

MEMORANDUM: A BRIEF OVERVIEW OF SOUTH AFRICA'S CANNABIS REGIME

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AS AT: 21 JANUARY 2018

INTRODUCTION

1. This memorandum:
 - 1.1. in relation to recreational cannabis, analyses the effect of the order handed down on 18 September 2018 ("the Order") in the case of 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 ("the Judgment"); and
 - 1.2. sets out the legal limitations currently faced by the South African cannabis industry;
2. Any reference to "cannabis" herein is also a reference to "the whole plant or any portion or product thereof" excluding cannabidiol. This would include cannabis, seeds, leaves, stalks, flowers and cannabinoids (excluding cannabidiol).



MARIJUANA

DECriminalIZATION OF CANNABIS

3. The Order has profoundly changed the rights of South African adults in relation to cannabis. In the wake of the Judgment, the full extent of the changes to the day-to-day lives of cannabis-smoking South Africans has yet to crystalize, but, as of 18 September 2018, the following is of application: -
 - 3.1. Adults may, for their personal consumption, use, possess and cultivate cannabis in private. In this regard, privacy is not confined to the dwelling (home) of the adult in question. Adults may, for their personal consumption, use, possess and cultivate cannabis in any place that is private and not public. The Judgment, while not setting it out expressly, appears, in paragraphs 98 to 100 thereof, to suggest that adults may have cannabis on their private person while passing through a public space, provided that such cannabis is concealed and is intended to be used for personal consumption in private. Readers are, however, advised to exercise extreme caution in this regard, at least until the understanding/s of the police, prosecutors and Courts are established.
 - 3.2. It remains illegal for:
 - 3.2.1. adults to use cannabis in public, or in the presence of children, or in the presence of non-consenting adults;
 - 3.2.2. children to use, possess or cultivate cannabis, although readers should note that the Medicines and Related Substances Act 101 of 1965 ("the Medicines Act") may, in exceptional circumstances, permit the use of cannabis for the treatment of a child's medical condition;
 - 3.2.3. adults to possess, or cultivate, cannabis for any reason, other than for their personal consumption; and
 - 3.2.4. any person to buy or sell cannabis, unless in accordance with the Medicines Act 101 of 1965 ("the Medicines Act").

4. The Judgment also specifically notes the following: -
 - 4.1. A cannabis-possessing adult can only be arrested if it can be said that there is a reasonable suspicion that such possession was not for personal consumption. In this regard, the amount of cannabis in the possession of the adult in question will assume special importance, but all relevant factors will be taken into consideration.
 - 4.2. The Order does not operate retrospectively, which means that people who were charged for the use, possession and cultivation of cannabis before 18 September 2018 cannot, without more, escape their convictions by way of the Order.
 - 4.3. The Order has, in the interim, changed the law, as set out in paragraph 3.1 above, with immediate effect, by reading certain words into the relevant statutory provisions. However, the Order has also granted Parliament 24 months, from 18 September 2018, within which to amend the relevant statutory provisions in its own terms.
5. Lastly, the Constitutional Court, while handing down the Judgment on 18 September 2018, mentioned that it is for Parliament to determine the quantity of cannabis which may be used, possessed and cultivated in terms of the Order, but this does not change the interim arrangement, as detailed above. No such quantity has yet been declared.



6. In order to bring about the results detailed in paragraph 3 above, the Constitutional Court had to undo a number of statutory limitations, which were previously imposed by the Drugs and Drug Trafficking Act 140 of 1992 ("the Drugs Act") and the Medicines Act.
7. The Order has effectively invalidated sections, 1(1), 4(b) and 5(b) of the Drugs Act as well as section 22A(9)(a)(i) of the Medicines Act ("the Offending Provisions"), inasmuch as they prevented adults from consuming, using or cultivating cannabis in private, for their personal consumption in private, on the basis that such limitations offended against the constitutional right to privacy.
8. However, the Offending Provisions, in accordance with the Order, still prevent the sale of cannabis and the use, possession and cultivation of cannabis for any purpose other than for personal consumption by adults in private.
9. With respect to the handling of cannabis generally, section 22A(9)(a)(i) of the Medicines Act essentially provides that any person who intends to acquire, possess, manufacture, use, supply or handle cannabis for medicinal purposes must, as a starting point, obtain a permit from the Director General of the Department of Health ("s22A(9) Permit").
10. With respect to the sale of cannabis, section 22A(10) of the Medicines Act provides that no person shall sell or administer any scheduled substance or medicine for anything other than medicinal purposes. Naturally, there can be no sale without purchase. Therefore, it is apparent that the purchase and sale of cannabis can only be for medicinal purposes, as envisioned in the Medicines Act.
11. Lastly section 29(k) of the Medicines Act provides that any person who contravenes section 22A of the same act is guilty of a criminal offence.



SECTION 21 AUTHORISATION FOR MEDICAL PRACTITIONERS

12. Presently and before such time as a cannabis containing medicine is registered in South Africa (a process which takes up to 5 years) the only means by which a medical practitioner can sell a cannabis containing medicine to a patient is through section 21(1) of the Medicines Act which provides that the South African Health Products Regulatory Authority ("SAHPRA"):

"... may in writing authorise any person to sell during a specified period to any specified person or institution a specified quantity of any particular medicine ... which is not registered".

13. Cannabis, intended for medicinal uses, certainly, meets the definition of "Medicine" in section 1 of the Medicines Act, as it purports to be suitable in the terms listed therein. At present, no cannabis-containing medicines have been registered in South Africa.
14. In practice, applications in terms of section 21(1) can only be made on behalf of individual patients by their attendant medical practitioners. The medicine, which forms the subject matter of an application in terms of section 21(1), must be registered in another jurisdiction which is recognised by SAHPRA, but must not be registered in South Africa.
15. The section 21(1) procedure, therefore, allows medical practitioners to import an unregistered medicine to administer to specific patient, subject to a strict dosage regime. However, if that medicine contains a schedule 7 substance, such as cannabis, the relevant doctor must also apply for a s22A(9) Permit, as detailed above, and for a further permit in terms of section 22A(11)(a) of the Medicines Act, which must be obtained when anyone intends to import or export a substance which is categorised in is in schedules 5 to 8 of the Medicines Act ("s22A(11) Permit").

LICENCE TO CULTIVATE IMPORT AND EXPORT CANNABIS

16. Section 22C(1)(b) of the Medicines Act effectively allows any person to apply to SAHPRA for a licence to import, export, act as a wholesaler of or distribute cannabis. Before taking any steps towards obtaining a s22C Licence, applicants are required to meticulously consider and implement the requirements set out in the on Cultivation of Cannabis and Manufacture of Cannabis-Related Pharmaceutical Products for Medicinal and Research Purposes, published by the Medicine's Control Council (SAHPRA's previous identity), in November 2017, ("the Guidelines").
17. As confirmed in the Guidelines, applicants for a licence in terms of section 22C(1)(b) ("s22C Licence") must also apply for a s22A(9) Permit in order to acquire, possess, manufacture, use or supply cannabis for medicinal purposes.

18. Furthermore, people who wish to import or export cannabis must also, as in the case of medical practitioners, obtain a s22A(11) Permit, which must be obtained when anyone intends to import a substance which is categorised in is in schedules 5 to 8 of the Medicines Act.
19. However, nothing in s22C Licences, or s22A(9) and s22A(11) Permits, allows their holders to sell cannabis directly to the general public. This channel of sale can only be exploited by appropriately licenced pharmacists, from appropriately licenced pharmacies. Furthermore, in terms of South Africa's current pharmacy laws, sale of cannabis can only take place where such cannabis has been integrated into a registered medicine (which registration can take up to 5 years).
20. Accordingly, a holder of a s22A(9) Permit, a s22C Licence and a s22A(11) Permit may either cultivate and export cannabis, cultivate cannabis and supply same to a manufacturing pharmacy, can in turn integrate the cannabis into a medicine, and apply for the registration of same, or import cannabis and supply same to a manufacturing pharmacy, for the same purpose as stated above.

CONCLUSION

21. Overall, it is apparent that South Africa's cannabis industry remains extremely limited in that, despite the availability of the licence and permits set out above, the market to which such cannabis may be supplied is severely limited.
22. Given that Parliament has, in terms of the Order, been instructed to significantly change South Africa's cannabis laws, it is the hope of the writers that Parliament will go beyond the parameters of the Order and pave the way for the creation of a cannabis industry which is free of any overbearing and unnecessary limitations.
23. In any event, although no section 21 authorisations, s22A(9) Permits, s22C Licences or s22A(11) Permits have been granted in respect of cannabis (to date), prospective suppliers, medical practitioners and patients are advised to ensure that their intended engagements with cannabis meet the requirements set out in the various laws, applications forms and guidelines set out and alluded to above.
24. Schindlers avails itself to assist its clients through the various alternative processes and applications detailed above.

