

4.1.3 The popularity of the cannabis.

4.1.4 The effect cannabis has on the health of the users.

4.1.5 The centrality of the cannabis in the Rastafari religion.

5.

5.1 Use of cannabis by the Rastafari

The Rastafari , according to the Applicant have no specific occasion of their worship wherein they smoke cannabis. The Appellant has in many times asserted that the use starts in the morning till going to bed. The Applicant does not suggest what quantity of cannabis is required for each use.

5.2 Restrictions in place on the use of cannabis.

No restrictions are placed on the Rastafari on the use of cannabis outside the religions worship. The Rastafari can smoke or eat or drink cannabis anytime he or she feels like. No age restriction is currently in place and it is doubtful whether any age restriction will be enforceable.

5.3 The Popularity of the cannabis.

Cannabis is popular especially among the adolescents in South Africa. Exemption granted to the Rastafari will surely cause an influx of “foxes”, “wolves”, “goats” and “jack – asses” to the Rastafari community. No gate keeping measures have been suggested by the Applicant to avoid the

influx. Indeed, the Applicant cannot suggest any as it has already been shown above that the problem is international among the Rastafari.

5.4 The effect cannabis has on the health of the users.

It has, through various publications based on research, been demonstrated that cannabis is a harmful drug. All the research that has been conducted to date points towards the harmfulness of a smoked cannabis. Although there is an ongoing research on some substances extracted from cannabis and which so far appearing to be of medicinal use, that research is far from being complete. Nowhere has it been alleged that there are any positive attributes of cannabis with regard to the health of the people. On the other hand one of the positive attributes of peyote is its use to heal alcoholism.

5.5 The Centrality of cannabis in the Rastafari religion.

The problem here is two – fold:-

5.5.1 As already said above The Rastafari claim to worship the same God worshipped by the Jews and the Christians only they call him Jah. That God has

prescribed how to be worshiped and nowhere does He prescribe that cannabis should be used in worshipping him. This puts a great question mark on the sincerity of the Rastafari in using cannabis to worship God.

5.5.2 The cannabis is not only used as part of a specific form of worship, conventional or non – conventional. It is used even when the Rastafari is not worshipping.

This shows that the use of cannabis is not central to the worship as the Rastafari claim.

6.

STATE INTEREST.

The stated objectives of the Department of Health has been declared - to promote health among the people and to protect them from harmful substances such as cannabis. Further the state laws on cannabis are aimed at fighting drug – trafficking and drug – dependency. These objectives are international and respected in the democratic societies of the world based on human dignity, equality and freedom. Further, the laws used to further the objectives are general in character. They are based on international instruments which the South African Constitution demands are to be respected.

7.

REASONABLENESS AND JUSTIFIABILITY OF LIMITATIONS.

7.1 The limitation imposed by the laws of the Republic of South Africa, which are of general application, on the right of the Rastafari to practice their religion is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including: -

7.1.1 The nature of the right.

The right involved here is the freedom of religion. There is no Constitutional right to smoke dagga. There is a right to worship Jah without smoking dagga. No case has been made that this cannot be possible.

7.1.2 The importance of the purpose of the limitation.

It is important to promote the health of the citizen. It is more important to combat crime of drug trafficking and to protect the citizens from drug – dependency.

7.1.3 The nature and extent of the limitation.

The limitation placed on the freedom of religion of the Rastafari is only on their exercise of the religion as it pertains to the use of cannabis.

7.1.4 The Relation between the limitation and its purpose;

The limitation serves to promote the purpose of promoting health and of combating drug trafficking and drug – dependency.

7.1.5 Less restrictive means to achieve the purpose.

No less restrictive means are possible. The Applicant has failed to suggest even the amount or quantity of cannabis reasonably needed to exercise his religion. The unlimited amount seemingly needed will promote drug trafficking and drug dependency.

8.

CONCLUSION.

Having regard to the above there is no way in which an exemption may be made for the Rastafari to use and possess

cannabis for the purpose of worship. As it appears from the affidavit of the Director General of Health cannabis has no medicinal value and it is difficult to determine what quantity of dosage can be prescribed in order to avoid psychosis. Further, the Applicant himself has not come up with any reasonable suggestion as to how much quantity or dosage should be prescribed in order to avoid drug dependency. Further, having regard to what is said by Jabulani Tafari on the inability of the Rastafari to avoid the infiltration of the movement by criminals, hypocrites, tricksters and fad followers, there is just no way in which it can be determined that a person exempted is a true Rastafari or not.

WHEREFORE the appeal should be dismissed.

Dated at Pretoria on this the 12th Day of April 2001.

VVW DUBA
Counsel for the Department of Health

