

**GUIDELINES REGARDING CANNABIS (DAGGA) PROSECUTIONS
USE, POSSESSION OR CULTIVATION OF CANNABIS BY AN ADULT IN PRIVATE
FOR THAT ADULT'S PERSONAL CONSUMPTION IN PRIVATE**

1. INTRODUCTION

- 1.1. The recent decision by the Constitutional Court in *Minister of Justice and Constitutional Development and Others v Prince: Case CCT 108/17 [2018] ZACC 30* (18 September 2018) relating to the use, possession or cultivation of cannabis by an adult in private for that adult's personal consumption in private has created some uncertainty with regard to the prosecution of persons for possession or dealing in cannabis in contravention of the Drugs and Drug Trafficking Act, 140 of 1992.
- 1.2. This decision is binding on all courts.
- 1.3. This guideline serves to assist prosecutors in deciding the course of action in a particular matter.

2. THE DECISION

- 2.1. The Constitutional Court in the abovementioned matter declared, section 22A(9)(a)(i) of the Medicines and Related Substances Control Act, 1965 as well as sections 4(b) and 5(b) of the Drugs and Drug Trafficking Act, 1992, inconsistent with the Constitution and invalid to the extent that they respectively prohibit the use, possession or cultivation of cannabis by an adult in private - where use, possession or cultivation of cannabis is for personal consumption by that adult in private.
- 2.2. The Constitutional Court suspended its order of invalidity for a period of 24 months to give Parliament an opportunity to correct the constitutional defects in the mentioned Act.
- 2.3. In order to ensure that adults who fall into the above described category receive effective relief, the Court granted interim relief by way of a reading-in of the two Acts to ensure that, during the period of suspension of invalidity, it would not be a criminal offence for an adult:
 - (a) To use or be in possession of cannabis in private for his or her personal consumption in private; and
 - (b) to cultivate cannabis in a private place for his or her personal consumption in private.

3. CHILDREN

The Court explicitly states that the case/judgment is only applicable to adults and therefore children (as defined) are excluded.

4. PURCHASE OF CANNABIS

The provision that prohibits the purchase of cannabis is not declared constitutionally invalid. The Court specifically states: "A purchaser of cannabis would be purchasing it from a dealer in cannabis" and "We have no intention of decriminalising dealing in cannabis".

5. USE, POSSESSION OR CULTIVATION OF CANNABIS FOR PERSONAL CONSUMPTION BY AN ADULT IN PRIVATE.

5.1. The decision is limited to the use, possession or cultivation of cannabis in private for personal consumption by that adult in private. This is based on a right to privacy.

In this regard, the Dictionary meaning of 'consumption' as well as the Dictionary meaning of 'in private' with inclusion of the Court's description of 'in private' should be considered:

Consumption: 'the act of using, eating, or drinking something'. (Cambridge Dictionary)

In private: 'With no one else present' (Dictionary. Com) or with only consenting adult(s) present. (Court's words)

5.2 The Court states specifically:

- a) An adult may, use or be in possession of cannabis in private for his or her personal consumption in private.
- b) The use, including smoking, of cannabis in public or in the presence of children or in the presence of non-consenting adult(s) is not permitted.
- c) The use or possession of cannabis in private other than by an adult for his or her personal consumption is not permitted.
- d) The cultivation of cannabis by an adult in a private place for his or her personal consumption in private is no longer a criminal offence.

Considering the above, the Court specifically distinguish between the actions use, possess and cultivation of cannabis.

USE OF CANNABIS:

- a) An adult may use cannabis in private for his or her personal consumption in private.
- b) An adult may not use (including smoking) cannabis in public or in the presence of children or in the presence of non-consenting adult(s).
- c) An adult may not use cannabis in private other than for his or her personal consumption.

POSSESSION OF CANNABIS:

- a) An adult may be in possession of cannabis in private for his or her personal consumption in private.
- b) With regard to possession of cannabis by an adult in public for his or her personal consumption in private the Court states the following:

"[98]...The effect of the order of the High Court is that an adult would not be committing any crime by using or possessing or cultivating cannabis in a private dwelling or in a home for his or her consumption but the moment he or she steps out of the private dwelling or home, he or she would be committing a criminal offence. This means that an adult who has cannabis in his or her pocket for his or her personal consumption within the boundaries of a private dwelling or home would not be committing an offence but he or she would be committing an offence if, for example, he or she were to step outside of the boundary of the home or private dwelling while such cannabis remained in his or her pocket and he or she possesses it for his or her personal consumption.

[99] Mr Prince and those who were applicants or plaintiffs in the High Court have applied for leave to cross-appeal against the High Court's decision to confine its order to the use and possession of cannabis at home or in a private dwelling.

[100] It seems to me that, indeed, there was no persuasive reason why the High Court confined its declaration of invalidity to the use or possession or cultivation of cannabis at a home or in a private dwelling. In my view, as long as the use or possession of cannabis is in private and not in public and the use or possession of cannabis is for the personal consumption of an adult, it is protected. Therefore, provided the use or possession of cannabis is by an adult person in private for his

or her personal consumption, it is protected by the right to privacy entrenched in section 14 of our Constitution.

[101] Since I have concluded that the limitation is not reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, an order will have to be made declaring the relevant provisions constitutionally invalid to the extent that they criminalise the use or possession of cannabis in private by an adult for his or her personal consumption in private...

[108] This judgment does not confine the permitted use or possession or cultivation of cannabis to a home or a private dwelling. This is because there are other places other than a person's home or a private dwelling where the prohibition of the use or possession or cultivation of cannabis would be inconsistent with the right to privacy if the use or possession or cultivation of cannabis was by an adult in private for his or her personal consumption in private. Using the term "in private" instead of "at home" or "in a private dwelling" is preferable.

[129] In all the circumstances I make the following order:

...6. The cross-appeal is upheld in part to the extent that the reference in the order of the High Court to "in a private dwelling" or "in private dwellings" is replaced with "in private" or in the case of cultivation, "in a private place".

Having regard to the above statements by the Court, it is apparent that an adult may 'privately/discreetly possess cannabis in public for his or her personal consumption in private, i.e. the possession while the person is in public must be 'in private'.

Privately: "in a private way, manner, or capacity".

Discreetly: "in an intentionally unobtrusive manner".

- c) An adult may not possess cannabis other than for his or her personal consumption.

CULTIVATION OF CANNABIS:

- a) An adult may cultivate cannabis in a private place for his or her personal consumption in private.

- b) An adult may not cultivate cannabis in a public place for his or her personal consumption in private. An adult may not cultivate cannabis in a private place other than for his or her personal consumption in private.

6. QUANTITY OF CANNABIS

6.1 The Court states specifically:

"[111] ...I think that the references to possession of cannabis, "for personal use," or "for personal consumption" help to ensure that we do not have to specify the amount or quantity of cannabis that may be possessed. We only need to say that the amount that may be possessed is an amount for personal consumption."

Stemming from this statement by the Court, the Court also indicates:

- a) The amount that may be possessed is an amount for personal consumption.
- b) In determining whether an adult is in possession of cannabis for a purpose other than for personal consumption, an important factor to be considered will be the amount of cannabis found in his or her possession.
- c) The greater the amount of cannabis of which a person is in possession, the greater the possibility is that it is possessed for a purpose other than for personal consumption.
- d) Where an adult is charged with possession of cannabis, the State will bear the onus to prove beyond a reasonable doubt that the purpose of the possession was not personal consumption.
- e) Ultimately, it will be the court that will decide whether the person possessed the cannabis for personal consumption.

6.2 The judgment is silent on whether a person may store a large quantity for use or 'small quantities' over a long period, but it appears that this is not what the court had in mind.

7. SECTION 40(1)(h) OF THE CPA

7.1. The applicants also sought an order of invalidity of section 40(1)(h) of the Criminal Procedure Act, 51 of 1977, which empowers a peace officer without a warrant to arrest

any person who is reasonably suspected of have committed an offence under any law governing the making, supply, possession or conveyance of cannabis.

- 7.2. The Court decided that there is no need for this provision to be declared constitutionally invalid and it therefore remains valid.

8. CATEGORIES OF PROSECUTION

8.1. CHILDREN

There is no change in the law and the prosecutions must proceed in the usual manner.

8.2. PENDING CASES (WHERE THE ACCUSED HAS NOT PLEADED YET)

The prosecutor must consider the evidence of each case on its merits and if it appears that the accused will be able to successfully raise the defence provided by the Constitutional Court, the charge(s) may be withdrawn. The Senior Public Prosecutor or Office of the DPP should be consulted in cases of uncertainty.

8.3. PARTLY HEARD MATTERS

It is important to note that there is no general or automatic stay of these prosecutions in terms of the order granted by the court.

Regarding 'Retrospectivity of the order of invalidity', the Court stated as follows:

"[102] Another issue which must be decided is whether the order of invalidity that we make in this matter should operate with retrospective effect. I think it should not because it could have a disruptive effect on, and, cause uncertainty in, our criminal justice system. Accordingly, the order of invalidity in this case will operate prospectively."

8.4. NEW MATTERS

- a) Again, there is no general or automatic stay of these prosecutions.
- b) The prosecutor must decline to prosecute the docket (Nolle prosequi) on the basis that the use or possession of cannabis was in private for the suspect's personal consumption in private OR the cultivation of cannabis was in a private place for the suspect's personal consumption in private. The prosecutor should endorse the docket stating that the matter is withdrawn in compliance with the Constitutional Court's Order.

- c) If it appears that the accused will be able to successfully raise the defence, the charge may be withdrawn at first appearance. The Senior Public Prosecutor or Office of the DPP should be consulted in cases of uncertainty. The prosecutor should endorse the docket stating that the matter is withdrawn and mention the reason(s) in accordance with the supplied guidelines.