

Explanatory Note

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*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.*

The producers of the magazine *Hustler*, and one of its franchisees, appealed against a decision of the Supreme Court refusing to refer to the Constitutional Court the question of whether the Publications Act 42 of 1974 and the Indecent or Obscene Photographic Matter Act 37 of 1967, or sections thereof, were unconstitutional. The applicants had sought a declaratory order after the repeated banning of the magazine and seizure of their merchandise. The Supreme Court had refused to refer the matter on the ground that the question that called for the Constitutional Court's consideration was the sole issue raised.

The Court upheld the appeal with costs. It rejected the finding of the Supreme Court that the referral was not competent, holding instead that an issue could be referred to the Constitutional Court irrespective of whether it was the only one in the case or there were others that were not referable.

Having found that the applicants' request for a declaratory order should have been referred, the Court considered the merits of the matter. The Court decided that it had a discretion to grant a declaratory order. However, it decided not to grant such an order here because the legislation challenged had recently been repealed and replaced by the new Films and Publications Act of 1996, which rendered the questions of constitutional validity sought to be determined wholly academic. The Court noted that although the new Act was not yet in operation, it soon would be, and found that the applicants would obtain no advantage from an order dealing with the repealed legislation.

The judgment of the Court was delivered by Didcott J and was concurred in by the other members of the Court.