

Case and another v Minister of Safety and Security and Others

Case CCT 20/95

Explanatory Note

The following explanation is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

These cases concerned a challenge to the constitutionality of section 2(1) of the Indecent or Obscene Photographic Matter Act, which prohibited the possession of indecent or obscene photographic matter. The Court was unanimous in its agreement with the order of Mokgoro J to the effect that s 2(1) was invalid and of no force and effect as from the date of judgment. However, there were differing reasons for the finding of unconstitutionality.

In a judgment delivered by Didcott J and concurred in by the majority of the Court, it was held that s 2(1) constituted an infringement of the right to personal privacy guaranteed by s 13 of the interim Constitution. The invasion of the right to privacy, the Court held, was aggravated by the very broad definition of indecent or obscene photographic matter contained in the Act. The Court held that the infringement of the right to privacy was neither reasonable nor justifiable in terms of s 33(1) of the Constitution and therefore s 2(1) was unconstitutional.

The Court did, however, note that an invasion of privacy may be permissible in terms of the limitation clause, where the material concerned was so pernicious that a ban on its possession could be said to serve a useful purpose in the campaign against the production of such material. This was not, however, the case in respect of the challenged section because the section covered innocuous material that deserved to be protected by the constitutional right to privacy.

Having established that s 2(1) constituted an unreasonable and unjustifiable violation of the right to privacy, the Court found it unnecessary to consider whether s 2(1) violated the possessor's right to freedom of expression and therefore left the question open.

The judgment of the majority of the Court was delivered by Didcott J. Mokgoro J delivered a minority judgment holding that s 2(1) constituted an unjustifiable infringement of the right to freedom of expression as well as the right to privacy. Langa J and Madala J delivered separate judgments concurring with Didcott J while Sachs J, delivered a separate judgment concurring with both Mokgoro J and Didcott J.