CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 253/15

In the matter between:

MINISTER OF POLICE First Applicant

DIRECTOR OF PUBLIC PROSECUTIONS, WESTERN CAPE Second Applicant

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES Third Applicant

and

GRACE NOMAZIZI KUNJANA Respondent

Neutral citation:	*Minister of Police and Others v Kunjana* [2016] ZACC 21
Coram:	Moseneke DCJ, Bosielo AJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Nkabinde J and Zondo J
Judgments:	Mhlantla J (unanimous)
Heard on:	12 May 2016
Decided on:	27 July 2016
Summary:	Confirmation proceedings — order of invalidity in terms of section 172(2)(a) of the Constitution — section 11(1)(a) and (g) of the Drugs and Drug Trafficking Act 140 of 1992 unconstitutional and invalid — declaration of invalidity prospective

ORDER

Application for confirmation of the order of the High Court of South Africa, Western Cape Division, Cape Town:

1. The declaration of constitutional invalidity of section 11(1)(a) and (g) of the Drugs and Drug Trafficking Act 140 of 1992, made by the High Court of South Africa, Western Cape Division, Cape Town is confirmed
2. The declaration of invalidity will apply from the date of this order.
3. The first and third applicants are ordered, jointly and severally, to pay the respondent's costs, including the costs of two counsel, up to the date of delivery of her notice dated 13 January 2016.

JUDGMENT

MHLANTLA J (Moseneke DCJ, Bosielo AJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Nkabinde J and Zondo J concurring):

Introduction

[1] Section 14 of the Constitution guarantees that everyone has the right to privacy, including the right not to have their person or home searched, their property searched, their possessions seized or the privacy of their communications infringed. This application involves a warrantless search of an individual's properties and seizure of items by members of the South African Police Service (SAPS). It comes before us as confirmation proceedings brought by the Minister of Police (first applicant) in terms of section 172(2)(d) of the Constitution for an order confirming the declaration of constitutional invalidity made by the High Court of South Africa, Western Cape

Division, Cape Town[1] (High Court) relating to section 11(1)(a) and (g) of the Drugs and Drug Trafficking Act[2] (Drugs Act).

Factual Background

[2] On 14 March 2011, members of SAPS received information from an informant that a large quantity of illegal drugs, particularly Mandrax (which is a substance listed in Part III of Schedule 2 to the Drugs Act) was kept at 2 Moor Street, Kenilworth, Cape Town (Kenilworth premises) and that these drugs would be moved during the course of that day. It was also reported that another large quantity of drugs was stored at 6 Chartwell Place, Robinson Street, Wynberg, Cape Town (Wynberg premises). Both properties were leased by the respondent, Ms Grace Nomazizi Kunjana (respondent).

[3] As a result, the police conducted search and seizure operations at the Kenilworth premises and Wynberg premises. Upon searching these premises, the following was found and seized by SAPS:

a. a total of 24 719 Mandrax tablets weighing 33.9586 kg at the Kenilworth premises;
b. a total of 262 818 Mandrax tablets weighing 350.923 kg and "Tik" weighing 2.1241 kg at the Wynberg premises; and
c. cash in an amount of R1 823 200 at the Wynberg premises with traces of Mandrax.

[4] As a result, the respondent was arrested and charged with being in possession of, and dealing in Mandrax and "Tik", in contravention of the Drugs Act. The criminal case against the respondent is pending in the High Court. In conducting the search and seizure operations, the police relied on section 11(1)(a) and (g) which provides:

[1] *Kunjana v Minister of Police and Others* [2015] ZAWCHC 198 (High Court judgment).

[2] 140 of 1992.

"A police official may—

(a) if he has reasonable grounds to suspect that an offence under this Act has been or is about to be committed by means or in respect of any scheduled substance, drug or property, at any time—

(i) enter or board and search any premises, vehicle, vessel or aircraft on or in which any such substance, drug or property is suspected to be found;

(ii) search any container or other thing in which any such substance, drug or property is suspected to be found;

. . .

(g) seize anything which in his opinion is connected with, or may provide proof of, a contravention of a provision of this Act."

[5] Hence, section 11(1)(a) and (g) of the Drugs Act grants police officials the power to conduct a warrantless search in any premises if there are reasonable grounds to suspect that an offence under the Drugs Act has or is about to be committed, and the power to seize anything that would result in an infringement of the Drugs Act.

Proceedings in the High Court

[6] The respondent filed two applications before the High Court against the first applicant as well as the Director of Public Prosecutions in the Western Cape and the Minister of Justice and Correctional Services (second and third applicants respectively in the present case). In the first application, she sought a postponement of the trial pending the determination of the second application, where she sought an order declaring the entire section 11 of the Drugs Act to be inconsistent with the Constitution and invalid. She maintained that the two warrantless search and seizure operations, conducted pursuant to section 11, were inconsistent with the Constitution and unlawful. The applicants opposed the application. However, they later conceded that section 11(1)(a) and (g) infringed the right to privacy in section 14 of the Constitution and that the infringement was not justifiable in terms of section 36 of the Constitution.

[7] The High Court (per Veldhuizen J) concluded that the order of invalidity of the entire section 11 of the Drugs Act sought by the respondent was too broad.[3] Therefore, the learned Judge restricted the relief to section 11(1)(a) and (g) of the Drugs Act.

[8] After analysing the constitutionality of section 11(1)(a) and (g) of the Drugs Act, and relying on *Estate Agency Affairs Board*[4] and *Gaertner*,[5] the High Court concluded that section 11(1)(a) and (g) infringed the right to privacy enshrined in section 14 of the Constitution and that these provisions were invalid. Regarding the effect of the order, the High Court concluded that the order of invalidity would have immediate effect as police officials had other remedies and investigating powers at their disposal. Furthermore, the Court concluded that the issue relating to the admissibility of the evidence gathered pursuant to the search operations would be determined by the trial Court. As to the costs, the High Court found that, although the respondent had approached the Court in her own interest, she should not be deprived of her costs as she was obliged to bring the application to obtain the declaration of invalidity.[6]

[9] Accordingly, on 3 December 2015 the High Court made the following order:

> "(a) Section 11(1)(a) and (g) of the Drugs and Drug Trafficking Act 140 of 1992 are declared invalid;
>
> (b) The declaration of invalidity is not retrospective, and
>
> (c) The first and fourth respondents are ordered to pay the costs of the application."[7]

[3] High Court judgment above n 1 at para 3.

[4] *Estate Agency Affairs Board v Auction Alliance (Pty) Ltd and Others* [2014] ZACC 3; 2014 (3) SA 106 (CC); 2014 (4) BCLR 373 (CC).

[5] *Gaertner and Others v Minister of Finance and Others* [2013] ZACC 38; 2014 (1) SA 442 (CC); 2014 (1) BCLR 38 (CC).

[6] High Court judgment above n 1 at para 11.

[7] Id at para 12.

[10] Flowing from the High Court's declaration of constitutional invalidity, the applicants brought this application for the confirmation of the order of invalidity. The respondent, in her notice dated 13 January 2016, supported the application.

Parties' submissions in this Court

[11] In this Court, the applicants supported the conclusion of the High Court and argued that the order declaring section 11(1)(a) and (g) of the Drugs Act constitutionally invalid should be confirmed as it authorises warrantless searches even where there is no urgency. They also submitted that the order should operate prospectively, i.e. that searches and seizures undertaken prior to the date of the order will be unaffected, even if proceedings relating to them were yet to be finalised. In so far as costs are concerned, they contended that the respondent should be entitled to costs until the date on which her notice was filed in this Court.

[12] The respondent relied on *Estate Agency Affairs Board* and submitted that "this case requires no reinvention".[8] She supported the finding of the High Court. As to costs, the respondent submitted that the first applicant should pay all her costs, including the costs of two counsel. This was despite the fact that the notice of support had been filed on 13 January 2016. The respondent contended that the applicants, as responsible members of the Executive, had a duty to embark on a legislative process to repeal or amend the impugned provisions which were clearly invalid and that this is an incident of the rule of law and separation of powers. Yet in this case, the first applicant ignored the established principles stated in *Magajane*,[9] *Gaertner* and *Estate Agency Affairs Board*, so the respondent stated. Instead, the applicants effectively relied, impermissibly, on the invalid provisions until the High Court declared them unconstitutional.

[8] *Estate Agency Affairs Board* above n 4 at para 33.

[9] *Magajane v Chairperson, North West Gambling Board* [2006] ZACC 8; 2006 (5) SA 250 (CC); 2006 (10) BCLR 1133 (CC).

Issues

[13] The issues for determination are:

a. Whether section 11(1)(a) and (g) of the Drugs Act is constitutionally invalid.
b. If the section is unconstitutional and thus invalid, whether the declaration of invalidity should be retrospective or prospective.
c. Should this Court grant a costs order?

Constitutionality of section 11(1)(a) and (g)

[14] The power, as provided by section 11(1)(a) and (g) of the Drugs Act, for police officers to search and seize someone's property is a violation of the right to privacy protected by section 14 of the Constitution.[10] As submitted by the applicants, relying on *Thint*,[11] the right to privacy flows from the value placed on human dignity.

[15] Thus it must be assessed whether the infringement of the rights to privacy and dignity is reasonable and justifiable in an open and democratic society. Section 36 of the Constitution governs the situations in which constitutional rights may be limited. It enjoins a court to balance five relevant factors, which are: the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and whether there are less restrictive means to achieve the purpose.[12] I analyse each of these factors below.

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[10] Section 14 of the Constitution provides:

> "Everyone has the right to privacy, which includes the right not to have—
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> (a) their person or home searched;
>
> (b) their property searched;
>
> (c) their possessions seized; or
>
> (d) the privacy of their communications infringed."

[11] *Thint (Pty) Ltd v National Director of Public Prosecutions and Others, Zuma and Another v National Director of Public Prosecutions and Others* [2008] ZACC 13; 2009 (1) SA 1 (CC); 2008 (12) BCLR 1197 (CC) (*Thint*) at paras 76-7. See also *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) (*Hyundai*) at para 18.

[12] Section 36 of the Constitution provides:

The nature of the right

[16] Section 14 of the Constitution guarantees everyone the right to privacy, including the right not to have their person or home searched, their property searched, their possessions seized, or the privacy of their communications infringed. This Court has held that an individual's right to privacy is bolstered by his or her right to dignity in section 10 of the Constitution.[13]

[17] Privacy, like all rights, is not absolute. In *Bernstein* this Court held:

> "The truism that no right is to be considered absolute implies that from the outset of interpretation each right is always already limited by every other right accruing to another citizen. In the context of privacy this would mean that it is only the inner sanctum of a person, such as his/her family life, sexual preference and home environment, which is shielded from erosion by conflicting rights of the community."[14]

[18] In *Mistry*, this Court emphasised the sanctity of the right to privacy and said that the existence of safeguards to regulate the way in which state officials may enter the private domains of ordinary citizens is one of the features that distinguishes a

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"(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

[13] *Hyundai* above n 11 at para 18; *Thint* above n 11 at para 77.

[14] *Bernstein and Others v Bester NO and Others* [1996] ZACC 2; 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) at para 67.

constitutional democracy from a police state.[15] In *Gaertner*, this Court held that "the right to privacy embraces the right to be free from intrusions and interference by the state and others in one's personal life".[16] How closely one infringes on the "inner sanctum" of the home is a consideration that must be borne in mind when considering the extent to which a limitation of the right to privacy may be justified.

The importance of the purpose of the limitation

[19] In *Magajane*, Van der Westhuizen J stated:

> "[T]he importance of the purpose of the limitation, is crucial to the analysis, as it is clear that the Constitution does not regard the limitation of a constitutional right as justified unless there is a substantial state interest requiring the limitation."[17]

[20] Section 11(1)(a) and (g) aims to prevent and prosecute the commission of offences under the Drugs Act. These offences, like other unlawful activities, are conducted in a clandestine fashion, successful prosecution of which requires the limitation of the right to privacy. The absence of having to obtain a warrant allows police officers to conduct efficient inspections by facilitating the quick discovery of evidence that would otherwise be lost or destroyed. Drug related offences are commonplace and their successful prosecution necessitates that the integrity of evidentiary material is preserved; which the impugned provisions ostensibly purport to achieve. The importance of this purpose diminishes the invasiveness of searches under the impugned provisions.

The nature and extent of the limitation

[21] The impugned provisions are broad. Section 11(1)(a) and (g) of the Drugs Act does not circumscribe the time, place nor manner in which the searches and seizures

[15] *Mistry v Interim National Medical and Dental Council of South Africa and Others* [1998] ZACC 10; 1998 (4) SA 1127 (CC); 1998 (7) BCLR 880 (CC) at para 25.

[16] *Gaertner* above n 5 at para 47.

[17] *Magajane* above n 9 at para 65.

can be conducted. Again, the words of Van der Westhuizen J in *Magajane* bear reference:

> "[The warrant] governs the time, place and scope of the search, limiting the privacy intrusion, guiding the State in the conduct of the inspection and informing the subject of the legality and limits of the search. Our history provides much evidence for the need to adhere strictly to the warrant requirement."[18]

[22] Further, section 11(1)(a) grants police officers the power to search warrantless at "any time" "any premises, vehicle, vessel or aircraft" and "any container" in which substances or drugs are suspected to be found. Hence, as contended by the applicants, the premises which may be searched include private homes where the expectation of privacy is greater, being regarded as the "inner sanctum" of a person. Section 11(1)(g) allows police officers to seize "anything" connected with a contravention of a provision of the Drugs Act. This power to seize without a warrant derives from the power of police officials to engage in a warrantless search.

[23] I agree with the applicants' contention that the impugned provisions leave police officials without sufficient guidelines with which to conduct the inspection within legal limits. A warrantless search procedure implies the absence of a warrant providing guidance as to the time, place and scope of a search and it is therefore desirable that the statutory provision authorising a warrantless search procedure be crafted so as to limit the possibility of a greater limitation of the right to privacy than is necessitated by the circumstances, which the warrant requirement would otherwise do.

The relation between the limitation and its purpose

[24] A rational connection must exist between the purpose of a law and the limitation it imposes.[19] As was submitted by the applicants, a rational connection

[18] Id at para 74.

[19] Id at paras 72-3 and *Gaertner* above n 5 at para 67.

does exist between the limitation of the respondent's rights and the purpose of section 11(1)(a) and (g). The prevention and prosecution of offences under the Drugs Act, which concern illicit and harmful drugs that constitute a serious scourge to public safety and well-being, require search and seizure operations of the sort contemplated in the provisions. Intrinsic to such operations is an element of intrusion and the provisions must be construed in such context.

Are there less restrictive means to achieve the purpose?

[25] The fundamental problem in section 11(1)(a) and (g) is that it allows police officials to escape the usual rigours of obtaining a warrant in all cases, including those cases where urgent action is not required and that the delay occasioned in obtaining a warrant will not result in the items or evidence sought being lost or destroyed. Surely police officials can prevent and prosecute offences under the Drugs Act in a less restrictive fashion than what is contemplated in this section.

[26] Section 11(1)(a) implies that warrantless searches of private homes may be conducted pursuant to it. The more a search intrudes into the "inner sanctum" of a person (such as their home) the more the search infringes their privacy right.[20] The provisions are also problematic as they do not preclude the possibility of a greater limitation of the right to privacy than is necessitated by the circumstances, with the result that police officials may intrude in instances where an individual's reasonable expectation of privacy is at its apex.

[27] It should not be forgotten that exceptions to the warrant requirement should not become the rule. In 2013, this Court found provisions in the Customs and Excise Act[21] that provided for a warrantless search procedure to unjustifiably conflict with the constitutionally guaranteed right to privacy. Madlanga J stated:

[20] See *Bernstein* above n 14 at para 67 and *Magajane* above n 9 at para 82.

[21] 91 of 1964.

> "A warrant is not a mere formality. It is a mechanism employed to balance an individual's right to privacy with the public interest in compliance with and enforcement of regulatory provisions. A warrant guarantees that the State must be able, prior to an intrusion, to justify and support intrusions upon individuals' privacy under oath before a judicial officer. Further, it governs the time, place and scope of the search. This softens the intrusion on the right to privacy, guides the conduct of the inspection, and informs the individual of the legality and limits of the search. Our history provides evidence of the need to adhere strictly to the warrant requirement unless there are clear and justifiable reasons for deviation."[22]

[28] In 2014, this Court again found provisions,[23] which allowed for a warrantless search and seizure procedure, unconstitutional because of the limitation on the right to privacy. Cameron J held:

> "The conclusion is unavoidable that in their present form both provisions fail to pass constitutional scrutiny. The fundamental reason in each case is their initiating premise: that all the searches they authorise require no warrant. In this, they afford no differentiation as to the nature of the search or the nature of the premises searched. The result is that they go too far, in authorising warrantless searches in circumstances where no justification can exist for not requiring the Board to obtain a warrant."[24]

[29] In the same year, this Court found in *Ngqukumba* that the retention of a motor vehicle by the police without having obtained a search and seizure warrant, or having acted pursuant to a lawful warrantless search procedure, to be inconsistent with the right to privacy and dignity. Madlanga J held:

> "In the face of the privacy right as also the right to dignity, which are closely linked, it is not overly restrictive to require of police to comply strictly with search-warrant requirements. Where there is a need for swift action, the police can always invoke

[22] *Gaertner* above n 5 at para 69.

[23] Namely, section 32A of the Estate Agency Affairs Act 112 of 1976 and section 45B of the Financial Intelligence Centre Act 38 of 2001.

[24] *Estate Agency Affairs Board* above n 4 at para 40.

> section 22 of the Criminal Procedure Act. Strict compliance with the Constitution and the law will not hamper police efforts in stemming the scourge of crime."[25]

[30] Constitutionally adequate safeguards must exist to justify circumstances where legislation allows for warrantless searches.[26] Examples of such safeguards can be found in section 22 of the Criminal Procedure Act which provides:

> "A police official may without a search warrant search any person or container or premises for the purpose of seizing any article referred to in section 20–
>
> (a) if the person concerned consents to the search for and the seizure of the article in question, or if the person who may consent to the search of the container or premises consents to such search and the seizure of the article in question; or
>
> (b) if he on reasonable grounds believes–
>
> (i) that a search warrant will be issued to him under paragraph (a) of section 21(1) if he applies for such warrant; and
>
> (ii) that the delay in obtaining such warrant would defeat the object of the search."[27]

[31] Less restrictive measures therefore do exist to achieve the purpose of the Drugs Act. There is no readily discernible reason for section 11(1)(a) and (g) not contemplating such less restrictive means, which would prevent the possibility of a greater limitation of the right to privacy than is necessitated by the circumstances. Furthermore, the provisions do not contemplate instances where evidence sought will be lost or destroyed as a result of the delay occasioned when applying for a warrant.

[32] The balancing of these factors leads me to conclude that the limitation of the respondent's constitutional rights to privacy and dignity by section 11(1)(a) and (g) cannot be justified in terms of section 36 of the Constitution. I therefore conclude that

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[25] *Ngqukumba v Minister of Safety and Security and Others* [2014] ZACC 14; 2014 (5) SA 112 (CC); 2014 (7) BCLR 788 (CC) at para 19.

[26] *Magajane* above n 9 at para 77 and *Gaertner* above n 5 at paras 71-2.

[27] See also *Ngqukumba* above n 25 at para 19.

section 11(1)(a) and (g) of the Drugs Act constitutes an impermissible violation of the rights to privacy and dignity and is accordingly constitutionally invalid.

Must the declaration of invalidity be retrospective?

[33] A confirmation of constitutional invalidity will have retrospective effect unless the court making the declaration orders otherwise for reasons pertaining to justice and equity.[28] In this regard, the applicants and the respondent support the finding of the High Court that the effect of the declaration of invalidity be prospective. The applicants pointed out that the circumstances in this matter were similar to those in *Gaertner* and *Estate Agency Affairs Board*, where this Court ordered that the declarations of invalidity operate purely prospectively.[29]

[34] It is so that an order of prospective invalidity would mean that the respondent may not gain any effective relief during her trial. However, during the hearing, both parties supported the fact that an order of prospective invalidity would, in this case, be the most appropriate.

[35] Another factor that has to be taken into account is the reason why an order of prospective invalidity is made. The case law on this issue is trite. In *S v Zuma*[30] this Court held that the ability to limit the retrospective effect of orders of invalidity can be used "to avoid the dislocation and inconvenience of undoing transactions, decisions or

[28] Section 172(1) of the Constitution provides:

> "When deciding a constitutional matter within its power, a court—
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> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
>
> (b) *may make any order that is just and equitable*, including—
>
> (i) *an order limiting the retrospective effect of the declaration of invalidity*; and
>
> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

See also *Cross-Border Road Transport Agency v Central African Road Services (Pty) Ltd* [2015] ZACC 12; 2015 (5) SA 370 (CC); 2015 (7) BCLR 761 (CC) at paras 13-20.

[29] See *Gaertner* above n 5 at paras 76 and 88 and *Estate Agency Affairs Board* above n 4 at paras 49-51 and 73.

[30] *S v Zuma* [1995] ZACC 1; 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC).

actions taken under [the invalidated] statute".[31] The Court further held that "the interests 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".[32]

[36] In *Mistry* this Court rejected the idea of reaching back into the past to aid a single litigant and deny the same benefits to others in similar situations.[33] The Court held that its order would apply prospectively and refused to cause the order to apply to the applicant who launched the constitutional litigation. Similarly, in this case, it would not be appropriate to single out the respondent and not give other litigants who were in her position in the past the same benefit.

[37] In considering the respondent's interests, I must note that the warrantless searches of the respondent's property occurred on 14 March 2011. On that date neither this Court, nor lower courts had pronounced on *Gaertner*, *Estate Agency Affairs Board* and *Ngqukumba*.[34] The only judgment of this Court that provided jurisprudential clarity on warrantless search and seizure procedures was *Magajane* which was decided in 2006. It is therefore difficult to sustain the respondent's contention that at that stage the impugned provisions were "clearly inconsistent [with] the Constitution of South Africa, 1996 and invalid". Absent an earlier challenge of constitutional invalidity it cannot be said that the respondent, having been searched in compliance with what was then binding legislation, can aver that it would be unjust for this Court to make a prospective order, but one that still protects her interests. The respondent was no doubt aware that legislation existed to prevent and combat drug related offences and her institution of proceedings to challenge such legislation some two and a half years after the searches and seizures in question were made do

[31] Id at para 43.

[32] Id.

[33] *Mistry* above n 15 at para 42.

[34] This Court pronounced in *Gaertner* in 2013 and *Estate Agency Affairs Board* and *Ngqukumba* in 2014.

not entitle her to an exemption from their application. In any event, the respondent can challenge the validity of the searches during her trial.

[38] In conclusion, the offences prosecuted under the Drugs Act are serious. Retrospective application may cause criminals who have contravened provisions of the Drugs Act to go free and undermine the administration of justice. The declaration may result in delictual claims by persons subject to searches and seizures, further burdening SAPS. I have found this case to be analogous to *Gaertner* and *Estate Agency Affairs Board* and I see no reason to depart from the approach adopted in these decisions to make a declaration of invalidity that operates prospectively.

[39] Therefore, it is in the interests of justice and equity that the High Court's declaration of constitutional invalidity be confirmed and its operation be prospective.

Should the declaration of invalidity be suspended?

[40] In the circumstances of this case, I see no reason for this Court to suspend the declaration of invalidity. A *lacuna* is avoided in that the offences contemplated by the Drugs Act are already covered by section 22 of the Criminal Procedure Act, which provides for a constitutionally sound warrantless search procedure. It follows that police officials seeking to prevent and prosecute offences contemplated by the Drugs Act may rely on section 22 of the Criminal Procedure Act, should the need for a warrantless search and seizure procedure be occasioned.

Costs

[41] Notwithstanding the respondent's support of the application – as evidenced in her notice filed on 13 January 2016 – and the concessions by her counsel before us, her counsel insisted that this Court should (i) confirm the High Court's costs order and (ii) order costs against the first and third applicants for the respondent's appearance before this Court.

Costs in the High Court

[42] Counsel for the respondent argued that in confirmation proceedings this Court is required to confirm the High Court's order in its entirety, including the costs order. This proposition was based on two legs, the first was that if this Court declined to confirm the High Court's order of invalidity, the High Court's costs order would be imperilled, and secondly, counsel relied on *Dawood*[35] to support the contention that confirmation of an order of invalidity requires this Court to confirm all orders ancillary thereto, including the High Court's costs order. This proposition is without merit.

[43] Regarding the first leg, the applicants did not appeal against the High Court's costs order. This left the costs order safely in the respondent's pocket. In fact not only had the applicants' right of appeal long become pre-empted, but they had expressly supported the confirmation of the High Court's order of invalidity. As for the second leg, section 172(2)(a) of the Constitution makes it clear that confirmation proceedings are limited to an "order of constitutional invalidity". It is only the parts of the order that declare "an Act of Parliament, a provincial Act or any conduct of the President" unconstitutional that this Court is required to confirm in order to give legal force to such invalidity. Costs, on the other hand, follow a different logic. The purpose of a costs order is to indemnify the successful party[36] and to refund expenses actually incurred.[37] A costs order is not intended to compensate for the risk to which one has been exposed.[38]

[35] *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* [2000] ZACC 8; 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) (*Dawood*) at para 18.

[36] *Texas Co (SA) Ltd v Cape Town Municipality* 1926 AD 467 at 488.

[37] *Payen Components South Africa Ltd v Bovic Gaskets CC* 1999 (2) SA 409 (W) at 417D.

[38] Id.

Costs in this Court

[44] Counsel for the respondent asked for costs in this Court on the basis that in recent years this Court has on numerous occasions been asked to confirm the constitutional invalidity of warrantless search provisions in several pre-constitutional statutes as they infringe the constitutionally entrenched rights to dignity and privacy. He contended that even though these cases have been so analogous, that, faced with another, this Court has held that such a case "requires no reinvention", the respondent still required representation in this Court. This is not an argument that can vindicate the respondent's costs in this Court.

[45] What is apparent is that at the time of the hearing, this Court's pronouncements in *Gaertner*, *Estate Agency Affairs Board* and *Ngqukumba* were not only fresh but plain in their impact on the impugned provisions. Similarly not only had the applicants conceded the invalidity of the provisions, but themselves sought confirmation of their invalidity in this Court. There may very well be instances where a respondent's presence in confirmation proceedings in this Court is necessary to ensure that its interests are protected in the event of novel or complex issues arising during the hearing, notwithstanding its agreement with the applicant's contentions. However, in the circumstances of this case it is clear that this contention cannot be sustained.

[46] Therefore, it follows that the respondent's entitlement to costs is limited to her costs up to the delivery of her notice dated 13 January 2016 which indicated her support for the applicants' confirmation application.

Order

[47] In the result, the following order is made:

1. The declaration of constitutional invalidity of section 11(1)(a) and (g) of the Drugs and Drug Trafficking Act 140 of 1992, made by the

High Court of South Africa, Western Cape Division, Cape Town is confirmed.

2. The declaration of invalidity will apply from the date of this order.

3. The first and third applicants are ordered, jointly and severally, to pay the respondent's costs, including the costs of two counsel, up to the date of delivery of her notice dated 13 January 2016.

For the Applicants:	AM Breitenbach SC and N Pakade instructed by the State Attorney
For the Respondent:	A Katz SC and R Liddell instructed by Francois Potgieter & Partners