THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 548/2023

In the matter between:

JOYCE SEABERRY BRITTON	**APPELLANT**

and

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	**FIRST RESPONDENT**
DIRECTOR OF PUBLIC PROSECUTIONS, WESTERN CAPE	**SECOND RESPONDENT**
MAGISTRATE, PRETORIA	**THIRD RESPONDENT**
ADDITIONAL MAGISTRATE, CAPE TOWN	**FOURTH RESPONDENT**

Neutral citation: *Britton v Minister of Justice and Correctional Services and Others* (548/2023) [2024] ZASCA 148 (31 October 2024)

Coram: ZONDI DP and NICHOLLS and KGOELE JJA and HENDRICKS and MASIPA AJJA

Heard: 16 August 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down of the judgment is deemed to be 14h00 on 31 October 2024.

Summary: Section 5(1)(*a*) of the Extradition Act 67 of 1962 – finding of constitutional invalidity does not apply retrospectively – held that Constitutional Court's order was prospective in effect.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Sher J, sitting as court of first instance):

The appeal is dismissed with costs including the costs of two counsel, where so employed.

JUDGMENT

Nicholls JA (Zondi DP and Kgoele JA and Hendricks and Masipa AJJA concurring):

Introduction

[1] This appeal concerns the extradition of Joyce Seaberry Britton (Ms Britton), a citizen of the United States of America (USA), to her country of origin. Ms Britton faces various counts of tax evasion in the State of Illinois, where she formerly practised as an attorney. She fled the USA and has been living in Cape Town since approximately October 2002. The central issue for determination is whether the finding by the Constitutional Court in *Smit v Minister of Justice and Correctional Services and Others* (*Smit*),[1] that s 5(1)*(a)* of the Extradition Act 67 of 1962 (the Act), is unconstitutional and invalid, is retrospective in effect. If this is the case, then the notice of extradition and the warrant of arrest issued in terms of that section, in respect of Ms Britton, falls to be declared unlawful and set aside.

[2] The Constitutional Court in *Harksen*[2] detailed the three bases upon which extradition may be sought in South Africa under the Act.[3] The first, and which this

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[1] *Smit v Minister of Justice and Correctional Services and Others* [2020] ZACC 29; 2021 (3) BCLR 219 (CC); 2021 (1) SACR 482 (CC) (*Smit*).

[2] *Harksen v President of the Republic of South Africa and Others* [2000] ZACC 29; 2000 (2) SA 825 (CC); 2000 (1) SACR 300; 2000 (5) BCLR 478.

[3] Ibid para 5; *Gueking v President of South Africa* [2002] ZACC 29; 2003(3) SA 34 (CC); 2004 (9) BCLR 895 (CC); 2003 (1) SACR 404 (CC) (*Gueking*) para 12.

appeal is concerned with, is where the person is accused of an extraditable offence committed in the jurisdiction of a foreign state with which South Africa has an extradition agreement. The second is where there is no extradition agreement with the foreign state but the President has consented to the person being extradited. The third is where the foreign state has been 'designated' by the President.

[3] The extradition process itself has different stages.[4] Once there exists an extradition treaty between a foreign state and the Republic of South Africa, as is the case here, the Minister of Justice and Correctional Services (the Minister), after receiving an extradition request from the foreign state, has the power to notify a magistrate of such a request. In terms of s 5(1)*(a)* the notification empowers the magistrate to issue a warrant for the arrest of such a person regardless of their whereabouts.

[4] Therefore, the first stage in the extradition process is the arrest of the person concerned under s 5(1)*(a)* or s 5(1)*(b)*. The second stage is the holding of an enquiry under s 9(1),[5] where the magistrate makes a finding in terms s 10,[6] whether the evidence is sufficient to have the person surrendered to the foreign state. If such a

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[4] *Gueking* para 13 -17*; Smit v Minister of Justice and Correctional Services and Others* [2020] ZACC 29; 2021 (3) BCLR 219 (CC); 2021 (1) SACR 482 (CC) paras 49-50.

[5] Section 9(1) of the Extradition Act 67 of 1962 (the Act) provides that:
'Any person detained under a warrant of arrest or a warrant for his further detention, shall, as soon as possible be brought before a magistrate in whose area of jurisdiction he has been arrested, whereupon such magistrate shall hold an enquiry with a view to the surrender of such person to the foreign State concerned'.

[6] Section 10 of the Act provides that:
'(1) If upon consideration of the evidence adduced at the enquiry referred to in section 9 (4) (*a*) and (*b*) (i) the magistrate finds that the person brought before him or her is liable to be surrendered to the foreign State concerned and, in the case where such person is accused of an offence, that there is sufficient evidence to warrant a prosecution for the offence in the foreign State concerned, the magistrate shall issue an order committing such person to prison to await the Minister's decision with regard to his or her surrender, at the same time informing such person that he or she may within 15 days appeal against such order to the Supreme Court.
(2) For purposes of satisfying himself or herself that there is sufficient evidence to warrant a prosecution in the foreign State the magistrate shall accept as conclusive proof a certificate which appears to him or her to be issued by an appropriate authority in charge of the prosecution in the foreign State concerned, stating that it has sufficient evidence at its disposal to warrant the prosecution of the person concerned.
(3) If the magistrate finds that the evidence does not warrant the issue of an order of committal or that the required evidence is not forthcoming within a reasonable time, he shall discharge the person brought before him.
(4) The magistrate issuing the order of committal shall forthwith forward to the Minister a copy of the record of the proceedings together with such report as he may deem necessary.'

finding is made, the Minister then has a discretion under s 11,[7] to order the surrender of the person to the foreign state. It is the initial stage that is at issue in this appeal, namely the arrest of Ms Britton under s 5(1).

[5] Section 5 of the Act provides that:

'(1) Any magistrate may, irrespective of the whereabouts or suspected whereabouts of the person to be arrested, issue a warrant for the arrest of any person-

(a) upon receipt of a notification from the Minister to the effect that a request for the surrender of such person to a foreign State has been received by the Minister; or

(b) upon such information of his or her being a person accused or convicted of an extraditable offence committed within the jurisdiction of a foreign State, as would in the opinion of the magistrate justify the issue of a warrant for the arrest of such person, had it been alleged that he or she committed an offence in the Republic.'

Background

[4] The charges against Ms Britton date back to the period between 1999 to 2002. The allegations made against Ms Britton are as follows. She was employed through the Department of Children and Family Services to provide legal services to the State of Illinois for which she received approximately $4,1 million. This was based on fraudulent billing. She claimed to have been working on cases for prospective adoptive parents, when in fact no work had been done. She evaded income tax and instructed

[7] Section 11 of the Act provides that:
'The Minister may-
(a) order any person committed to prison under section 10 to be surrendered to any person authorized by the foreign State to receive him or her; or
(b) order that a person shall not be surrendered-
(i) where criminal proceedings against such person are pending in the Republic, until such proceedings are concluded and where such proceedings result in a sentence of a term of imprisonment, until such sentence has been served;
(ii) where such person is serving, or is about to serve a sentence of a term of imprisonment, until such sentence has been completed;
(iii) at all, or before the expiration of a period fixed by the Minister, if he or she is satisfied that by reason of the trivial nature of the offence or by reason of the surrender not being required in good faith or in the interests of justice, or that for any other reason it would, having regard to the distance, the facilities for communication and to all the circumstances of the case, be unjust or unreasonable or too severe a punishment to surrender the person concerned; or
(iv) if he or she is satisfied that the person concerned will be prosecuted or punished or prejudiced at his or her trial in the foreign State by reason of his or her gender, race, religion, nationality or political opinion.'

her secretary to destroy all her records. She then liquidated $2,5 million of her assets which she deposited in a Swiss bank account and fled to South Africa.

[5] Two indictments were filed against Ms Britton, one in the Circuit Court of Cook County in 2005 and the other in the US District Court, Northern District of Illinois in 2006. She was charged with offences of theft by deception, theft by unauthorised control over property, and various income tax related charges concerning the evasion of the payment of taxes and the failure to submit tax returns over a period of four years. A warrant for her arrest was issued. She was disbarred by the Supreme Court of Illinois in January 2005. It is not disputed that the offences with which Ms Britton was charged are extraditable offences in terms of the extradition treaty between South Africa and the USA.

[6] Ms Britton first learnt in 2007 that the authorities in the USA were intent on seeking her extradition. On 4 February 2009 she appeared in the Cape Town Magistrates Court for the purposes of holding an inquiry in terms of the Act. She successfully challenged the lawfulness of those extradition proceedings in the Western Cape High Court (the high court). Unbeknownst to Ms Britton, the USA government sent through another request for her extradition in 2011. As far as Ms Britton was concerned, nothing further occurred until some eight years later when in October 2017 she was advised by a member of the South African Police Services that a request had been received for her extradition. It is these extradition proceedings that are the subject of this appeal.

[7] The current extradition process commenced on 27 February 2017, when the USA sent a diplomatic note to the Department of International and Foreign Affairs in South Africa to request the extradition of Ms Britton. The National Director of Public Prosecutions was informed of the request, and on 20 June 2017 the Minister issued a notice for her extradition in terms of s 5(1) of the Act. On 18 July 2017, the magistrate issued a warrant for her arrest in terms of the s 5(1)*(a)* of the Act. She was subsequently arrested on 12 October 2017 and immediately released on bail.

In the high court

[8] In 2018 Ms Britton launched proceedings in the high court claiming the following relief:

'1. Declaring that section 5(1) of the Extradition Act 67 of 1962 (the Extradition Act) is inconsistent with the Constitution of the Republic of South Africa, 1996 (the Constitution) and invalid.

2. Declaring that the notification dated 20 June 2017, purportedly issued in terms of section 5(1)(a) of the Extradition Act by the First Respondent to the effect that he had received a request for the surrender of the Applicant to the United States of America (the notification) is inconsistent with the Constitution and invalid.

3. Reviewing and setting aside the First Respondent's decision to issue the notification.

4. Declaring that the warrant of the Applicant's arrest purportedly issued in terms of section 5(1)(a) of the Extradition Act by the Third Respondent on 18 July 2017 (the warrant of arrest) is inconsistent with the Constitution and invalid.

5. Reviewing and setting aside the Third Respondent's decision to issue the warrant of arrest.

6. Declaring the Applicant's arrest on 12 October 2017 to be inconsistent with the Constitution, unlawful and invalid.

7. . . . '

By the time the matter was heard in the high court the primary issue for determination was whether Ms Britton was entitled to relief consequent upon *Smit* which had been delivered on 18 December 2020, more than three years after the warrant for her arrest had been issued and executed. The high court dismissed her application but granted leave to appeal to this Court.

[9] The majority in *Smit*[8] found s 5(1)(*a*) to be inconsistent with the Constitution, in that, when issuing a warrant of arrest, all that was required of the magistrate to issue a warrant was a notification from the Minister. The magistrate did not have to apply his or her mind in any way, nor was there any exercise of a discretion. Instead, a magistrate was obliged to act on the mere say-so of the Minister. As the section implicated the right in s 12(1)(*a*) of the Constitution not to be arbitrarily deprived of freedom, it had to satisfy both a substantive and a procedural component. The Constitutional Court found that the substantive facet of the section was satisfied by the

[8] *Smit* fn 1 paras 103-107, 111-114, 147 and 151.

need to arrest for the purposes of fulfilling international obligations and of considerations of reciprocity and comity among nations.

[10] However, the majority found that this was not the case with the procedural facet of s 5(1)*(a)*, which required that no one be deprived of their liberty unless fair and lawful procedures had been followed. This, said Madlanga J, writing for the majority, meant that the magistrate should play the oversight role of an independent arbiter, rather than merely rubberstamp what a member of the executive places before her. Unlike s 5(1)*(b)*, which requires the magistrate to weigh up facts and to reach a decision on them, thereby affording the magistrate the opportunity 'to act as a magistrate', s 5(1)*(a)* did not permit a magistrate to exercise any judicial discretion.

[11] On this basis the Constitutional Court declared s 5(1)*(a)* to be inconsistent with the Constitution and invalid. Without giving reasons therefor, it ordered that the declaration of invalidity 'takes effect from the date of this order'.[9] The date of that order was 18 December 2020. This was after the arrest of Ms Britton on 12 October 2017 but while her extradition was pending.

[12] The high court rejected the argument that despite its prospectivity, the order was applicable to Ms Britton. It reasoned:

'49. The fact that the learned judge failed to comment in this regard, or to expressly set out his rationale for making an order which was prospective in effect, as opposed to one which was retrospective, in accordance with the default position, does not mean that this aspect was not considered. As was pointed out in *Cross-Border*, judges must be taken to be 'well-appraised' of the consequences of a declaration of constitutional invalidity, and their 'silence' when making such a declaration must not readily be understood to mean that there was 'judicial inadvertence' on their part.

50. In my view, considering the context of the minority and majority judgments in *Smit* as a whole, one must conclude that the selfsame considerations as those which motivated the minority against the default position being implemented in respect of the declaration of constitutional invalidity pertaining to s 63 of the Drugs Act, must have motivated the determination in paragraph 10 of the order of the majority, that the declaration of constitutional invalidity in respect of s 5(10)*(a)* of the EA was also to be prospective.

[9] Ibid para 155.

51 In this regard, making a default order which was retrospective would have nullified all extradition proceedings and orders for extradition which had been previously made, since the time when the Constitution came into operation i.e since 1997, and would have invalidated all pending extradition proceedings where extraditees had been arrested in terms of s 5(1)(a), which had not been finalized as at the date of the decision. This would obviously have caused immeasurable chaos and disruption in international relations between SA and partner states with whom it had entered into extradition treaties and would have damaged its international standing and reputation. It would, at least in regard to pending extraditions, have resulted in convicted foreign criminals and fugitives being rendered non-extraditable, resulting in a wholesale failure of justice.' (Citations omitted.)

In this Court

[13] In this Court, the challenge to Ms Britton's notice of extradition and warrant of arrest crystallised into two points, namely whether *Smit* applied retrospectively and what was described by Ms Britton's counsel as the 'rubberstamping' argument. The question of the previous extradition applications and the delay in bringing the current extradition application was one of the main challenges to Ms Britton's arrest in the heads of argument. However, it was accepted that this Court was bound by *McCarthy v Additional Magistrate*, *Johannesburg and Others*.[10] There, it was held that a delay of approximately nine years before a third warrant was issued, was not sufficient grounds for an indefinite stay of proceedings of an enquiry in terms of ss 9 and 10 of the Act. This was with a view to surrendering the appellant in that case to the USA. In any event, said the court, the significance of the delay would be a matter for consideration at a later stage when the Minister, in his discretion would decide whether, in terms of s 11 of the Act, to surrender the person to the foreign state. I now deal with the two arguments before this Court.

Rubber-stamping

[14] This was an argument that counsel for Ms Britton informed us he had thought of the night before the hearing. It was not raised in the heads of argument and the state had not had an opportunity to consider it. As a result, it was agreed that supplementary heads would be filed by both parties on this point. The notion of

[10] *McCarthy v Additional Magistrate, Johannesburg* [2000] ZASCA 191; [2000] 4 All SA 561 (A) paras 30, 43 and 46.

rubberstamping espoused by the Constitutional Court was taken further and in a different context. It was contended that not only did the Pretoria Magistrate fail to exercise an independent mind when he issued the warrant for Ms Britton on the say-so of the Minister (in line with the majority finding in *Smit*), but that he also did no more than merely rubberstamp the draft warrant that was placed before him. This is allegedly evidenced from the text of the warrant and the magistrate's own affidavit.

[15] The warrant of Ms Britton reads as follows:

'. . .

WHEREAS a request under **Section 4(1) of the Extradition Act 67 of 1962,** has been received and a notification under **Section 5(1)(a)** has been issued for the surrendering of one **FATIMA JOYCE BRITTON @ JOYCE SEABERRY BRITTON date of birth 27 August 1950, United State National, Passport number 201726793.**

WHEREAS I am in receipt of information under oath that a warrant of arrest has been issued in the **UNITED STATE OF AMERICA** and she is wanted on **Two (2) counts of theft by deception, in violation of chapter 720, Two (2) counts theft by unauthorized control over property, in violation of Chapter 720, section 5/16-1 (a) of the Ilinois Compiled Statues and counts five (5) through eight (8) she willful failure to file income tax returns for the years 2000, 2001, 2002 and 2023 in violation of Chapter 35, Act 5 Section 1301 of Illinois Compiled States.**

AND WHEREAS I am also of the opinion, based upon information placed before me, that the issuing of a warrant of arrest in respect of **FATIMA JOYCE BRITTON @ JOYCE SEABERRY BRITTON.**

Would have been justified on charge **of theft by deception, contrary to chapter 720 and willful failure to file income tax return contrary to United States Code 7203,** had it been alleged that he committed the said offences in the Republic, and that he is a person liable to be surrendered to the **UNITED STATE OF AMERICA.**

You are hereby directed to arrest him and bring him before a lower court in accordance with the provisions of **Section 50 of the Criminal Procedure Act, 1977 (Act 51 of 1977).**

. . . '

[16] The magistrate in his affidavit stated that the decision to issue a warrant of arrest in terms of s 5(1)*(a)* does not involve the exercise of any discretion on his part. Instead, he must determine objectively whether the Minister has issued a s 5(1)*(a)*

notification for the surrender of a person to a foreign state. If there is such a notice, said the magistrate, he has no discretion to refuse to issue a warrant. If there is no such notice then the magistrate has the discretion to refuse to issue the warrant, alternatively to satisfy himself that the requirements of s 5(2) have been met.

[17] It was argued that, in addition, the magistrate could not have considered the documents before him, nor the exact terms of the draft order provided to him. The basis for this is said to be found in the text of the warrant in the following respects: Ms Britton pointed out that there is a reference to s 4(1)*(b)* although there is no evidence to that effect placed before the magistrate; the pronouns used for Ms Britton are male in the third paragraph of the warrant; the warrant uses phraseology found in s 5(1)*(b)* even though the magistrate was not required to issue a warrant in terms of that section; and, there is a reliance on the USA statutory offences instead of referring to their South African equivalents. It is submitted that from a cursory look at the warrant it is apparent that the magistrate did not apply his mind to the actual warrant but merely signed the draft warrant which the police had placed before him, unaccompanied by a written request.

[18] What is clear is that the magistrate did not believe that he had a discretion to refuse to issue a warrant in terms of s 5(1)*(a)* once the jurisdictional requirements stated by the minority in *Smit* were present. These are a notification by the Minister; that the Minister has received a request from a foreign state; that the request is for the surrender of the person to the foreign state; that the offence is in respect of an extraditable offence.[11] As such the warrant in this respect fell into the category which was criticised and found to be unconstitutional by the majority in *Smit*. But what is not apparent is that from the text alone, the magistrate can be accused of merely rubberstamping the warrant without reading it properly or applying his mind to it.

[19] Many of the latter complaints were not raised in the pleadings. The use of male pronouns in the third paragraph of the warrant was raised for the first time in reply and the magistrate did not have an opportunity to explain the error. The correct pronoun is used in the second paragraph of the warrant although not in the third paragraph. The

[11] *Smit* fn 1 above para 113.

undisputed fact is that the magistrate was aware of Ms Britton's gender. The use of s 5(1)(*b*) phraseology was not raised in the papers. In any event this is irrelevant as the magistrate explained in his affidavit that notwithstanding the use of terminology of s 5(1)*(b)* the warrant of arrest was clearly sought and granted in terms of s 5(1)*(a)*.

[20] The magistrate also said that when issuing a warrant, he considered the offences for which the person is sought in the requesting state and then determined whether those would be offences in South Africa. The magistrate stated that if Ms Britton had committed the offence of 'theft by deception contrary to chapter 720 and wilful failure to file income tax return[s] contrary to United States Code 7203' then a warrant could have been issued in South Africa. It is correct that none of the specific offences mentioned by the magistrate exist in South Africa and are statutory offences in the USA. However, the magistrate considered whether these are offences in South Africa. He stated that 'theft by deception' was equivalent to fraud in South Africa.

[21] As regards the reference to s 4(1) it is difficult to understand why this would justify a finding that the magistrate did not apply his mind before issuing the warrant. Section 4(1) sets out that any request for the surrender of a person to a foreign state shall be made through diplomatic channels to the Minister. That it was recorded in the warrant is factually correct.

[22] The argument that on the face of it the magistrate merely rubberstamped the draft warrant of arrest without paying any attention to the contents thereof, and thus in effect merely rubberstamping what was placed before him, is not borne out by the evidence. This submission must fail.

Retrospectivity

[23] What has to be considered by this Court is whether the *Smit* order of invalidity made by the Constitutional Court on 18 December 2020 applies to the arrest of Ms Britton although her arrest was three years prior to that date. The supremacy clause in the Constitution automatically renders any unconstitutional law a nullity *ab initio*. A court order declaring a law to be unconstitutional does not invalidate the law but merely

declares it to be invalid.[12] Thus, the default position in all declarations of constitutional invalidity is retrospectivity. Section 98(6) of the 1993 Interim Constitution specifically provided that orders of invalidity would not invalidate any act permitted before the coming into effect of the declaration of invalidity.[13] Now s 172(1)*(b)*(i) permits a court in the interests of justice and equity to limit the retrospective effects of an order of invalidity. This is done by balancing the disruptive effects of the retrospectivity against the need to grant effective relief to an applicant and others in a similar situation.

[24] The argument on behalf of Ms Britton is that until 18 December 2020, s 5(1)*(a)* provided a lawful basis for her arrest but thereafter the legal justification ceased. Because arrest is 'continuing' in that her deprivation of liberty is ongoing, on the Constitutional Court's declaration of invalidity, the underlying justification for Ms Britton's arrest no longer exists and she is being deprived of her liberty arbitrarily and without just cause. There must be a constant justification for a person's arrest and a continuing lawful reason for the entire period of arrest, so it is contended. On this basis it was submitted that even though the *Smit* order does not apply to finalised cases of extradition, it applies retrospectively to ongoing arrests under s 5(1)*(a)*. It therefore applies retrospectively to extradition proceedings which have not been finalised. In addition, so it was argued, a declaration of retrospective invalidity would not leave the state without remedies. As counsel for Ms Britton pointed out on more than one occasion, a declaration of invalidity on the basis of *Smit*, would entitle the state to issue a new warrant of arrest in terms of s 5(1)*(b)* the following day.

[25] It has been acknowledged that retrospective invalidation of actions taken in good faith could have disruptive effects. For example, in *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*,[14] the Constitutional Court ordered prospectivity to avoid 'potential disruption' of marriages

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[12] *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 para 27.

[13] Section 98(6) of the Interim Constitution provides that:

'Unless the Constitutional Court in the interests of justice and good government orders otherwise, and save to the extent that it so orders, the declaration of invalidity of a law or a provision thereof-

(a) existing at the commencement of this Constitution, shall not invalidate anything done or permitted in terms thereof before the coming into effect of such declaration of invalidity; or

(b) passed after such commencement, shall invalidate everything done or permitted in terms thereof.'

[14] *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* [1999] ZACC 17; 2000 (2) SA 1; 2000 (1) BCLR 39 para 89.

that had already been solemnised under the challenged statute. The court emphasised that, while the Act in question was unconstitutional, its retroactive invalidation would have a destabilising effect on those who relied on its provisions. In ordering a period of suspension of invalidity the Constitutional Court has acknowledged the destabilising effect of immediate declarations of invalidity.

[26] Ms Britton placed strong reliance on *S v Ntesle*,[15] and *S v Bhulwana*; *S v Gwadiso*,[16] to argue for limited retrospectivity. Both these matters were heard when the interim Constitution was in force. In both, the Constitutional Court cited with approval Harlan J in *Mackey v US*,[17] where he said:

'No one, not criminal defendants, not the judicial system, not society as a whole, is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved.'

As a general principle, therefore, an order of invalidity will have no effect on cases which have been finalised prior to the date of the order of invalidity.[18] The considerations before making an order of retrospectivity were outlined in these two matters. One was the likely impact on the administration of justice if the provision were to be struck down with immediate effect.[19] It is only when the interests of good government outweigh the interests of individual litigants that the court will not grant relief to successful litigants, and, in principle those which are in a similar situation.[20]

[27] However, what is significant is that the court in both those matters fashioned the relief in such a manner so as to specifically exclude an appeal or review which was pending or where the time for noting an appeal had not yet expired, in its order of prospectivity. Similarly, in *Geldenhuys v National Director of Public Prosecutions and Others*,[21] the court found that there may be outstanding cases relating to the offence

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[15] *S v Ntsele* [1997] ZACC 14; 1997 (11) BCLR 1543 (*Ntsele*).
[16] *S v Bhulwana, S v Gwadiso* [1995] ZACC 11; 1996 (1) SA 388; 1995 (12) BCLR 1579 (*Bhulwana*).
[17] *Mackey v United States* [1971] USSC 61; 401 US 667 at 691.
[18] *Ntsele* fn 15 para 14. See also *Bhulwana* fn 16 para 32.
[19] *Ntsele* fn 15 above para 13.
[20] *Bhulwana* fn 16 case at para 32.
[21] *Geldenhuys v National Director of Public Prosecutions and* Others [2008] ZACC 21; 2009 (2) SA 310 (CC); 2009 (1) SACR 231 (CC); 2009 (5) BCLR 435 (CC) para 39.

and to strike down the legislation would create a *lacuna*.[22] It therefore made specific provision for pending appeals. No such order was made in *Smit*. Had the majority wanted to exclude pending matters from its order of prospectivity, it would have done so in explicit terms, with reasons for its decision. The failure to do so can only mean that the Constitutional Court, being aware of the possibility of making a limited declaration of retrospectivity, elected not to do so.

[28] As was explained by the minority in *Smit*, in dealing with the constitutional invalidity of s 63 of the Drugs Act 140 of 1992,[23] any retrospective invalidation would be inimical to the public interest and the administration of justice in respect of concluded prosecutions. 'It will also result in a disruption in the prosecution of suspected offenders.'[24] Because it dismissed the application to declare s 5(1)*(a)* inconsistent with the Constitution, it was not necessary for the minority to deal with the prospectivity of s 5(1)*(a)*. Surprisingly, neither did Madlanga J in the majority judgment deal with why he had ordered that the constitutional invalidity apply prospectively.

[29] While there are sound reasons of policy not to make an order of invalidity applicable to cases that have been determined under an invalid law, the same is not ordinarily so in respect of pending cases. There does not seem to be a reason to resolve these cases on the basis of a law that has finally been declared to be invalid. That is usually what the interests of justice require, and it is what the Constitutional Court has ordered in a number of its decisions, referred to above. It did not do so in *Smit*. While it provided no reasons for its order of prospectivity, the order it gave is explicit. It is not open to this Court to speculate as to some implicit reservation of retrospectivity that the Constitutional Court in *Smit* left unexpressed. The appellant may well be deserving of the benefit of the declaration of invalidity given by the Constitutional Court, but since that court has rendered such invalidity prospective, the warrant of arrest that was issued in terms of s 5(1)*(a)* in respect of Ms Britton, is to be treated as valid. Any different order is beyond the remit of revision by this Court.

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[22] The offence in question was the age of consent for 'immoral and indecent acts' among same sex people as opposed to the same acts between heterosexual people.
[23] *Smit* fn 1 para 93.
[24] Ibid para 93.

[30] In the result the following order is made:

The appeal is dismissed with costs including the costs of two counsel, where so employed.

C E HEATON NICHOLLS
JUDGE OF APPEAL

Appearances

For the appellant:	A Katz SC (with M Adhikari)
Instructed by:	Walkers Incorporated, Cape Town
	Claude Reid Attorneys, Bloemfontein
For the first respondent:	A G Christians
Instructed by:	State Attorney, Cape Town
	State Attorney, Bloemfontein