

**CONSTITUTIONAL COURT OF SEYCHELLES**

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**Reportable**  
[2019] SCCC 2  
CP 10/2017

In the matter between:

**RALPH VOLCERE**  
*(rep. by Frank Elizabeth)*

**Petitioner**

and

**MINISTER FOR HOME AFFAIRS & LOCAL  
GOVERNMENT**

**1<sup>st</sup> Respondent**

**GOVERNMENT OF SEYCHELLES**

**2<sup>nd</sup> Respondent**

**THE ATTORNEY GENERAL**

**3<sup>rd</sup> Respondent**

**MINISTER OF HEALTH**  
*(rep. by George Thachett)*

**4<sup>th</sup> Respondent**

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**Neutral Citation:** *Volcere v Minister For Home Affairs & Ors* (CP10/2017) [2019] SCCC 2  
(31<sup>st</sup> May 2019)

**Before:** Burhan, André & Nunkoo JJ

**Summary:** Whether or not the Minister for Home Affairs the 1<sup>st</sup> Respondent and the other Respondents have individually and/or collectively failed, refused or neglected to make regulations in terms of the Misuse of Drugs Acts 2016 (MODA 2016), and whether this failure violates the Petitioner’s Charter Rights, including the right to life (Article 15); the Right to Dignity (Article 16) and the right to health (Article 29). Duty to pass regulations is created by the enabling legislation, and has not been discharged. Failure to pass regulations does not violate the Constitution.

**Heard:** 19 March 2019

**Delivered:** 31 May 2019

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**ORDER**

- (a) The first and fourth respondent have a statutory duty to make and issue regulations under s 4 and 54(1)(a) of the Misuse of Drugs Act;
- (b) The Petitioner has failed to establish that the failure to make and issue regulations under the provisions in (a) constitutes an infringement to the petitioner's mothers right to life, dignity and health;
- (c) The first and fourth respondent are ordered to issue regulations within 24 months, which regulations will have prospective effect.

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## JUDGMENT

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### **BURHAN J (NUNKOO J concurring)**

- [0] This case raises constitutional questions regarding whether or not the Minister for Home Affairs and Local Government (1st Respondent) has failed, refused or neglected to make regulations in terms of the Misuse of Drugs Acts 2016 (MODA 2016), and whether this failure violates the Petitioner's mother's right to health, life and dignity.
- [1] The Petitioner in his amended petition dated 27th March 2018 seeks the following relief, namely that the Constitutional Court:
- a) *Declare that the 1<sup>st</sup> Respondent's refusal or failure to make regulations under the Misuse of Drugs Act 2016 to regulate the possession, use, sale, supply prescription or other dealing in, or the manufacture or importation or exportation of any controlled drug for medical or scientific purposes is a contravention of Articles 15, 16 and 29 of the Constitution.*
  - b) *Issue a writ of mandamus against the 1<sup>st</sup> Respondent ordering her to immediately make regulations under the Misuse of Drugs Act 2016 to regulate the possession, use sale, supply, prescription or other dealing in or the manufacture or importation or exportation of any controlled drug for medical or scientific purposes.*
  - c) *Order the 1<sup>st</sup> respondent to give the said regulations retrospective effect to apply from the 1<sup>st</sup> of June 2016 when the Misuse of Drugs Act came into operation for the reasons provided herein above.*

[2] The Petitioner whose mother is suffering from Alzheimer’s disease, is seeking a declaration from the Constitutional Court that the 1st Respondent has violated and continues to violate Articles 15, 16 and 29 of the Constitution of the Republic of Seychelles (hereinafter referred to as the Constitution) by refusing to make regulations under sections 4 (1) and 54 (2) (a) of MODA 2016. Specifically, the Petitioner is seeking to access cannabis to manage the symptoms of his mother’s Alzheimer’s. It is his contention that the 1st Respondent’s failure to pass regulations is depriving many terminally ill Seychellois access to this “revolutionary alternative medical treatment and therapy”. Be that as it may, the prayers for relief as detailed above have not asked this Court to consider whether or not the medical use of cannabis should be permitted, but rather whether there is failure to make new regulations has resulted in a constitutional breach. It would be pertinent at this stage to set out Articles 15, 16 and 29 of the Constitution.

**Article 15 of the Constitution reads as follows.**

- (1) Everyone has a right to life and no one shall be deprived of life intentionally.*
- (2) A law shall not provide for a sentence of death to be imposed by any Court.*
- (3) Clause (1) is not infringed if there is a loss of life—*
  - (a) by any act or omission which is made not punishable by any law reasonably justifiable in a democratic society; or*
  - (b) as a result of a lawful act of war.*

**Article 16 of the Constitution reads as follows:**

*Every person has a right to be treated with dignity worthy of a human being and not to be subjected to torture, cruel, inhuman or degrading treatment or punishment.*

**Article 29 of the Constitution reads as follows:**

- (1) The State recognizes the right of every citizen to protection of health and to the enjoyment of the attainable standard of physical and mental health and with a view to ensuring the effective exercise of this right the State undertakes –*
  - a) To take steps to provide for free primary health care in State institutions for all its citizens*
  - b) To take appropriate measure to prevent, treat and control epidemic, endemic and other diseases*

- c) *To take steps to reduce infant mortality and promote the healthy development of the child;*
- d) *To promote individual responsibility in health matters;*
- e) *To allow, subject to such supervision and conditions as are necessary in a democratic society, for the establishment of private medical services.*

[3] The Petitioner further seeks a writ of mandamus against the 1st Respondent as a constitutional remedy to compel her to immediately make such regulations under the MODA 2016 and to give the said regulations retroactive effect by rendering them applicable from the 1st June 2016 when the MODA 2016 came into operation, so as to give legitimacy to the acts of those terminally ill Seychellois who have been using and continue to use cannabis or its derivatives to treat their medical conditions, and to the acts of the people who supply, sell, possess, prescribe, import, export, manufacture, cultivate or otherwise deal with the said products.

[4] The Respondents by way of their reply dated the 26th February 2018, raised threefold preliminary objections against the above Petition, as follows:

*(1) Firstly, that the Petition is infructuous in law, in that the Regulations for medical use of controlled drugs in accordance with section 4 of the MODA 2016 are already in place in view of section 55 (3) of the MODA 2016 hence the Petition being infructuous and only to be dismissed; and*

*(2) Secondly, that the Petitioner has no locus standi to file the Petition, in that there is no violation or likely contravention of any of the Constitutional rights of the Petitioner under the MODA 2016; and that there is no prima facie case of any alleged violation of the Constitutional rights as alleged by the Petitioner and further that the Petitioner does not enjoy any guaranteed/vested right within the framework of the Constitution to pray for mandatory relief from Court without any actual violation of any rights guaranteed in the Constitution.*

*(3) Thirdly, the nature of the relief prayed for by the Petitioner is beyond the jurisdiction of the Court as it falls especially under the policy decision of the executive as well as legislative functions of the State. And further, it is respectfully averred that the relief sought by the Petitioner is not sustainable under the principle of separation of powers and granting of any relief prayed for by the Petitioner would amount to intrusion into the powers and functions of other organs of the State or invalidating the scheme of constitution with reference to*

*judicial powers; and that the Respondents dependent on the ruling on the plea in limine litis reserves the right to file defence on the merits and should the plea in limine succeed in their favour, moves for dismissal of the Pleint and compensatory costs.”*

- [5] In support of the above argument relating to the purported upsetting of the principle of separation of powers the Respondents made reference to the following cases: (Republic v Albert Geers & Ors (2018) SCSC 39), (Khanaiya Lal Sethia & Anr v Union of India & Anr of the 4th August 1997; Academy of Nutrition improvement and others v/s Union of India Writ no 80 of 2006 Ruling), and (Centre for Health Human Rights and Development (CEHURD) and Ors v/s Attorney General (Constitutional Petition No. 16 of 2011) Ruling of the 5th June 2012).
- [6] By its ruling dated 11 September 2018, this Court dismissed the preliminary objections of the Respondents and even though invited by Learned Counsel for the Respondents when making his final submission, to revisit its ruling, this Court is of the view that the necessity to do so does not arise.
- [7] Thereafter the case proceeded and both parties made their final submissions.

### **Petitioner’s Submissions**

- [8] Learned Counsel for the Petitioner Mr. Frank Elizabeth, strenuously argued for the legalisation of the use of cannabis for medical purposes. Mr Elizabeth submitted that despite the new MODA 2016 being passed by the National Assembly authorising the use of cannabis for medical and scientific purposes, the 1st Respondent Minister has failed up to date despite a period of two years having lapsed, to pass any regulations to this effect. This has resulted in the citizens of this country including the Petitioner who wishes to use cannabis for treatment of medical conditions not being able to use such medication, thereby depriving the citizens of their right to life as guarded by Article 15 of the Constitution. Learned Counsel also referred to an email sent by the Attorney General dated 2nd October 2018 and submitted that despite the instructions been given by the Attorney General, the Minister had failed to act which indicated “a contradictory approach being taken by the Government”.

[9] Learned Counsel for the Petitioner next referred to a report tendered by the International Narcotics Control Board tendered by the Respondents in this case. Referring to paragraph H of the report at page 10, he submitted that it stated that “weak regulation of medical usage has allowed the diversion of cannabis to nonmedical use and according to some has facilitated the legalisation of non-medical cannabis use in some states in the United States”. He further submitted that this highlights the need for strong regulations to be made by the 1st Respondent. Learned Counsel Mr. Elizabeth also referred to paragraph 362 of the report and quoting the report stated that “in September 2018 the Constitutional Court of South Africa upheld a lower Court ruling striking down certain provisions of the countries Drug Trafficking Act and the Medicines and Related Substances Act that criminalised the use or cultivation of cannabis in a private place by an adult for his or his own personal consumption on the grounds that those provisions violated an individual’s constitutional right to privacy.” Learned Counsel also referred to the relevant parts of the report concerning Lesotho and Canada as well.

[10] Mr. Elizabeth next submitted that as the law mandates the use of cannabis for medical purposes, the failure of the government to pass the regulations has resulted in the violation of the right of the Petitioner to have a freedom of choice of a remedy resulting in her Constitutional right to health and life being contravened.

[11] It is apparent that Learned Counsel quite correctly did not seek to rely on Article 16 of the Constitution in his submissions which in our view has no relevance to the issue before us. He further submitted that the several internet links tendered by him indicate that cannabinoids can be used as a treatment for Alzheimer’s disease which his clients suffers from and the treatment by cannabinoids are more relevant to the management of the disease, than the cure.

### **Respondents’ Submissions**

[12] Learned Counsel for the Respondents Mr. George Thachett countered that there was no evidence before Court that the Petitioner’s mother actually needed or required any medication with controlled drugs other than the averments in the petition. He further submitted that the prayers in the petition refer to the necessity of regulations and although

lengthy submissions were made in respect of the effective medical use of cannabis, this was not an issue before Court but the issue before Court was the need for regulations under the new Act, MODA 2016. He further submitted that the decision to amend the regulation or repeal the regulation is a decision the government has to take and is exclusively a policy decision of the government. Learned Counsel for the Respondents Mr. Thachett further referred to the United Nations International Narcotic Control Board report which raised concerns that poorly controlled programs for the medicinal use of Cannabis can have adverse effects on public health.

### **Findings of the Court**

- [13] At the very outset, we wish to state that this Court following the liberal interpretation as set out by Domah JA in the case of Chow v/s Attorney General and Ors SCCA 2/2007 has already made a ruling that the Petitioner does have locus standi to continue with the case on behalf of his sick mother for reasons already given in our ruling dated 11 September 2018. Further we observe the petitioner in addition to his affidavit has annexed to his final written submission a medical certificate indicating that Ms Marie Volcere suffers from Alzheimer’s disease which has not been contested by the Respondents. Therefore the Respondents contention that there was no evidence before Court that the Petitioner’s mother actually needed or required any medication with controlled drugs other than the averments in the petition bears no merit.
- [14] We would next proceed to deal with the relevant provisions in MODA 2016 dealing with the need to control drugs being used for medical and scientific purposes and the provisions dealing with regulations as contained therein. It would be pertinent at this stage to set out the relevant provisions of MODA 2016 prior to analysing the arguments of the Petitioner.
- [15] Section 3 (1) of MODA 2016 reads as follows:
- 3. (1) Controlled drugs and preparations thereof shall be classified in the First Schedule to this Act according to the degree of control to which they should be subject, as follows –*

- a) *Class A: Drugs that are subject to special measures of control in view of the particular harms that their non-medical or non-scientific use can cause, including those classified in Schedule IV of the 1961 Convention and in Schedule I of the 1971 Convention;*
- b) *Class B: Drugs having a medical and/or scientific use which should be subject to control in view of the harms that their non-medical or non-scientific use can cause, including those classified in Schedule II of the 1971 Convention, and in Schedule II and Schedule I of the 1961 Convention, except the drugs included in its Schedule IV;*
- c) *Class C: Drugs having a medical and/or scientific use which should be subject to control in view of the harms that their non-medical or non-scientific use can cause, but of a less substantial degree than Schedule II drugs, including those preparations classified in Schedule III of the 1961 Convention and in Schedule III and Schedule IV of the 1971 Convention.*

[16] A reading of this section clearly indicates the important societal need to control drugs being used for medical and scientific purposes in view of the harm that their non-medical and/or non-scientific use can cause. Section 54(1) of MODA 2016, empowers the 1st Respondent in consultation with the Minister responsible for Health i.e. 4th Respondent to make regulations for carrying into effect the objectives and purposes of this Act. It is to be specifically mentioned that sections 54(1) and 54 (2)(a) of MODA2016 refer to regulations being made for the, “authorising for possession, use, sale, supply, prescription or other dealing in, or the manufacture or importation or exportation of, any controlled drug for medical or scientific purposes”.

[17] Thus MODA 2016 provides the 1st Respondent, in consultation with the Minister responsible for Health, the power to make regulations, which if exercised will form part of MODA 2016. It is to be borne in mind that in Seychelles, the legislative authority is vested in the National Assembly, as set out in Article 85 of the Constitution. However, it is also constitutionally permissible, in terms of Article 89 of the Constitution, for (original) legislation adopted by the National Assembly, to contain enabling provisions which delegate powers to members of the Executive branch of government to adopt



subordinate legislation (such as regulations) in the process of implementation. This means that by virtue of enabling provisions in legislation, a member of the Executive branch of government or any other functionary could be assigned powers to further make laws, in certain circumstances. The exercise of this power under Article 89 is to be reasonable and in good faith, in accordance with the purposes it was intended for and the Constitution.

[18] In *Premier, Mpumalanga v Executive Committee, Association of State-aided Schools, Eastern Transvaal* 1999 2 BCLR 151 (CC), the Constitutional Court of South Africa observed the following:

*“Regulations are a category of subordinate legislation framed and implemented by a functionary or body other than the legislature for the purpose of implementing valid legislation ... A legislature has the power to delegate the powers to make regulations to functionaries when such regulations are necessary to supplement the primary legislation.”*

[19] Although the power to delegate law-making functions to the Executive branch of government raises difficult questions relating to the traditional application of the doctrine of separation of powers, this practice is inevitable in a modern state, where the National Assembly may not be well placed to make the necessary policy determinations. The South African Constitutional Court held in *Executive Council, Western Cape Legislature* that for the purposes of good governance, it was constitutionally permissible for an Act of Parliament to delegate law-making powers to the Executive. The Court stated that:

*“In a modern state detailed provisions are often required for the purpose of implementing and regulating laws, and parliament cannot be expected to deal with all such matters itself.”*

[20] MODA 2016, provides for the delegation of law-making functions to the 1st Respondent and the Minister for Health to supplement enabling legislation to take into account the possible need to regulate the use of certain drugs for scientific or medicinal purposes. For better understanding we set out section 54(1) and 54(2) (a) of MODA 2016 which reads as follows:

54. (1) *The Minister may, in consultation with the Minister responsible for health, make regulations for carrying into effect the objectives and purposes of this Act.*

(2) *Without prejudice to the generality of subsection (1), regulations may provide for*

–  
*(a) authorising the possession, use, sale, supply, prescription or other dealing in, or the manufacture or importation or exportation of, any controlled drug for medical or scientific purposes;*

[21] We are satisfied that there is a need to control drugs being used for medical and scientific purposes in view of the harms that their non-medical and/or non-scientific use can cause and the burden and duty is cast on the Minister in consultation with the Minister for Health to determine whether and how such drugs may be available.

[22] Section 4 of MODA 2016 states that:

*d) 4. (1) A controlled drug may be manufactured, imported or exported, and dealt with in the Seychelles for medical or scientific purposes in accordance with regulations made under this Act.*

*(2) In any proceedings under this Act a person claiming to have acted pursuant to a provision of this Act or to regulations made under subsection (1) shall bear the burden of proving that fact.*

[23] It is apparent on a reading of this section that the intention of the Legislature was that the manufacture, import or export, and dealing with of the controlled drugs listed in the Act would be permitted in Seychelles for medical or scientific purposes only in accordance with regulations made under this Act.

[24] Furthermore, we interpret section 4(1) as requiring and mandating new regulations to be drafted in accordance with the statutory scheme of MODA 2016. We observe that section 4(1) of the MODA 2016 provides that, “a controlled drug may be manufactured, imported or exported, and dealt with in Seychelles for medical or scientific purposes in accordance with regulations made under this Act” (emphasis ours). Unfortunately no regulations have been made under the new Act up to date. The only regulations in existence are those referred to in the saving provision contained in section 55(3) of

MODA 2016 which provide that the regulations enacted under the repealed Misuse of Drugs Act 1990 (MODA 1990) i.e. the regulations of the 22nd of May 1995 enacted under section 44(1) of MODA 1990, remain in force.

[25] It is our finding from the wording of section 4 (1) of the MODA 2016 that the section refers specifically for new regulations to be made under the new MODA 2016, in accordance and with due consideration to the new provisions of law contained within the new Act and not found under the old Act MODA 1990.

[26] It is to be further observed that section 44 (1) (a) of the previous Act (MODA 1990) i.e. the section under which the above regulations were enacted, differs in its wording from the pertinent provisions of the new Act. Moreover the nature of the MODA 2016 is quite different from the old Act, particularly in the manner that it penalises the unlawful use of drugs. Overall, its approach is resoundingly more progressive.

[27] Section 44 (1) (a) of the MODA 1990 reads as follows:

*“The Minister may make regulations for carrying into effect the purposes and provisions of this Act and, without limiting the generality of the foregoing, may make regulations-*

*(a) authorizing the possession, sale, supply, prescription or other dealing in, or the manufacture or importation or exportation of, a controlled drug and prescribing the circumstances and conditions under which the controlled drug may be possessed, sold, supplied, prescribed or otherwise dealt with or manufactured or imported or exported”*

[28] Section 54 (1) and (2) (a) of the MODA 2016 on the other hand reads:

*“(1) The Minister may, in consultation with the Minister responsible for health, make regulations for carrying into effect the objectives and purposes of this Act.*

*(2) Without prejudice to the generality of subsections (1), regulations may provide for –*

*(a) authorizing the possession, use, sale, supply, prescription or other dealing in, or the manufacture or importation or exportation of, any controlled drug for medical or scientific purposes” (emphasis ours).*

- [29] The addendum “for medical or scientific purposes” is contained only in the new and not in the old Act. This clearly indicates that there has been a material change in the law, and that the factors that ought to be considered by the Minister when enacting the said regulations under the new Act are different than the ones that had to be considered under the old Act, a notion which is further substantiated by the fact that under the new Act the Minister of Health ought to be consulted.
- [30] Lastly, it is our view that the saving provision contained in section 55(3) of the MODA 2016 with respect to regulations passed under the previous Act was only intended to provide an interim solution to prevent gaps in the law until regulations made under the new Act come into force, and was never intended to be of a permanent nature. Section 55 (3) of the MODA 2016, explicitly states that the regulations made under the previous Act, “... shall continue in operation until amended or repealed under this Act” (emphasis ours), thereby clearly indicating the intended temporary nature of the operation of the old regulations under the old Act until regulations were amended or repealed under the new Act.
- [31] The extended application of the regulation from the 22nd May 1995 enacted under the previous Act does not suffice to fulfil the statutory duty provided for in section 4 (1) of the MODA 2016 to enact new regulations regarding the manufacturing, import and export of controlled drugs for medical and scientific purposes. It appears that no visible effort has been made by the Ministers concerned up to now (May 2019) to address their mind to the new provisions of MODA 2016 to bring in such necessary new regulations, resulting in the creation of the concern of the Petitioner that his mother’s constitutional rights under Article 15 (right to life) and Article 29 (right to health care) were being infringed.
- [32] We recognise that the passing of such regulations requires expertise and detailed consideration of many factors outside of the knowledge of the Petitioner or the scope of this Court’s appreciation. To pass such important regulations requires a review of all of the scheduled drugs, the mobilisation of resources and, especially where significant policy changes are to be introduced, political will. We can understand that this takes time.

The regulations under the previous MODA 1990 were only passed in 1995, this is indicative of how long this process may take. Recognising the various factors affecting the passing of regulations we recognise a suitable timeframe must be given within which to pass regulations. Moreover, we would be ill placed to dictate to the 1st Respondent what the contents of such regulations should be. This touches on the Respondents' arguments regarding the separation of powers.

[33] The Respondent specified in detail that the relief prayed for is not sustainable under the principle of separation of powers and granting of any of the relief prayed for by the petitioner would amount to intrusion into the powers and functions of other organs of the State or invalidating the scheme of the Constitution with reference to judicial powers.

[34] In *Public Utilities Corporation v Elisa* (20 of 2009) [2011] SCCA 8 (29 April 2011) the Court held that;

*“[47] The fact of the matter is, however, there are limits up to which, under the Separation of Powers, the Courts could go. It cannot with by the stroke of a judicial pen repeal and replace an Act of Parliament, unless it is inconsistent with a particular provision of the Constitution. Laws passed by Parliament may be restrictively or generously interpreted to meet the justice of the case but they cannot be repealed and replaced by the Judiciary.*

*[49] It is our view that we should not in our fledgling democracy proceed with haste in the matter but with circumspection having regard to the separation of powers.”*

[35] We therefore agree that Court must be mindful of the separation of powers in this matter, and our decision gives the necessary and constitutional deference to the Executive and Legislative branches of government in accordance with Constitution and Seychellois jurisprudence.

[36] On consideration of the submissions before us, although much has been said and submitted about the revolutionary alternative medical treatment and therapy of cannabis, the burning issue in this case is the interpretation of numerous provisions in regard to regulations as set out above as contained within the new MODA 2016 which we have

done. Of the three main organs of the State, it is the function and duty of the Judiciary to interpret any provisions relating to law or any regulations.

[37] In this instant case all this Court has done is what it is empowered to do, interpret the law and in doing so and having concluded that the law indicates that MODA 2016 requires new regulations to be enacted, it cannot be said that granting the relief of the petitioner, has resulted in the Judiciary intruding into the powers of the Executive and Legislature. The manner which the Executive regulates the use of scheduled drugs for scientific and medicinal purposes is beyond the expertise and jurisdiction of this Court.

[38] Our inquiry is therefore limited to whether an obligation exists to make regulations, which we have found it to, and whether that obligation has been discharged, which it has not. In reviewing the conduct of the different branches of government for constitutional and legal compliance, the Court is able to evaluate both positive conduct and, as in this case, the absence of conduct in this regard.

[39] The South African Constitutional Court in the case of Minister for Environmental Affairs & Ano v Aquarius Platinum SA Pty Ltd & Ors [2016] ZACC 4. in considering the failure of a Minister to make regulations made the following observations in instances where legislation places a mandatory obligation on the Executive:

*[41] The Minister was the functionary mandated to make the regulations within three months from the date of publication. This she failed to do and there is no explanation for the failure, despite the fact that she was cited as a party to the proceedings. It may well be that she has a plausible explanation for her failure but we simply do not know because she chose not to furnish it. For now it is fair to infer from her failure to give an explanation that she has none. Otherwise she would have provided one if she had it. More so because the matter raises a serious dereliction of duty on her part.*

*[42] The Minister's failure to make regulations here has serious implications to upholding the Constitution and the rule of law. Her omission undermined not only the legislative process authorised by the Constitution but also thwarted the operation of legislation in the making of which she had participated...*

*[43] Every Minister carries an obligation to uphold the Constitution as well as to respect and promote the rights in the Bill of Rights. One of them is everyone's right to*

*an environment that is not harmful to their health or wellbeing and also the right to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures. The Environmental Amendment Act is a legislative measure the Minister was duty-bound to enforce. Here the omission had quite the opposite effect. From September 2014 when the Act came into force to July 2015 when she published the regulations, a lacuna was created which may have had catastrophic consequences.”*

- [40] This case indicates the severity of a failure to pass regulations, and illustrates how far a Court can go in considering that failure. It also reminds us of the constitutional element that the requirement to pass regulations may entail. When the Legislature enacts laws regarding the use and misuse of drugs, and when the Minister is regulating the lawful use of those drugs, there is an implication on the availability of palliative or soothing remedies to persons such as the Petitioner’s mother. This will impact on their right to health and even their right to life and dignity. However, this is not necessarily a breach of those rights. For the purposes of this judgment, this case is somewhat different as that in the quotation above as there was no distinct time limit set for the passing of regulations by law and because the efficacy of the MODA 2016 is not dependent on the passing of the regulations as the previous regulations had been saved. Therefore it cannot be said that such a lacunae referred to in the above case exists in our law.
- [41] It is our considered view that even though the new regulations have not yet been made by the 1st Respondent, the saving of the previous regulations under the old Act, saves the Minister from being held responsible for any contravention under Articles 15, 29 and other Charter rights.
- [42] Regulating the use of scheduled drugs, for medicinal and other purposes will inevitably have implications. The experiences in other jurisdictions as borne out in the report of the International Narcotic’s Control Board demonstrates the complexities, the technical and time-consuming nature of regulating this area, broad and competing public policy considerations and other factors that render this process an important but challenging task. The Court however, cannot dictate how this task should be undertaken.

[43] Having thus interpreted the law and the need for regulations under the new MODA 2016, we leave it to the Ministers concerned, the 1st and 4th Respondents to determine the nature, content and scope of the new regulations on the basis that they act reasonably, in good faith, rationally and within the parameters of the Constitution. If a citizen is of the view that the new regulations are unconstitutional once enacted, they are free to seek the intervention of this Court.

[44] For the aforementioned reasons Learned Counsel for the Respondent's contention that granting the relief of the petitioner has resulted in the Judiciary intruding into the powers of the Executive and Legislature bears absolutely no merit and is accordingly dismissed.

[45] Therefore, although we find that the 1st Respondent has a positive obligation to pass regulations under the MODA 2016 within a reasonable time, we do not find that the failure has amounted to a violation of any constitutional provisions. We would strongly urge the 1st Respondent to take note that the continuation of the reliance on the previous regulations cannot go on indefinitely, it has a statutory duty to pass regulations under the new MODA 2016 and should apply its efforts to this.

[46] Therefore we order as follows:

- a. The first and fourth respondent have a statutory duty to make and issue regulations under s 4 and 54(1)(a) of the Misuse of Drugs Act;
- b. The Petitioner has failed to establish that the failure to make and issue regulations under the provisions in (a) constitutes an infringement to the petitioner's mothers right to life, dignity and health;
- c. The first and fourth respondents are ordered to issue regulations within 24 months, which regulations will have prospective effect.



Signed, dated and delivered at Ile du Port on 31 May 2019

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Burhan J

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Nunkoo J

**ANDRE J (concurring) :**

**Introduction**

[47] I concur with the judgment of Burhan J, however, for different reasons. This Judgment arises out of an Amended Constitutional Petition No. 10/2017 of the 28<sup>th</sup> March 2018, filed by Ralph Volcere (“*Petitioner*”) against the Minister for Home Affairs and Local Government (“*1<sup>st</sup> Respondent*”), Government of Seychelles (“*2<sup>nd</sup> Respondent*”), the Attorney General (“*3<sup>rd</sup> Respondent*”) and Minister for Health (“*4<sup>th</sup> Respondent*”).

[48] This petition has some parallels with Constitutional Petition No. 01/2018 of 25<sup>th</sup> January 2018, filed by Mr Alexander Geers (the *Petitioner*). There will thus be some overlap in the findings.

[49] The *Petitioner* is seeking the following prayers. Firstly, a declaration that the 1<sup>st</sup> Respondent’s refusal or failure to make regulations under the Misuse of Drugs Act 2016 (“*MODA 2016*”) to regulate the possession, use, sale, supply, prescription or other dealing in, or the manufacture or importation or exportation of, any controlled drug for medical or scientific purposes, is a contravention of the Constitution. He claims that the failure contravenes Articles 15 (the right to life), 16 (the right to dignity) and 29 (the right to health care) of the Constitution.

[50] Secondly, he seeks a writ of mandamus against the 1<sup>st</sup> Respondent ordering her to immediately make regulations under *MODA 2016* to regulate the possession, use, sale, supply, prescription or other dealing in, or the manufacture or importation of, any

controlled drug for medical or scientific purposes; and thirdly, that the 1<sup>st</sup> Respondent, be ordered to give the said regulations retrospective effect to apply from 1<sup>st</sup> June 2016, when the MODA 2016 came into operation.

[51] The Respondents, by way of reply of 27<sup>th</sup> March 2018, raised three preliminary objections which were dismissed on 18<sup>th</sup> September 2018. The court determined that the Petitioner had the necessary locus standi as had been laid out in the pleadings, and that the Petition was not infructuous and vexatious. The Respondents filed their defence on the merits.

[52] They vehemently objected to the prayers of the Petitioner. They claimed that sections 4 (1) and 55 (1) of MODA 2016 were similar to the corresponding provision of Section 44 (1) of the repealed Misuse of Drugs Act, 1990 (the 1990 Act). The repealed Act also had corresponding regulation (SI dated 22<sup>nd</sup> May 1995), in pursuance with section 44 (1), which enabled and authorised the possession, supply, prescription or other dealing in, or the manufacture or importation or exportation of, controlled drug and prescribing the circumstances and conditions under which the controlled drug may be possessed, sold, supplied, or otherwise dealt with or manufactured or imported or exported and also the usage of controlled drugs for medical services.

[53] They further stated that Section 55 (1) of MODA 2016 is a repeal and saving provision which does not affect the previous operation of the 1990 Act or anything duly done or suffered under it. Thus, the regulations made in 1990 Act continued to operate under subsection (d) of section 55, until these were amended or repealed under MODA 2016.

[54] Finally, they said that in light of the operative regulations, like SI dated 22<sup>nd</sup> May 1995, made under Section 44 (1) of the 1990 Act, there was no need for new regulations under Section 4 of MODA 2016, as claimed by the Petitioner.

## **Background**

- [55] The Petitioner is a citizen of Seychelles, and an editor of a local newspaper. He brings this claim under Article 40 of the Constitution of Seychelles, which sets out the fundamental duties of citizens of Seychelles.<sup>1</sup>
- [56] He claims that the first Respondent has failed in her duty to comply with her statutory duty to provide regulations to, inter alia, use or prescribe cannabis for medical or scientific purposes.
- [57] He claims that the use of cannabis has been proved to cure, heal, reduce pain and medical complications associated with several chronic diseases such as Alzheimer's, cancer, multiple sclerosis, asthma, depression, epilepsy, HIV/AIDS. He claims that many countries have now legalised cannabis not just for scientific use, but also for recreational use.
- [58] He alleges that his elderly mother, Mrs Marie Therese Volcere, suffers from Alzheimer's and has been given medical advised to try cannabis oil as an alternative medical treatment, since conventional medicine does not alleviate her condition. He claims that her situation is deteriorating rapidly. The Petitioner claims that many cancer patients have expressed to him the desire to try this treatment to aid with chemotherapy side effects. And that he knows of many Seychellois who use this treatment illegally to manage their illnesses. He says that unless this is legalised through the regulations, many terminally ill Seychellois will continue to suffer. This failure, he claims, violates the constitutional rights of these terminally ill Seychellois, including his mother. This includes their right to life, to dignity and to health. In his view, it is just and necessary to order the respondents to make the regulations.

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<sup>1</sup> This provision reads:

**'Fundamental duties**

40. It shall be the duty of every citizen of Seychelles-

- (a) to uphold and defend this Constitution and the law;
- (b) to further the national interest and to foster national unity;
- (c) to work conscientiously in a chosen profession, occupation or trade;
- (d) to contribute towards the well-being of the community;
- (e) to protect, preserve and improve the environment; and
- (f) generally, to strive towards the fulfilment of the aspirations contained in the Preamble of this Constitution.'

- [59] In their defence, filed on 30 October 2018, the Respondents denied that there was failure by the first Respondent to issue regulations under MODA 2016. They claim that regulations are already in place, because of the saving provisions in Section 55(3) of MODA 2016. They claim that the Section 4(1) of MODA, which enjoins the making of regulations, is similar to Section 44 of the 1990 Act. The executive, in terms of that Act, passed regulation dated 22<sup>nd</sup> May 1995 which enabled, inter alia, supply and prescription of controlled drugs and prescribed conditions under which the controlled drugs could be managed for medical services. Since this regulation already existed, there was then no need for new regulations.
- [60] They claimed that the Petitioner had no right to demand regulation of cannabis as a controlled drug for medical and scientific purposes, because this was a policy decision to be made by the executive. And this decision would be made based on authentic scientific research and data, and the availability of experts and other facilities.
- [61] The Respondents stated that there was no merit in the Petitioner's stance that the regulations were necessary to legitimise use of cannabis for those who are terminally ill, because this kind of treatment is alien to the medical services rendered in Seychelles, and illegal.
- [62] The Respondents deny the medical benefits claimed by the Petitioner, stating that there was no conclusive scientific or data based proof. In their view, contrary literature existed, showing that such treatment may lead to drug abuse in users.
- [63] Additionally, they say the countries cited by the Petitioner as examples of legalised use of cannabis are distinguishable from the local context. Seychelles is a small jurisdiction with a small population. It has, they claim, a lot of social issues arising from substance abuse. Thus, they have a duty to protect the social interests of the community and are legally under no compulsion to follow situations in other jurisdictions.
- [64] In their view, there are effective treatments available to alleviate or manage medical situations like Alzheimer which are provided by the Minister of Health. In relation to the

use of cannabis to help with side effects of chemotherapy and radiography, the Respondents suggest that alleviating side effects is not as good a cure or a treatment of cancer. They claim that the government does all it can to overcome the side effects, and to manage or control diseases. The system, in their view, functions well. Accordingly, there is no infringement on the rights of terminally ill Seychellois. They say that the Constitution does not put any burden on the State to treat citizens with medical treatment of their choice.

[65] Accordingly, the Petitioner is not entitled to the prayers.

### **Submissions**

[66] Both Learned Counsel filed written submissions and a considerable amount of documents and case law. Due consideration has been given to the contents thereof.

[67] At the hearing of the matter as above-referred, Learned Counsel for the Petitioner Mr. F. Elizabeth produced before the Court a list of documents which the Petitioner relied upon more particularly, these included the United Nations Office on Drugs and Crime (UNODC) World Drug Report 2013, as well as links to various websites showing that cannabis can be used as a treatment for several diseases.

[68] He also referred to a comparative study showing that cannabis is safer than alcohol, physician data summary from the national cancer institute's comprehensive information database, article entitled a closer look at the therapeutic utility of cannabis and cannabinoids and some informal speculation on mechanisms of action, link to various websites which refers to case study of the effect of cannabis on epilepsy and seizure disorders, links to various websites which show that cannabis can be used as a treatment for addiction such as heroin addiction, several articles showing that cannabis can be used as a substitute for alcohol, harm reduction, substance abuse treatment.

- [69] The documents also included United States Patent showing that The United States of America as represented by the Department of Health and Human Services, Washington DC (US) has filed for patent of cannabinoids as antioxidants and neuro-protectants, links to various websites entitled "Alzheimer's Disease" which states that cannabinoids can be used as a treatment for Alzheimer's, agitation and aggression in Alzheimer's disease;<sup>2</sup> information about the effect of cannabis as a treatment for multiple sclerosis.<sup>3</sup> They also included the petitioner's mother's medical records, showing that she suffers from Alzheimer's disease.
- [70] Learned Counsel submitted that despite the Petitioner's request to make the regulations, the 1<sup>st</sup> Respondent has failed, refused or neglected to give any decision as to when she intends to make the said regulations.
- [71] He submitted that the refusal by the 1<sup>st</sup> Respondent or failure to make regulations amounts to a violation of the constitutional rights of those terminally ill Seychellois, including the Petitioner's mother, who wants to have access to this 'revolutionary alternative medical treatment' which has the potential to save their lives.
- [72] This, he submits, constitutes a violation of his mother's right to life right (Article 15), right to dignity (Article 16), right to health care (Article 29) of the Constitution.
- [73] The Petitioner further submits that it is just and necessary for the Court to issue a writ of mandamus against the 1<sup>st</sup> Respondent ordering her to make regulations under MODA 2016 to regulate the possession, use, sale, supply, prescription or other dealing in, or the manufacturer or importation or exportation of, any controlled drug for medical or scientific purposes.
- [74] His request is that this court should find that the articles referred to have been contravened due to the Respondents' failure and or refusal to make the stated regulations, and that the court is empowered to issue a mandamus against the 1<sup>st</sup> Respondent ordering

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<sup>2</sup> A study entitled "regulations Works" It's time for a New Approach to marijuana". Research on the history of cannabis published by Doctor David Bearman (MD) Executive Vice president, Society of cannabis clinicians/American Academy of cannabinoid medicine.

<sup>3</sup> Links to several websites and studies which deal with the effect of cannabis use on neuro degeneration, article by marijuana policy project entitled "effective arguments for advocates of regulating and taxing marijuana", pen drive containing several documentaries promoting the use of marijuana for medical use.

to immediately make the regulations. He also wants the court to order the 1<sup>st</sup> Respondent to give the regulations retrospective effect as of 1 June 2016 when MODA 2016 came into operation.

[75] Learned Counsels for the Respondents on their part submitted that this Court ought to note and be guided by South Africa's *Grootboom* judgment,<sup>4</sup> with respect to extent of the court's intervention into policy decisions and the "principle of institutional conversation". He also submitted that the recent matter concerning cannabis of *Minister of Justice and Constitutional Development and Ors and Gareth Prince and Kathleen Clarke and Ors and Doctors for life International Inc*<sup>5</sup> should be looked at, in which the court declared provisions in legislation criminalising use or possession of cannabis by an adult in a private place contrary to the right to privacy in s 14 of the South African Constitution, 1996.<sup>6</sup>

[76] The Respondents further submitted that the prayers sought were not within the boundaries of the jurisdiction of the Court to the extent of the enactment of the regulations under MODA 2016. The Court should not venture into the arena of the wordings and the nature of the contents of the regulations being left to the executive and medical professionals having the know-how and medical knowledge for the use of cannabis use. They submit that even if the Court can find that there are certain benefits as alleged in this matter by the Petitioner, this cannot be elevated to be constitutional rights.

[77] The Respondents also submitted that the manner in which Section 54 has been drafted is clearly permissive/discretionary, because of the use of the word "may". Section 54(1) of MODA states that the Minister may, in consultation with the Minister responsible for health, make regulations to bring into effect the object and purpose of the Act. This

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<sup>4</sup> *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000).

<sup>5</sup> *Minister of Justice and Constitutional Development and Others v Prince (Clarke and Others Intervening); National Director of Public Prosecutions and Others v Rubin; National Director of Public Prosecutions and Others v Acton* (CCT108/17) [2018] ZACC 30; 2018 (10) BCLR 1220 (CC); 2018 (6) SA 393 (CC); 2019 (1) SACR 14 (CC) (18 September 2018).

<sup>6</sup> Section 14 reads: "14. Privacy – Everyone has the right to privacy which includes the right not to have—

(a) their person or home searched;  
(b) their property searched;  
(c) their possessions seized; or  
(d) the privacy of their communications infringed."

means that the Minister is under no obligation to pass regulations; however, he may choose to do so. If that is the case then the question is whether the Court can oblige or advise the executive to issue regulations, hence the ‘institutional conversation principle’, coming into play.

[78] It was further submitted by Respondents that the Petitioner’s arguments that access to cannabis is so medically beneficial that it should be elevated to a constitutional right does not appear to be supported by any constitutional precedents elsewhere in the world. And albeit there being some evidence that cannabis alleviates certain users of pain or medical conditions, it is within the exclusive terrain of the legislative/executive to regulate for the health and welfare of a society and not the judiciary. Hence, the big question as to the extent to which the court may intervene, if at all.

[79] Finally, with respect to the plea for retrospectivity of the regulations, it was submitted that it is clear that it is not allowed excepted in criminal matters “as far as lighter sentences are concerned should there be a subsequent amendment to the relevant, “law”, *la preuve la plus douce* to be applied”. And that in this case, implications on other criminal cases as heard and diagnosed with reference to medical use of cannabis would be chaotic should the Court allows retroactivity.

### **Relevant Law and analysis**

[80] This issue, to recap, is whether the alleged failure by the 1<sup>st</sup> Respondent to issue regulations under MODA 2016, for medical and scientific prescription and other activity of cannabis, constitute an infringement to Article 15 (right to life), Article 16 (right to dignity), or right to health care (Article 29) of the Constitution.

[81] The first question to be asked is whether the Respondents have failed to issue the regulations. As pointed out above, the Respondents have submitted that the wording in Section 4 of MODA 2016 is not prescriptive. That the Minister has a discretion to regulate controlled drugs, and that the decision regarding which drugs to regulate is a policy one which the court cannot make.



[82] In the Geers judgment, this court alluded to the content of the regulations in the 1990 Act, in terms of which the Minister regulated, for medical use, controlled drugs like Morphine. The regulations legitimise the use of Morphine by hospitals or licensed medical practitioners. If these regulations were not passed, it would be unlawful for these facilities to use or prescribe Morphine to patients. So, while the regulation is framed in permissive terms, it is clear that the Minister has a statutory obligation to make the regulations to, for instance, allow the administration of Morphine to patients suffering extreme pain because of a chronic illness.

[83] The Respondents cannot hide behind this permissive language, after it had issued the regulation to legitimise certain controlled drugs for medical use. This same obligation now exists in regard to regulations for scientific use. This court thus finds that notwithstanding the use of the word may in Section 54 of MODA 2016, the Respondents have a statutory duty to issue regulations under MODA 2016.

[84] However, as expressed in Geers,<sup>7</sup> this court cannot dictate which controlled drugs they may regulate. It is necessary to reproduce below and to incorporate, with some modification, the legislative history of MODA 2016, and the reasoning employed in Geers, as this is the same basis upon which this court relies in finding that the Respondents have a duty to regulate for controlled drugs, and that they have failed in this duty.

### **Legislative background – MODA 2016 and the 1990 Act**

[85] The legislative backdrop of this Petition is necessary to provide some context to the issues. On 1<sup>st</sup> June 2016, MODA 2016 became effective. Before this Act, provisions criminalising and legitimising certain forms of drug activity were contained in the Misuse of Drugs Act 11 of 1990 (the 1990 Act). That Act underwent several amendments, until it was largely repealed by MODA 2016.

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<sup>7</sup> Constitutional Petition No. 01/2018 of 25 January 2018.

- [86] One of the purposes of MODA 2016 is to ensure the availability of controlled drugs for legitimate medical and scientific use. The scientific purposes aspect is novel; prior to its repeal, the 1990 Act only regulated importation and other legitimate activity for medical purposes.
- [87] Controlled drugs under MODA 2016 include Cannabinol, except where contained in cannabis or cannabis resin and Cannabinol derivatives. Section 4(1) of the Act provides that a controlled drug may be manufactured, imported or exported and dealt with in Seychelles for medical or scientific purposes – but, only in accordance with regulations made under the Act.
- [88] The power to make the regulations envisaged in Section 4(1) is contained in Section 54 of MODA. Section 54(1) states that the Minister may, in consultation with the Minister responsible for health, make regulations to bring into effect the object and purpose of the Act. The regulations may provide for a wide range of factors, such as authorising the possession, use or other dealing of any controlled drug for medical or scientific purposes.
- [89] As mentioned, MODA 2016 largely repealed the 1990 Act. However, certain saving provisions were inserted in Section 55 of MODA 2016. In terms of Section 55(3), statutory instruments made under the repealed 1990 Act ‘that are in operation immediately prior to the date on which [MODA] comes into operation’ continue until amended or repealed under [MODA].
- [90] The Minister passed several statutory instruments under Section 44 of the 1990 Act. This section empowered the Minister to make various kinds of regulations, including regulations –
- ‘authorising the possession, sale, supply, prescription or other dealing in, or the manufacture or importation or exportation of, a controlled drug and prescribing the circumstances and conditions under which the controlled drug may be possessed, sold, supplied, prescribed or otherwise dealt with or manufactured or imported or exported’*
- [91] Like MODA, controlled drugs under the 1990 Act included Cannabinol, except where contained in cannabis or cannabis resin and Cannabinol derivatives.

[92] The regulations passed in terms of Section 44 of the 1990 Act includes statutory instrument 53 of 1995, the Misuse of Drugs Regulations. This regulation regulate inter alia, the importation of certain specified controlled drugs by Government, by licensed persons or veterinary services, and by persons from other jurisdictions for medical purposes.

[93] The relevant provision dealing with importation reads as follows:

**‘Importation of controlled drugs**

4.(1) The Government, acting through its Ministry responsible for health, may import in raw form the specified controlled drugs morphine and cocaine and in finished dosage form any specified controlled drug and shall cause to be kept, in respect of each consignment of a specified controlled drug so imported, a register which shall specify -

- (a) the date of the arrival of the consignment in Seychelles;
- (b) the form and quantity of the specified controlled drug and the trade name or brand, if any, under which the specified controlled drug is imported;
- (c) the country from which the drug was imported;
- (d) the name of the exporter in that country, and
- (e) where an export certificate is required under an international convention for the export of the drug, the particulars of that certificate.

(2) The Division of the Ministry responsible for the provision of veterinary services or a person who is the holder of a licence to provide medical services or services as a veterinary surgeon may -

- (a) with and subject to the prior written authorisation of the Ministry responsible for health -
  - (i) in the case of the holder of a licence to provide medical services, import in finished dosage form a controlled drug specified in Part 1 of the Schedule, other than diphenoxylate;
  - (ii) in the case of the Division of the Ministry responsible for the provision of veterinary services or the holder of a licence to provide services as a veterinary surgeon, import in finished dosage form the specified controlled drugs fentanyl and pethidine;
- (b) import in finished dosage -
  - (i) in the case of the holder of a licence to provide medical services, the specified controlled drug diphenoxylate when contained in a medical preparation, a controlled drug specified in Part II of the Schedule, other than amphetamine, and a controlled drug specified in Part III of the Schedule;

(ii) in the case of the Division of the Ministry responsible for the provision of veterinary services or the holder of a licence to provide services as a veterinary surgeon, the specified controlled drug codeine, and

shall keep a register in a form acceptable to the Ministry responsible for health which shall give the particulars referred to in subregulation (1)(a) to (e).

(3) A person entering Seychelles may -

(a) where the person is in possession of a certificate for a controlled drug specified in Part 1 of the Schedule, other than fentanyl or cocaine, or the controlled drug amphetamine issued to that person by a medical practitioner in the country where the person comes from, import for the person's own consumption the controlled drug specified in the certificate in finished dosage form in an amount which constitutes a normal course of treatment;

(b) import for the person's own consumption in finished dosage form an amount which constitutes a normal course of treatment of a medical preparation containing the controlled drug diphenoxylate, a controlled drug specified in Part II of the Schedule, other than amphetamine or a controlled drug specified in Part III of the Schedule.

(4) A body or person authorised to import a specified controlled drug under subregulation (2) shall -

(a) keep the specified controlled drug in a safe and secure place satisfactory to the Ministry responsible for health;

(b) in the case of a controlled drug specified in Part I or Part III of the Schedule -

(i) retain each prescription or a copy thereof issued by the body or person or against which a specified controlled drug was dispensed or sold;

(ii) at the end of every three months beginning with the date of the coming into force of these Regulations or, where a person commences to provide medical services or services as a veterinary surgeon after the coming into force of these Regulations, beginning with the date the person commences to provide the services, submit to the Ministry responsible for health a return in respect of the controlled drug in a form acceptable to that Ministry;

(c) account to the Ministry responsible for health of the disposal, use or otherwise of a specified controlled drug imported under these Regulations and forthwith advise the Ministry responsible for health and the police of any loss, disappearance or theft of a specified controlled drug which was in the possession of that body or person.'

[94] The Schedule specified drugs under this regulation are divided into classes A, B and C. The following drugs are under Class A are: (a) Cocaine; (b) Diphenoxylate; (c) Fentanyl; (d) Methadone; (e) Morphine; (f) Pethidine; and (g) Phenazocine. The following are in Class B: (h) Amphetamine; (i) Codeine; (j) Dihydrocodine; and (k) Pholcodeine. Class C has only one: (l) Flunitrazepam.

[95] It also contains provisions regulating the manufacture of specified controlled drugs by Government, the sale and disbursement of controlled drugs by Government, a person licensed to provide medical services, or a veterinary surgeon.

[96] The manufacturing provision reads:

**‘Manufacture of controlled drugs**

5. (1) The Government may manufacture a specified controlled drug and any mixture or preparation containing a specified controlled drug.

(2) The Government shall cause to be kept proper record of any specified controlled drug or any mixture or preparation containing a specified controlled drug which it manufactures.

(3) A person who is employed by the Government for the purposes of subregulation (1) shall, while manufacturing a specified controlled drug or a mixture or preparation containing a specified controlled drug at the premises used by the Government for the purpose of manufacturing medicinal preparations, be presumed, subject to proof to the contrary, to be manufacturing the drug, mixture or preparation for the Government.’

[97] The sale and disbursement provision states:

**‘Sale or dispensing of controlled drugs**

6. (1) The Government or a person employed by the Government for this purpose in the course of that employment or a person licensed to provide medical services or services as a veterinary surgeon in the course of the provision of these services may, where a specified controlled drug has been imported, purchased or, in the case of Government, manufactured in accordance with these Regulations, sell or dispense in finished dosage form -

(a) to a person who is authorised to sell or dispense specified controlled drugs under this regulation, a specified controlled drug;

(b) to a person, other than a person referred to in paragraph (a), who -

(i) in the case of a specified controlled drug referred to in Part I or Part III of the Schedule, is in possession of a prescription for the drug issued by a medical practitioner or dentist registered as such under the laws of Seychelles or a veterinary surgeon licensed to provide services as such under the laws of Seychelles or employed by the Government;

(ii) in the case of any other specified controlled drug, other than amphetamine, requires the drug for treatment.

(2) A body or person authorised to sell or dispense a controlled drug under this regulation shall, in the case of a controlled drug specified in Part I or Part III of the Schedule, maintain a register in which shall be entered the name and address of the person to whom the drug was sold, the name including the brand or trade name and quantity of the drug sold, the date and time when the drug was sold.

(3) Except in the case of an emergency, a person authorised to sell or dispense a specified controlled drug under this regulation shall not sell or dispense a specified controlled drug, other than the specified controlled drug codeine, pholcodine or dihydrocodeine when contained in a medical preparation, to a person who is less than 18 years.

[98] Further, it regulates possession of certain controlled drugs for medical purposes.

#### **‘Possession**

7. (1) A person employed by the Ministry responsible for health as a medical practitioner, dentist, pharmacist or veterinary surgeon or to perform a function which requires the person to handle or have in the person's custody at any time in the course of the person's employment a specified controlled drug or a substance containing a specified controlled drug may, in the course of the performance of the person's employment and for and in connection with the person's functions, have in the person's possession a specified controlled drug.

(2) A person who is the holder of a licence to provide medical services or services as a veterinary surgeon may, for or in connection with the provision of those services and where the specified controlled drug has been imported or purchased in accordance with these Regulations, have in that person's possession a specified controlled drug in finished dosage form.

(3) A person who is undergoing medical treatment may -

(a) where another person who -

(i) is licensed to provide medical services; or

(ii) is employed by the Ministry responsible for health and is authorised in the course of that person's employment to prescribe or dispense specified controlled drugs,

has prescribed or dispensed a controlled drug specified in Part I or Part III of the Schedule or the controlled drug amphetamine to the first-mentioned person;

(b) where a controlled drug specified in Part I or Part III of the Schedule or the controlled drug amphetamine has been lawfully prescribed and dispensed to the first-mentioned person in connection with the treatment of that person in a place outside Seychelles,

have in that person's possession an amount, which constitutes a normal course of treatment, of a controlled drug, in finished dosage form, specified in Part I or Part III of the Schedule or the controlled drug amphetamine.

(4) A person may, for medicinal purposes, have in the person's possession an amount which constitutes a normal course of treatment of a controlled drug, in finished dosage form, specified in Part II of the Schedule’

[99] These provisions in the regulation legitimise certain activities pertaining to specified controlled drugs for medical purposes. These activities include importation, manufacturing, sale and dispensing as well as possession. The controlled drugs to which they relate are those specified in the schedule to the regulation in Classes A, B and C,

only to the extent set out in the regulations. The activities only relate to medical use, and limit these to the specified groups of persons identified in the regulation. These include, in certain instances, the Government, medical and ministry of health officials, dentist, pharmacist, veterinary surgeon and persons from other jurisdictions. Only a few restricted specified controlled drugs may be imported, and only by a limited group of persons. Similarly, only a few itemised specified controlled drugs may be manufactured and by Government. The sale and dispensing of some specified controlled drugs is also only restricted to some drugs, and by some specified classes of persons, and restricts exist regarding the sale and dispensing of these drugs. Similarly, possession of certain specified controlled drugs is also restricted.

[100] Clearly, the regulation restricts legitimate activities in relation to only specified controlled drugs, and only to the extent provided for. In all instances, only for medical use; no provision is made for scientific use or research. Authority for these activities is severely limited. It is not free for all. And cannabis does not form part of the specified controlled drugs under the regulation.

[101] The second, and last regulation passed in terms of Section 44, is statutory instrument 9 of 2001. This SI sets up the Centre Mont Royal as an approved institution for the treatment and rehabilitation of substance dependant persons.

[102] These are the only statutory instruments promulgated in terms of that provision. The two regulations have been 'saved' by Section 55 of MODA, and are thus incorporated into the MODA 2016 framework.

[103] Despite Section 54 of MODA granting the Minister power to pass regulations for medical or scientific activity, no regulations have been passed. As mentioned, statutory instrument 53 of 1995 regulates legitimate activities of controlled for medical purposes only. There is no regulation that deals with legitimate activity for scientific purposes, as this is a novel aspect which has been added in the MODA framework. Further, cannabis is not a specified controlled drug for purposes of the regulation.

## **Analysis**

[104] In the preceding section above which sets out the legislative backdrop, a detailed analysis has been made of the ambit of the regulations under the 1990 Act. This assessment reveals, inter alia, that the provisions in the regulation legitimise certain activities pertaining to specified controlled drugs only for medical purposes. That the controlled drugs to which they relate are those specified in the schedule to the regulation in Classes A, B and C, only to the extent set out in the regulations. Only specified groups of persons identified in the regulation may legitimately conduct activities in relation to particular specified controlled drugs. These include, in certain instances, the Government, medical and ministry of health officials, dentist, pharmacist, veterinary surgeon and persons from other jurisdictions. Possession of certain specified controlled drugs is also restricted. The regulation restricts legitimate activities in relation to only specified controlled drugs, and only to the extent provided for. In all instances, only for medical use, no provision is made for scientific use or research. Authority for these activities is severely limited. It is not free for all. And cannabis does not form part of the specified controlled drugs under the regulation.

[105] One of the purposes of MODA 2016 is to ensure the availability of controlled drugs for legitimate medical and scientific use. And Section 4(1) provides that regulations may be made for certain activity relating to controlled drugs. In terms of Section 54(1), these regulations are made in consultation with the Minister for health, and are intended to carry into effect the purpose and object of the Act. Despite the saving provisions in Section 55, especially Section 55(3), it appears that the respondents have to issue regulations in terms of Section 54, to bring into effect the new objectives of MODA 2016. This includes the objective in MODA to ensure the availability of controlled drugs for scientific use – which is a novel aspect. The regulation under the 1990 Act only covers medical use, and in the circumstances provided in the regulation. The respondent's submission that the regulation under the 1990 Act deals sufficiently with the requirement to regulate is thus misplaced.

[106] The implication of this finding is that the respondents have failed to regulate for scientific purposes, and have to issue regulations to accommodate this new element that has been brought in by MODA 2016.



[107] Despite this finding however, the court may not impose upon the Respondents the ambit of such regulations, or their content. For instance, the court may not provide input on which controlled drug should be regulated and how, who should be authorised legitimate use and under what conditions. The Court would be entering the policy and legislative fray if it were to direct these conditions.

[108] Further, the Court cannot ignore the rest of the provisions of MODA 2016, which inter alia, criminalise activities relating to some controlled drugs, including cannabis. These provisions have not been impugned in this petition, and remain on the statute books. Any regulation that flows from MODA 2016, have to be done within the parameters of these provisions.

[109] The next question is whether the Petitioner's rights to life, dignity and health have been infringed due to the Respondents' failure to regulate use of a controlled drug, especially, cannabis.

### **The Right to life-Article 15**

[110] The right to life is protected under Article 15 of the Constitution of Seychelles. This section reads:

“15. (1) Everyone has a right to life and no one shall be deprived of life intentionally.

(2) A law shall not provide for a sentence of death to be imposed by any court.

(3) Clause (1) is not infringed if there is a loss of life-

(a) by any act or omission which is made not punishable by any law reasonably justifiable in a democratic society; or

(b) as a result of a lawful act of war.”

[111] The right to life that the Petitioner seeks to enforce, as stated in his Petition, is that of his mother, and patients who are terminally ill. The central question is whether the State failed its obligation to respect, protect, promote or fulfil their right to life when it did not pass regulations for cannabis.

[112] At its core, the right to life protects human life from extinction. To kill or to condone the killing of a person intentionally amounts to an infringement of this right. But it also includes the right to live with dignity. It means something more than mere animal existence; it embraces not only the physical existence but also the quality of life.<sup>8</sup> In *Government of Seychelles v Rose & Ors* (SCA NO. 14 OF 2011) [2012] SCCA 30 (07 December 2012), Msoffe J said that “the foremost and fundamental constitutional right is life. . . life is so precious that it should not be lost under circumstances which are inappropriate.” The court there correctly stated that ‘articles 15 and 16 should be read together with the Preamble which recognizes the inherent dignity and the equal and inalienable rights of all members of the human family as the foundation for freedom, justice, welfare, fraternity, peace and unity.

[113] The right to life also implies, in certain well-defined circumstances, a positive obligation on the State to take preventive operational measures to protect an individual whose life is at risk.<sup>9</sup> The Court of Appeal has, in the context of a case where fundamental constitutional rights were pleaded against the private law protection of contractual freedom, stated that the proper approach by courts should be one based on the concept of positive obligations i.e. where all state organs have a duty to protect fundamental human rights.<sup>10</sup> This means that the right to life does not merely exist on a horizontal level between persons, but also vertically between the State and persons. Thus, the State has an obligation to protect and fulfil the right to life of persons.

[114] The existence of an obligation to fulfil the right to life was first acknowledged in South African Constitutional jurisprudence in *S v Makwanyane and Another*<sup>11</sup> wherein Sachs J

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<sup>8</sup> See the opinion by Justice Field in the US Supreme Court judgment of *Munn v. Illinois*, 94 U.S. 113 (1876) at 94, where he said: By the term "life," as here used, something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body by the amputation of an arm or leg, or the putting out of an eye, or the destruction of any other organ of the body through which the soul communicates with the outer world. The deprivation not only of life, but of whatever God has given to everyone with life for its growth and enjoyment, is prohibited by the provision in question if its efficacy be not frittered away by judicial decision.

<sup>9</sup> See for instance, *Carmichele v Minister of Safety and Security* (CCT 48/00) [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) (16 August 2001) C para 45 where the Constitutional Court of South Africa endorsed a dictum by the European Court of Human Rights.

<sup>10</sup> *Ugo Sala and another vs Sir Georges Estate (proprietary) Ltd and another* (SCA 19 of 2011) [2014] SCCA 9 (11 April 2014), judgment by Twomey J.

<sup>11</sup> *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995) para 353.

stated that an ‘objective approach in relation to the enjoyment of the right to life’ entail that ‘the State is under a duty to create conditions to enable all persons to enjoy the right’. The obligation to fulfil the right to life, therefore, involves, to the extent permissible, satisfaction of the socio-economic dimensions of the right. Therefore, to intersects with various positive obligations that a State must meet as for instance with regards to the right to health.

[115] The right to life, in the context of provision of the socio-economic right of access to health, intersected in the South African case of *Soobramoney v Minister of Health, Kwazulu-Natal* (1998) (1) SA 765 (CC),<sup>12</sup> a case concerning a terminally ill patient in the last stages of chronic renal failure who applied to the Durban High Court claiming that he had a right to receive renal dialysis treatment from the public hospital. The Constitutional Court acknowledged that access to socio economic amenities was essential to the enjoyment of the right to life. Mandala J observed that ‘[t]he State undoubtedly has a strong interest in protect and preserve life.’<sup>13</sup> Sachs J however also stated that ‘the right to life may [not]... be extended to encompass the right indefinitely to evade death’.<sup>14</sup>

[116] However, the South African Constitutional Court in *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC),<sup>15</sup> acknowledged that the obligation to promote the right to life may also entail life-saving treatment. Following this line of argumentation, the question of when the stage of life saving treatment is met is another crucial question.

[117] From these cases, it seems clear that the right to life, guaranteed in Article 15 of the Constitution, also entails the duty to protect the health of a person.

[118] This raises the question whether the right to life under Article 15 of the Constitution was infringed by the failure of the Minister to regulate the possession, use, sale, supply, prescription, or other dealing in, or the manufacture or importation of any cannabis for

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<sup>12</sup> *Soobramoney v Minister of Health (Kwazulu-Natal)* (CCT32/97) [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (27 November 1997).

<sup>13</sup> Para 39.

<sup>14</sup> Para 57.

<sup>15</sup> *Minister of Health and Others v Treatment Action Campaign and Others (No 1)* (CCT9/02) [2002] ZACC 16; 2002 (5) SA 703; 2002 (10) BCLR 1075 (5 July 2002).

medical or scientific purposes in Seychelles. Such an examination involves the question whether access to cannabis was central to the petitioner’s health, and by extension, his life or that of his mother. The Petitioner must substantiate his claim that the use of medical cannabis products will have or at least contribute towards the preservation of the life of his mother.

[119] On the evidence presented to the court by the Petitioner, such an assessment cannot be made. The Petitioner through the submissions of Learned Counsel has not been able to substantiate the claim that cannabis-based medication is more beneficial for his mother other than the current medications used. The Petitioner has based his claim on academic writings, which can do no more than provide this court with specialised opinions in the field. However, he has not shown any evidence, in the form of a medical opinion which may help the court assess the state of her health with and without the cannabis based treatment. In the absence of such evidence, the court is not able to assess how the regulations impinge on her rights personally.

[120] In *A.M. and A.K. c. Hongrie* (nos. 21320/15 and 35837/15), the applicants, both with serious health conditions which they submitted could be alleviated by cannabis-based medication, complained under Article 8 of the European Convention of Human Rights that, domestic legislation providing a legal avenue for requesting individual permission to import such medication lacked legal certainty. The European Court for Human Rights declared their claim inadmissible, on the basis that they had failed to substantiate their claim with the medical evidence that a cannabis-based treatment would be beneficial for their current health condition.

[121] This does not mean that the court rejects the evidence that cannabis may have health benefits in certain chronic illnesses. But the evidence must bear out the right. In Canada, for instance, the Supreme Court of Appeal in *R. v SMITH*, 2015 SCC 34, [2015] 2 S.C.R. 602 accepted the expert medical evidence that ‘non-dried forms of marihuana for treatment of some serious health conditions is medically reasonable. . . there are cases where alternative forms of cannabis will be “reasonably required” for the treatment of serious illnesses. Importantly, the court based this on both expert evidence and anecdotal

evidence from the medical marijuana patients. The court also said that the fact that the lay witnesses did not provide medical reports asserting a medical need for an alternative form of cannabis was not, as the Crown suggests, determinative of the analysis. An essential feature there is that the relevant Act in Canada already accepted the medical benefit of dry marijuana. So what was required, was evidence of alternative cannabis based treatment. The court found that ‘the evidence amply supports the trial judge’s conclusions on the benefits of alternative forms of marijuana treatment; indeed, even the Health Canada materials filed by the Crown’s expert witness indicated that oral ingestion of cannabis may be appropriate or beneficial for certain conditions.’ (para 19).

[122] Canada is one of 33 jurisdictions to legitimise the use of cannabis products for medical use as it has been pointed out in the recent case at the *South African Court of Minister of Justice and Constitutional Development and Others v Prince*.<sup>16</sup>

[123] The Petitioner in this case has not been able to substantiate his claim that the medical use of cannabis could have medical benefits to the treatment of his mother’s Alzheimer’s disease, nor for the Seychellois whom he alleges suffer terminally. Thus, there is no basis for the claim that the Minister’s failure to regulate the medical and scientific use of cannabis has infringed his mother’s right to life.

### **Right to dignity - Article 16 of the Constitution**

[124] The right to the protection of human dignity under Article 16 of the Constitution is very wide in its scope. It reads: “every person has a right to be treated with dignity worthy of a human being and not to be subjected to torture, cruel, inhuman or degrading treatment or punishment.”

[125] Human dignity of all persons is independently recognized as both an attribute and a right in the Constitution. It is woven, in a variety of ways, into the fabric of our Charter of Rights.<sup>17</sup> At the heart of the right to the protection of dignity is the assumption that each

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<sup>16</sup> *Minister of Justice and Constitutional Development and Others v Prince (Clarke and Others Intervening); National Director of Public Prosecutions and Others v Rubin; National Director of Public Prosecutions and Others v Acton* (CCT108/17) [2018] ZACC 30; 2018 (10) BCLR 1220 (CC); 2018 (6) SA 393 (CC); 2019 (1) SACR 14 (CC) (18 September 2018) *South African Court of Minister of Justice and Constitutional Development and Others v Prince*, 2018 (10) BCLR para 79.

<sup>17</sup> *Simeon v Attorney-General* (1 of 2010) [2010] SCCC 3 (28 September 2010).

human being has incalculable human worth, regardless of circumstances, and should be treated accordingly. Dignity in humans involves the earning or the expectation of personal respect or of esteem. As Dodan J stated in *Ponoo v Attorney-General* (5 of 2010) [2010] SCCC 4 (16 November 2010):

‘Human dignity is something that is inherently a person's God-given inalienable right that deserves to be protected and promoted by the Government and the community. Human dignity is in itself enshrined as the cornerstone of society from the very beginning of civilization. Thus all social institutions, governments, states, laws, human rights and respect for persons originate in the dignity of man or his personhood. It is even said that dignity is the foundation, the cause and end of all social institutions. Thus all social institutions, governments, states, laws, human rights and respect for persons originate from the concept of dignity of man or his personhood.’<sup>18</sup>

[126] The Canadian Supreme Court described the right to human dignity as follows in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 para 53:

“Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon person traits or circumstances which do not relate to individual need, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities and merits of different individuals taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalised, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within ... society.”

[127] Noting the very wide scope of the right to the protection of dignity as provided under Article 16 of our Constitution, against this backdrop, it may very well be argued that this right is infringed every time conduct treats the subject as non-humane or less than human or as an object. It follows further, that from the above cited Canadian case law that the right to protection of dignity also entails the protection of physical and psychological integrity of the human being.

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<sup>18</sup> See also *City Council of Pretoria v Walker* (CCT8/97) [1998] ZACC 1; 1998 (2) SA 363; 1998 (3) BCLR 257 (17 February 1998) para 133 where Sach J said that the right to dignity entails that every human has the same moral worth.

[128] The Petitioner's claim is that the failure to regulate, has impaired his mother's right to dignity. The Petitioner has not set out how this failure has inhibited her mother's sense of humanness and integrity. The Petition does not set out, factually, how her lack of access to cannabis has influenced her Alzheimer's disease, and her person. The court has no way of knowing how this failure has implicated her. All the court has is a bald allegation, without any substantiated facts. The Petitioner has failed to raise, prima facie, any grounds to substantiate a claim for breach of his mother's right to dignity.

### **The right to health care, Article 29**

[129] In terms of this provision, the State recognises the right of every citizen to protection of health and to the enjoyment of the attainable standard of physical and mental health. The Petitioner has alleged breach of this right by the Respondents.

[130] In support of this, he claims that his mother, who suffers from Alzheimer's disease, has been denied access to cannabis based medication, which she has been advised to use, as an alternative since the conventional medicine does not alleviate her medical condition, which is deteriorating. He claims that he has made one request for regulations to the Respondents. And that he knows of other cancer and terminally ill patients who prefer cannabis based medication, but are unable to access it legitimately. The Respondents have denied the claim that cannabis based medication is the only alternative, and has the effect claimed. They have also stated that the Petitioner's mother does not have a right to specific medication. And lastly, that there is policy reasons which militate against the legitimisation of cannabis for medical or scientific use.

[131] The correct ambit of the right to health has yet to be determined in Seychelles. The Petitioner has argued that Article 29 of the Constitution has to be interpreted in light of or incorporating the value of human dignity. Counsel in oral argument relied on *Government of the Republic of South Africa v Grootboom*,<sup>19</sup> where the South African Constitutional Court said that the foundational values of the Constitution like human dignity are denied to those who have no food, clothing or shelter. In the context of the

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<sup>19</sup> *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000).

right to health care the Court said in *Minister of Health and Others V Treatment Action Campaign and Others (No. 2)* that a person should not be condemned to a life below the basic level of dignified human existence.<sup>20</sup> Therefore, it can be said that the right to dignity under article 16 of the Constitution underpins the right to health in Article 29 of the Constitution.

[132] Now, noting the above argument of the Petitioner, it is for this court to scrutinize the State's obligations which arise from Article 29 as a socio-economic right. The exercise is to establish, generally, the duty of the State in fulfilling the socio-economic right to health.

[133] Section 29 reads:

‘(1) The State recognises the right of every citizen to protection of health and to the enjoyment of the attainable standard of physical and mental health and with a view to ensuring the effective exercise of this right the State undertakes -

(a) to take steps to provide for free primary health care in State institutions for all its citizens.

(b) to take appropriate measures to prevent, treat and control epidemic, endemic and other diseases;

(c) to take steps to reduce infant mortality and promote the healthy development of the child;

(d) to promote individual responsibility in health matters;

(e) to allow, subject to such supervision and conditions as are necessary in a democratic society, for the establishment of private medical services.’

[134] The South African Constitutional has captured the health right differently. It states that, in relevant parts, that:

**‘27. Health care, food, water and social security**

(1) Everyone has the right to have access to -

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<sup>20</sup> *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* (CCT8/02) [2002] ZACC 15; 2002 (5) SA 721; 2002 (10) BCLR 1033 (5 July 2002).



(a) health care services, including reproductive health care;

....

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

(3) No one may be refused emergency medical treatment.’

[135] In the context of access to housing, the Court concluded in **Grootboom** that socio-economic right must be interpreted in its context and that such an interpretation required the consideration of two types of context. The first was that the right has to be interpreted in its textual setting. Secondly, a right had to be interpreted in the social and historical context. As **Grootboom** illustrates, socio-economic rights can pose a positive obligation on the State to promote access to the right in question. Such a positive obligation then entails three components: (a) to take reasonable legislative and other measures; (b) within available resources; (c) to achieve the progressive realization of the right.

[136] Despite the distinction in the text, between the South African and our Constitution (this right speaks of access to health, rather than right to health and limits the State’s obligations to what is available within its resources), the approach in **Grootboom** is sound and may be applied. Based on the wording of Article 29 of the Constitution, which states that the State ‘respects the right of every citizen to protection of health’, and has a duty to take steps to provide for free primary health care in State institutions for all its citizens; to take appropriate measures to prevent, treat and control ... diseases, there is no doubt that the textual setting supports a positive obligation on the State.

[137] As regards the social and historical context, the State is obliged to take measures to provide free primary health care for its citizens. This is a feature of Seychelles’ largely socialist state.

[138] The above indicates that citizens of Seychelles may enforce their right to health care against the State, which has a positive obligation to provide it. Is this obligation breached by the failure to pass regulations to regulate use of cannabis for medical or scientific reasons?

[139] The Respondents have made three pertinent submissions. (1) they are already providing appropriate medical care for patients and patients may not demand particular medication and (2) Seychelles has a substance abuse problem and regulation of legitimised cannabis may be difficult; and (3) there is no conclusive proof about the effectiveness of cannabis, and it has been shown that it may lead to drug dependency.

[140] It seems, from this, that the Respondents concede to some point, that the right to health has been implicated, but they aver that it is not violated through its failure to regulate.

[141] The State's duty to protect and promote the right to health includes taking necessary legislative steps such as those regulating the use of controlled drugs for medical and scientific treatment. However, what these regulations may regulate is not within this court's domain. In this instance, the Petitioner has persuaded the court that his mother's right to health includes the right to require regulation of certain controlled drugs, but we are not convinced, on these facts, that it includes the right to regulate the controlled drug of cannabis.

### **Summary of Findings**

[142] Having considered the question whether the Petitioner's rights have been infringed, the findings on this aspect may be summarised as follows.

[143] The Petitioner has not been able to substantiate, with evidence, his claim that the medical use of cannabis could have medical benefits to the treatment of his mother's Alzheimer's disease, nor for the Seychellois who he alleges suffer terminally. Thus, there is no basis for the claim that the Minister failure to regulate the medical and scientific use of cannabis has infringed his mother's right to life.

[144] The petitioner has not set out how the failure to regulate has inhibited her mother's sense of humanness and integrity, i.e. her dignity. The Petition does not set out, factually, how her lack of access to cannabis has influenced her Alzheimer's disease, and her person. The court has no way of knowing how this failure has implicated her. All the court has is a bald allegation, without any substantiated facts. The Petitioner has failed to raise, prima facie, any grounds to substantiate a claim for breach of his mother's right to dignity.

[145] As regards the alleged contravention of his mother’s right to health care. The State’s duty to protect and promote the right to health includes taking necessary legislative steps such as those regulating the use of controlled drugs for medical and scientific treatment. However, what these regulations may regulate is not within this court’s domain. In this instance, the petitioner has persuaded the court that his mother’s right to health includes the right to require regulation of certain controlled drugs, but the court is not convinced, on these facts, that it includes the right to regulate the controlled drug of cannabis.

**The findings on the duty to regulate may be summarised as follows.**

[146] While the wording of Section 4 of MODA uses the word ‘may’, and not ‘shall’, the Respondents cannot hide behind this permissive language, after it had issued the regulation to legitimise certain controlled drugs for medical use. This same obligation now exists in regard to regulations for scientific use. This court thus finds that notwithstanding the use of the word may in Section 54 of MODA 2016, the Respondents have a statutory duty to issue regulations under MODA 2016.

[147] Section 4 (1) of MODA 2016 which provides that, “a controlled drug may be manufactured, imported or exported, and dealt with in Seychelles for medical or scientific purposes in accordance with regulations made under this Act” has not been complied with. (own emphasis.)

[148] Although Section 55 (3) of MODA 2016 provides that regulations enacted under the repealed 1990 Act, such as the Regulation of the 22<sup>nd</sup> May 1995 enacted under Section 44 (1) of the repealed 1990 Act remains in force, this regulation is only limited to medical purposes. It does not provide for scientific purposes, which is a new aspect introduced in MODA 2016.

[149] It is clear from the wording of Section 4 (1) of MODA 2016 that the section envisages new regulations to be made under MODA 2016, in accordance and with due consideration to the new provisions of law contained within the new Act, which are many.

[150] The saving provision contained in Section 55 (3) of MODA 2016 with respect to regulations passed under the previous act was only intended to provide an interim solution to prevent gaps in the law until regulations were made under the new Act. They could not have been intended to be of a permanent nature. Section 55 (3) of MODA 2016 states that the regulations made under the previous Act, “shall continue in operation *until amended or repealed under this Act*” (own emphasis). This clearly indicates the temporary nature of the operation of the old regulations.

[151] Section 44 (1)(a) of the 1990 Act, i.e. the section under which the regulations were enacted, differs in its wording from the pertinent provisions of the new Act, namely section 54 (1) and 54 (2)(a), in one crucial aspect. Section 44 (1)(a) of the 1990 Act reads as follows:

“The Minister may make regulations for carrying into effect the purposes and provisions of this Act and, without limiting the generality of the foregoing, may make regulations (a) authorizing the possession, sale, supply, prescription or other dealing in, or the manufacture or importation or exportation of, a controlled drug and prescribing the circumstances and conditions under which the controlled drug may be possessed, sold, supplied, prescribed or otherwise dealt with or manufactured or imported or exported”

[152] Section 54 (1) read with 54 (2)(a) of MODA 2016 on the other hand reads:

“54(1) The Minister may, in consultation with the Minister responsible for health, make regulations for carrying into effect the objectives and purposes of this Act.

(2)Without prejudice to the generality of subsections (1), regulations may provide for (a) authorizing the possession, use, sale, supply, prescription or other dealing in, or the manufacture or importation or exportation of, any controlled drug for medical or scientific purposes”. (own emphasis)

[153] This requirement of “*medical or scientific purposes*” is contained only in the new and not in the old Act. This shows that there has been a material change in the law, and that the factors that ought to be considered by the Ministry when enacting said regulations under the new act are different than the ones that had to be considered under the old act. This is

further substantiated by the fact that under MODA 2016, the Ministry of Health must be consulted when regulations are made.

[154] In light of this, the conclusion is reached that the extended application of the Regulations from the 22<sup>nd</sup> May 1995 enacted under the 1990 Act does not fulfil the statutory duty provided for in s 4 (1) of MODA 2016 to enact new Regulations regarding the manufacturing, import and export of controlled drugs for medical or scientific purposes. The second respondent has a statutory obligation to pass new regulations.

### **What remedies can the Court issue?**

[155] This raises the question whether the court can issue an order to the Minister of Home Affairs and Local Government directing him or her to issue the regulations. The power of the court on this issue derives from Article 46 (5) of our Constitution. This section reads:

‘(5) Upon hearing of an application under clause (1) the Constitutional Court may-

(a) declare any act or omission which is the subject of the application to be a contravention of the Charter;

(b) declare any law or the provision of any law which contravenes the Charter void;

(c) make such declaration or order, issue such writ and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of the Charter and disposing of all the issues relating to the application;

(d) award any damages for the purpose of compensating the person concerned for any damages suffered;

(e) make such additional order under this Constitution or as may be prescribed by law.’

[156] This article provides the court with wide powers to carve out an appropriate order. This includes the power to make an order giving directions that are appropriate to enforce the Charter and to dispose of the issues. While the court is mindful of its duty not to overstep or enter the executive fray, the Constitution enjoins the court to ensure that appropriate

relief is given to litigants whose rights have been infringed. The Respondents have raised concerns over the former, i.e. the judiciary entering policy issues, and this concern is legitimate, taking into account the guiding principles of separation of power. The court's powers, as laid out in Section 46(5), enjoins the court to make appropriate orders. These take into account the parameters of what constitutes appropriate orders, and the court is mindful of its obligations in this regard. However, the principle of separation of powers incorporates the notion that the judiciary has the obligation to check, within the court's powers, other branches of government when called upon to do so.

[157] The Constitutional Court of South Africa has strongly rejected the contention by the other branches of government that there may be cases in which the separation of powers principle requires the Court ipso facto not to give directions to the executive. This was the government's stance in *Mohamed and Another v President of the Republic of South Africa and Others* (CCT 17/01) [2001] ZACC 18; 2001 (3) SA 893 (CC); 2001 (7) BCLR 685 (CC) (28 May 2001) a case in which a foreign national had been illegally arrested and extradited to the US without any assurance from the US government that it would not impose or carry out the death penalty on him if convicted.

[158] Furthermore, in *Minister of Health and Others v Treatment Action Campaign and Others* (No 1) (CCT9/02) [2002] ZACC 16; 2002 (5) SA 703; 2002 (10) BCLR 1075 (5 July 2002) the South African Constitutional Court directed the executive to develop a policy for the provision of anti-retroviral treatment.

[159] The South African Constitutional Court reconciled the conflicting principles of separation of powers and the need for an effective remedy by granting interim relief to the successful litigant pending the rectification of the defective legislation.

[160] This Court is empowered to give orders to the organs and individuals of the Executive if the conclusion is that they have failed to carry out their statutory duty of issuing regulations where these are required. In this instance, the court is empowered to direct the Minister of Home Affairs and local Government to issue the regulations. However, the court cannot give directions about the substance or content of the regulations. This is to be determined by the Minister.

[161] Thus, the second Respondent is directed to make the necessary regulations as prayed for in prayer 1 of the Petition, for the purpose of enforcing the stated provisions of MODA 2016.

### **Retrospective application of an order of invalidity**

[162] Turning to the question as to retroactivity of the said regulation. As rightly pointed out by the Petitioner, s 4 (1) of MODA 2016 was assented to on 15 April 2016 and the then Minister for Home Affairs issued the commencement notice on 30 May 2016.

[163] It is trite that an Act has prospective effect. Retrospectivity may be permissible where legislation is declared unconstitutional. The main question that has to be discussed in this context is whether retrospective application is in the interest of justice. In that light, the South African Constitutional Court held in *S v Bhulwana, S v Gwadiso* (CCT12/95, CCT11/95) [1995] ZACC 11; 1996 (1) SA 388; 1995 (12) BCLR 1579 (29 November 1995) that:

“It is only when the interests of good government outweigh the interests of the individual litigants that the court will not grant relief to successful litigants .... the litigants before the court should not be singled out for the grant of relief, but relief should be afforded to all people who are in the same situation as the litigants ...[but the court should] be circumspect in exercising [its power in this regard].’

[164] In *S v Ntsele* (CCT25/97) [1997] ZACC 14; 1997 (11) BCLR 1543 (14 October 1997), the South African Constitutional Court stated against this backdrop that “the interest of individuals must be weighed against the interest of avoiding dislocation to the administration of justice and the desirability of a smooth transition from the old to the new’ and the interest of avoiding the dislocation and inconvenience of undoing transactions, decision or actions taken under [the] statute”.

[165] The South African Constitutional generally invalidates the statute so that it no longer applies from the date of the order. This can also be seen in recent cases like *Minister of Justice and Constitutional Development and Others v Prince (Clarke and Others Intervening)*; *National Director of Public Prosecutions and Others v Rubin*; *National*

*Director of Public Prosecutions and Others v Acton* (CCT108/17) [2018] ZACC 30; 2018 (10) BCLR 1220 (CC); 2018 (6) SA 393 (CC); 2019 (1) SACR 14 (CC) (18 September 2018) para 102, where the South African Court rejected any retrospective effect of the order ‘because it could have a disruptive effect on, and, cause uncertainty in, our criminal justice system.’

[166] The Petitioner’s mother’s interest of individuals must be weighed against the interest of avoiding dislocation to the administration of justice. The petitioner in this instance has not provided any basis for the need to have the regulations apply retrospectively. In light of our order requiring the Minister to make the regulations, and criminal cases pending, we are mindful of the disruptive effect on, and, cause of uncertainty in our criminal justice system.

[167] Thus, this Court must refuse the prayer for retroactivity.

[168] The court has found that there was a failure and an obligation to pass regulations under MODA 2016 but the court appreciates the nature and extent of the delegation of legislative power under Section 54 (1) of MODA 2016. The Court can thus not interfere with the contents of the regulation, which is clearly within the precincts of the executive. It cannot dictate the extent of the regulations; it cannot prescribe which controlled drugs should form part of the regulations. This is the terrain of the second respondent and the Minister of Health.

[169] It should be mentioned in passing that while the court notes the Petitioner’s claims regarding the benefits of cannabis, and the literature which he has relied on, and the move towards legalisation of certain use of cannabis in some countries, the court does not have the authority, in these circumstances, to dictate to the executive how best to regulate controlled drugs like cannabis.

### **Final Determination**

[170] I therefore concur with order of Burhan J.



Signed, dated and delivered at Ile du Port on 31<sup>st</sup> May 2019

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Andre J