THE CANNABIS JUDGMENT: OCCUPATIONAL HEALTH AND SAFETY CONSIDERATIONS

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INTRODUCTION

On 18 September 2018, the Constitutional Court handed down judgment in the consolidated matters of *Minister of Justice and Constitutional Development and Others v Prince (Clarke and Others Intervening); National Director of Public Prosecutions and Others v Rubin; National Director of Public Prosecutions and Others v Acton and Others* [2018] ZACC 30 ("**the Cannabis Judgment**"). It deals with the constitutionality of the prohibition and criminalisation of the use of cannabis by adult persons in private. The Drugs and Drug Trafficking Act 140 of 1992 ("**Drugs Act**') and the Medicines and Related Substances Control Act 101 of 1965 ("**Medicines Act**") prohibit and criminalise the use, possession, purchase and cultivation of cannabis (referred to conveniently as the "**usage**" of cannabis) by a person in South Africa.

LITIGATION HISTORY

The litigation that initially gave rise to the Cannabis Judgment began in 1998 when Mr Garreth Prince ("**Mr Prince**"), a practicing Rastafarian with a law degree, unsuccessfully applied to the Law Society of the Cape of Good Hope to register his contract of community service. On a subsequent occasion, when Mr Prince applied to the Law Society to be admitted as an attorney, it refused once again asserting that Mr Price was not a "fit and proper" person eligible for entry to the legal profession.

Top of mind for the Law Society was that Mr Prince held two previous criminal convictions for the possession of cannabis and that he openly admitted that he intended to continue to smoke cannabis, despite legal sanction. Mr Prince challenged the constitutionality of the Law Society's decision, arguing that it infringed upon his right to freedom of religion. Although the Constitutional Court found that the prohibition on the usage of cannabis limited Mr Prince's right to freedom of religion as a Rastafarian, it declined to grant Mr Prince an order directing the Law Society to register his contract of community service. Subsequently, Mr Prince approached the issue from a different angle by bringing an application alleging an infringement of his right to privacy.

CANNABIS JUDGMENT

Mr Prince (in bringing his most recent application) was joined by two other persons who had separately challenged the constitutionality of certain provisions of the Drugs Act and the Medicines Act in the High Court on the basis that these provisions violated their right to privacy as enshrined in section 14 of the Constitution. In view of the fact that Mr Prince and the other persons were essentially advancing the same arguments in their respective matters, the High Court consolidated the matters for the purposes of convenience and efficiency.

In the High Court, the relevant provisions of the Drugs Act (namely Sections 4(b) and 5(b)) prohibiting the use and cultivation of cannabis by an adult in private for personal consumption, was declared to be unconstitutional. Further, section 22A(9)(a)(i) of the Medicines Act, which criminalises the use and possession of cannabis by an adult in private for personal consumption, was also declared unconstitutional. The High Court found that these legislative restrictions unjustifiably limited the right to privacy. The order of unconstitutionality applied only to the extent that the provisions prohibit the usage of cannabis by an adult person in private for personal consumption in a "*private dwelling*" (i.e. in one's home).

The order of the High Court was referred to the Constitutional Court for confirmation. This is a requirement of the Constitution. In a unanimous judgment, the Constitutional Court ultimately agreed with the order made by the High Court. However, the Court removed the High Court's qualification that the usage of cannabis is restricted to one's "*home*" or "*private dwelling*", holding instead that the usage of cannabis must merely occur "*in private*". However, the use of cannabis in public or in the presence of children or non-consenting adults is still not permitted. Accordingly, the Court has called upon the legislature to effect amendments to the Drugs Act and Medicines Act to align that legislation with the findings of the Constitutional Court.

CANNABIS AND THE RIGHT TO PRIVACY

The right to privacy as enshrined in section 14 of the Constitution may appropriately be described as being fluid in nature, having a meaning that is incapable of precise definition. The concept of privacy has, however, been expounded upon in a number of judgments, an excellent example of which is the following pronouncement by Ackerman J in *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC):

> "*Privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly*."

The extent to which the prohibition of cannabis usage by individuals affects the constitutional right to privacy was phrased as a question by Mr Prince in his founding affidavit in the High Court as follows: "*Can government legitimately dictate what people eat, drink or smoke in the confines of their own home or in properly designated places?*". This question was effectively answered by the Constitutional Court in the negative as it decriminalised the usage of cannabis under such circumstances, justifying its decision by holding that such governmental intervention placed an unjustifiable limitation on an individual's right to privacy.

In coming to its finding that the current legislative framework concerning cannabis unjustifiably infringes upon the right to privacy, the Court placed considerable emphasis on a paragraph from the judgment of *Case and Another v Minister of Safety and Security and others; Curtis v Minister of Safety and Security and others* 1996 (5) BCLR 609 (CC) (the "**Case Judgment**"). There the Constitutional Court dealt with whether a provision of the Indecent or Obscene Photographic Matter Act 37 of 1967, which rendered it an offence to possess any sexually explicit matter, violated various constitutional rights under the Interim Constitution. Didcott J made the following pronouncement in respect of the violation of the right to privacy in the context of the matter before him, on which the Court in the Cannabis Judgment placed emphasis:

> "*What erotic material I may choose to keep within the privacy of my home, and only for my personal use there, is nobody's business but mine. It is certainly not the business of society or the State. Any ban imposed on my possession of such material for that solitary purpose invades the personal privacy which section 13 of the Interim Constitution (Act 200 of 1993) guarantees that I shall enjoy*".

The Court in the Cannabis Judgment subsequently went on to state that the position as adopted in the Case Judgment regarding the right to privacy has application to the usage of cannabis by an adult in private for his personal consumption. The Court did not expand upon exactly what it meant in this regard, specifically the extent to which the Case Judgment linked the concept of privacy to being within the confines of one's home. By way of contrast, the Court in the Cannabis Judgment merely continued to make the point that cannabis could legally be used by an adult person, provided that such usage takes place "*in private*".

This raises the question of what exactly the Court meant by the phrase "*in private*" as the Court neither defined what the phrase "*in private*" meant in the context of cannabis usage, nor provided any examples of how a person may lawfully use same in a private setting. The Court amplified the uncertainty in respect of the meaning of such phrase when it pronounced upon the issue of the cultivation of cannabis in private. In this regard, the Court stated that "*the cultivation of cannabis by an adult must be in a private place*" and that "*an example of cultivation of cannabis in a private place is the garden of one's residence. It may or may not be that it can also be grown inside an enclosure or a room under certain circumstances. It may also be that one may cultivate it* ***in a place other than in one's garden*** *if that place can be said to be a private place [our emphasis]*".

In light of this uncertainty, persons indulging in cannabis in light of this ground-breaking judgment must do so with the utmost caution. In this regard, such persons cannot stretch the meaning of the phrase "*in private*" further than its reasonably conceivable bounds.

THE PURCHASE OF CANNABIS

The phrase "*in private*" is obscure. Whilst the Court has decriminalised the usage of cannabis by adults in private and for their personal consumption, the Court also held that a purchaser of cannabis would be required to purchase same from a dealer in cannabis and that "*dealing in cannabis is a serious problem in [South Africa] and the prohibition of dealing in cannabis is a justifiable limitation of the right to privacy*". Accordingly, the Court expressly confirmed that it would not decriminalise the dealing in cannabis and it remains a criminal offence.

This raises the question how a cannabis enthusiast is going to consume same in private if he/she is unable to legally acquire the cannabis in the first place. In this regard, it is worth noting that the Court in no way confined the decriminalisation of cannabis to the use thereof for medicinal purposes alone. On the contrary, the decriminalisation by the Court is aimed at those individuals wishing to enjoy cannabis in a private space without the fear of the imposition of a criminal sanction. This, it is submitted, does not align with the Court's pronouncement regarding dealing in cannabis. To this end, we are of the view that the legislature is going to be presented with significant challenges in defining the ambit within which cannabis users are permitted to "*cultivate*" a substance that cannot be lawfully purchased.

CONSIDERATIONS FOR HEALTH AND SAFETY IN THE WORKPLACE

The Cannabis Judgment will have occupational health and safety implications. In view of the fact that the judgment effectively allows employees to lawfully consume cannabis in private, the question that arises is how employers are going to comply with their onerous general duty under the Occupational Health and Safety Act 85 of 1993 ("**the OHS Act**") to provide and maintain a safe working environment whilst such working environment could encounter employees who are consuming cannabis. Although this is not a new proposition, the impact of the Cannabis Judgment may encourage this behaviour.

Ultimately, we are of the view that employers will need to revise and possibly amend their health and safety policies in response to the implications of the Cannabis Judgment. An employer should conduct additional risk assessments based on a number of factors pertinent to risk at the employer's particular workplace. In embarking upon such assessments, we suggest that employers have regard to the following considerations.

- Firstly, the employer should be mindful of the fact that the Cannabis Judgment is going to require the employer to embark upon a careful balancing exercise. On the one hand, the employer is going to be required to respect its employees' rights to privacy. On the other hand, the employer should assess the risks that the impact of the consumption of cannabis may have on health and safety at its workplace.

- Secondly, employers should to have regard to section 8(2)(d) of the OHS Act which imposes the requirement on employers to give effect to their general statutory duties. In conducting appropriate risk assessments, the employer would undertake three activities:

  (i) The employer should identify all hazards that are present in the workplace.

  (ii) The employer must assess the risks that such identified hazards may pose to employee health and safety.

  (iii) The employer should then take reasonable steps to either eliminate or mitigate the identified hazards.

  In undertaking the abovementioned activities, it is conceivable that there will be situations where the nature of the work performed by the employee and the nature of the employer's workplace necessitate a zero-tolerance approach towards the consumption of cannabis by its employees. In this sense, the employer would argue with conviction that the consumption of cannabis by an employee in the context of the workplace environment could constitute a hazard that the employer is required to eliminate from its workplace.

- Thirdly, a consideration which will also have an impact upon the consumption of cannabis by an employee is the fact that the OHS Act not only imposes obligations upon employers, but also imposes obligations upon employees. Section 14 of the OHS Act imposes a statutory duty on employees to ensure that their

actions do not endanger their own health and safety and that of others with whom they work. Accordingly, employees have a duty to continuously evaluate whether their conduct complies with the abovementioned standard. We are of the view that this duty will necessarily be impacted by the consumption of cannabis by an employee. In this sense, it is submitted that even where an employer does not prohibit the consumption of cannabis in private by its employees through the implementation of workplace rules and policies, such employees who decide that they will consume cannabis in private will need to assess whether such a practice does not endanger their own health and safety and that of others whilst they are performing their duties at the employer's workplace.

Ultimately, a risk assessment may demonstrate that little or no latitude can be afforded to an employee wishing to indulge in cannabis consumption in private (for example, in their motor vehicle). This is a contextual exercise. In this regard, it is submitted that the employer should have regard to the following guiding principles in response to the Cannabis Judgment:

(i) The nature of the employer's workplace.

(ii) The nature of the work performed by the particular employees in question.

(iii) The extent to which the employees in question are under supervision by superiors.

(iv) The possibility of having the employer declare that its workplace is a "public" space where the usage of cannabis cannot be tolerated. This would be determined by its risk assessment.

(v) Drug testing.

With regard to the issue of drug testing, an employer should put greater emphasis on random drug testing in its workplace (such as, for example, random urine tests) in line with its workplace health and safety policies. The employer will be entitled to refuse to allow the relevant employee entry to the workplace if a positive result is yielded. Such a decision by the employer will be justified in light of the OHS Act General Safety Regulations. In terms of General Safety Regulation 2A(1), an employer "*shall not permit any person who is or who appears to be under the influence of intoxicating liquor or drugs to enter or remain at a workplace*". General Safety Regulation 2A(2) compliments the former provision in that it provides that "*no person at a workplace shall be under the influence of or have in his or her possession or partake of or offer any other person intoxicating liquor or drugs*". In this regard, we are of the view that employers should consider the following paragraph written by Alan Rycroft as instructive:

> "*In the absence of a workplace policy or agreement, testing an employee without the consent of an employee is in violation of his or her constitutional right to privacy. But if the employee refuses to be tested, the employer can still refuse entry to the workplace or demand the employee leave the workplace, using [OHS Act] General Safety Regulation 2A(1) as authority. This exclusion can be on a no work, no pay basis, and if challenged, the employer's defence would be that it offered the test as a way of verifying that the employee was not under the influence of alcohol or drugs*."[1]

Whatever the final stance taken by the employer on the issue of cannabis consumption by employees may be, it is clear that the employer is, at the very least, going to have to clearly communicate what its position is to its workforce. If the employer is of the view that it will be necessary for it to implement or maintain a zero-tolerance policy towards the use of cannabis by its employees, such employer will need to justify its stance and ensure that same is communicated to its employees through workplace policies, rules and practices. On the other hand, if an employer were to take a more lenient stance on the consumption of cannabis by its employees depending upon the nature of the workplace and nature of the work to be performed, such employer would need to define the exact limits within which employees would be permitted to do so. In this regard, the employer would still need to include a detailed section on cannabis use in its workplace policies, particularly its health and safety policy, and ensure that employees are made aware of same to prevent any cannabis-induced health and safety incidents from occurring.

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[1] Alan Rycroft 'Privacy in the Workplace' (2018) 39 *ILJ* 725 at 732.

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Summary Profile

Fiona Leppan is a Director of the Employment practice. She has extensive experience in the field of employee relations both from a litigation perspective and in terms of strategic planning. Training and development in this field has been a focal point. She has actively trained clients on how to deal with internal disputes and to conduct enquiries and arbitrations. She has also established entire dispute resolution processes for a number of mining houses where disputes were dealt with by way of private conciliation and arbitration. Fiona works in various industries including mining, metals, engineering, retail, broadcasting, financial services and the commercial distributive trade. She has also been involved in occupational health and safety work. Fiona is a member of the SEIFSA Industrial Relations Forum in the Metals' Industry.

Career

Fiona began her career as Registrar to Mr Justice Margo in the then Supreme Court. In 1983 Fiona joined Webber Wentzel Bowens as a Candidate Attorney where she was later promoted to Partner. Fiona then joined Deneys Reitz as a Partner. In 1998, she left Deneys Reitz to establish the law firm Leppan Beech. In 2007 Fiona joined Cliffe Dekker (now Cliffe Dekker Hofmeyr) as a Director.

Education/Qualifications

BA LLB, LLM (with distinction - Employment Law, Privacy Law, Access to Information and Media Law), HDip (Advanced Company Law), University of the Witwatersrand

Cert. (Mining and Prospecting Law) (with distinction), Mandela School of Law

Year of admission: 1986

Experience

- Conducted many reported cases in the Land Claims, Labour Court and Labour Appeal Court
- Acted as an Assessor in the previous Labour Appeal Court
- Requested by the Minister of Justice to sit as an Acting Judge in the Labour Court
- Developed Land Law as an area of expertise, inclusive of community relocations and land claims
- Undertaken occupational health and safety work and conducted serious incident and fatal accident inquiries
- Writes articles for the Industry in Martin Creamer's Engineering News, Without Prejudice and several online publications

Accolades/ Achievements

- Fiona is ranked as a leading lawyer in the employment and labour field.
- PLC Which Lawyer? Yearbook 2010 – 2017
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