CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 13/97

ASHOK RAMA MISTRY	Applicant / Appellant
versus	
THE INTERIM NATIONAL MEDICAL AND DENTAL COUNCIL OF SOUTH AFRICA	First Respondent
J P ENSLIN	Second Respondent
THE MINISTER OF HEALTH	Third Respondent
RUSSELL KEVIN COOTE	Fourth Respondent
DR D MOODLIAR	Fifth Respondent
THE REGISTRAR OF THE INTERIM NATIONAL MEDICAL AND DENTAL COUNCIL OF SOUTH AFRI	S i x t h Respondent
THE PRESIDENT OF THE INTERIM NATIONAL MEDICAL AND DENTAL COUNCIL OF SOUTH AFRICA	Seventh Respondent

Heard on : 24 February 1998

Decided on : 29 May 1998

JUDGMENT

CHASKALSON P:

CHASKALSON P

[1] I have read the judgment of Sachs J in this matter and concur in his judgment and the order made by him.

[2] In dealing with the application to refer the issue of the constitutionality of section 28(1) of the Medicines and Related Substances Control Act[1] ("the Medicines Act") to this Court for decision, McLaren J correctly pointed out in his judgment that the case raised complex and interrelated questions of law and policy.[2] He suggested that in such circumstances a decision on the referral might depend to some extent on the subjective attitudes of the judges of this Court and that this was a factor to be taken into account in deciding whether or not to order a referral.[3]

[3] Whilst it may not be easy "to avoid the influence of one's personal intellectual and moral preconceptions",[4] this Court has from its very inception stressed the fact that "the Constitution does not mean whatever we might wish it to mean."[5] Cases fall to be decided on a principled basis. Each case that is decided adds to the body of South African constitutional law, and establishes principles relevant to the decision of cases which may arise in the future. Particularly where principles have not yet been

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1 Act 101 of 1965.

2 *Mistry v Interim National Medical and Dental Council of South Africa and Others* 1997 (7) BCLR 933 (D) at 963F-H.

3 Id 963H-964A.

4 See Kentridge AJ in *S v Zuma and Others* 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC) at para 17.

5 Id.

established, courts may draw on the burgeoning international jurisprudence on constitutional rights. It is, however, the duty of the courts of this country to develop a constitutional jurisprudence based on principle and to decide cases in the light of principles that have been established. It is on *this* basis that courts should decide whether or not to refer a question to this Court, and whether or not to grant a positive certificate in an application for leave to appeal to this Court.

[4] In his judgment on the application for a certificate to support an application for leave to appeal to this Court, McLaren J also expressed the view that it is desirable for such matters to be dealt with in a judgment in which the decision of the judge on the application is motivated.[6] He indicated, however, that there remains some uncertainty as to how such applications should be dealt with and suggested that a practice direction should be given concerning such matters.[7]

[5] Rule 18(e) of the Constitutional Court Rules[8] provides as follows:

> "If it appears to the judge or judges of the division of the [High Court] concerned, hearing the application [for a certificate], that -
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> (i) the constitutional issue is one of substance on which a ruling by

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6 *Mistry v Interim National Medical and Dental Council of South Africa and Others* 1997 (10) BCLR 1460 (D) at 1468D-F.

7 Id 1468F-G.

8 The rules promulgated under section 100(1) of the Constitution of the Republic of South Africa Act 200 of 1993 were still in force when leave to appeal to this Court was granted.

> the Court is desirable; and
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> (ii) the evidence in the proceedings is sufficient to enable the Court to deal with and dispose of the matter without having to refer the case back to the division concerned for further evidence; and
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> (iii) there is a reasonable prospect that the Court will reverse or materially alter the decision given . . . if permission to bring the appeal is given, such judge or judges . . . shall certify on the application that in his or her or their opinion, the requirements of subparagraphs (i), (ii) and (iii) have been satisfied or, failing which, the judge or judges shall certify which of such requirements have been satisfied, and which have not been satisfied."

[6] A party wishing to appeal against a decision of the High Court applies formally to that court for a certificate in terms of Rule 18. Considerations relevant to deciding whether a certificate should be positive or negative are in many respects similar to those which should influence a court in deciding whether or not to grant leave to appeal to the Supreme Court of Appeal. In both instances the High Court is required to consider whether or not there are reasonable prospects of success and whether the issues raised are of sufficient substance to be dealt with by such court. It is appropriate, therefore, that an application for a certificate in terms of Rule 18 should be dealt with in the same manner as a conventional application for leave to appeal. In both instances a judgment on the application is required.

[7] The purpose of the certificate is to assist this Court in the decision that it has to

make as to whether or not leave to appeal should be granted. Where the relevant constitutional issues have been fully traversed in the judgment in respect of which the certificate is given, there may be no need for a detailed judgment on the certificate. But where the application for a certificate raises issues which have not been fully canvassed in the judgment, or where the reasoning in the judgment is subjected to challenge which calls for comment, the judgment on the certificate may have to be more comprehensive. Ultimately what is necessary is that the judge or judges in the High Court to whom the application is made, should, as McLaren J did in the present matter, consider the issues identified in Rule 18(e) and give reasons for the findings made.

Langa DP, Ackermann J, Goldstone J, Kriegler J, Madala J, Mokgoro J, O'Regan J and Sachs J concur in the judgment of Chaskalson P.

SACHS J:

[8] The central problem in this case is whether the powers of entry, examination, search and seizure given to inspectors by section 28(1) of the Medicines and Related

Substances Control Act[1] are consistent with the provisions of section 13 of the interim Constitution[2] which guarantee personal privacy. The matter comes to this Court both as a referral of a constitutional issue and as an appeal under the interim Constitution. To avoid confusion the parties are referred to as in the court of first instance.

[9] The applicant is a registered medical practitioner in private practice. The chain of events which led to the present proceedings was initiated by a letter of complaint by a patient to the Interim National Medical and Dental Council of South Africa (the Council, which is the first respondent). It alleged that the applicant was fraudulently claiming reimbursement from the patient's medical aid fund for services which he had not in fact rendered. In response, the Council ordered an inspection of the premises by a senior legal advisor on its staff, Mr Enslin (who is the second respondent) and a doctor in private practice in Durban, Dr Moodliar (who is the fifth respondent).[3]

[10] Prior to carrying out the order of the Council, Mr Enslin informed the chief medicines control officer of the Department of Health and an inspector of medicines, Mr Coote (who is the fourth respondent), of the impending inspection.[4] The three inspectors

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1 Act 101 of 1965. Hereinafter referred to as the Medicines Act.

2 The Constitution of the Republic of South Africa Act 200 of 1993.

3 Mr Enslin and Dr Moodliar were appointed as investigating officers pursuant to section 41A(1) of the Medical, Dental and Supplementary Health Service Professions Act 56 of 1974 (which I will refer to as the Medical Act).

4 Mr Coote was appointed as an inspector under section 26(1) of the Medicines Act.

went together to the applicant's surgery and proceeded to search it in the absence of the applicant, who arrived when the search was almost complete. The inspectors claim they were informed by staff at the surgery that the applicant had not been in full-time attendance for some months. Shortly after his arrival, Mr Coote purchased a container of Persivate cream[5] from the applicant's receptionist. In the course of the search he seized numerous items, while Mr Enslin and Dr Moodliar seized various other items which, however, do not form part of the present matter since they were subsequently returned as a result of a court order.[6]

[11] The applicant made urgent application to the Durban and Coast High Court[7] for a rule nisi calling on the respondents to show cause, if any, why an order should not be granted in the following terms:

> "1. That the First, Second and Fifth Respondents are directed to forthwith return to the Applicant all the items referred to in annexures 'A1', 'A2' and 'A3', appearing at pages 33, 34 and 35 of the papers, as well as any other items that were seized (referred to in paragraph 19 of the affidavit deposed to by the Second Respondent), together with all copies that were made of any such documents.
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> 2. That the Third and Fourth Respondents are directed to forthwith return to the Applicant:

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5 Persivate cream is a skin lightening cream which contains one of the Schedule 4 substances (Corticosteroids), the sale of which is prohibited under section 22A(6) of the Medicines Act by anyone other than a pharmacist, their assistants or trainees; except as otherwise provided in subsection 15.

6 See *Mistry v Interim National Medical and Dental Council of South Africa and Others* 1997 (7) BCLR 933 (D) at 964F. See para 12 below.

7 Then known as the Durban and Coast Local Division of the Supreme Court.

2.1 all the photographs taken by the Fourth Respondent at the Applicant's surgery on 8 October 1996, all copies thereof as well as the negatives relating to such photographs;

2.2 all the items on annexure 'RKC18' to the Fourth Respondents affidavit, which is at page 154 of the papers, as well as all copies that were made of any of the documents or records on the said list;

alternatively to 2.1 and 2.2

2.3 all the items on annexure 'RKC18', sae (sic) for items 1, 12, 15, 16, 27 and 28 on the said list, and the Persivate cream described and referred to in paragraph 6.14 and 6.15 of the Fourth Respondent's affidavit at pages 119 to 120 of the papers.

3. That the Respondents pay the cost of the application.

4. Alternatively to 1 to 3 hereof, that the following issues are referred to the Constitutional Court in terms of section 102(1) of the Interim Constitution:

4.1 whether sections 41A(1), (2), (5), (6)(a) and (d) of the Medical, Dental and Supplementary Health Service Professions Act 56 of 1974 are constitutional and valid or not;

4.2 whether sections 28(1)(a), (b) and (c) of the Medicines and Related Substances Control Act 101 of 1965 are constitutional and valid or not.

5. That pending the final determination of the matter in the Constitutional Court:

5.1 that the Second and Fifth Respondents are interdicted and restrained from conducting any searches of the Applicant's premises or any seizures thereat in terms of section 41A(6) of the Medical, Dental and Supplementary Health Service Professions Act 56 of 1974.

5.2 that the First, Sixth and Seventh Respondents are interdicted and restrained from instructing any person to conduct searches of the Applicant's premises or any seizures that, pursuant to sections 41A(1), (2) and (5) of the Medical, Dental and Supplementary Health Service Professions Act 56 of 1974;

5.3 that the Fourth Respondent is interdicted and restrained from conducting any searches of the Applicant's premises and any seizures thereat in terms of section 28(1)(a), (b) and (c) of the Medicines and [R]elated

Substances Control Act 101 of 1965.

6. That the costs of the application are reserved pending the determination of the issues referred to the Constitutional Court."[8]

[12] The matter eventually came before McLaren J on 25 March 1997. On 25 April 1997 he gave judgment, upholding the application against the Council, Mr Enslin and Dr Moodliar, as well as against the Registrar and President of the Council (who were the sixth and seventh respondents respectively). Mr Enslin and Dr Moodliar were directed to return the articles which they had seized under the Medical Act.[9] The validity of the Medical Act therefore ceased to have any practical relevance. The learned judge further ordered that Mr Coote and the Minister of Health (who was the third respondent) should return some of the items which Mr Coote had seized. He refused, however, to order the return of other items.[10] It is this refusal which forms the basis of the present application.

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8 *Mistry* above n 6 at 936-7. The prayers quoted are as amended by counsel for the applicant during the course of argument before McLaren J.

9 The Registrar of the Council, with the approval of the President of the Council, was responsible for ordering Mr Enslin and Dr Moodliar to inspect the premises of the applicant. The learned judge held that Mr Enslin and Dr Moodliar were only authorised by section 41A(5)(c) of the Medical Act to conduct "a particular investigation" into the particular complaint and therefore were not authorised to conduct a general search of applicant's surgery. No appeal was lodged against the order McLaren J made in this respect.

10 These were identified as the following:

1 tube of Persivate Cream exp date 06/98 Lot No Mn 31450 purchased from R Mnguni.

R9,00 (R5,00 + R2,00 + R1,00 + 5 x 20c)	8 x Persivate Mn 31450
Lenovate Ointment mm 70943 x 12	Lenovate cream mm 51910 x 10
Persivate cream mn 31450 x 15	Demulen tablets x 10 Lot 736360
Dermovate Cream x 1	Elocon Cream x 1
Persivate Cream x 1	1 x R20,00 DD4361425B
1 green note "1 packet of cream R132 5/10/96"	1 white note "450 wages for 3 weeks"
1 x Synap Forte 20's	Persivate Cream 1 x carton of 8 x 12 tubes
2 x Ativan tablets - sample	1 x abbermetic 500 tablets exp Aug 94
8 x amps of Depotrone	1 x Persivate Book page 1 date 20/9/96

[13] In addition McLaren J referred the constitutionality of section 28(1) of the Medicines Act to this Court under section 102(1) of the interim Constitution. The learned judge granted leave to appeal to this Court against those aspects of his judgment which resulted in his refusal to order the return of the specified items.

[14] The learned judge's reasons for granting a certificate for leave to appeal are reported[11] and it is not necessary to restate the many issues raised by the applicant. It is sufficient to note that at the heart of this appeal is the request for the return of the items seized by Mr Coote during his search of the surgery. The three grounds of appeal are as follows:

> "(a) Whether the second and fifth respondents invaded the applicant's right to privacy in terms of section 13 of the interim Constitution by *inter alia* disclosing to the fourth respondent the fact of the complaint, the intended investigation and information gleaned during the investigation and, further, whether a decision to carry out a search prompted by information disclosed in conflict with a statutory duty to maintain secrecy, would violate the right to privacy in section 13.
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> (b) Whether section 28(1) of the Medicines and Related Substances Control Act 101 of 1965 should be read down to incorporate the requirement that the powers therein be exercised reasonably and in such a manner that it does not infringe the Chapter 3 rights or, where the exercise of the said powers does infringe the said

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1 x Persivate Cream book page 1 date 7/10/96 1 x Pharmed Invoice A921539

11 *Mistry v Interim National Medical and Dental Council of South Africa and Others* 1997 (10) BCLR 1460 (D).

> rights, such infringement must be justifiable in terms of section 33(1) of the interim Constitution.
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> (c) Whether the search carried out *in casu* infringed the applicant's right to privacy in terms of section 13 and, if so, further whether such infringement falls within the ambit of section 33(1) of the interim Constitution."[12]

[15] When this Court granted leave to appeal it gave directions that, for the sake of convenience, the referral and the appeal should be argued together. The outcome is that this Court is called upon to deal with two substantive questions. The first is raised by the terms of the referral itself:

> "Is section 28(1) of the Medicines and Related Substances Control Act 101 of 1965 constitutional and valid, or not?"[13]

The second question, which arises from the appeal, is whether the communication of information by Mr Enslin and Dr Moodliar to Mr Coote resulting in the latter's decision to conduct the search, or the manner in which the search itself was carried out by the three inspectors, constituted a breach of the applicant's constitutional right to privacy. A consequential issue we have to determine is whether Mr Coote and the Minister should be ordered to return the various items seized from applicant's surgery and still in their possession.

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12 Id 1464.

13 See *Mistry* above n 6 at 964I.

The Referral

The challenged provision: section 28(1) of the Medicines Act

[16] Section 28(1) of the Medicines Act reads as follows:

> "An inspector may at all reasonable times -
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> (a) enter upon any premises, place, vehicle, vessel or aircraft at or in which there is or is on reasonable grounds suspected to be any medicine or Scheduled substance;
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> (b) inspect any medicine or Scheduled substance, or any book, record or document found in or upon such premises, place, vehicle, vessel or aircraft;
>
> (c) seize any such medicine or Scheduled substance, or any books, records or documents found in or upon such premises, place, vehicle, vessel or aircraft and appearing to afford evidence of a contravention of any provision of this Act;
>
> (d) take so many samples of any such medicine or Scheduled substance as he may consider necessary for the purpose of testing, examination or analysis in terms of the provisions of this Act."

[17] To understand the scope and effect of these powers, it is necessary to locate them within the scheme of the Medicines Act as a whole. In *Administrator, Cape v Raats Röntgen and Vermeulen (Pty) Ltd*[14] Kriegler AJA pointed out that the Medicines Act "[was] directed at the control of two main categories of substances, namely medicines and

[14] 1992 (1) SA 245 (A).

so-called related substances."[15] His judgment makes it clear that the purpose of the Medicines Act was not merely to regulate the manner in which scheduled substances were made available to members of the public, but to control the quality and supply of medicines generally:

> "Manifestly the Act was put on the statute book to protect the citizenry at large. Substances for the treatment of human ailments are as old as mankind itself; so are poisons and quacks. The technological explosion of the twentieth century brought in its wake a flood of pharmaceuticals unknown before and incomprehensible to most. The man in the street - and indeed many medical practitioners - could not cope with the cornucopian outpourings of the world-wide network of inventors and manufacturers of medicines. Moreover, the marvels of advertising, marketing and distribution brought such fruits within the grasp of the general public. Hence an Act designed, as the long title emphasises, to register and control medicines. The enactment created a tightly meshed screening mechanism whereby the public was to be safeguarded: in general any medicine supplied to any person is, first, subject to stringent certification by experts; then it has to be clearly, correctly and comprehensively packaged and labelled and may only be sold by certain classes of persons and with proper explanatory information; to round it out detailed mechanisms for enforcement are created and ancillary measures are authorised."[16]

[18] One of the main purposes of the Medicines Act, accordingly, is to provide for the registration of medicines intended for human and for animal use.[17] "Medicines" are

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15 Id 251J-252A.

16 Id 254 B-E.

17 The purposes of the Medicines Act are set out in the long title. In terms of section 2, a Medicines Control Council is established whose function it is to regulate the registration of medicines. Furthermore, section 12 establishes the office of a Registrar of Medicines which maintains a register of all the medicines which have been approved by the Council.

widely defined to include any substance used in the diagnosis or treatment of physical or mental disease or its symptoms, and includes any veterinary medicine.[18] The statute goes on to stipulate measures to ensure proper standards and quality control; all medicines subject to registration have to be approved and registered by the Medicines Control Council;[19] labelling of and advertisements for medicines are regulated,[20] there is a prohibition against issuing false advertisements and making claims not substantiated by the Council,[21] and medicines must comply with certain standards.[22] Breach of these conditions is a criminal offence carrying penalties of a fine of up to R40 000 or imprisonment of up to 10 years or both.[23]

[19] "Scheduled substances" constitute a narrower class of medications which, presumably because of their special potential for harm, are subject to much stricter regulation, especially as to the manner in which they may be dispensed to the public. The substances are listed in nine different schedules to the Medicines Act. Each schedule is attached to a specific provision of the Medicines Act indicating how the listed substances

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18 Section 1(1).

19 Sections 2-17.

20 Section 18.

21 Section 20.

22 Section 19.

23 Section 30(1).

may be sold or dispensed, by whom and to whom.[24] The main control is that the scheduled substances only reach the public under the responsibility of qualified health professionals[25] acting according to prescribed standards. Such professionals are required, for example, to maintain books and records containing all the prescribed particulars of the sale of scheduled substances, including the actual prescription of the medical practitioner, the date of sale and the quantity of medicine sold.[26] Possession or use of scheduled substances outside the provisions of the Medicines Act constitutes a criminal offence and gives rise to the penalties mentioned above.[27]

[20] The Director-General of the Department of Health is empowered to "authorize such persons as inspectors, as he may consider necessary for the proper enforcement of this Act."[28] The precise meaning of the phrase "for the proper enforcement of this Act" will be considered later.[29] It is clear, however, that the inspectors are appointed to monitor both the sale of medicines in general and the sale of scheduled substances in particular.

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24 Section 22A.

25 Section 22A refers directly to medical practitioners, dentists, pharmacists (trainees and assistants), veterinarians and their nurses and for certain purposes also includes manufacturers, wholesalers, importers, exporters, cultivators and researchers.

26 Section 22A(6)(d).

27 Above n 23.

28 Section 26(1).

29 See paras 31 and 32 below.

[21] It is against this functional background that the powers of entry, inspection and seizure granted by section 28(1) must be analysed. The most striking feature of section 28(1) is the lack of qualification of the powers of entry and inspection given to the inspectors. In general terms, the only requirement imposed is that the powers must be exercised at reasonable times.[30] The single criterion for entering "any premises, place, vehicle, vessel or aircraft" is that any medicine or scheduled substance is there or is reasonably suspected of being there. Defined as it is to include any substance used for the treatment of disease or its symptoms, the term "medicine" covers the kinds of analgesics, ointments or influenza relief potions to be found in the majority of South African homes. Once on the premises, the inspector may look not only at any medicine or scheduled substance, but at "any book, record or document". The result is that inspectors are given the power to enter any home where aspirins, ointments or analgesics happen to be, and once there, may inspect not only medicine cabinets or bedside drawers, but also files which might contain a person's last will and testament, private letters and business papers.

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[30] Section 26 of the Medicines Act also provides that:

> "(1) . . .
> (2) Every inspector shall be furnished with a certificate signed by the Director-General and stating that he has been authorized as an inspector under this Act.
> (3) An inspector shall, before he exercises or performs any power or function under this Act, produce and exhibit to any person affected hereby, the certificate referred to in subsection (2)."

Scope of the right to privacy and permissible limitations

[22] The constitutionality of these powers has to be examined in the light of section 13 of the interim Constitution[31] which states:

> "Every person shall have the right to his or her personal privacy, which shall include the right not to be subject to searches of his or her person, home or property, the seizure of private possessions or the violation of private communications."

[23] For the purposes of the present case, it is not necessary to determine precisely when an inspection becomes a "search", and I expressly refrain from trying to do so. Neither is it necessary to decide whether an extensive or narrow meaning should be given to the word "property", nor exactly what was contemplated by the term "private possessions". Such determinations would be of a threshold nature, that is, they would establish whether or not there had been a breach of section 13. What is clear, nevertheless, is that however the terms "search" and "seizure" may be interpreted in a particular case, to the extent that a statute authorises warrantless entry into private homes and rifling through intimate possessions, such activities would intrude on the "inner sanctum"[32] of the persons in question and the statutory authority would accordingly breach the right to personal privacy as protected by section 13. There can be no doubt

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31 It was accepted by all the parties that since the events took place during the period of operation of the interim Constitution, the provisions of the interim Constitution should apply. I agree, and will proceed on that basis.

32 As explained in *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) at para 67. This is more fully discussed in para 27 of this judgment.

that the language of section 28(1) is so sweeping as to permit such entry and inspection. Accordingly it is in breach of section 13 and has to be justified by the state as being reasonable[33] and justifiable in terms of section 33 of the interim Constitution.[34]

[24] In *S v Makwanyane and Another*[35] this Court held that there was no absolute standard which could be laid down for determining reasonableness and justifiability. Principles could be established, but the application of those principles to particular circumstances could only be done on a case by case basis:

> "This is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process the relevant considerations will include the nature of the right that is limited and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy and, particularly where the limitation has to be necessary, whether the desired ends could

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33 Contrast the position in Canada where section 8 of the Charter reads:

> "Everyone has the right to be secure against **unreasonable** search or seizure." (My emphasis.)

Had such a qualification been introduced in section 13, it would have necessitated an immediate need to balance private rights against public interest at the definitional and not the justificatory stage. This would have left a difficult question as to whether there was scope for further balancing of interests at the section 33 stage, in other words, whether an unreasonable search and seizure could ever be reasonable and justifiable. See Dickson J in *Hunter et al. v Southam Inc.* (1984) 9 CRR 355 at 374.

34 Section 33 reads:

> "(1) The rights entrenched in this Chapter may be limited by law of general application, provided that such limitation -
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> *(a)* shall be permissible only to the extent that it is -
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> (i) reasonable; and
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> (ii) justifiable in an open and democratic society based on freedom and equality; . . . "

It should be noted that the more stringent requirement of necessity does not apply to limitations of section 13.

35 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC).

reasonably be achieved through other means less damaging to the right in question."[36]

I will consider these elements in turn, looking at each in its own context.[37]

A The nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality.

[25] The existence of safeguards to regulate the way in which state officials may enter the private domains of ordinary citizens is one of the features that distinguish a constitutional democracy from a police state.[38] South African experience has been notoriously mixed in this regard. On the one hand there has been an admirable history of strong statutory controls over the powers of the police to search and seize.[39] On the other,

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36 Id para 104.

37 See Madala J in *Case and Another v Minister of Safety and Security and Others; Curtis v Minister of Safety and Security and Others* 1996 (3) SA 617 (CC); 1996 (5) BCLR 609 (CC) at para 106:

> "The protection accorded to the right to privacy is broad but it can also be limited in appropriate circumstances. The different circumstances of different cases may require us to take decisions specifically suited to particular cases."

38 See the classic words of Jackson J in a judgment written not long after he acted as a prosecutor at Nuremberg:

> "These [Fourth Amendment rights], I protest, are not mere second-class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government." *Brinegar v United States* 338 US 160, 180 (1949). (Jackson J dissenting.)

39 See, for example, chapter 2 of the Criminal Procedure Act 51 of 1977, which was based on the Criminal Procedure Act 31 of 1917 and Act 56 of 1955. In Hiemstra *Suid-Afrikaanse Strafproses* 5 uit (Butterworths, Durban 1993) Kriegler introduces a discussion of chapter 2 with the following general observation at 30:

> "Visentering en beslaglegging is noodsaaklik by misdaadbekamping. Terselfdertyd is dit 'n verreikende inbreuk op die menswaardigheid, privaatheid en besitsreg van die landsburger. Dit moet gevolglik met omsigtigheid gemagtig en uitgevoer word. In hierdie hoofstuk het die wetgewer die ewewig gehandhaaf tussen sy plig om misdaad

when it came to racially discriminatory laws and security legislation, vast and often unrestricted discretionary powers were conferred on officials and police.[40] Generations of systematised and egregious violations of personal privacy established norms of disrespect for citizens that seeped generally into the public administration and promoted amongst a great many officials habits and practices inconsistent with the standards of conduct now required by the Bill of Rights. Section 13 accordingly requires us to repudiate the past practices that were repugnant to the new constitutional values, while at the same time re-affirming and building on those that were consistent with these values.

B The purpose for which the right is limited and its importance for an open and democratic society based on freedom and equality.

[26] There is nothing to suggest that the broad objectives of section 28(1) raise echoes of the racism and authoritarian de-personalisation which characterised the earlier era. Indeed, the purpose of the Medicines Act is manifestly beneficent; it "was put on the statute book to protect the citizenry at large".[41] Its purpose is to provide for proper

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te bekamp, enersyds, en sy plig om die waardigheid en privaatheid van die individu te beskerm."

40 See the remarks in *Case* above n 37 at para 100 citing statutes (at n 136) which penalised inter-racial sex or marriage, gave carte blanche to the security police and permitted interference by the post office with private communications. I would add to this list the myriad pass, liquor and curfew statutes of notorious and painful memory which authorised police to stop people in the street to demand their passes or to raid homes in what were called locations at any time of day or night in random searches; similarly, the powers given to state officials to enforce group areas and race classification legislation. See also *Key v Attorney-General, Cape Provincial Division, and Another* 1996 (4) SA 187 (CC); 1996 (6) BCLR 788 (CC) at para 13 in which Kriegler J identifies the tension which lies at the heart of the criminal justice process in this area.

41 Above para 17.

inspection and regulation of the multiple health undertakings in modern society which impact on the welfare and general well-being of the community. It furnishes protection both for the public and for honest health professionals, and cannot be enforced without the existence of inspectors who are appropriately empowered.[42]

C The extent of the limitation.

[27] For the purpose of the present case it has not been necessary to determine whether or not regulatory inspections should be regarded as searches and seizures as contemplated by section 13. Yet, even if one were to accept in favour of applicant that there were situations where they did so qualify, it would be necessary to decide on a case by case basis how invasive any such regulatory inspections would be. The more public the undertaking and the more closely regulated, the more attenuated would the right to privacy be and the less intense any possible invasion.[43] In *Bernstein and Others v Bester and*

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42 I should stress that the issue of the constitutionality of section 28(1) is not dependent on an examination of the conduct of the inspectors or other respondents or of the applicant in the present case.

43 This factor is strongly emphasised in open and democratic societies based on freedom and equality. See La Forest J in *Thomson Newspapers Ltd. v Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)* (1990) 47 CRR 1 at 18-20:

> ". . . Canadian courts have on numerous occasions taken the view that the standard of reasonableness which prevails in the case of a search or seizure made in the course of enforcement of the criminal law will not usually be appropriate to a determination of reasonableness in the administrative or regulatory context . . .
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> . . .
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> The application of a less strenuous and more flexible standard of reasonableness in the case of administrative . . . searches and seizures is fully consistent with a purposive approach to . . . section 8.
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> . . .
>
> But the degree of privacy the citizen can reasonably expect may vary significantly depending on the activity that brings him or her into contact with the state. In a modern industrial society, it is generally accepted that many activities in which

Others NNO[44] Ackermann J posited a continuum of privacy rights which may be regarded as starting with a wholly inviolable inner self, moving to a relatively impervious sanctum of the home and personal life and ending in a public realm where privacy would only remotely be implicated.[45] In the case of any regulated enterprise, the proprietor's expectation of privacy with respect to the premises, equipment, materials and records must be attenuated by the obligation to comply with reasonable regulations and to tolerate the administrative inspections that are an inseparable part of an effective regime of

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> individuals can engage must nevertheless to a greater or lesser extent be regulated by the state to ensure that the individual's pursuit of his or her self-interest is compatible with the community's interest in the realization of collective goals and aspirations. In many cases, this regulation must necessarily involve the inspection of private premises or documents by agents of the state. The restaurateur's (sic) compliance with public health regulations, the employer's compliance with employment standards and safety legislation, and the developer's or homeowner's compliance with building codes or zoning regulations can only be tested by inspection, and perhaps unannounced inspection, of their premises. Similarly, compliance with minimum wage, employment equity and human rights legislation can often only be assessed by the inspection of the employer's files and records."

With respect to the English approach, see Feldman *Civil Liberties and Human Rights in England and Wales* (Oxford University Press, New York 1993) at 356.
In the United States see *Frank v Maryland* 359 US 360, 383 (1959); *See v City of Seattle* 387 US 541, 545-6 (1967); *New York v Burger* 482 US 691, 702-3 (1987).

44 Above n 32.

45 The most pertinent passage in his judgment merits quotation in full:

> "The truism that no right is to be considered absolute implies that from the outset of interpretation each right is always already limited by every other right accruing to another citizen. In the context of privacy this would mean that it is only the inner sanctum of a person, such as his/her family life, sexual preference and home environment, which is shielded from erosion by conflicting rights of the community. This implies that community rights and the rights of fellow members place a corresponding obligation on a citizen, thereby shaping the abstract notion of individualism towards identifying a concrete member of civil society. Privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly." Id para 67.

regulation.[46] The greater the potential hazards to the public, the less invasive the inspection. People involved in such undertakings must be taken to know from the outset that their activities will be monitored. If they are licensed to function in a competitive environment, they accept as a condition of their licence that they will adhere to the same reasonable controls as are applicable to their competitors. Members of professional bodies, for example, share an interest in seeing to it that the standards, reputation and integrity of their professions are maintained. In *Almeida-Sanchez v United States*,[47] Stewart J, writing for the majority, highlighted well the expectations of privacy involved in the modern world of closely regulated enterprises:

> "The businessman in a regulated industry in effect consents to the restrictions placed upon him. As the Court stated in *Biswell*: ' . . . When a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection . . . The dealer is not left to wonder about the purposes of the inspector or the limits of his task'."[48]

[28] Had section 28(1) confined itself to authorising periodic inspections of the business premises of health professionals, such inspections would accordingly have entailed only the most minimal and easily justifiable invasions of privacy, if they had qualified as

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46 This formulation is adapted from a statement by Hogg *Constitutional Law of Canada* 3 ed (Carswell, Toronto 1992) at 1065. What he said about proprietors in Canada is equally applicable to persons engaged in regulated businesses or professions in South Africa.

47 413 US 266 (1973).

48 Id 271 and quoting the court in *United States v Biswell* 406 US 311, 316 (1972). See also *Marshall, Secretary of Labor, et al. v Barlow's, Inc.* 436 US 307, 313 (1978).

invasions of privacy at all. Indeed, all legitimate health professionals can only welcome such regulatory inspections. It is clear however that section 28(1) does not limit itself to authorising regulatory inspections of the premises of doctors and chemists. It expressly empowers inspectors to enter not only "premises", but also any "place, vehicle, vessel or aircraft". There can be no doubt that the word "place" is meant to have a wider meaning than "premises", otherwise there would have been no need to put it in. The description is accordingly so broad as to authorise the inspectors to enter private homes,[49] whether they be the dwellings of health professionals or of other persons. Similarly, the vehicles, vessels and aircraft that inspectors may search are not limited to ambulances, hospital ships or the planes of flying doctors, nor could they reasonably be confined to such. Although it has become almost a judicial cliché to say that the object is " . . . [to protect] people, not places",[50] that is, to safeguard personal privacy and not to protect private property, there can be no doubt that certain spaces are normally reserved for the most

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49 Contrast it with the Canadian Food and Drugs Act, R.S.C. 1985, F-27 which provided at section 42(1):

> "A peace officer may, at any time, without a warrant enter and search any **place other than a dwelling-house**, and under the authority of a warrant issued [by a justice], enter and search any dwelling-house in which the peace officer believes on reasonable grounds there is a controlled drug by means of or in respect of which an offence under this part has been committed." (My emphasis.)

50 The phrase was first coined by Stewart J in *Katz v United States* 389 US 347, 351 (1967). In the United States it has been stated that:

> "The greater latitude to conduct warrantless inspections of commercial property reflects the fact that the expectation of privacy that the owner of commercial property enjoys in such property differs significantly from the sanctity accorded an individual's home, and that this privacy interest may, in certain circumstances, be adequately protected by regulatory schemes authorizing warrantless inspections." *Donovan, Secretary of Labor v Dewey et al.* 452 US 594, 598-9 (1981).

See too the observations of Ackermann J in *Bernstein* referred to in para 27 above, and the comments of Dickson CJC in *R v Kokesch* (1990) 50 CRR 285 at 303.

private of activities.[51] The section is so wide and unrestricted in its reach as to authorise any inspector to enter any person's home simply on the basis that aspirins or cough mixture are or are reasonably suspected of being there. What is more, the section does not require a warrant to be issued in any circumstances at all.

D Whether the desired ends could reasonably be achieved through other means less damaging to right in question.

[29] It is difficult to see how the achievement of the basic purposes of the Medicines Act requires that inspectors be allowed at will to enter private homes and inspect private documents. If only periodic regulatory inspection of the premises of health professionals was in issue, then a requirement of a prior warrant might be nonsensical in that it would be likely to frustrate the state objectives behind the search.[52] Once the investigation

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51 Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms reads:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A similar domestically focussed right to privacy is also recognised in Article 12 of the Universal Declaration of Human Rights; Articles 5, 9 and 10 of the American Declaration of the Rights and Duties of Man; Article 17 of the International Covenant on Civil and Political Rights; and Article 11 of the American Convention on Human Rights.

52 The issue of whether warrants should be required for regulatory searches as well as investigatory ones has divided US judges. Clark J dissenting in *See v City of Seattle* above n 43 at 554 commented on the absurdity of having to obtain a warrant:

> "These boxcar warrants will be identical as to every dwelling in the area, save the street number itself. I daresay they will be printed up in pads of a thousand or more - with space for the street number to be inserted - and issued by magistrates in broadcast fashion as a matter of course." (Cited with approval in *Regina v Bichel* (1986) 33 DLR

extends to private homes, however, there would seem to be no reason why the time-honoured requirement of prior independent authorisation should not be respected.[53] Whether that would require a prior warrant from a judicial officer in all circumstances where homes were being searched need not be decided now. If, however, the circumstances were in fact such that even trained police officers would be required to get such a warrant, all the more reason for medical inspectors to do so; it would be odd if the law allowed personnel who might be medical experts but forensically untrained to rush in where even experienced police officers must refuse to tread. Furthermore, even a subjective belief of the investigator that some offence or another was being committed might not be enough - here not even that is required.[54] Inspectors, like any other persons exercising power on behalf of the state, are as entitled as the public to know the precise

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4th 254 at 264).

On the other hand, White J in *Camara v Municipal Court of the City and County of San Francisco* 387 US 523, 530 (1967), observed how absurd it would be not to require warrants:

> "It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior."

53 See Hiemstra above n 39.

In *De Wet and Others v Willers, NO and Another* 1953 (4) SA 124 (T) at 127B, Ramsbottom J said:

> "To enter premises, to search those premises, and to remove goods therefrom is an important invasion of the rights of the individual. The law empowers police officers to infringe the rights of citizens in that way provided that they have a legal warrant to do so."

See also chapter 2 of the Criminal Procedure Act 51 of 1977.

54 The basic balancing which section 13 requires us to do is well articulated in the following words of Dickson J in the Canadian context:

> "The location of the constitutional balance between a justifiable expectation of privacy and the legitimate needs of the state cannot depend on the subjective appreciation of individual adjudicators. Some objective standard must be established.
>
> . . .
>
> The state's interest in detecting and preventing crime begins to prevail over the individual's interest in being left alone at the point where credibly-based probability replaces suspicion."

Hunter above n 33 at 372-3.

framework within which they can lawfully and effectively carry out their functions. The statute gives hardly any guidance.[55] All is left to the discretion of the inspectors and their superiors. The fact that the Medicines Act is manifestly in the public interest in no way diminishes the need for the powers of inspection to be exercised according to constitutionally valid criteria and procedures. Lord Acton's famous statement about all power tending to corrupt and absolute power corrupting absolutely was made in the context of power being exercised by the most worthy people, not the least.[56] It follows that the desired and permissible ends of regulatory inspection could easily be achieved through means less damaging to the section 13 right.

[30] To sum up: irrespective of legitimate expectations of privacy which may be intruded upon in the process, and without any predetermined safeguards to minimise the extent of such intrusions where the nature of the investigations makes some invasion of privacy necessary, section 28(1) gives the inspectors carte blanche to enter any place, including private dwellings, where they reasonably suspect medicines to be, and then to inspect documents which may be of the most intimate kind. The extent of the invasion of the important right to personal privacy authorised by section 28(1) is substantially

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55 If courts have difficulty in deciding when and how to read down statutes which on the face of it are overbroad, how much more difficult must it be for persons trained in the medical rather than the legal arts. One inspector will give an aggressive, sweeping interpretation, another a more timid one. There are no common standards, surely one of the elements of the rule of law.

56 See Collins *Dictionary of Quotations*, Jeffares and Gray (ed) (Harper-Collins, Glasgow 1995) at 1. He went on to add: ". . . There is no worse heresy than that the office sanctifies the holder of it." Acton, First Baron. Letter to Bishop Mandell Creighton, 1887.

disproportionate to its public purpose; the section is clearly overbroad in its reach and accordingly fails to pass the proportionality test laid down in *S v Makwanyane and Another*.[57]

Can section 28(1) be read down?

[31] In his written argument, counsel for Mr Coote and the Minister acknowledged that a straightforward reading of the Medicines Act gave rise to the abovementioned problems of overbreadth, but contended that the answer could be found in terms of section 35(2) of the interim Constitution, which permits what is frequently referred to as a "reading-down" of a statute so as to keep it within constitutional limits and thereby secure its validity.[58] He argued further that section 35(3) of the interim Constitution should also be applied, namely, that "[i]n the interpretation of any law and the application and development of the common law and customary law, a court shall have due regard to the spirit, purport and objects of [chapter 3]". The combined effect of these two provisions, he contended, together with the indication in section 26 of the Medicines Act that inspectors are appointed "for the proper enforcement of this Act", produced a result that was not nearly

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57 Above n 35 at para 104.

58 Section 35(2) states:

> "No law which limits any of the rights entrenched in this Chapter, shall be constitutionally invalid solely by reason of the fact that the wording used *prima facie* exceeds the limits imposed in this Chapter, provided such a law is reasonably capable of a more restricted interpretation which does not exceed such limits, in which event such law shall be construed as having a meaning in accordance with the said more restricted interpretation."

as wide or draconian as at first blush might appear. In order to act legitimately in terms of section 28(1) the inspector would have to demonstrate that as a matter of objective fact, the act he or she sought to perform fell within the terms of reference of his or her legitimate functions, which should be limited to the monitoring of health professionals. This, counsel asserted, was a requirement which had to exist over and above the circumstance that there was medicine in any premises, place or vehicle, etc.

[32] I have no doubt that there would be considerable merit in this argument if section 28(1), in the context of the Medicines Act as a whole, was reasonably capable of such a construction. Yet, appealing though it might be to retrieve a core of constitutionally sound regulatory activity from the manifestly overbroad powers granted by the section, its wording simply does not permit such a solution. The Medicines Act contemplates an active role for the inspectors which goes well beyond the limited one of monitoring the premises of health professionals as put forward in the written argument. Accordingly, the argument calling for a reading down of the statute to restrict it to searches only of premises (and possibly the homes) of health professionals, does violence to the explicit language of section 28(1), and contradicts the scheme of the Medicines Act as a whole. Indeed, we are being asked in effect not only to read down the inspectors' powers of search and seizure but to read down their general functions as well, that is, to re-write their mandate, and this we cannot do. Similarly, even if the mandate were to be narrowed, it would be the responsibility of the legislature to enact legislation that embodied

appropriate safeguards, not the duty of the Court to read such safeguards in.

[33] At the hearing of the appeal, counsel for Mr Coote and the Minister[59] did not press the reading-down argument, and urged this Court instead to use its powers under section 98(5) of the interim Constitution to declare section 28(1) to be unconstitutional to the extent only that it authorised inspectors to enter and perform their functions in any premises, place, vehicle, vessel, or aircraft other than any premises or place used or occupied by medical practitioners, dentists, pharmacists and veterinarians. For the reasons that follow, this request too must be refused.

[34] The intention of the legislature was to enable the inspectors to carry out their functions not only in places and conveyances used by health professionals, but to monitor the activities of non-professionals as well, whether in their homes, cars or business premises. There are just too many aspects to the over-breadth to make the proposal put forward by counsel either feasible or just. In this respect the order made in *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others*[60] is distinguishable inasmuch as the constitutionally obnoxious dimension to the impugned statute in that matter was easily identifiable and notionally if not textually capable of being detached from the rest of the provision without affecting its substance. In the present matter, the

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59 Counsel who appeared at the hearing did not draft the written argument.

60 1996 (1) SA 984 (CC); 1996 (4) BCLR 441 (CC).

Court is being asked not merely to eliminate one aspect of the challenged provision but to re-cast it in substance.

[35] At the end of the day, the reasonableness and justifiability of the powers given to the inspectors will depend on the overall scheme of checks and balances put in place to regulate their authority. Such scheme would have to take account of the statutory and social context in which the inspectors would have to function and would include, where appropriate, independent prior authorisation. Thus, the failure to distinguish between the circumstances where such authorisation would be required and those where a warrantless regulatory inspection would be quite in order, is, in my view, a sufficiently material defect to undermine the scheme of section 28(1) as a whole.

The order on the Referral

[36] Respondents' written argument conceded that if the whole of the impugned section was invalid and that no part could be saved, there was no basis upon which it could reasonably be submitted that the section should remain in force pending correction of the defect by the legislator in terms of section 98(5) of the interim Constitution. Counsel for the respondents who appeared at the hearing, however, requested the Court to use its powers under section 98(5) to keep the section alive until rectified.

[37] Section 98(5) authorises this Court "in the interests of justice and good

government" to require Parliament to correct within a specified time a defect in a law found to be invalid. No information was laid before us, however, as to why in the present matter it would be in the interests of justice and good government for this Court to make such an order. A party wishing the Court to make such an order must provide it with reliable information to justify it doing so. The requisite information will necessarily depend for its detail on the nature of the law in question and the character of the defect to be corrected. Yet, as a general rule, a government organ or other party wishing to keep an unconstitutional provision alive should at least indicate the following: what the negative consequences for justice and good government of an immediately operational declaration of invalidity would be; why other existing measures would not be an adequate alternative stop-gap; what legislation on the subject, if any, is in the pipeline; and how much time would reasonably be required to adopt corrective legislation. Parties interested in opposing such an order should be given an opportunity to motivate their opposition. Legal representatives should ensure that they have appropriate and timeous instructions on the matter, and not do their best while on their feet or else rely on a rushed telephone call at the tail-end of the hearing.

[38] In the present matter, counsel for Mr Coote and the Minister requested by letter some days after the conclusion of the hearing that the Court receive written evidence as to why it was imperative that the Court make a declaration of specified inconsistency, rather than one of general invalidity. No notice was given to the applicant who, on being

informed of the request, indicated strenuous opposition. The request was refused. These are matters that should be addressed at the earliest opportunity. If, for example, it is necessary to adduce evidence, this can be done under the proviso to section 102(1) of the interim Constitution prior to the referral of the matter to this Court. The issues should also be properly canvassed in the written arguments.

[39] Right at the end of the proceedings the Court's attention was drawn by counsel for the respondents to the fact that section 28(1)(a) was due to be amended by the Medicines and Related Substances Control Amendment Act .[61] Section 33 of this new Medicines Act provides that it shall come into operation on a date to be fixed by the President by proclamation in the Gazette. Since we are not called upon to decide whether the new provisions relating to entry, search and seizure would be consistent with the Constitution and the principles outlined in the present judgment, I will say nothing further on the matter, and simply state that in my opinion there are no grounds upon which this Court could accede to the request by counsel to use its powers under section 98(5) to suspend

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61 Act 90 of 1997. Section 16 of the amended Medicines Act reads as follows:

> "Section 28 of the principal Act is hereby amended by the substitution for paragraph (a) of subsection (1) of the following paragraph:
>
> (a) enter upon -
>
> (i) any place or premises from which a person authorised under this Act to compound and dispense medicines or Scheduled substances or from which the holder of a licence as contemplated in section 22C(1)(b) conducts business; or
>
> (ii) any premises, place, vehicle, vessel or aircraft if he or she has reason to suspect that an offence in terms of this Act has been or is being committed at or in such premises, place, vehicle, vessel or aircraft or that an attempt has been made or is being made there to commit such an offence".

the effect of a declaration of invalidity pending correction of its defects.

[40] Counsel for the applicant, on the other hand, urged the Court not only to strike down the provisions of section 28(1) with immediate effect, but to make an order that the search and seizures carried out by Mr Coote at the applicant's surgery were unlawful. Section 98(6) of the interim Constitution provides that ordinarily the declaration of invalidity of a law existing at the commencement of the Constitution shall not invalidate anything done or permitted in terms thereof before the coming into effect of such declaration of invalidity, "[u]nless the Constitutional Court in the interests of justice and good government orders otherwise". Yet only if it is persuaded that the interests of justice and good government so require will this Court issue an order under section 98(6).

[41] Once again, no information has been provided to assist the Court in deciding whether the interests of justice and good government require a departure from the general rule favouring prospectivity. This time the responsibility for such failure rests with the applicant. An already complex balancing exercise is made even more difficult by the lack of concrete and persuasive information. The interests of justice in an individual case might not always coincide with the interests of good government for the country as a whole. We may assume, on the one hand, that a great deal of the work of inspectors of medicines is of a regulatory character, intended to protect the health of the public and to maintain high medical standards amongst health professionals. We may accept further

that generally when medical inspectors conducted their searches in the past they did so in the honest belief that they were acting under lawful authority. Any general declaration of invalidity with retrospective effect would impact negatively on good government by rendering unlawful all such searches conducted after the retrospective date specified. This could create considerable uncertainty with regard to the validity of proceedings which were conducted on the basis of evidence obtained as a result of such searches. It could also give rise to delictual claims by persons subjected to searches and seizures after that date, and add further burdens to a health budget already under considerable strain.

[42] Yet, looking at the matter from the point of view of the applicant, it might seem that the interests of justice would not be served if, after successfully going to the trouble and expense of launching constitutional litigation, a person in this position were to derive no concrete benefit at all as a result. The problem here is that to make an order reaching selectively back into the past simply to come to the aid of one successful litigant without affording such relief to "all people who are in the same situation as the [litigant]"[62] would "result in a denial of equal protection of the law [and would] raise considerations of legal certainty".[63] It should be added that in the present matter it cannot be said that the applicant has derived no benefit from the proceedings which he brought. The

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62 See O'Regan J in *S v Bhulwana; S v Gwadiso* 1996 (1) SA 388 (CC); 1995 (12) BCLR 1579 (CC) at para 32.

63 See Ackermann J above n 60 at para 26. See too Yacoob J in *Member of the Executive Council for Development Planning and Local Government in the Provincial Government of Gauteng v The Democratic Party and Others* CCT 33/97; 29 May 1998, as yet unreported at para 65.

investigation launched into his affairs was suspended, and it appears that follow-up enquiries involving examination of the records that he claimed were with his accountants were not pursued. He has succeeded in getting a declaration in the terms he sought as to the invalidity of section 28(1). Any future search that might be contemplated of his premises would accordingly have to be conducted in terms of a law which respected his rights to personal privacy as required by the Constitution.

[43] Applicant's interest in pressing for an order under section 98(6) was to get back all the items seized from his premises.[64] Yet the issue of who should keep the materials taken from the premises was relatively trivial. The High Court ordered the return of a number of these items. As for the remainder, applicant does not ask for the restoration of the one which could possibly prove the most damaging, namely, the tube of skin-lightening cream which Mr Coote bought from the applicant's receptionist. There is nothing before the Court to show that the other items could have significant probative value as exhibits in themselves, should proceedings one day be brought against the applicant. They constituted real evidence, and no-one disputes that they were found on and taken away from the applicant's premises. They are presently in the possession of Mr Coote as a result of a search which has not been retrospectively invalidated.[65] Whether or not they could be relevant to or admissible in future proceedings is not a matter before this Court,

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64 Those items which were not returned are listed above n 10.

65 The question of whether or not the search and seizure was unlawful because of the manner in which it was conducted will be dealt with in the appeal section of this judgment, which follows.

but one to be determined by the relevant court or disciplinary body should the need arise. If no proceedings take place, applicant will be able to pursue normal possessory remedies to get them back. The interests of justice would be appropriately secured.

[44] I accordingly remain unpersuaded that an order under section 98(6) should be made. As a result, no consequential relief can be given to the applicant in respect of those items taken from the applicant's premises which are still in the possession of Mr Coote.

The Appeal

[45] There is much overlap in the three grounds of appeal.[66] The arguments are fully reported[67] and need not be extensively repeated here. They boil down to two. In the first place, the search was not a normal regulatory search conducted randomly in terms of section 28(1) (a) of the Medicines Act. On the contrary, it was initiated and carried out as a result of information communicated to Mr Coote by Mr Enslin in breach of the privacy provisions of section 41A(9)(a) of the Medical Act.[68] The communication of confidential information by Mr Enslin to Mr Coote constituted an infringement of the

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66 The grounds are set out above at para 14.

67 *Mistry* above n 6.

68 Section 41A(9)(a) of the Medical Act reads:

> "A person who carries out or assists with the carrying out of an investigation in terms of this section, shall keep or assist in preserving secrecy in respect of all facts which come to his notice in the performance of his functions, and shall not disclose any such fact to any person except the registrar, the president, the council, the professional board concerned, or the public prosecutor concerned in the case of an offence in terms of this Act, or by order of a court."

applicant's rights to privacy under section 13 of the Constitution. In the circumstances - the argument goes - the search was a direct result of a breach of applicant's constitutional rights.

[46] Secondly, the search was not a routine inspection as contemplated by section 28(1)(a) but one planned and implemented as a joint search contrary to the secrecy requirements in the Medicines Act[69] and in the Medical Act[70]. This constituted an improper exercise of the powers of search vested in Mr Coote under the Medicines Act and in Mr Enslin and Dr Moodliar under the Medical Act. As such, it was contended, the searches as conducted were not authorised by either Act and accordingly amounted to invasions of the constitutional right to privacy contained in section 13.

[47] The case touches on the problem of breach of informational privacy which, unlike invasion of private communications, is not dealt with expressly in section 13.[71] Does a person have a constitutional right to privacy in respect of information concerning himself or herself? Are there impediments to private information procured for one purpose being used for a different purpose? And if so, was the right to privacy breached in the present case? A full analysis of the texture and perimeters of informational privacy is not

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69 Section 34. See n 77 below.

70 Section 41A(9)(a).

71 See section 13 of the interim Constitution.

however, required in the present matter. The terrain is complex and controversial,[72] the issues were not fully explored in argument, and the facts of the present case do not compel us to make such an analysis.

[48] In my view, it is possible to dispose of the matter on the basis of assumptions made in applicant's favour. I will make three such assumptions. The first is that a right to informational privacy is covered by the broad protection of privacy guaranteed by section 13. The second is that Mr Enslin was at all material times fulfilling state functions and, as such, obliged to respect the provisions of the Bill of Rights, including section 13.[73] The

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72 For various definitions of privacy, see McQuoid-Mason in Chaskalson et al *Constitutional Law of South Africa* (Juta, Kenwyn 1996) at 18.1 and Neethling et al *Neethling's Law of Personality* (Butterworths, Durban 1996) at chapter 8. See too *National Media Ltd and Another v Jooste* 1996 (3) SA 262 (A) at 271, the latest in a number of cases where the Supreme Court of Appeal has developed the common law on privacy. An author of several works on the subject of privacy comments:

> ". . . 25 years have passed since my interest in the subject of 'privacy' was first kindled. And still the quotation marks. Still the uneasy feeling that this perplexing concept is no nearer being understood . . ." Wacks *Privacy and Press Freedom* (Blackstone Press, London 1995) at vii.

Tribe in *American Constitutional Law* 2 ed (The Foundation Press, Inc., New York 1988) observes at 1302:

> "Justice Louis Brandeis defined the constitutional right of privacy as "the right to be let alone - the most comprehensive of rights and the right most valued by civilized men." That eloquent formulation reveals the animating paradox of the right of privacy: it is revered by those who live within civil society as a means of repudiating the claims that civil society would make of them. It is a right that has meaning only within the social environment from which it would provide some degree of escape.
>
> . . .
>
> Much judicial and scholarly ink has been spilt in the task of expounding this paradoxical right."

73 McLaren J indicated that a controversy existed as to whether or not the Medical Council was an organ of state and as such governed by the Bill of Rights. See *Mistry* above n 6 at 947A - 948C where he agreed with Booysen J (who dismissed the application for interim relief in this matter), that the Council was not an organ of state. As mentioned above at n 10 he ordered the return of the items seized by Mr Enslin and Dr Moodliar for other reasons. The assumption that I have made renders it unnecessary to resolve the question. No doubt it will come to be dealt with under the 1996 Constitution which contains a different definition of "organ of state" from that which appears in the interim Constitution.

third assumption - in line with the finding of McLaren J[74] - is that Mr Enslin breached section 41(A)(9)(a) of the Medical Act in informing Mr Coote of the fact of the complaint against the applicant and of the proposed investigation, and also in communicating with Mr Coote during the inspection.

[49] The fact remains that it was Mr Enslin and not Mr Coote who was responsible for any possible breach of section 41A(9)(a) of the Medical Act. Such breach would in no way have related to the jurisdictional facts on which the power of Mr Coote to inspect the premises was based. The inspection by Mr Coote was accordingly lawfully conducted by him in terms of powers granted by a statute which at the time in question was still in force. In terms of section 28(1) of the Medicines Act, all that was required was that he entertain a reasonable belief that there were likely to be medicines on the premises. Clearly, such belief existed, with the result that when he conducted the inspection he was doing so on premises and for purposes contemplated by the section.[75] There is nothing to suggest that Mr Coote did not receive and act upon the information he received in good faith.[76]

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74 *Mistry* above n 6 at 948I.

75 Section 33(1) of the Bill of Rights, commonly known as the limitations clause, was referred to in argument as allegedly establishing standards for measuring the reasonableness and justifiability of the conduct of the inspectors. This is incorrect. Section 33 has no application to the question of the justifiability of conduct by a state official, but only functions as a measure of the justifiability of the law in terms of which the conduct takes place. At most it could serve as a guide for the values which animate the Bill of Rights and which should be respected by persons carrying out functions governed by the Bill of Rights.

76 See *Mistry* above n 6 at 950D.

[50] It could be argued, however, that a search which was authorised by statute could nevertheless have been tainted and constitutionally vitiated by preceding or surrounding infringements of applicant's constitutional rights; this could in turn necessitate appropriate relief in the form of an order to restore the seized items to him. I venture no firm opinion on the broad subject of "tainting". Yet, accepting for the purpose of this judgment that the interim Constitution requires us to give some scope to such a principle, I believe that the facts of the present case come nowhere near to establishing the requisite degree of egregious conduct which could bring it into operation.

[51] The circumstances relating to the alleged invasion of constitutional privacy (as opposed to the breach of statutory confidentiality) are as follows: the substance of the communication by Mr Enslin to Mr Coote was merely that a complaint had been made and that an inspection was planned; the information conveyed by Mr Enslin which triggered the inspection by Mr Coote had not been obtained in an intrusive manner but had been volunteered by a member of the public; it was not about intimate aspects of applicant's personal life but about how he conducted his medical practice; it did not involve data provided by applicant himself for one purpose and used for another; it was information which led to a search, not information derived from a search; it was not disseminated to the press or the general public or persons from whom the applicant could reasonably expect such private information would be withheld, but was communicated only to a person who had statutory responsibilities for carrying out regulatory inspections for the

purposes of protecting public health, and who was himself subject to requirements of confidentiality.[77] In all the circumstances it cannot be said that the applicant's right to constitutional privacy was breached by the communication made by Mr Enslin to Mr Coote. The discussions between the three inspectors during the search added little to the matter, bearing in mind that Mr Coote was an experienced professional exercising his ordinary discretionary functions when deciding what to look for, what to inspect and what to seize.

[52] Whether or not the inspection could have been conducted in a more sensitive manner was a matter of some dispute, but was not the issue before us. Our task has been to decide whether Mr Coote seized the disputed items in a constitutionally improper manner. For substantially the same reasons as those give by McLaren J, I am of the opinion that the answer is no, and that the appeal must fail.

Costs

[53] The applicant was substantially successful in respect of the referral but failed on the appeal. The split between the referral and the appeal resulted from the procedural requirements of the interim Constitution, but if regard is had to the case as a whole, it was really one matter and was conducted as such at all times. The appeal did not add

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[77] Section 34 of the Medicines Act provides that:

> "No person shall . . . disclose to any other person any information acquired by him in the exercise of his powers . . ."

substantially to the costs and it is appropriate that the applicant be allowed all the costs of the proceedings before us.

The Order

It is ordered that:

7. Section 28 (1) of the Medicines and Related Substances Control Act 101 of 1965 is inconsistent with section 13 of the interim Constitution and is declared invalid.

8. The appeal is dismissed.

9. Mr Coote and the Minister are jointly and severally to pay the costs of the proceedings in this Court, including the costs of two counsel.

Chaskalson P, Langa DP, Ackermann J, Goldstone J, Kriegler J, Madala J, Mokgoro J and O'Regan J concur in the judgment of Sachs J.

SACHS J

For the Applicant / Appellant: Mr N Singh SC and Mr K Govender, instructed by Ash Singh & Associates

For the Respondents: Mr TN Aboobaker SC and Mr M Govindasamy, instructed by the State Attorney (Natal)