



Case summary written by Danmari Duguid, Associate

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BACKGROUND

Following the arrest of an employee and director of the Haze Club, the applicants (The Haze Club, Liddell and Van Houten) instituted application proceedings wherein they sought a declaratory order from the court that a “grow club” model is lawful and consistent with the Prince Judgement.¹

A grow club model is defined in this matter as a socialised system of cannabis cultivation in terms of which a member rent private space by means of a sublease from the Haze Club, wherein the members grow their own cannabis for personal consumption, while employing the applicants as professional horticulturalists to attend to the cultivation of said plants.

Alternatively, the applicants sought to declare the provisions of:

- (a) section 4(b) of the Drugs and Drug Trafficking Act 140 of 1992 (“**the Drugs Act**”) read with part III of schedule 2 thereto and the provisions of section 22A(9)(a)(i) of the Medicines and Related Substances Control Act 101 of 1965 read with schedule 7 of GN R509 of 2003 published in terms of section 22A(2) thereof as inconsistent with the Constitution and, therefore invalid to the extent that they make the use or possession of cannabis by an adult person through the grow club model, for his or her own consumption a criminal offence; and
- (b) section 5(b) of the Drugs Act read with part III of schedule 2 to that Act and with the definition of the phrase 'deal in' in section 1 of the Drugs Act inconsistent with the Constitution and are, constitutionally invalid to the extent that they prohibit the cultivation of cannabis by an adult in a private place rented out by such persons for this purpose, and for his or her personal consumption in private as is done through the grow club model.

The application was brought in the applicants' interests as well as the broader public interest.

¹ The Prince Judgement refers to the case of *Minister of Justice and Constitutional Development v Prince* [2018] ZACC 30 - a decision of the Constitutional Court of South Africa delivered on 18 September 2018, which found that it is unconstitutional for the state to criminalize the possession, use or cultivation of cannabis by adults for personal consumption in private.

ARGUMENTS

The applicants argued that the grow club model is a legitimate business model that remains in the confines of the Prince Judgement, in that the ownership of the cannabis never changes hands, and always remain in the possession of the grow club member. With the grow club model, the member provides the grow club with their seeds and does not purchase cannabis from the club, but rather the expertise, together with the tools to cultivate cannabis and rents out the space where it may be cultivated. The aforesaid process will then ensure the member's plant grows and yields a harvest of cannabis, albeit in small amounts for personal use.

The applicants argued that cultivation occurs privately and that they only derive financial remuneration from the grow by availing their expertise in cultivating the member's cannabis at a stipulated fee, similar to employing a gardener.

The applicants argued that the word 'possess' in the Drugs Act must be interpreted in such a way that it does not include within its scope instances where cannabis is being kept/stored or under supervision of a party who (a) has limited rights of rendering growing, harvesting or curing services; (b) in respect of seeds that are provided by and held by a person in respect of which ownership does not change hands; and (c) in circumstances where possession is for a limited period in a private space. The applicants also argued that the word 'deal in' must be interpreted in such a way to include the collection, supply and transmission of cannabis insofar as it relates to the cultivation by an adult in a private place for personal consumption.

The applicant also raised the fact that the Prince Judgement creates a disparity between persons who can grow cannabis in their home gardens and those who are prevented from doing so and who cannot access grow clubs, that such disparity leads to unfair discrimination on the grounds of culture, belief and socio-economic status.

The Minister of Police, Minister of Justice and Correctional Services, and the National Director of Public Prosecutions (the "**respondents**") all opposed the application. The Minister of Trade, Industry and Competition chose to file a notice to abide.

The respondents in turn argued that the grow club model falls foul of section 4(b) of the Drugs Act, read with the definition of 'possess' in section 1(1) thereof and Schedule 2 thereto (cannabis still being a scheduled substance), since the club will have 'possession' and control of the seeds and plants. The respondents further argued that the grow club model contravenes section 5(b) of the Drugs Act as the actions of receiving, handing and storing the member's cannabis equates to 'dealing in' cannabis. Section 13 provides that contravention of section (4) and (5(b)) of the Drugs Act is a criminal offence.

The respondents argued that the Prince Judgement only permits the cultivation of cannabis by an adult for their own personal consumption in private. It does not allow for the cultivation of cannabis belonging to another. Therefore, the respondents argued, the establishment of a grow club which keeps and grows cannabis for others and which supplies cannabis to its members is illegal.

The respondents further contended that the actions of the club in keeping a number of mother plants on behalf of and at the request of various members, where the club can take clones from the mother plant to be used by other members is not a donation, but equates to 'dealing in' cannabis.

The respondents highlighted the Prince Judgement and the refusal by the apex court to allow for dealing in cannabis, arguing that the grow club model can therefore not be consistent with the Prince Judgement as cannabis is not cultivated by the members themselves in a private place.

COURT HELD

After consideration of the aforesaid arguments, the court held that the Prince Judgement was related to the right to privacy and whether section 4(b) and 5(b) of the Drugs Act unjustifiably limited this right. The court held that the Constitutional Court in the Prince matter did not address the general legality of possession, use or cultivation of cannabis by adults or the commercial sphere of cannabis.

The court in this instance reiterated the reasonable expectation of privacy test as applied in the Prince Judgement – namely that there must be a subjective expectation of privacy and the expectation must be recognised as reasonable by society. The court in this matter held that where the expectation to privacy relates to the inner sanctum such as that pertaining to a person's home or family, society is more likely to accept the reasonableness thereof over the expectation to privacy which relates to a commercial setting. The court held that the Prince Judgement arose to protect the inner cores to the right to privacy as provided for in section 14 of the Constitution and this thus had to be narrowly construed. The court held that one's private space utilised for the cultivation and consumption of cannabis, must be the private space which is associated with an individual's inner sanctum, which would enjoy a high level of protection, where the right to be left alone is vigorously defended. The court held that the grow club model is not within an individual's inner sanctum but a communal sphere and activities of a grow club acquired a social dimension, rendering the right of privacy subject to greater limitation.

The court in turn rejected certain argument by the applicants and stated that the applicants cannot argue that cultivation occurs privately, as the model provides for a common area where member's plants can be stored, dried or cured. The court also did not agree with the applicant's argument that this model is akin to a gardening service, as the grow club model provides for shared tools, rental of grow space, possession over the member's plants and co-ownership of member plants – all which would not be applicable to a gardening service. The court further added that a gardener does not

exercise any decision making powers and the definition of 'possess' as set out in the Drugs Act requires some measure of decision making which is absent from the grow club model as presented by the applicants. The court thus concluded that the Prince Judgement is not authority for persons to employ gardeners to grow cannabis on their behalf, it requires the adult user to grow it him/herself in a private space.

The court further also states that co-ownership of cannabis plants takes possession, cultivation and use of cannabis to the realm of increased social relationship, away from the inner sanctum of privacy and therefore the club and its members cannot claim the right to privacy if actively associating with others.

The court thus concluded that the prohibition of cannabis as provided for in the Drugs Act is indicative that the private place where the cannabis had to be cultivated is the same private place where it had to be consumed by an adult.

The court also rejected the arguments that the process is specialised and that the Prince Judgement created an irrational disparity for those without proper access to private spaces to grow cannabis. The court held that (1) the fees charged for a grow club makes it unaffordable to financially disadvantaged individuals and hence do not serve such members, (2) no facts support the argument for disparity or complexity of cannabis cultivation, and (3) the respondents rebutted this argument by stating that cannabis can be grown in small spaces including in informal settlements with little skill and tools, and therefore the *Plascon-Evans* Principle in law dictates that the respondent's version is to be accepted.

The court further rejected the applicant's argument that refusing to recognise the grow club model would infringe on the right to freedom of trade, occupation and profession, as the case of *Affordable Medicine*² confirmed that this right may be limited in terms of section 36 of the Constitution, and the court held that the characteristics of a grow club and a dealer of cannabis are too similar and thus needs to be limited.

CONCLUSION

The court concluded that recognising the legitimacy of the grow club model would be impractical and non-sensical as it would allow the applicants to engage in conduct in contravention of section 4(b) and 5(b) of the Drugs Act. When the club takes possession and control of the cannabis plants, this would be in contravention of section 4(b) and the donation of clones, cultivation, drying and curing of cannabis plants, even in sub-let spaces, are in contravention of section 5(b) of the Act.

² *Affordable Medicines Trust and Others v Minister of Health and Another* 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) (11 March 2005)

The operation of grow club models, which are not subject to any statutory or legal guidelines or regulations could increase the possibility of dealing in cannabis. Therefore the court concluded that legalisation of dealing in cannabis concerns policy issues and fall within the realm of the legislature, and not the judiciary.

The court confirmed that in this instance a member would not be purchasing the end-product (cannabis flower) but purchases the cultivation process, resulting in the end-product. Therefore the court held that the grow club model does not result in the members cultivating cannabis for their own consumption in a private place, and thus it has not been shown that the model is consistent with the Prince Judgement. Outsourcing of the cultivation process is thus not allowed.

The application was dismissed with no order as to costs.

NOTE: The applicants in this matter have indicated that an application for leave to appeal will be lodged. The result of lodging an appeal means the implementation of an order made by a court is suspended. Meaning, pending an appeal the validity of the model will remain open for final determination by the appeal court.

Disclaimer: The above is merely a summary of a complex area of the law. Should you have any concerns or queries relating to the enforcement or application of cannabis law in South Africa, kindly contact us at cannabis@schindlers.co.za for a preliminary consult with one of our professionals.

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