

**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**

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**AFFIDAVIT**

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I, the undersigned,

**AYANDA NTSALUBA**

do hereby declare under oath and say:-

1.

- 1.1 I am an adult male, the Director-General of the Department of Health,  
having my offices at Civitas, Struben Street, PRETORIA.

- 1.2 All facts deposed to herein by me are, unless the context otherwise indicates, within my personal knowledge and are, according to my personal knowledge and belief, both true and correct.
- 1.3 I hereby respond to Order number 3 at paragraph 41 of the judgment of the Honourable Mr Justice Ngcobo in this matter wherein he makes the following order:

*“The Respondents are granted leave to deliver, on or before 14 February 2001, evidence on affidavit setting out:*

- (a) their response, if any, to the evidence submitted by the Appellant;*
- (b) What particular difficulties, if any, will be encountered if an exemption for the sacramental use of cannabis is allowed;*  
*and*
- (c) How a religious exemption for the personal use of cannabis would differ, in its administration and the overall enforcement of the Drugs and Drug Trafficking Act 140 of 1992 and the Medicine’s and Related Substances Control Act 101 of 1965, from the medical and scientific exemptions currently to be found in Section 4(b) of the Drugs Act and Section 22A (10) ..of the Medicine’s Act if at all.”*

## 2.

- 2.1 I have been appointed as the Head of Department of the Department of Health (the Department) in terms of Section 12(2) of the Public Service Act (Proclamation No. 103 of 1994) of 1994 (the Public Service Act). In terms of Section 7(3)(b) of the Public Service Act I, as the Head of Department, am responsible for the efficient management and administration of the Department including the effective utilisation and training of staff, the maintenance of discipline, the promotion of sound labour relations and the proper use and care of state property.
- 2.2 It is my responsibility, *inter alia*, to administer and to execute the policies of the Department and the laws emanating therefrom. The Department is responsible for the maintenance and promotion of a healthy environment for all South Africans and the foreigners in our land; the promotion and cultivation of healthy foodstuffs which are nutritious; the maintenance of healthy water to drink; the promotion and maintenance of physically and mentally healthy citizens and the eradication and destruction of all unhealthy substances, of whatever kind, which negatively affect the health of the people within the borders of South Africa.

2.3 It is my duty therefore to ensure that the policies of the Department are in place and the laws are properly executed. In doing that, I take into account the specific situations and the problems which we, as South Africans, experience and also those we share with all humanity. Of primary importance is that the policies and the laws passed by the Department have to promote the values of an open and democratic society based on freedom and equality.

2.4 I am entitled to depose to this affidavit by virtue of my position as the Head of the Department. I also depose on behalf of the Minister of the Department .

2.5 Further, in terms of Section 32 of The Public Service Act, I am empowered to assign my powers to depose to the following persons:

2.5.1 Ingrid Madel Van Vuuren, a Chief Medicine Control Officer in the Directorate of Medicines Administrations in the Department of Health who deposes specifically on issues relating to the control of drugs and dependence producing substances, both in South Africa and internationally;

2.5.2 Onica Cecilia Maphai who will also depose on the problems encountered by the Department regarding the persons addicted to drugs and cannabis.

3.

3.1 I must submit that the policies of the Department are based on the Constitution of the Republic of South Africa Act No. 108 of 1996 (the Constitution) especially on the Bill of Rights therein.

3.2 It is my responsibility to ensure that any law passed by Parliament which originates from the Department is not inconsistent with the provisions of both the Constitution and the Bill of Rights therein and also with the International Conventions to which South Africa is a signatory.

3.3 The Department is aware of the provisions concerning the freedom of religion as expressed in Section 15 of the Constitution which provides as follows:

*“(1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion.*

*(2) Religious observances may be conducted at State or State Aided institutions, provided that –*

- (a) those observances follow rules made by the appropriate public authorities;*
- (b) they are conducted on an equitable basis; and*
- (c) attendance of them is free and voluntarily.”*

3.4 This section must be read with Section 31 which provides for the cultural, religious and linguistic communities. The section provides as follows:

- “(1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community –*
  - (a) to enjoy their culture, practice their religion and use their language; and*
  - (b) to form, join and maintain cultural, religious and linguistic associations and other organisations of civil society.*
- (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.”*

3.5 The Department respects and upholds the freedom of religion in its dealings both internally and with the public in general. The Department knows that religion is a realm in which faculties beyond reason, and experience often removed from the public sphere, prove central to most conceptions of the values at stake. The Department knows that the

religion may be theistic or non-theistic. It knows that in South Africa there are mostly theo - centric transcendental religions mostly based on Christian, Islamic, Buddhist, Hindu and Jewish faiths. However, the Department is aware that there is an ever increasing number and diversity of faiths and these faiths, in most cases, form a minority group. The Department, therefore, views any religion from the believer's perspective. It knows that beliefs are adequately religious even if they are not acceptable, logical, consistent, or comprehensive; even if the religious adherent's beliefs are, although sincerely held, not fully developed; and even if other believers construe and apply religious tenets differently from the claimant. Further, the Department knows that the truth is that one man's bizarre cult is another's true path to salvation. It therefore knows that a person has a right to worship according to his or her conscience. The policies and the laws of the Department are passed with this knowledge prevailing.

## 5.

- 5.1 Having regard to the above I am advised by the Legal Unit of the Department- a section of the Department which is responsible for, inter alia, giving legal advice to me on legal matters- that although Section 15 of the Bill of Rights does not mention anything about the *establishment* clause or the *free exercise* clause which dominate the freedom of religion

in the Constitution of the United States of America and that country's jurisprudence, the tone of the Bill of Rights as a whole, having regards to section 8 which provides for equality of treatment, section 16 which provides for the freedom of expression, section 18 which provides for the freedom of association and section 31 which provides for the cultural religious and linguistic communities, includes the notions involved in the *establishment* and *free exercise* clauses.

5.2 I am further advised that the Government is not to be perceived to promote any religion or to be associated with any religion. Neither is it to be perceived to grant favours to a particular religion.

5.3 Further, I am advised that the clause on freedom of religion protects religious beliefs absolutely; but religious actions are only qualifiedly protected. I am advised that the law will absolutely protect a person's belief in satanism but will punish an action of murder perpetrated in the exercise of that belief.

5.4 Further, I am also advised that a fundamental requirement in the passing of laws by the government is that the laws must be justifiable in secular terms. In other words, the secular purpose for which the law is enacted should at best be divorced or distinct from the religious beliefs of any religious group. Where the purpose of a law is to endorse or to



disapprove a religion, the law will inevitably violate the freedom of religion clause in the Bill of Rights.

5.5 I am also advised that the freedom of religion clause inherently prohibits absolutely the following:

5.5.1 discriminating amongst different denominations;

5.5.2 the State lending its powers to religious bodies ;

5.5.3 borrowing the aura of legitimacy from religion.

5.6 I am advised that the religious groups are free to canvass for membership and the state should neither assist them nor should it restrict “the false prophets in order to protect their potential flock”.

5.7 I am further advised that the only justification for the violation of a religious right is when the state pursues a very important governmental goal and when an exemption therefrom would substantially hinder the fulfilment of that goal. On the other hand, the victim of the violation should, on the balance of probabilities, show that the violation threatens the very survival of the religion or the core values of a faith. In other words, the violation should not only cause a mere inconvenience to the faithful.

6.

Having regard to the above advice I received from the Legal Unit, which I unreservedly accept, I now react as follows to the Affidavit of Mr Prince:

6.1 The Department respects Mr Prince's belief in Rastafarianism. Indeed the Department has no problem in Mr Prince's belief that the late Emperor Haile Selassie of Ethiopia was or is a god. Mr Prince has an absolute right to believe in that. The Department has only a problem with the expression of that belief by Mr Prince and his group in the smoking of cannabis sativa (dagga).

6.2 The Department is known for its policies against smoking and it will be against its own policies to allow smoking, especially the smoking of dagga. Further, and this is very important, dagga has no medicinal use and it is difficult to determine what quantity of dosage can be prescribed in order to avoid psychosis. It must be remembered that Section 22A (10) of the Medicines and Related Substances Control Act No. 101 of 1965 (The Medicines Act) provides as follows:

*"No person shall-*

- (a) acquire, use, have in his possession, manufacture or import any Schedule 8 substance except for analytical or research purposes and unless a permit for such acquisition, use, possession, manufacture or importation has been issued to him by the Director-General on the recommendation of the council;*
- or*
- (b) acquire, import, collect, cultivate, keep or export any plant or any portion thereof from which any such substance can be extracted, derived, produced or manufactured, unless a permit to acquire, import, collect, cultivate, keep or export such plant or any portion thereof, has been issued to him by the Director-General on the recommendation of the council.”*

6.3 I am empowered to grant a permission to allow a person to acquire, use or possess, manufacture or import a substance in Schedule 8 firstly through the recommendation of the council and secondly for the purposes of analysis or research and for no other purpose. The purpose of the provision is clearly to ensure that the public is not exposed to harmful drugs which will eventually destroy the health of the inhabitants of our country. At the same time, research and analysis which may lead to a discovery of useful substance within the very harmful drug is being encouraged. However, that research must be conducted under a watchful

eye of competent bodies whose members are experts in their respective fields of natural sciences. These bodies are under the direct supervision of the Department. The Medicines Control Council (the Council) is the relevant body established in terms of section 2 of the Medicines Act. The Council is responsible for the approval of, inter alia, the use or consumption of drugs in South Africa.

6.4 I must add that Section 4 of the Drugs and Drugs Trafficking Act No. 140 of 1992 does not apply in my case nor in the case of the Department in this matter as dagga is not a substance with medicinal qualities nor are Rastafarians patients.

6.5 Further, South Africa is the signatory to the Single Convention on Narcotic Drugs, 1961, as amended by the 1972 Protocol Amending the Single Convention On Narcotic Drugs 1961 (the Convention).

6.6 The preamble of this convention is very fundamental

*“The Parties,*

*Concerned* with the health and welfare of mankind,

*Recognising* that the medicinal use of narcotic drugs continues to be indispensable for the relief of pain and suffering and that

adequate provision must be made to ensure the availability of narcotic drugs for such purposes,

*Recognising* that addiction to narcotic drugs constitutes a serious evil for the individual and is fraught with social and economic danger to mankind,

*Conscious* of their duty to prevent and to combat this evil,

*Considering* that effective measures against abuse of narcotic drugs require co-ordinated and universal action,

*Understanding* that such universal action calls for international co-operation guided by the same principles and aimed at common objectives,

*Acknowledging* the competence of the United Nations in the field of narcotics control and desirous that the international organs concerned should be within the framework of that Organisation,

*Desiring* to conclude a generally acceptable international convention replacing existing treaties on narcotic drugs, limiting such drugs to medical and scientific use, and providing for continued international co-operation and control for the achievement of such aims and objectives,

*Hereby agree as follows:*

...

*Article 2*

1. *Except as to measures of control which are limited to specific drugs, the drugs in Schedule 1 are subject to all measures of control applicable to drugs under this convention and in particular to those prescribed in Article 4(c), 19, 20, 21, 29, 30, 31, 32, 33, 34 and 37...*
- 4 . *The drugs in Schedule 4 shall also be included in schedule 1 and subject to all measures of control applicable to drugs in the latter schedule, and in addition thereto:*
- 5 (a) *A Party shall adopt any special measures of control which in its opinion are necessary having regard to the particularly dangerous properties of a drug so included; and*
- 6 (b) *A Party shall, if in its opinion the prevailing conditions in its country render it in the most appropriate means of protecting the public health and welfare, prohibit the production, manufacture, export and import of, trade in, possession or use of any such drug except for amounts which may be necessary for medical and scientific research only, including clinical trials therewith to be conducted under or subject to the direct supervision and control of the party..."*

6.7 Dagga is included in both Schedule 1 and schedule 4 as cannabis and cannabis resin.

6.8 Article 4 of the convention needs to be quoted in full:

*“The party shall take such legislative and administrative measures as may be necessary:*

*(a) To give effect to and carry out the provisions of this convention within their own territories;*

*(b) To co-operate with other states in the institution of the provisions of this convention; and*

*(b) Subject to the provisions of this convention, to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in use and possession of drugs.*

6.9 Section 22(A) (10) of the Medicines Act is a response to the provisions of the convention.

6.10 I am advised by the Legal Unit that the international agreements are binding to the government of the Republic of South Africa through Section 231 of the Constitution of the Republic of South Africa Act No 108 of 1996. I am advised that the South African Government has a duty to comply with the provisions of the convention which is attached hereto as Annexure “NA”. For further submissions on the control of dagga I refer to the Affidavit of INGRID VAN VUUREN.

7.

I now deal with the Affidavit of GARRETH ENVAR PRINCE signed on 22 January 2001:

7.1 AD PARAGRAPH 1 THEREOF:

It is denied that the contents of the Affidavit are true and correct.

7.2 AD PARAGRAPH 2 THEREOF:

The contents of this paragraph are admitted.

7.3 AD PARAGRAPH 3 THEREOF:

The contents of this paragraph are noted. It is noted further that nowhere is it alleged that the smoking of dagga is a sine qua non of the Rastafari religion. Indeed at paragraph 3.15.4.3 Mr Prince excludes women and presumably males under 18 years. Indeed, Mr Prince realises that dagga is harmful to children and seeks to assure the court that no parent will allow a child to partake in dagga smoking. I am advised that argument will be made in court that both the children and women who are excluded from the smoking of dagga are Rastafarians and,



therefore dagga is not a sine qua non of the Rastafarian religion- it is possible for a Rastafari to carry on with his or her religion without smoking dagga. Further, I note that Mr Prince in paragraph 3.14 says that he does not belong formally to any House of the Rastafari religion. This on its own puts a question mark on his commitment and sincerity on the religion of the Rastafarians and this I am advised will be argued at the hearing. I note further that in all the constitutions attached to the Affidavit of Mr Prince nowhere is the smoking of dagga mentioned and this, it will be argued, shows that smoking of dagga is not a sine qua non of the Rastafari religion. With regard to control, as I already said above, dagga is not medicine and there is no scientific evidence to show as to how much quantity should be administered or should a person take in order to avoid the evil effects of its consumption. Without that scientific analysis it will become difficult for the Department to control the use of dagga. It must be remembered that the Department's primary purpose is to promote and maintain the health of the people who are within the borders of South Africa. Any other averments by Mr Prince in this paragraph which are inconsistent with the contents of this Affidavit are denied as if specifically traversed.

#### 7.4 AD PARAGRAPH 4 THEREOF:

7.4.1 The contents of this paragraph insofar as they are inconsistent with the averments herein are denied as if specifically traversed. Primarily the

contents of this paragraph are within the knowledge of Mr Prince. However, it is specifically denied that the seeds contain no psychoactive components. Further, it is denied that there are any medicinal values on dagga and, if there may be any, they are far outweighed by the negative effects it has on the health of its consumers.

7.4.2 Mr Prince does not assist this Honourable Court nor the Department on the manner of controlling the use of dagga by the Rastafari. Indeed, instead of solving the problem, Mr Prince's Affidavits complicates it more. It becomes very difficult to establish as to how a genuine Rastafari can be identified as it is now difficult to hold with certainty that Mr Prince, himself, is a genuine Rastafari having regard to the fact that he does not belong to any Rastafari House. Further, it becomes difficult to establish whether the persons suggested who can control the use of dagga have the capacity and the wisdom to so do.

7.4.3 I must refer the court to paragraph 4.8 of Mr Prince's Affidavit where he says:

*"Accordingly whilst it is not obligatory that a member consumes the holy herb everyday, neither is it completely optional as the tenets of our religious observance require that a member communicates as often as such member feels the need to be in contact with Jah with the aid of our sacred Godgiven plant."*

This again shows that the smoking of dagga is not a sine qua non of the Rastafari religion. Neither are we told by Mr Prince whether Emperor Hale Selassie was a dagga smoker or did he command his worshipers to smoke dagga.

#### 7.5 AD PARAGRAPH 5 THEREOF:

The contents of this paragraph make things most complicated. Mr Prince suggests, although in not so many words, that the government should legalise the selling of dagga by the dagga dealers in order to ensure good quality, purity and good quantity of dagga. Indeed that will be irresponsible and against the international obligations which our country has to respect.

#### 7.6 AD PARAGRAPH 6 THEREOF:

The contents of this paragraph are denied as if specifically traversed especially insofar as they are inconsistent with the averments herein. It is strange that Mr Prince alleges that Rastafari does not encourage any form of intoxication. The mere smoking of dagga causes intoxication.

#### 7.7 AD PARAGRAPH 7 THEREOF:

The contents of this paragraph are insofar as they are inconsistent with the averments herein, denied as if specifically traversed. As already said above the exemption granted by Section 22(A)(10) of the Medicines Act is for analytical and research purposes and the exemption granted by the Drugs and Drugs Traffic Act concerns drugs with medicinal use. Dagga has no medicinal use and there is no person in South Africa who has ever been exempted to use dagga for medicinal purposes. Further, Mr Prince's references in this paragraph are concerned with exemption for medicinal use and they are saying little or nothing about exemption for religious purposes.

#### 7.8 AD PARAGRAPH 8 THEREOF:

The contents of this paragraph are denied as if specifically traversed.

7.8.1 Firstly, the Rastafari are protected as a religion and as a minority by the constitution and there is no evidence that they are being prosecuted for their belief. It is only the practice of smoking dagga which is outlawed and for which they are prosecuted. Further, granting an exemption to the Rastafarians to smoke dagga will be interpreted by the public as favouring the Rastafarians and this will be against the notion of the establishment clause which underlies the freedom of religion. Further, as I understand

from Mr Prince's affidavit, the Rastafarians base their religious practice or actions on the Holy Bible –a book regarded by Christians as the Word of God. Christians are very particular about the Holy Bible. In some Christian denominations the Holy Bible is only read by certain people chosen because of their commitment to the Christian belief. In fact, in catholic churches like the Anglican and Roman Catholic Churches which have millions of followers in our country, the Gospel is only read by ordained persons; and the people stand when the Gospel is read. That is how revered the Bible is among the Christians. There are people who purchase special covers to clothe their Bibles. Some do not even want anything to be placed on top of the Bible –It is the Word of a Living God. When these Christians learn that the Government has passed a law permitting the Rastafarians to read the Bible while smoking dagga, they will surely regard it as a promotion of desecration of the Bible by the Government. They will regard the law as a violation of their freedom of religion.

7.8.2 Secondly, it is not true that the practice of the Rastafari religion does not cause harm to other members of the society. The Rastafari smoke dagga and pollute the air. That is clearly harmful to the health of the members of the society and is a contravention of Section 24 of the Constitution which entitles everyone to an environment that is not harmful to their health or well-being. The practice is also violating the rights of children to physical or mental health as entrenched in Section 28 of the Constitution. Further,

Rastafarians have no hospitals of their own. On becoming psychosis through dagga smoking, they will have to be admitted in the public hospitals or treatment centres at the expense of the taxpayers.

7.8.3 Thirdly it is denied that the decriminalisation of the possession of dagga is gaining momentum in the Western democracies. The truth is that in the fifties cannabis was widely produced in some European countries for fibre as an industrial raw material. No specific controls were applied in those days, but cannabis as a plant which can be smoked for pleasure was literally unknown at that time. This explains the old laws of Switzerland permitting farmers to grow marijuana. Today however, the prevailing conditions in these countries have changed. Cannabis abuse has invaded most of the principal hemp producing counties. As a result commercial cannabis production now requires stringent control by the authorities. This is discussed in the Affidavit of Ingrid Van Vuuren.

7.8.4 Fourthly as already said above it is denied that the cannabis or dagga has any medicinal use and it is specifically denied that there is any exemption permitting patients to obtain cannabis from medical practitioners and pharmacists. As already said above the exemption in terms of Drugs and Drug Trafficking Act is only for the drugs which are of medicinal use.

7.8.5 Fifthly I do not see how the decision of the Court of Appeal of Ontario can assist Mr Prince in his application. That court was concerned there with the medicinal use of dagga which is not a case in this application. Further, I am advised that the courts of Ontario or of Guam have no influence in our judicial system in South Africa. Our laws have to take into account our special circumstances in the country.

7.8.6 Further, for the rest of the contents of paragraph 8 there is still a problem of monitoring the administration of dagga by the Rastafari. Mr Prince has failed to come up with an acceptable solution. As already said above, the administration and control of the use of dagga by the Rastafarians will differ from the administration and control by the Council. Firstly, the Rastafarians are not patients. Secondly, dagga is not medicine. Thirdly, it is not known as to how much dose of dagga should a Rastafarian be limited to so as to avoid drug dependency and psychosis. Fourthly, the persons suggested to administer dagga to the Rastafarians are not trained in medicine. Further, with regard to the affidavits of Godfrey Porthen and Kenneth de Bruyn, insofar as these Affidavits are in conflict with the averments herein they are specifically denied as if specifically traversed.

7.8.7 Lastly, I am advised that the denial of the exemption as requested by Mr Prince is justifiable and reasonable in an open and democratic society based on human dignity, equality and freedom. I am advised that the

limitation imposed on the right to freedom of religion of the Rastafarians is reasonable having regard to the nature of the right. The right can be exercised without smoking dagga. Further, the limitation is important as it is aimed at protecting the public from drug abuse. It must be remembered that in South Africa there is a law called Prevention and Treatment of Drug Dependency Act No 20 of 1992. This Act is administered by the Department of Welfare. Section 2 thereof establishes the Central Drug Authority. The Central Drug Authority is composed of persons from different fields; all concerned with the problem of drug abuse in South Africa. The youth is also represented therein. In terms of section 3(b) of this Act, the Central Drug Authority should plan, co-ordinate and promote measures relating to the prevention and combating of the abuse of drugs and the treatment of persons dependent on drugs in accordance with the National Drug Master Plan. In terms of section 6 of the same Act, the Central Drug Authority has a duty to create programmes for prevention and treatment of drug dependency; to disseminate information to the public on the abuse of drugs; to educate the youth in regard to the use of drugs; to monitor the observation, treatment and supervision of persons who are either in or released from treatment centres. Further, it looks at the rendering of assistance to the families of persons detained in treatment centres. Allowing the Rastafarians to smoke dagga will be in conflict with the purpose of this Act and the Department of Welfare will be seen as contradicting itself in the important matter of drug abuse. Its



commitment in fighting drug abuse will be severely doubted. Further, the limitation is important as it, inter alia, supplements the administration, and promotes the objectives, of this Act. Further, the limitation is only concerned with the smoking of dagga which (smoking) is not the core of the Rastafarian religion. No limitation is placed on the belief of the Rastafarians in their God, Jah. Only those Rastafarians who smoke dagga suffer the limitation. The purpose of the limitation is to promote health among the inhabitants of South Africa and to prevent drug dependency. Having regard to the above, this is the less restrictive means to achieve the purpose.

Wherefore I support the dismissal of this application with costs.

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DEPONENT

I CERTIFY THAT THE DEPONENT HAS ACKNOWLEDGED THAT HE/SHE UNDERSTANDS THE CONTENTS OF THE DECLARATION WHICH WAS SWORN TO/AFFIRMED BEFORE ME ON THIS \_\_\_\_\_ DAY OF \_\_\_\_\_ 2001. THERE HAS BEEN COMPLIANCE WITH THE REQUIREMENTS OF THE REGULATIONS CONTAINED IN GOVERNMENT GAZETTE R1258, DATED 21 JULY 1972 AS AMENDED.

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COMMISSIONER OF OATHS