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**CONSTITUTIONAL COURT JUDGMENT ON THE USE, CULTIVATION OR POSSESSION OF CANNABIS BY AN ADULT PERSON IN PRIVATE FOR HIS / HER PERSONAL CONSUMPTION IN PRIVATE: MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT AND OTHERS V PRINCE; NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS AND OTHERS V RUBIN; NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS AND OTHERS V ACTON AND OTHERS [2018] ZACC 30**

## **1. BACKGROUND:**

- 1.1 The recent judgment of the Constitutional Court in *Minister of Justice and Constitutional Development and Others v Prince: Case CCT 108/17 [2017] ZACC 30*

(18 September 2018) pertaining to the use, possession or cultivation of cannabis by an adult for that adult's personal consumption in private has created uncertainty with regard to the policing and prosecution of cannabis matters which may or may not qualify as personal consumption in private.

1.2 To this end, the National Prosecuting Authority issued guidelines regarding prosecutions to assist prosecutors in deciding the course of action in a particular matter. The guidelines are also relevant for police officials in that these guidelines assist with an understanding of the **effect of the judgment**. The guidelines are attached hereto as an annexure to this circular.

## 2. ORDER:

2.1 On 18 September 2018 the Constitutional Court, *inter alia*, declared that, with effect from the date of the handing down of the judgment, the **provisions of sections 4(b) of the Drugs and Drug Trafficking Act, 1992 (Act No. 140 of 1992)** read with Part III of Schedule 2 of that Act **and the provisions of section 22A(9)(a)(i) of the Medicines and Related Substances Control Act, 1965 (Act No. 101 of 1965)**, read with Schedule 7 of GN R509 of 2003 published in terms of section 22A(2) of that Act are **inconsistent** with the **right to privacy** entrenched in section 14 of the Constitution and, therefore, **invalid** to the extent that they make the **use or possession of cannabis in private** by an **adult** person for his or her **own consumption in private** a criminal offence.

2.2 The Court further declared that, with effect from the date of the handing down of the judgment, the **provisions of section 5(b) of the Drugs and Drug Trafficking Act, 1992 (Act No. 140 of 1992)** read with Part III of Schedule 2 of that Act and with the **definition of the phrase "deal in"** in section 1 of the Drugs and Drug Trafficking Act, 1992 are **inconsistent** with the **right to privacy** entrenched in section 14 of the Constitution and, are, therefore, constitutionally invalid to the extent that they prohibit the **cultivation of cannabis by an adult in a private place** for his or her **personal consumption in private**.

2.3 The Court declared that the operation of the above orders will be **suspended for a period of 24 months** to enable Parliament to rectify constitutional defects and that

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**consumption in private.**

2.3 The Court declared that the operation of the above orders will be **suspended for a period of 24 months** to enable Parliament to rectify constitutional defects and that **during this period of invalidity certain additional exceptions** have to be read into **section 4(b)** of the Drugs and Drug Trafficking Act, 1992, **the definition of “deal in”** in section 1 of the Drugs and Drug Trafficking Act, 1992 and the provisions of **section 22A(9)(a)(i)** of the Medicines and Related Substances Control Act, 1965.

**3. RELEVANT LEGISLATION:**

The following legislation is relevant to this circular:

- 3.1 Constitution of the Republic of South Africa, 1996;
- 3.2 Criminal Procedure Act, 1977 (Act No. 51 of 1977);
- 3.3 Drugs and Drug Trafficking Act, 1992 (Act No. 140 of 1992);
- 3.4 Medicines and Related Substances Control Act, 1965 (Act No.101 of 1965);
- 3.5 Child Justice Act, 2008 (Act No. 75 of 2008);
- 3.6 Children’s Act, 2005 (Act No 38 of 2005) and
- 3.7 National Road Traffic Act, 1996 (Act No. 93 of 1996).

**4. THE CURRENT WORDING AND READING IN PROVISIONS OF THE AFFECTED LEGISLATION, FOLLOWING THE ORDER OF THE CONSTITUTIONAL COURT:**

4.1 Section 4(b) of the Drugs and Drug Trafficking Act, 1992 provides as follows (following the order of the Constitutional Court):

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4.2 *“No person shall use or have in his possession—*

*(b) any dangerous dependence-producing substance or any **undesirable dependence-producing substance**, unless—*

*(i) he is a patient who has acquired or bought any such substance—*

*(aa) from a medical practitioner, dentist or practitioner acting in his professional capacity and in accordance with the requirements of the Medicines Act or any regulation made thereunder; or*

*(bb) from a pharmacist in terms of an oral instruction or a prescription in writing of such medical practitioner, dentist or practitioner, and uses that substance for medicinal purposes under the care or treatment of the said medical practitioner, dentist or practitioner;*

*(ii) he has acquired or bought any such substance for medicinal purposes—*

*(aa) from a medical practitioner, veterinarian, dentist or practitioner acting in his professional capacity and in accordance with the requirements of the Medicines Act or any regulation made thereunder;*

*(bb) from a pharmacist in terms of an oral instruction or a prescription in writing of such medical practitioner, veterinarian, dentist or practitioner; or*

*(cc) from a veterinary assistant or veterinary nurse in terms of a prescription in writing of such veterinarian, with the intent to administer that substance to a patient or animal under the care or treatment of the said medical practitioner, veterinarian, dentist or practitioner;*

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- (iii) *he is the Director-General: Welfare who has acquired or bought any such substance in accordance with the requirements of the Medicines Act or any regulation made thereunder;*
- (iv) *he, she or it is a patient, medical practitioner, veterinarian, dentist, practitioner, nurse, midwife, nursing assistant, pharmacist, veterinary assistant, veterinary nurse, manufacturer of, or wholesale dealer in, pharmaceutical products, importer or exporter, or any other person contemplated in the Medicines Act or any regulation made thereunder, who or which has acquired, bought, imported, cultivated, collected or manufactured, or uses or is in possession of, or intends to administer, supply, sell, transmit or export any such substance in accordance with the requirements or conditions of the said Act or regulation, or any permit issued to him, her or it under the said Act or regulation;*
- (v) *he is an employee of a pharmacist, manufacturer of, or wholesale dealer in, pharmaceutical products, importer or exporter who has acquired, bought, imported, cultivated, collected or manufactured, or uses or is in possession of, or intends to supply, sell, transmit or export any such substance in the course of his employment and in accordance with the requirements or conditions of the Medicines Act or any regulation made thereunder, or any permit issued to such pharmacist, manufacturer of, or wholesale dealer in, pharmaceutical products, importer or exporter under the said Act or regulation;*
- (vi) *he has otherwise come into possession of any such substance in a lawful manner; or*
- (vii) *in the case of an adult, the substance is cannabis and he or she uses it or is in possession thereof in private for his or her personal consumption in private* **(Sub-section (vii) is a new insertion, following the order of the**

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**Court).**

4.3 The definition of “**deal in**” in section 1 of the Drugs and Drug Trafficking Act, 1992 provides as follows (following the order of the Constitutional Court):

*“**deal in**”, in relation to a drug, includes performing any act in connection with the transshipment, importation, cultivation other than the cultivation of cannabis by an adult in a private place for his or her personal consumption in private, collection, manufacture, supply, prescription, administration, sale, transmission or exportation of the drug”. (New insertion, following the order of the Court).*

4.4 Section 5 of the Drugs and Drug Trafficking Act, 1992, **prohibits dealing in any dependence-producing substance or any dangerous dependence-producing substance or any undesirable dependence-producing substance** unless one or more of the exceptions listed in that section applies. **(This section has not been declared invalid by the Constitutional Court** and, accordingly, has not been amended).

4.5 Section 5 of the above-mentioned Act reads as follows:

*“No person shall deal in—*

*(a) any dependence-producing substance; or*

*(b) any dangerous dependence-producing substance or any undesirable dependence-producing substance, unless—*

*(i) he has acquired or bought any such substance for medicinal purposes—*

*(aa) from a medical practitioner, veterinarian, dentist or practitioner acting in his professional capacity and in accordance with the*

*requirements of the Medicines Act or any regulation made thereunder;*

- (bb) from a pharmacist in terms of an oral instruction or a prescription in writing of such medical practitioner, veterinarian, dentist or practitioner; or*
- (cc) from a veterinary assistant or veterinary nurse in terms of a prescription in writing of such veterinarian, and administers that substance to a patient or animal under the care or treatment of the said medical practitioner, veterinarian, dentist or practitioner;*
- (ii) he is the Director-General: Welfare who acquires, buys or sells any such substance in accordance with the requirements of the Medicines Act or any regulation made thereunder;*
- (iii) he, she or it is a medical practitioner, veterinarian, dentist, practitioner, nurse, midwife, nursing assistant, pharmacist, veterinary assistant, veterinary nurse, manufacturer of, or wholesale dealer in, pharmaceutical products, importer or exporter, or any other person contemplated in the Medicines Act or any regulation made thereunder, who or which prescribes, administers, acquires, buys, transships, imports, cultivates, collects, manufactures, supplies, sells, transmits or exports any such substance in accordance with the requirements or conditions of the said Act or regulation, or any permit issued to him, her or it under the said Act or regulation; or*
- (iv) he is an employee of a pharmacist, manufacturer of, or wholesale dealer in, pharmaceutical products, importer or exporter who acquires, buys, transships, imports, cultivates, collects, manufactures, supplies, sells, transmits or exports any such substance in the course of his employment and in accordance with the requirements or conditions of the Medicines*

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*Act or any regulation made thereunder, or any permit issued to such pharmacist, manufacturer of, or wholesale dealer in, pharmaceutical products, importer or exporter under the said Act or regulation”.*

4.6 According to **section 13** of the Drugs and Drug Trafficking Act, 1992, the following **offences** in relation to schedule substances and drugs have been created:

*“Any person who—*

- (a) places any drug in the possession, or in or on the premises, vehicle, vessel or aircraft, of any other person with intent that the latter person be charged with an offence under this Act;*
- (b) contravenes a provision of section 3;*
- (c) contravenes a provision of section 4 (a);*
- (d) contravenes a provision of section 4 (b);*
- (e) contravenes a provision of section 5 (a); or*
- (f) contravenes a provision of section 5 (b), shall be guilty of an offence”.*

4.7 The above-mentioned Act provides for the following **penalties** in **section 17**:

*“Any person who is convicted of an offence under this Act shall be liable—*

- (a) .....*;
- (b) in the case of an offence referred to in section 13 (a) or (c), to such fine as the court may deem fit to impose, or to imprisonment for a period not exceeding five years, or to both such fine and such imprisonment;*



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- (c) *in the case of an offence referred to in section 13 (e), to such fine as the court may deem fit to impose, or to imprisonment for a period not exceeding 10 years, or to both such fine and such imprisonment;*
- (d) *in the case of an offence referred to in section 13 (b) or (d), 14 or 15, to such fine as the court may deem fit to impose, or to imprisonment for a period not exceeding 15 years, or to both such fine and such imprisonment; and*
- (e) *in the case of an offence referred to in section 13 (f), to imprisonment for a period not exceeding 25 years, or to both such imprisonment and such fine as the court may deem fit to impose”.*

4.8 Section 22A(9)(a)(i) of the Medicines and Related Substances Control Act, 1965 provides as follows (following the order of the Constitutional Court):

“(9) (a) *No person shall—*

- (i) *acquire, use, possess, manufacture or supply any Schedule 7 or Schedule 8 substance, or manufacture any specified Schedule 5 or Schedule 6 substance unless, in the case of cannabis, he or she, being an adult, uses it or is in possession thereof in private for his or her personal consumption in private or, in any other case, he or she has been issued with a permit by the Director-General for such acquisition, use, possession, manufacture or supply: Provided that the Director-General may, subject to such conditions as he or she may determine, acquire or authorise the use of any Schedule 7 or Schedule 8 substance in order to provide a medical practitioner, analyst, researcher or veterinarian therewith on the prescribed conditions for the treatment or prevention of a medical condition in a particular patient, or for the purposes of education, analysis or research”. **(New insertion, following the order of the Court).***

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4.9 Section 29(k), read with section 30(1), provides for the **offence** and **penalties** in respect of a contravention of Section 22A(9)(a)(i) of the Medicines and Related Substances Control Act, 1965. (According to section 30(1) of the Act, a person who is convicted of an offence referred to in **section 29** shall be liable to a fine, or to imprisonment for a period not exceeding 10 years).

## 5. WHAT IS CANNABIS?

5.1 Cannabis is listed in Schedule 2 Part III of the **Drugs and Drug Trafficking Act, 1992** as an undesirable dependence-producing substance and comprise of the whole plant or any portion thereof. Per definition, it relates to any part of the cannabis plant-including seeds, leaves and flowers.

5.2 Cannabis is listed in the **Medicines and Related Substances Control Act, 1965**, as a Schedule 7 substance where it is defined as the whole part or any portion or product thereof, subject to certain exceptions. Cannabis oil is therefore included in the definition of cannabis as per the Medicines and Related Substances Control Act, 1965.

## 6. EFFECT OF THE JUDGMENT:

6.1 An **adult** person may **use or possess** cannabis **in private** for his or her **personal consumption in private**.

6.2 The **use, including smoking**, of cannabis **in public** or in the **presence of children** or in the **presence of non-consenting adult persons** is **not permitted**.

6.3 The **use or possession** of cannabis **in private other than by an adult** for his or her **personal consumption** is **not permitted**.

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- 6.4 The **cultivation** of cannabis by an **adult** in a **private place** for his or **personal consumption in private** is **no longer a criminal offence**.
- 6.5 **Children** (under the age of 18 years) are **still subject to all the prohibitions** of both Acts, the Court did not create any exception in respect of children.
- 6.6 The **judgment does not confine** the permitted use or possession or cultivation of cannabis to a **home or a private dwelling**.
- 6.7 **Dealing in cannabis** (and other drugs) **remains a serious criminal offence** and has not been decriminalised by the Constitutional Court.
- 6.8 The Court **did not prescribe the quantity of cannabis** that will qualify as personal consumption. (The quantity of cannabis that may qualify as personal consumption still has to be incorporated in legislation). The larger the quantity of cannabis involved, the greater the possibility, that the cannabis is not possessed, used or cultivated for personal consumption.
- 6.9 Members must still register charges in terms of section 4(b) of the Drugs and Drug Trafficking Act, 1992 for the illegal use or possession of cannabis in a scenario which does not fall within the ambit of the judgment, namely:
- If cannabis is **used by a child** (subject to the provisions of the Child Justice Act);
  - If cannabis is in the **possession of a child** (subject to the provisions of the Child Justice Act);
  - If cannabis is **not possessed “in private” by an adult;**
  - If cannabis is **not used “in private” by an adult;** and

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- If cannabis is **not in the possession of an adult for purposes of his or her own consumption in private.**

6.10 In the light of the above, it is essential that the CAS/ICDMS must still provide for charges to be registered in terms of section 4(1)(b) of the Drugs and Drug Trafficking Act, 1992 and section 22A(9)(a)(i) of the Medicines and Related Substances Control Act, 1965.

## 7. DISCRETION OF A POLICE OFFICIAL:

- 7.1 In terms of the judgment, police officials have to rely on their discretion, based on reasonable grounds, to address situations where persons are found in the possession of cannabis in public or who are cultivating cannabis other than in a private place. The police official will need to have regard to all relevant circumstances and take a view whether the cannabis possessed by a person is for personal consumption or not.
- 7.2 In exercising the mentioned discretion, a police official will rely on his or her observation of the circumstances as well as the surrounding facts. In exercising this discretion, the police official will have to ask questions to the person implicated, including any other person who may be able to assist with information. The explanation provided by the person may guide the police official in respect of the course of action to be taken. In order to determine whether the person possesses, uses or cultivates the cannabis for personal consumption, the police official must consider all relevant circumstances inclusive of the quantity of cannabis.
- 7.3 If a police official finds a person in possession of cannabis and he or she reasonably suspects that it is **not for personal consumption**: Before a police official arrests, he or she will have to ask the person such questions as may be necessary to satisfy himself or herself whether the cannabis he or she is in possession of is for personal consumption. The arresting police official must exercise his or her discretion to arrest

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in good faith, rationally and not arbitrarily.

- 7.4 If the explanation is not satisfactory, the police official has a discretion whether to make use of summons, written notice or to arrest the person (e.g. person is in possession of other types of drugs or poses a flight risk).
- 7.5 If the police official is satisfied, based on reasonable grounds, that the quantity of cannabis found in the possession of the person is small enough to qualify as personal consumption, he or she may not arrest and charge the person. This means that the cannabis in question may not be seized from the person. It is advised that the police official records an entry to this effect in his or her pocket book/diary, together with the reasons for his or her decision not to arrest and charge the person.
- 7.6 If the police official is **in doubt** as to whether the quantity of cannabis found qualify as personal consumption, he or she **must not arrest the person** (unless there are other lawful and compelling reasons for an arrest such as the possession of other types of drugs or weapons, etc.) but should rather register a criminal case docket and ensure that the person is brought to court by means of a summons or written notice. The cannabis must be seized, weighed and booked into the SAP13. If the prosecutor declines to prosecute the person, (*nolle prosequi*), the cannabis must be returned to the person from whom it was seized, provided that such person may lawfully possess the cannabis. (See section 31 of the Criminal Procedure Act, 1977). (A child for instance, cannot lawfully possess cannabis). A dealer may, in certain circumstances, lawfully possess small quantities for his or her own personal consumption/use in private.
- 7.7 In all cases of doubt, Legal and Policy Services, and especially the prosecutor assigned to/dealing with the matter, must be approached for guidance. Ultimately, it will be the court that will decide whether the person possessed the cannabis for personal consumption or not.

7.8 If there is a **clear indication** that the cannabis **does not** qualify as **personal consumption** (*inter alia* large quantities and an unsatisfactory explanation provided) or where a suspect had been dealing in cannabis, **normal police practice must be followed**. This will include seizure of the cannabis and the registering of criminal charges and may or may not include arrest, based on the circumstances of a specific situation. In these instances the subsequent criminal trial will determine the fate of the suspect as well as the disposal of the seized cannabis. If the court does not make a disposal order in respect of the seized cannabis, the South African Police Service will have to dispose of the seized cannabis in accordance with the provisions of the Criminal Procedure Act, No. 51 of 1977. The seized cannabis cannot be returned to a person from whom it was seized, if such person may not lawfully possess the cannabis, e.g. quantities which do not qualify as personal consumption. **(The possession or cultivation of cannabis other than for personal consumption or dealing in cannabis are still criminal offences in terms of, *inter alia*, section 4(b) and 5(b) of the Drugs and Drug Trafficking Act, 1992).**

## **8. ARREST AS ONE OF THE METHODS OF SECURING THE ATTENDANCE OF AN ACCUSED IN COURT AND THE JURISDICTIONAL REQUIRMENTS FOR ARREST WITHOUT A WARRANT IN TERMS OF SECTION 40 OF THE CRIMINAL PROCEDURE ACT, 1977**

8.1 The jurisdictional facts for a lawful arrest without a warrant are set out in section 40 of the Criminal Procedure Act, 1977. Of specific relevance, as far as cannabis/drugs are concerned, are sections 40(1)(a), (b) and (h).

8.2 Section 40(1)(a) provides that a **peace officer** may, without warrant, arrest any person who commits or attempts to commit **any offence in his or her presence**.

8.3 Section 40(1)(b) provides that a **peace officer** may, without warrant, arrest any person whom he **reasonably suspects** of having committed an offence referred to in **Schedule 1**, other than the offence of escaping from lawful custody. Schedule 1

contains the more serious offences. Apart from the crimes which are specifically mentioned, the Schedule also includes offences for which a sentence may be imposed of imprisonment exceeding six months without the option of a fine.

8.4 Section 40(1)(h) of the Criminal Procedure Act of 1977 confers the power on a **peace officer to arrest without a warrant** any person who is **reasonably suspected** of committing or of having committed an offence **under any law** governing the making, supply, **possession** or conveyance of intoxicating liquor or of **dependence-producing drugs** or the possession or disposal of arms or ammunition. This section was not declared invalid by the Court and can be relied on to justify an arrest without a warrant in respect of cannabis, **provided that the possession or use of cannabis falls outside the perimeters of personal consumption**. Possession for purposes of personal consumption is no longer a criminal offence.

8.5 The police official is **not always obliged** to arrest. The decision to arrest must be based on the intention to bring the arrested person to justice, and not for any other reason.

## 9. PRIVACY:

9.1 The judgment, **distinguishes** between the **use, possession** and **cultivation of cannabis**.

9.2 **Possession** of cannabis for personal consumption in a **public place** is permitted, as long as the **possession is in private**. An adult may privately/discreetly possess cannabis in public for his or her personal consumption in private. Privately: "In a private way, manner, or capacity". Discreetly: "In an intentionally unobtrusive manner". In private: "*With no one else present*" (Dictionary.Com) or with only consenting adult(s) present. (Court's words). This means that a person may be in possession of a small quantity of cannabis in his pocket, bag or vehicle, even if the vehicle for instance, is parked or driven on a public road. See in this regard

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paragraph 5.2 of the National Prosecuting Authority Guidelines.

9.3 **The use, including smoking or consumption of cannabis in public or in the presence of children or non-consenting adults is not permitted.** “In public” will include public roads, sporting stadiums, schools, shops, cinemas, restaurants, taverns, public buildings and facilities such as parks, toilets, etc.

9.4 Cultivation of cannabis for personal consumption is limited to “**private places**”. This means that cultivation is **not permitted in a public place** or communal land that is worked by/occupied by various persons but is permitted in a person’s own private space such his or her residence, flat, room, garden or yard provided that a person has a legitimate expectation of privacy and the quantities of the cannabis qualify as personal consumption.

## 10. POSSIBLE SCENARIOS:

### 10.1 Passengers flying on a commercial airliner with small amounts of cannabis:

- Provided that the quantity of cannabis is small and based on all the circumstances of a specific matter, including the concealment of the cannabis in a bag or luggage of a passenger, possession for personal consumption, by an adult passenger on a **domestic flight, is permitted.**
- Cannabis **cannot be permitted** on an **international flight** since the definition of “deal in”, contained in the Drugs and Drug Trafficking Act, 1992, provides that importation or exportation will qualify as dealing in drugs. Dealing in cannabis remains a criminal offence. The person carrying cannabis on an international flight would in all probability and irrespective of the quantity involved, make himself or herself guilty of a serious offence at his or her final destination, which, in some countries, could result in lengthy jail sentences or a death sentence being imposed.



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#### 10.2 A child and an adult smoking cannabis together in a private place:

- The child still commits an offence and must be dealt with in terms of the Child Justice Act, No. 75 of 2008. Since the judgement did not decriminalise the use, including smoking of cannabis in the presence of children (or even in the presence of non-consenting adult persons), the adult is still committing an offence in terms of **section 4(b) of the Drugs and Drug Trafficking Act, 1992:** use or possession of an undesirable dependence-producing substance.
- In addition, the adult may also commit an offence in that he or she exposes the child to conduct which is unacceptable/dangerous and which is not in the best interest of the child in terms of the Children's Act No. 38 of 2005, providing possible grounds to remove such child to safe care if the child is in need of care and protection.

#### 10.3 Large scale cultivation of cannabis:

- It is most unlikely that large scale cultivation of cannabis will qualify as personal consumption, irrespective of the place and the manner in which, or where the same is cultivated. An offence may still be committed in terms of the Drugs and Drug Trafficking Act, 1992 or the Medicines and Related Substances Control Act, 1965 or both Acts. Cultivation of cannabis, other than cultivation by an adult in a private place for his or her personal consumption in private, will also **qualify as dealing in cannabis**, which remains a serious criminal offence in terms of section 5 of the Drugs and Drug Trafficking Act, 1992.

#### 10.4 Driving while under the influence of intoxicating liquor or drug having narcotic effect:

- It needs to be noted that according to **section 65(1) of the National Road Traffic Act**, No. 93 of 1996, no person may on a public road drive or occupy the

driver's seat of a vehicle while the engine of the vehicle is running, while such a person is under the **influence of an intoxicating liquor or a drug** which has a narcotic effect. Persons who drive under the influence of cannabis can be charged in terms of this section. The remainder of section 65 of the Act is aimed at the **concentration of alcohol** in a person's blood or breath and is therefore not relevant at present.

#### 10.5 Persons who use cannabis / cannabis oil for medicinal purposes:

- The Constitutional Court created a defence of personal consumption by an adult in private. Personal consumption may include the use, possession or cultivation of cannabis for medicinal purposes or even religious purposes, provided that the quantities involved qualify as personal consumption. If the quantities involved do not qualify as personal consumption, a criminal offence may be committed in terms of both the Drugs and Drug Trafficking Act, 1992 and/or the Medicines and Related Substances Control Act, 1965.

#### 10.6 Persons who purchase / sell cannabis:

- Conduct such as the **purchase, sale or supply** of cannabis constitutes **dealing** in cannabis which is a serious criminal offence in terms of the Drugs and Drug Trafficking Act, 1992. (Section 5(b)).

#### 10.7 Persons found in possession of small quantities of cannabis which may qualify for personal consumption, whilst walking along a street:

- It is possible that the possession of small quantities of cannabis may qualify as personal consumption, should a person be on a street and walking to, for instance, a private home. The police official concerned should, however, satisfy himself or herself through thorough inquiry, that the purpose of the conveyance of the cannabis at that particular time is for later private consumption of that

CONSTITUTIONAL COURT JUDGMENT ON THE USE, CULTIVATION OR POSSESSION OF CANNABIS BY AN ADULT PERSON IN PRIVATE FOR HIS / HER PERSONAL CONSUMPTION: MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT AND OTHERS V PRINCE; NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS AND OTHERS V RUBIN; NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS AND OTHERS V ACTON AND OTHERS [2018] ZACC 30

particular person, and not for the purpose of dealing or any other unlawful purpose. The police official's discretion is key and should an arrest follow, his or her reasonable suspicion should be accurately reflected in the arrest statement.

## **11. CONCLUSION:**

11.1 This circular must be brought to the attention of all members under your command. Any uncertainties must immediately be clarified with the Division: Legal and Policy Services and/or the National Prosecuting Authority.

11.2 Every police station must be in possession of this circular and the attached NPA Guidelines. This circular must be disseminated and brought to the attention of all operational members of the SAPS. Pending the enactment of legislation, the circular must be implemented by means of implementation plans in all provinces, which plans have to be signed off by every Provincial Commissioner. The implementation plans must provide for workshopping of the circular in all the provinces by Human Resource Development, Visible Policing and Legal and Policy Services. Corporate Communication and Liaison must ensure that the correct message in relation to the effect of the Constitutional Court is communicated, both externally as well as internally.

11.3 Cluster Commanders must ensure that possession-related cases are discussed with the Senior Public Prosecutor in whose area of jurisdiction his or her station precinct resort, in order to ensure that the Prosecuting Authority and the SAPS interpret and implement the guidelines in a uniform manner. This will ultimately minimise the risk of arrests being made only for the case not to be placed on the roll by the Prosecuting Authority.

11.4 The South African Police Service is in the process of implementing measures that will address the effect of the judgment in respect of its own employees in the workplace. Use of consumption of cannabis by a member of the South African Police Service

CONSTITUTIONAL COURT JUDGMENT ON THE USE, CULTIVATION OR POSSESSION OF CANNABIS BY AN ADULT PERSON IN PRIVATE FOR HIS / HER PERSONAL CONSUMPTION: MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT AND OTHERS V PRINCE; NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS AND OTHERS V RUBIN; NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS AND OTHERS V ACTON AND OTHERS. [2018] ZACC 30

while on duty at his or her workplace, even if it is done in private, is **unacceptable conduct**, similar to the consumption of liquor while on duty, and may constitute misconduct. Regulation 5(3)(r)(iv) and (v) of the **South African Police Service Discipline Regulations**, 2016 states that an employee will be guilty of misconduct if he or she renders himself or herself unfit for duty or for the performance of his or her functions by the **use** of liquor or **narcotic drugs** or reports for duty whilst **under the influence** of liquor or **narcotic drugs**.

  
**GENERAL  
NATIONAL COMMISSIONER SOUTH AFRICAN POLICE SERVICE  
KJ SITOLE (SOEG)**

Date: 2019-01-22

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

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### 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.