

MEMORANDUM:
A Brief Overview of South
Africa's Cannabis Regime

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INTRODUCTION

1. Please note that:
 - 1.1. in relation to recreational cannabis, this memorandum 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”);
 - 1.2. any reference to “cannabis” herein is also a reference to “the whole plant or any portion or product thereof” excluding cannabidiol ;
 - 1.3. in relation to the sale of cannabis, this memorandum, for reasons explained below, deals exclusively with:
 - 1.3.1. the supply of medical cannabis;
 - 1.3.2. to medical practitioners;
 - 1.3.3. for the purpose of prescribing same to human patients.

DECRIMINALIZATION OF CANNABIS

2. 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:
 - 2.1. 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 same 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 attitudes of the police, prosecutors and Courts are established.
 - 2.2. It is still illegal for:
 - 2.2.1. adults to use cannabis in public or in the presence of children or in the presence of non-consenting adults;
 - 2.2.2. 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;
 - 2.2.3. adults to possess or cultivate cannabis for any reason other than for their personal consumption; and
 - 2.2.4. any person to buy or sell cannabis (unless in accordance with the Medicines Act).

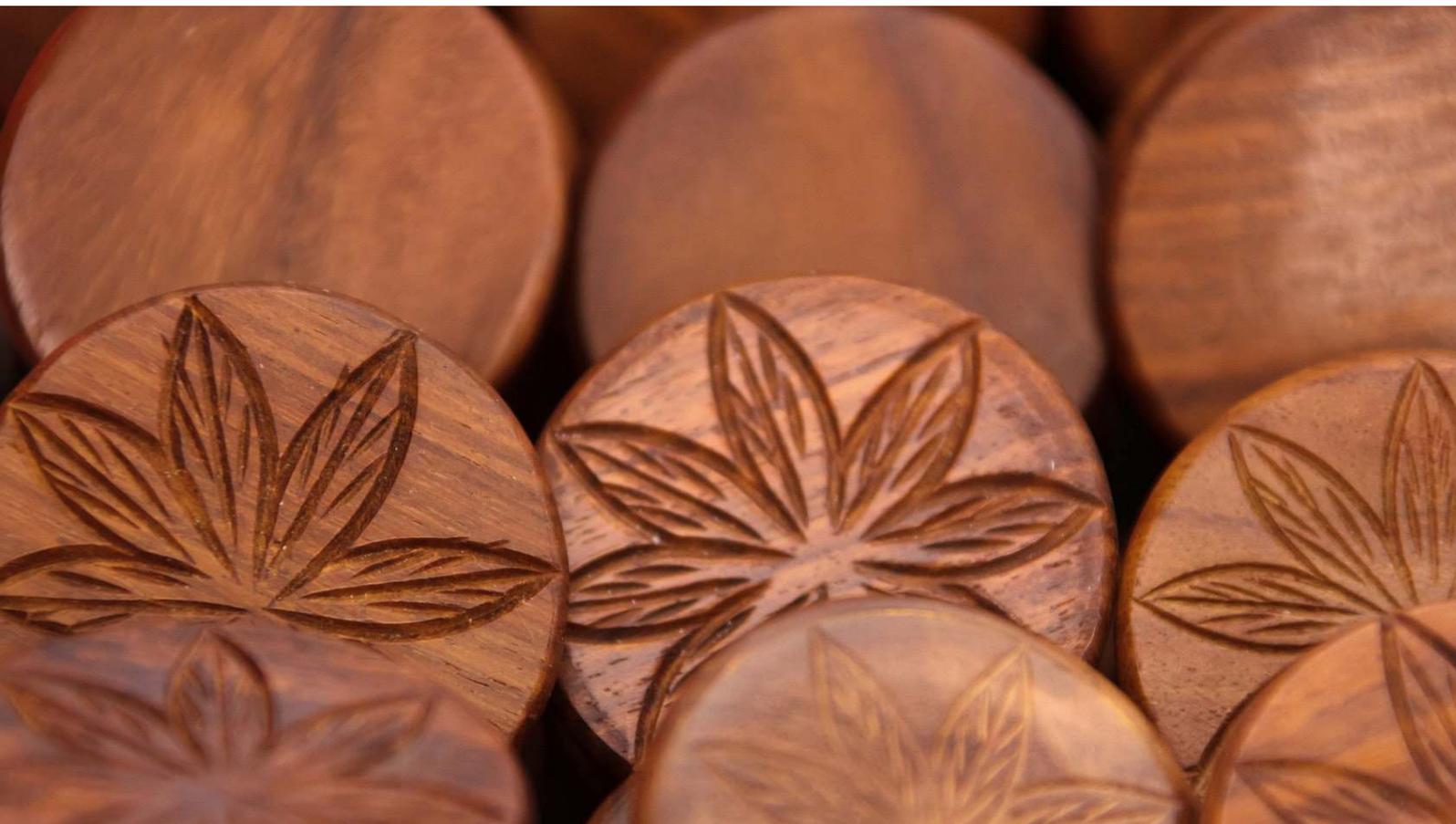


3. The Judgment also specifically notes the following: -
 - 3.1. A cannabis-possessing adult can only be arrested if it can be said that there is a reasonable suspicion that such possession was not for personal consumption. In this regard, the amount of cannabis in the possession of adult in question will assume special importance, but all relevant factors will be taken into consideration.
 - 3.2. 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.
 - 3.3. The Order has, in the interim, changed the law as set out in paragraph 2.1 with immediate effect, by reading certain words into the relevant statutory provisions. However, the Order has also granted Parliament 24 (Twenty Four) Months, from 18 September 2018, within which to amend the relevant statutory provisions in its own terms.
4. 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.



THE SALE AND SUPPLY OF CANNABIS

5. In order to bring about the results detailed in paragraphs 2 to 4 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.
6. 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.
7. However, the scope of the Offending Provisions, inasmuch as cannabis is concerned, extends beyond the scope of invalidity set out in the Order. In other words, certain aspects of the Offending Provisions still apply to cannabis in other ways.
8. In this regard, the Offending Provisions, in terms of 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 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.



THE MEDICINES ACT

10. For the purposes of this memorandum, as set out in paragraphs 1.3 and 9 above, section 22A(9)(a)(i) will only be considered inasmuch as it relates to medical practitioners and their patients. In this regard, the combined effect of sections 22A(9)(a)(i), 29(k) and the Order is that:
 - 10.1. it is a criminal offence for a person to sell or purchase cannabis, or to use, possess, and cultivate cannabis for any purpose other than for personal consumption by adults in private, without a permit duly issued by the Director General of the Department of Health ("the Director General");
 - 10.2. such a permit may only be issued in order to provide a medical practitioner with cannabis; and
 - 10.3. such a permit may only be issued for the purpose of treating or preventing a medical condition in a particular patient ("Medicinal Purposes").
11. However, section 22A is silent on from how or where medical practitioners are to source their cannabis. But it is also apparent that permit-bearing medical practitioners must be able to obtain cannabis to provide to their patients. Therefore, they must, at the very least, be able to purchase cannabis locally from a third party.
12. From a supply perspective, section 22C(1)(b) of the Medicines Act effectively allows any Supplier to apply to the South African Health Products Regulatory Authority ("SAHPRA") for a licence to import, export, act as a wholesaler of or distribute cannabis. However, this provision directly contradicts section 22A(9)(a)(i), which states that no person may acquire, use, possess manufacture or supply cannabis for medicinal purposes without a permit duly issued by the Director General. More problematic is the fact that section 22A(9)(a)(i) only allows for the Director-General to issue a s22A permit to a "medical practitioner, analyst, researcher or veterinarian" but makes no mention of other prospective suppliers of cannabis.
13. Notwithstanding the foregoing, the Guidelines 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") provide that applicants for a licence in terms of section 22C(1)(b) ("a s22C Licence") must also apply for a s22A permit in order to acquire, possess, manufacture, use or supply cannabis for medicinal purposes. This position is, for the reason stated in paragraph 12 above, incorrect. Nevertheless, section 22C(1)(b) remains the only avenue available to prospective suppliers who wish to import, export, act as a wholesaler of or distribute cannabis.

14. In any event, the practical requirements, to which applicants in terms of section 22C(1)(b) must adhere, are not affected by the contradictions contained in the Medicines Act and are, to a large extent, a manifestation of South Africa's international obligations in terms of the United Nations Single Convention on Narcotic Drugs (1961) ("the Single Convention") and a number of adopted international best practices.
15. To this end, the procedure which underpins the acquisition of a s22C Licence is unlikely to change to any great extent following any conceivable changes to South Africa's cannabis laws.

S22C LICENCES

16. Before taking any steps towards obtaining a s22C Licence, applicants are required to meticulously consider and implement the requirements set out in the Guidelines. Once applicants have done so, the next step in applying for a s22C Licence is to complete the requisite form as formulated and publicised by SAHPRA ("the s22C Form").
17. The s22C Form must be accompanied by either the prescribed application fee itself, or proof of payment in respect thereof. At the time of writing, applicants are charged:
 - 17.1. a fee of R1,800.00 (One Thousand, Eight Hundred Rand) upon submission of the s22C Form;
 - 17.2. a fee of R650.00 (Six Hundred and Fifty Rand) per hour once the s22C Form has been approved and an inspector has been appointed to inspect the applicant's intended site of operations;
 - 17.3. a collection fee of R1,400.00 (One Thousand, Four Hundred Rand) once further approval has been obtained from the inspector and the s22C Licence is collected by the successful applicant; and
 - 17.4. an annual retention fee of R3,000.00 (Three Thousand Rand).
18. Upon submission of the aforementioned documents, applicants will be issued with a receipt, recording their submission.



SECTION 21 AUTHORISATION

19. The last provision bearing relevance to the supply and use of cannabis is Section 21(1) of the Medicines Act which provides that 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”.
20. Medical cannabis certainly, meets the definition of “Medicine” in section 1 of the Medicines Act as purports to be suitable in the terms listed therein. Furthermore, it goes without saying that cannabis is not a registered medicine.
21. The wording of section 21(1) would then suggest that, in contradiction to section s22(9)(a)(i) and the Order, any person can be authorised by SAHPRA to sell cannabis to any specified person or institution in a specified quantity.
22. However, regulation 29 of the Medicines Act Regulations, which regulates the authorisation of the sale of an unregistered medicine in terms of section 21 of the Medicines Act, provides that SAHPRA may determine the requirements and conditions pertaining to applications in terms of section 21(1).
23. In this regard, SAHPRA has made it clear that only medical practitioners can apply to sell an unregistered medicine, such as cannabis, to specified patients.



CONCLUSION

24. Overall, South Africa's cannabis laws, albeit indirectly in part, only provide a mechanism for prospective suppliers to supply cannabis to medical practitioners who in turn may only supply same to specified patients for medicinal purposes. Although no section 21 authorisations, s22A permits or s22C Licences have been granted 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 above and to submit their duly completed applications so as to place themselves in an advantageous position when SAHPRA and the Department of Health eventually begin issuing permits and licences.
25. Furthermore, the Order, in a ground-breaking turn of events, has, to as yet unknown extent, changed the day to day lives all cannabis-using adults in South Africa, inasmuch the use, possession and cultivation of cannabis for personal consumption in private is concerned.
26. Schindlers avails itself to assist its clients through the various alternative processes/applications, as detailed above.



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