THOUGHTS ON THE DECRIMINALISATION OF THE USE OR POSSESSION OF CANNABIS WITHIN PRIVATE SETTINGS

Minister of Justice and Constitutional Development v Prince 2019 (1) SACR 14 (CC)

1 Introduction

> "The illegality of cannabis is outrageous, an impediment to the full utilization of a drug which helps produce the serenity and insight, sensitivity and fellowship so desperately needed in this increasingly mad and dangerous world." (Carl Sagan)

The use or possession of drugs has been a phenomenon since time immemorial. In South Africa, the essential offences pertaining to drugs are provided for in the Drugs and Drug Trafficking Act 140 of 1992 (the Act). The two most important crimes provided for in the Act are "dealing in drugs" and the "use or possession of drugs" (s 4 and 5 of the Act; Snyman *Criminal Law* (2014) 420–426; Burchell and Milton *Principles of Criminal Law* (2013) 797–806). The Act divides drugs into three general categories – namely, dependence-producing substances; dangerous dependence-producing substances; and undesirable dependence-producing substances. The specific drugs resorting in each of these categories are listed in Schedule 2 of the Act (Burchell and Milton *Principles of Criminal Law* 803; Snyman *Criminal Law* 420). The punishment prescribed for the possession, use or dealing in dangerous dependence-producing substances and undesirable dependence-producing substances is harsher than that for possession, use or dealing in dependence-producing substances (Snyman *Criminal Law* 420). It is interesting, and topical for purposes of the current discussion, that cannabis or dagga is classified in terms of Schedule 2 as an *undesirable* dependence-producing substance.

The case under discussion (*Minister of Justice and Constitutional Development v Prince* 2019 (1) SACR 14 (CC)) is of particular importance as the use or possession of cannabis within private settings was addressed from a constitutional perspective and, more pertinently, on a question as to the constitutionality of the criminalisation thereof. Upon first glance, it seems as though the issues addressed in this case correspond with the disputes addressed in the earlier case of *Prince v The President, Cape Law Society* (2002 (2) SA 794 (CC) (*Prince* (*2*)). As is indicated in this contribution, the issues in these two judgments are distinct and differ in many instances.

A critical analysis of the decision under discussion reveals that although the use or possession of cannabis within private settings has, by virtue of the

case, been decriminalised against a constitutional backdrop, it also opens the door to critical debate pertaining to various substantive and procedural issues.

2 Facts

The salient facts of the decision appear from the judgment delivered by Zondo ACJ (Cameron J, Froneman J, Jafta J, Kathree-Setiloane AJ, Kollapen AJ, Madlanga J, Mhlanta J, Theron J and Zondi AJ concurring; see also judgment of Davis J in *Prince v Minister of Justice* 2017 (4) SA 229 (WCC) (*Prince* (*1*)). The case under discussion dealt essentially with the use or possession of cannabis (dagga) for personal consumption or use within private settings and whether the criminalisation thereof was constitutional.

The applicants brought an application to declare invalid the legislative provisions prohibiting the use of cannabis and the possession, purchase and cultivation thereof for personal use (*Prince* (*1*) *supra* par 4–5). The relevant provisions that were sought to be declared as invalid were sections 4(*b*) and 5(*b*) of the Act read with section 22A(10) of the Medicines and Related Substances Control Act 101 of 1965 (Medicines Act) insofar as it related to, and prohibited, the possession and use of cannabis by adults within private settings (*Prince* (*1*) *supra* par 5). More specifically, the applicants argued that the criminal prohibition of the use and possession of cannabis in private settings, such as the home environment or "properly designated places", was unconstitutional (*Prince* (*1*) *supra* par 11). It was submitted that fundamental rights such as equality, dignity and freedom of religion were infringed upon.

The core challenge against the relevant legislative provisions was founded on the right to privacy (*Prince* (*1*) *supra* par 11). It was, in addition, contended that the distinction between cannabis and other harmful substances such as alcohol and tobacco was irrational and accordingly that the limitation to the right to privacy was unjustifiable in terms of section 36(1) of the Constitution, 1996 (the Constitution). After conducting a thorough analysis of the nature and ambit of the right to privacy as provided for in the Constitution as well as the arguments in favour of the limitation of this right, the High Court concluded that the relevant provisions infringed the right to privacy (*Prince* (*1*) *supra* par 21–34). The High Court, in addition, held that the expert evidence presented by the applicants as to why the limitation of the right to privacy was unjustifiable weighed more heavily than the evidence presented by the respondents (*Prince* (*1*) *supra* par 91–92). The High Court further emphasised that the case under discussion was concerned exclusively with the conduct of individuals within the privacy of their own homes or private settings having due regard to the numerous challenges surrounding drug abuse as well as drug abuse among minors (*Prince* (*1*)*)* *supra* par 107). The High Court embarked on an in-depth analysis with regard to the right to privacy in terms of the Constitution coupled with the justification analysis as provided for in terms of section 36 (*Prince* (*1*) *supra* par 21–34*)*. The High Court further held:

> "The evidence, read as a whole, cannot be taken to justify the use of criminal law for the personal consumption of cannabis. The present prohibition contained in the impugned legislation does not employ the least restrictive means to deal with a social and health problem for which there are now a number of less restrictive options supported by a significant body of expertise. The additional resources that may be unlocked for use or policing of serious crimes cannot be over emphasised." (*Prince* (*1*) *supra* par 106)

The High Court, in addition, found that it would be practical and objectively possible for legislation to provide for a distinction between the use of cannabis and the possession, purchase or cultivation thereof for private use as opposed to other uses (*Prince* (*1*)*) supra* par 110).

The High Court accordingly declared sections 4(*b*) and 5(*b*) of the Act read with Part 3 of Schedule 2 of the Act, as well as sections 22A(9)(*a*)(i) and 22(10) of the Medicines Act, to be inconsistent with the Constitution to the extent that they prohibited the use of cannabis by an adult in a *private dwelling* where the possession, purchase or cultivation is for the personal consumption by an *adult* (*Prince* (*1*) *supra* par 132).

The matter was thereafter referred to the Constitutional Court for confirmation of the High Court's order in terms of section 172(2) of the Constitution. The Constitutional Court accordingly had to assess whether the relevant provisions did indeed limit the right to privacy and, if so, whether such limitation was reasonable and justifiable (par 18–19). The Constitutional Court reiterated that the provisions that were attacked on constitutional grounds were only those that prohibited the use, cultivation or possession of cannabis in private by an adult for his or her own personal consumption in private by an adult (par 19).

3 Legislative framework

It is from the outset important to take a closer look at the relevant provisions of the Act and the Medicines Act that were declared inconsistent with the Constitution. As stated above, the Act provides for two main offences: the use or possession of drugs, and dealing in drugs (Snyman *Criminal Law* 420–426; Burchell and Milton *Principles of Criminal Law* 799–806). Dealing in drugs is the more serious of the two offences, concomitantly carrying harsher sentences or penalties (see s 17(*c*) and (*e*) of the Act read with s 13(*e*) and (*f*); *S v Cwele* 2013 (1) SACR 478 SCA; *S v Gcoba* 2011 (2) SACR 231 (KZP); *S v Naidoo* 2010 (1) SACR 369 (KZP); *S v Mtolo* 2009 (1) SACR 443 (O); *S v Mlombo* 2007 (1) SACR 664 (W); *S v Tshabalala* 2007 (2) SACR 263 (W)).

To "possess" is defined in the Act "in relation to a drug, [to] include[…] to keep or to store the drug, or to have it in custody or under control or supervision".

The word "include" in terms of the definition clearly denotes that both the conventional meaning of possession and the extended interpretation of possession in terms of the Act will serve to establish whether possession took place. As such, the prosecution can rely on either to prove possession

(see Snyman *Criminal Law* 421–422). Section 4 of the Act deals with the use and possession of drugs. Section 4 reads as follows:

> "No person shall use or have in his possession–
> (a) any dependence-producing substance; or
> (b) any dangerous dependence-producing substance or any undesirable dependence-producing substance, unless …"

Section 4 proceeds then to provide for an elaborate selection of circumstances in terms of which the possession or use of these substances will be justified, such as a patient acquiring any of the substances in terms of a prescription from a medical practitioner, or a pharmacist who is legally in possession of these substances (Snyman *Criminal Law* 422; Burchell and Milton *Principles of Criminal Law* 804).

In Schedule 2 of the Act, cannabis is listed under Part 3 as an undesirable dependence-producing substance. Section 13 of the Act provides for the offences in terms of the Act. Read with section 17, section 13 provides that any person convicted of the use or possession of an undesirable dependence-producing substance, which includes cannabis, potentially faces a sentence or such fine as the court may deem fit to impose or to imprisonment for a period not exceeding 15 years, or to both a fine and imprisonment (see s 13 of the Act; Snyman *Criminal Law* 423).

The decision under discussion dealt with the application of section 4(*b*) within the context of the use of possession of cannabis in private settings and whether the criminalisation of it was constitutional.

Section 5 of the 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 …"

Similar to section 4, section 5 provides for a selection of instances that would normally be classified as dealing, but which are justified in terms of the Act, such as substances acquired by a patient from a medical practitioner in terms of a written prescription, or from a pharmacist in terms of a written prescription (see s 5 of the Act; Snyman *Criminal Law* 423, 425).

The Act defines "deal in" in relation to a drug as "performing any act in connection with the transhipment, importation, cultivation, collection, manufacture, supply, prescription, administration, sale, transmission or exportation of the drug". It is specifically the "cultivation" of cannabis for personal use and possession thereof that was also placed under constitutional scrutiny in the decision under discussion. As stated above, cannabis is classified in terms of Schedule 2, Part 3 of the Act as an undesirable dependence-producing substance. Accordingly, the punishment prescribed for dealing in cannabis is imprisonment for a period not exceeding 25 years or to both a fine and imprisonment (see s 13(*f*) of the Act, read together with s 17(*e*); Snyman *Criminal Law* 426). In the past, an individual found to have "cultivated" cannabis for personal use could face a

harsh sentence for dealing in cannabis (see, for example, *S v Mbatha* 2012 (2) SACR 551 (KZP)).

Note that the order by the High Court provided for the decriminalisation of the cultivation of cannabis in a private dwelling by an adult for his or her personal use or consumption in private and it was accordingly held that the particular provisions were inconsistent with the right to privacy entrenched in the Constitution (*Prince* (*1*) *supra* par 132). Section 5(*b*) specifically becomes relevant when assessing the definition of "deal in" as provided for in the Act as discussed above.

Section 22A(9)(*a*)(i) of the Medicines Act reads as follows:

> "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 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."

In terms of Schedule 7 to the Medicines Act, cannabis is one of the listed substances and as such section 22A(9)(*a*)(i) of the Medicines Act prohibits the acquisition, use, possession, manufacture or supply of cannabis, among other substances.

Section 22(10) provides as follows:

> "Notwithstanding anything to the contrary contained in this section, no person shall sell or administer any Scheduled substance or medicine for other than medicinal purposes: Provided that the Minister may, subject to the conditions or requirements stated in such authority, authorise the administration outside any hospital of any Scheduled substance or medicine for the satisfaction or relief of a habit or craving to the person referred to in such authority."

Section 22(10) prohibits the sale or administration of any scheduled substance or medicine for any purpose other than medical purposes.

4 Judgment

In delivering judgment, the Constitutional Court had to assess whether to confirm the order of the High Court and if so, to what extent. The court conducted a thorough analysis of the nature and ambit of the right to privacy in terms of section 14 of the Constitution (see also *Bernstein v Bester NNO* 1996 (2) SA 751 (CC)). With respect to the right to privacy, Zondo ACJ held as follows:

> "What this means is that the right to privacy entitles an adult person to use or cultivate or possess cannabis in private for his or her personal consumption. Therefore, to the extent that the impugned provisions criminalise such

> cultivation, possession or use of cannabis, they limit the right to privacy." (par 58)

The court further proceeded to conduct the limitation analysis in terms of section 36 of the Constitution in order to assess whether the limitation of the right to privacy was reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom (par 59). It was argued on behalf of the State that the goal behind the prohibition pertains to the protection of the health, safety and psychological well-being of the individuals affected by the use of cannabis (par 63).

After analysing the report by the South African Central Drug Authority, it was held that on an assessment of all available data in other countries, it is clear that alcohol causes the most individual and social harm and that the immediate aim should fall on decriminalisation (par 78). The court further emphasised that in many other jurisdictions the possession of cannabis, in small quantities for personal use, has been decriminalised (par 79). The court, in addition, also with reference to *Prince* (*2*), pointed out that based on the medical evidence presented there is no indication as to the amount of cannabis that should be consumed in order to be regarded as harmful (par 81). It was accordingly held that the limitation of the right to privacy was not reasonable and justifiable in an open and democratic society (par 101).

In terms of section 5(*b*) of the Act, Zondo ACJ held as follows:

> "The issue of the cultivation of cannabis in private by an adult for personal consumption in private should not be dealt with on the basis that the cultivation must be in a dwelling or private dwelling. It should be dealt with simply on the basis that the cultivation of cannabis by an adult must be in a private place and the cannabis so cultivated must be for that adult person's personal consumption in private.
>
> I am of the view that the prohibition of the performance of any activity in connection with the cultivation of cannabis by an adult in private for his or her personal consumption in private is inconsistent with the right to privacy entrenched in the Constitution and is constitutionally invalid." (par 85–86)

The order of the High Court further declared the provisions dealing with the purchase of cannabis to be inconsistent with the Constitution. The Constitutional Court per Zondo ACJ, however, declined to confirm the order of the High Court in that regard and held:

> "If this court were to confirm the order declaring invalid provisions that prohibit the purchase of cannabis, it would, in effect be sanctioning dealing in cannabis. This the court cannot do. Dealing in cannabis is a serious problem in this country and the prohibition of dealing in cannabis is a justifiable limitation of the right to privacy." (par 88)

The Constitutional Court declined to confirm the part of the order of the High Court pertaining to section 22A(10) as it was held that this section prohibits the sale and administration of, among others, cannabis for purposes other than medicinal purposes unless it resorts under one of the exceptions. It was held, however, that the order of the High Court made no reference to the sale or administration of cannabis (par 89). The court, in addition, held that the declaration of invalidity of the use, or possession, or cultivation of

cannabis should extend further than merely when it occurs in a *home or private dwelling* as stipulated by the High Court order. It was accordingly held by Zondo ACJ:

> "In my view, as long as 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 s 14 of our Constitution." (par 100)

It was further held that the order of invalidity would operate prospectively and not retrospectively (par 102).

It was accordingly held that the provisions of section 4(*b*) and 5(*b*) of the Act, read with Part 3 of Schedule 2 to the Act, as well as section 22(9)(*a*)(i) of the Medicines Act, were inconsistent with the right to privacy entrenched in section 14 of the Constitution. It was ordered that during the period awaiting intervention by Parliament, interim relief in the form of reading-in would be granted (par 105). In terms of section 4(*b*), it was ordered that a sub-paragraph should be included to provide as follows:

> "No person shall use or have in his possession–
>
> …
>
> (b) any dangerous dependence-producing substance or any undesirable dependence-producing substance, unless
>
> …
>
> (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."

With regard to section 5(*b*) of the Act, it was held that the definition of "deal in" should be amended in the following manner in terms of reading-in:

> "deal in, in relation to a drug, includes performing any act in connection with the transhipment, importation, cultivation other than the cultivation of cannabis by an adult in a private place for his or her personal consumption in private …" (par 106)

In terms of section 22A(9)(*a*)(i) of the Medicines Act, it was held that the following words should be read in after the word "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 …" (par 107)

It was, in addition, held that the implications of the reading-in would entail the following:

- an adult may use or be in possession of cannabis in private for his or her personal consumption in private;
- the use, including the smoking of cannabis in public or in the presence of non-consenting adults would not be permitted;
- the use or possession of cannabis in private would only relate to adults; and

- the cultivation of cannabis by an adult in a private place for his or her personal consumption in private would no longer be an offence (par 109).

It was held that the amount of cannabis found in an individual's possession would be an indication as to whether that individual was in possession of cannabis for a purpose other than personal consumption (par 110).

5 Assessment

From a constitutional perspective, the judgment under discussion seems sound and in line with the values enshrined in the Constitution. The judgment, however, opens the door to a critical debate on a number of aspects.

The use or possession of cannabis for private use was also challenged on constitutional grounds in *Prince* (*2*). In the latter decision, the provisions of section 4(*b*) of the Act and section 22A of the Medicines Act were challenged on the grounds that they were inconsistent with section 15(1) of the Constitution in terms of failing to provide for an exemption to Rastafari individuals who possess and use cannabis for religious purposes.

The facts, briefly, were that the appellant sought to enter the attorneys' profession and had to register his contract to do articles of clerkship. Since the appellant had had two previous convictions for possession, the second respondent in the matter, the Cape of Good Hope Law Society, declined to register his contract on the basis that the appellant had disclosed that he uses cannabis for religious purposes as he was a member of the Rastafarian religion and was not intending to cease using it (*Prince* (*2*) *supra* par 1–2). In *Prince* (*2*), it was contended that the relevant provisions were unconstitutional to the extent that they failed to provide an exemption applicable to the use or possession of cannabis for religious purposes (*Prince* (*2*) *supra* par 27). As indicated above, section 4 of the Act creates a number of exceptions in terms of which the use or possession of cannabis is justified, such as for medical purposes. Accordingly, the decision in *Prince* (*2*) did not pertain to the complete decriminalisation of the private use or possession of cannabis, but concerned rather the failure to include religion as one of the exemptions to the prohibition of the private use or possession of cannabis and the question whether the provisions of the Act were overbroad. This is where the judgment under discussion differs essentially from *Prince* (*2*) (see in essence *Prince* (*2*) *supra* par 31).

The essential submission in *Prince* (*2*) was that the impugned provisions were so overbroad that the unlimited nature of the proscriptions also encompassed the use or possession of cannabis by Rastafarians for religious purposes (*Prince* (*2*) *supra* par 33). In *Prince* (*2*), the court had to assess whether a limited exemption from the prohibition of the use or possession of cannabis should be granted to individuals of the Rastafarian religion. The case under discussion, however, dealt with the complete decriminalisation of the use of possession of cannabis for private consumption. It is interesting to reflect on these polar opposites for purposes of assessment of the judgment under discussion.

Prince (*2*) indicated that providing for limited exemptions to the use or possession of cannabis could become problematic. The majority in *Prince* (*2*) (per Chaskalson CJ, Ackerman J and Kriegler J) held:

> "There is no objective way in which a law enforcement official could distinguish between the use of cannabis for religious purposes and the use of cannabis for recreation. It would be even more difficult, if not impossible, to distinguish objectively between the possession of cannabis for the one or the other of the above purposes. Nor is there any objective way in which a law enforcement official could determine whether a person found in possession of cannabis, who says that it is possessed for religious purposes, is genuine or not. Indeed in the absence of a carefully controlled chain of permitted supply, it is difficult to imagine how the island of legitimate acquisition and use by Rastafari for the purpose of practicing their religion could be distinguished from the surrounding ocean of illicit trafficking and use." (*Prince* (*2*) *supra* par 130).

The majority in *Prince* (*2*) dismissed the appeal. The minority judgments by Sachs J and Ngcobo J, however took the stance that religion could have been accommodated in terms of an exemption in the provisions of the Act (*Prince* (*2*) *supra* par 81–89 and 170–171).

In his minority judgment, Ngcobo J found the relevant provisions of the Act to be inconsistent with the Constitution and commented as follows:

> "I accept that the goal of the impugned provisions is to prevent the abuse of dependent-producing drugs and trafficking in those drugs. I also accept that it is a legitimate goal. The question is whether the means to employ that goal are reasonable. In my view, they are not. The fundamental reason why they are not is because they are overbroad. They are ostensibly aimed at the use of dependence-producing drugs that are inherently harmful and trafficking those drugs. But they are unreasonable in that they target uses that have not been shown to pose a risk of harm or to be incapable of being subjected to strict regulation and control. The net they cast are so wide that uses that pose no risk of harm and that can be effectively be regulated and subjected to government control like other dangerous drugs are hit by the prohibition." (par 81)

There seems to be merit in Ngcobo J's reasoning as the provisions of the Act are in a sense very broad; on the other hand, creating exemptions could become extremely problematic in terms of the practical enforcement thereof. The latter dilemmas are clearly canvassed in the judgment.

It is submitted that the majority decision in *Prince* (*2*) should be supported as it would be virtually impossible to enforce such exemptions. The practical and logistical dilemmas would be endless. The case under discussion, however, took the debate to the next level in terms of seeking the complete decriminalisation of the use or possession of cannabis for private consumption as well as of the cultivation of cannabis for personal use on the basis that the provisions of the Act infringed the right to privacy in terms of section 14 of the Constitution. The practical implication of the decriminalisation of the use or possession or cultivation of cannabis for personal use or consumption would entail that an adult person found in possession of small quantities of cannabis or, for example, cultivating cannabis in the form of growing a dagga plant in his or her garden would not be guilty of either possession of drugs in terms of section 4 of the Act, or of

dealing in drugs in terms of section 5 of the Act. It is important to note that the judgment only pertains to cannabis and only to adult persons using or possessing cannabis for personal use.

A clear-cut example of the issues canvassed in the judgment under discussion came before the court in the not-too-distant past in *S v Mbatha* (*supra*). The latter case is relevant within the current discussion as it illustrates one of the fundamental reasons that a revisitation of the provisions of the Act became pivotal. The facts, briefly, were that the South African Police Services proceeded to the home of the accused as a result of information received. While searching the premises of the accused, the police found a parcel of loose dagga in a clear plastic wrapping alongside the bed. On proceeding with their search outside the premises, they found a clear-plastic bread packet containing dagga seeds alongside the house. In addition, they also found a newspaper bundle containing loose dagga. On further searching the yard of the premises, they found a fully grown dagga plant.

The accused was subsequently charged in the magistrates' court of the district of Dundee of dealing in dagga in contravention of the provisions of section 5(*b*) of the Act read with sections 1, 13(*f*), 17(*e*), 18, 19, 25 and 64 and, in the alternative, with possession or use of dagga in contravention of sections 1, 13(*d*), 17(*d*), 18, 19, 25 and 64 of the Act.

The trial magistrate convicted the accused of dealing in dagga and sentenced the accused to eighteen months' imprisonment, wholly suspended for a period of three years on condition that he was not again convicted of contravening sections 5(*b*) or 4(*b*) of the Act committed during the period of suspension. The accused was, in addition ordered to pay a fine of R1 000.00 or in default thereof undergo six months' imprisonment. The case was referred for automatic review to Wallis J who referred the matter for argument before the full court in relation to the precise meaning of the word "cultivation" contained in the definition of "deal in" in the Act.

With reference to the interpretation of the term "cultivation", the majority of the court (*S v Mbatha supra* par 8) relied primarily on the *dictum* of Cillié JP and Bekker J in the decision of *S v Kgupane* (1975 (2) SA 73 (T) 75H), where the term "cultivate" was assessed in terms of the forerunner to the Act, namely the Abuse of Dependence Producing Substances and Rehabilitation Centres Act 41 of 1971 (see also *S v Guess* 1976 (4) SA 715 (A)). Bekker J stated as follows:

> "Na my mening geld die volgende: Dat 'n kweker van dagga skuldig is aan 'handeldryf' is nie te betwyfel nie. Hy word regstreeks getref en val binne die trefwydte van die statutêre omskrywing van 'handeldryf' wat verskyn in art 1 van die Wet. Kweek van dagga is handeldryf. Die afleiding wat gemaak moet word uit hoofed van omskrywing van 'handeldryf', gesien in die lig van die voorgeskrewe vonnis, is dat dit die bedoeling van die Wetgewer is om die nekslag toe te dien aan kweek van dagga al sou dit deur die kweker vir eie gebruik bestem wees. Met ander woorde, soos ek die artikel vertolk is die verbod gemik op die kweek van die plant ongeag vir watter doel dit ook al bestem is. Natuurlik is dit terselfdertyd dan ook so dat die kweker 'in besit' van die daggaplant is en dat 'n pas ontkiemde plant minder as 115 gram kan weeg. Dit egter, gesien in die lig van die omskrywing van 'handeldryf' bied hom geen uitkoms nie. Die klem val nie op die word 'besit' nie maar op

> 'kweek' van dagga, wat hom dan binne die trefwydte van handeldryf insleep." (*S v Kgupane supra* 75H)

In applying the *dictum* in the *Kgupane* decision, the majority of the court, per Gyanda J, held:

> "I am of the view therefore, that, in spite of the sympathy that may be felt for a user of dagga, who plants a single dagga plant for his own use, but is convicted of dealing in dagga rather than possession thereof, … it is quite clear that the intention of the legislature was that, in its pursuit of the sharks, unfortunately some minnows might be caught in the same net." (*S v Mbatha supra* par 12)

The court rejected the argument that "cultivate" should be interpreted within the context of "raising" or "growing" plants for commercial purposes and as such not bringing within the ambit of "cultivate" a user who grew a solitary plant for his or her own use (par 14). A person falling in the latter category would as such not be deemed a "dealer". It was held that such circumstances would at most be relevant for purposes of assessing the question of sentences to be imposed (par 14). It was accordingly held that the court could not assist the ordinary user of dagga who cultivates a dagga plant for his or her own personal use and, as such, not with the motive of cultivating it for the purpose of dealing (par 15). It was held that the accused had correctly been convicted of dealing in dagga (par 16).

It was held by the minority, per Madondo J, that the object of the Act was, *inter alia*, to provide for the prohibition of the use or possession of, or dealing in drugs as well as acts relating to the manufacture or supply of certain substances or the acquisition or conversion of the proceeds of certain crimes, the recovery of the proceeds of drug trafficking and matters connected thereto (563 f–g). Madondo J, in addition, held as follows:

> "It is apparent … that the Act aims at eliminating financial incentives from illicit trafficking in dagga, but not to brand any act relating to dagga-handling as dealing. Therefore it is appropriate to conclude that the word 'cultivation' should not be interpreted in isolation, but with reference to dealing in dagga. For an accused person to be convicted of dealing in dagga, merely on the basis that he or she has cultivated dagga, a link must be established between cultivation of and dealing in dagga. In other words, the evidence must show beyond a reasonable doubt that the accused person cultivated dagga for the purpose of selling or supplying it to other people. In fact, the state must prove cultivation, prohibition, i.e. dealing in dagga and intention." (*S v Mbatha supra* 563 g–h)

It was held by Madondo J that the intention of the legislature in prohibiting cultivation of dagga was to prevent its *sale* or *supply* and as such the provisions relating to "deal in" should not be construed so as to render a person possessing dagga for personal use, or therapeutic purposes, a dealer (564 e).

An important aspect to which Madondo J alluded in the minority decision relates to the penalties prescribed in the Act in respect of the offence of dealing in drugs. Section 17(*e*) of the Act provides that any person guilty of the offence of dealing in dagga shall be liable to imprisonment for a period not exceeding 25 years or to both imprisonment and such fine as a court

may deem fit (see also Snyman *supra* 434). It was held that the imposition of minimum imprisonment for an offence that may be committed unknowingly and without the requisite intention depriving the accused person of his or her liberty "[o]ffends against the principles of fundamental justice" (568 g–h).

Madondo J held that there is no indication that the interpretive approach ascribed to the meaning of the word "cultivation", which inherently infringes on the right to be presumed innocent and the right to freedom and security of the person, constituted a legitimate limitation of the rights, nor that such infringement serves a legitimate purpose (570 a–b). It was further held that there is no evidence to indicate that the cultivation of a single dagga plant or a few plants presents a reasonable risk of serious, substantial or significant harm to either the individual concerned or society (570 c–e). As such, an accused person who grows a single dagga plant or a few plants for own use, may face severe punishment and potentially be exposed to the full extent of the confiscation provisions. In terms of section 25 of the Act, such an accused person stands to lose his or her assets, including homes, as section 25 of the Act provides that a conviction of dealing in dagga may be followed by an order for confiscation of assets (570). In terms of section 25 of the Act, a court convicting an accused person of dealing in drugs may, in addition to any punishment that the court may impose, declare that any property, including the immovable property used for the purpose of or in connection with the commission of the offence, be forfeited to the State (570 i–j).

It was held that the legislature had not intended to exclude *mens rea* as an essential ingredient of the offence of dealing in drugs by including the word "cultivation" in the definition of "deal in" in the Act (572 a–b). It was further held that where a statutory provision imposes an obligation upon an accused person to establish certain facts in order to escape criminal liability, it constitutes a breach of the presumption of innocence enshrined in section 35(3)(*h*) of the Constitution (572 f–g). In respect of the interpretation of the term "cultivation", Madondo J held:

> "The word 'cultivation' should be interpreted restrictively to mean cultivation for commercial purposes or to supply to other people. In order to secure a conviction of dealing, on the ground of dagga cultivation, the state must prove beyond reasonable doubt cultivation, dealing and the *mens rea* to commit such an offence on the part of the accused. In other words, a connection between cultivation of and dealing in dagga must be proved beyond all reasonable doubt." (573 c–d)

The minority of the court held that the appeal against conviction should succeed and that the conviction of dealing in dagga should be set aside and substituted with a conviction for possession of dagga (573 g).

The decision in *Mbatha* illustrates the dilemma pertaining to the application of sections 4 and 5 prior to the decriminalisation of possession or use of cannabis, or cultivation thereof, for personal use. The accused was convicted of dealing in dagga merely for cultivating a dagga plant for personal use. As correctly noted in the minority judgment, serious repercussions flow from such conviction in terms of the Act. Had the same accused been charged after judgment in the decision under discussion had been handed down, the accused would not have been guilty of any offence.

Reflecting on the judgment in *Mbatha*, it becomes clear that the judgment under discussion is constitutionally sound and in line with the foundational principles enshrined in the Constitution.

It is submitted however, that there are certain critical aspects to which the legislature should have regard when drafting the amended legislation in line with the order granted by the Constitutional Court. These aspects open the door to a debate on other constitutional concerns that could be forthcoming after the handing down of the judgment under discussion. Note that the only way to assess whether an individual is in possession of cannabis only for personal consumption is to look at the quantity found in a person's possession. The larger the quantity of cannabis found in an individual's possession, the more likely it is that it is not possessed only for personal consumption. Bear in mind too that, to be lawful, the possession, or use, or cultivation should take place in private. The judgment, however, clearly indicates that "in private" is not confined to a home or private dwelling, as long as the place is not a public space.

Section 40(1)(*h*) of the Criminal Procedure Act 51 of 1977 (CPA) provides as follows:

> "Arrest by peace officer without warrant
> (1) A peace officer may without warrant arrest any person–
> …
> (h) 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 and ammunition."

Section 40 of the CPA was not included in the order of the court as one of the provisions held to be constitutionally invalid (par 91–93). After the handing down of the judgment of the Constitutional Court, it is no longer an offence for an adult to use or be in possession of cannabis in private for his or her own personal consumption. Accordingly, an individual found in possession of cannabis can no longer be arrested by a peace officer for being in such possession. Such possession obviously depends on the quantity found in possession but little to no guidance is provided as to the amount of cannabis found in a person's possession that could lead to a reasonable inference of dealing. It should be borne in mind that dealing in cannabis remains a criminal offence. The problem is alluded to by Zondo ACJ where he held:

> "The police officer will need to have regard to all the relevant circumstances and take a view whether the cannabis possessed by a person is for personal consumption. If he or she takes the view, on reasonable grounds, that that person's possession of cannabis is not for personal consumption, he or she may arrest the person. If he or she takes the view that the cannabis in the person's possession is for that person's personal consumption, he or she will not arrest him or her." (par 113)

It is submitted that it will become crucial to educate police officials as to the practical impact of this judgment and, eventually, also the amended sections of the Act. It is trite that providing for a set quantity of cannabis above which

a person will be potentially guilty of dealing in cannabis, would be tantamount to reinstating presumed dealing.

Presumed dealing can, in addition, no longer assist the prosecution in terms of proving the offence of dealing in drugs as the presumptions contained in section 21 of the Act were declared unconstitutional (see specifically *S v Zuma* 1995 (1) SACR 568 (CC) (1995 (2) SA 642; 1995 (4) BCLR 401) par 33; *S v Bhulwana* 1995 (2) SACR 748 (CC)*; S v Gwadiso* 1995 (2) SACR 748 (CC) (1996 (1) SA 388; 1995 [12] BCLR 1579; (1996) 1 ALL SA 11) par 15; *S v Mbatha supra; S v Prinsloo* 1996 (1) SACR 371 (CC) (1996 (2) SA 464; 1996 (3) BCLR 293) par 12; *S v Julies* 1996 (2) SACR 108 (CC) (1996 (4) SA 313; 1996 (7) BCLR 899) par 3; *S v Ntsele* 1997 (2) SACR 740 (CC); *S v Mjezu* 1996 (2) SACR 594 (NC)).

Proper and adequate training and education on these practical aspects are not only necessary, but also pivotal as, in their absence, numerous unlawful arrests could be made.

A further criticism that could be levelled at the judgment relates to dealing in cannabis. The question could be posed as to whether the outcome of the decision does not amount to promoting dealing in cannabis or dagga. The Preamble to the Act makes it specifically clear that the Act intends to provide for:

> "the prohibition of the use or possession of, or the dealing in, drugs and of certain acts relating to the manufacture or supply of certain substances or the acquisition or conversion of the proceeds of certain crime."

It should be emphasised that the judgment did not decriminalise the act of dealing in cannabis, but only decriminalised the *cultivation* of cannabis for personal consumption. It could be argued that since individuals are now free to possess cannabis for personal use, dealing in cannabis will concomitantly escalate. The latter inadvertently arises from the fact that despite the possession of cannabis being legal, it will still not be freely available and will have to be obtained, in the majority of cases, from a dealer. The latter will result in the dealer incurring liability for selling and dealing in drugs, whereas the possessor will not be criminally liable. It could thus be argued that the result of the judgment conflicts with the inherent objects of the Act as stipulated in the Preamble to the Act. It could accordingly be argued that the judgment will indirectly lead to the promotion of dealing in drugs.

Another most important aspect not addressed in the judgment relates to the impact of the judgment on the principle of the best interests of the child, which is paramount in terms of section 28(2) of the Constitution. It is trite that the decriminalisation of the possession or use of cannabis for personal consumption only applies to adult persons. This becomes problematic when parents of children possess or use cannabis for personal use. The question arises as to how this will impact on the best interests of children within those households. How will children be adequately protected from being exposed to the abuse of cannabis by their parents and further from being exposed to using it themselves? Note that minor children under the age of 18 are still subject to the provisions of the Act as well as the Medicines Act. No exception to criminalisation was made for the possession or use of cannabis

by children. Children can thus still be criminally prosecuted for possession of cannabis. A child living with parents who use or possess cannabis could be prosecuted if found in possession of cannabis that he or she has obtained while living with parents using or possessing it.

In such a scenario, the parent or parents will not face criminal prosecution, but the child will. It remains an undeniable reality that children often explore and, owing to their youth, do not always comprehend the implications of their actions. As such, they could possess cannabis after seeing their parents using it and not realise that it is a criminal offence for them to possess it. It could be argued that the decriminalisation should also apply to possession by children. However, that would be tantamount to sanctioning the use or possession of cannabis by children, which also conflicts with the best interests of the child principle. If children are found in possession of cannabis while at school, for example, further implications in terms of the South African Schools Act arise (see s 8 as well as s 8A(12) of the South African Schools Act 84 of 1996 (SASA)). Accordingly, exposing children to the possession or use, or cultivation of cannabis could be detrimental to the best interests of the child. It is further important to note that, in terms of section 8A(1) of SASA, all schools are declared as drug-free zones (see Joubert "The South African Schools Act" in Boezaart (ed) *Child Law in South Africa* 2ed (2017) 886). Children may be subjected to random searches in terms of section 8A(3)(*a*) and if a child is found in possession of drugs, he or she may be instructed to leave the premises or be denied access (see Joubert in Boezaart *Child Law in South Africa* 586–587).

An in-depth assessment of the impact of the decision under discussion on the best interests of the child principle falls beyond the scope of this contribution. Suffice it to state that the paramount nature of the best interests of the child principle is well entrenched, not only in the Constitution but also in international instruments (see Article 3 of the United Nations Convention on the Rights of the Child (1989), as well as Article 4 of the African Charter on the Rights and Welfare of the Child (1990); see also Skelton "Constitutional Protection of Children's Rights" in (ed) Boezaart *Child Law in South Africa* 345–347; *Minister of Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC) par 121).

It is submitted that the finding of the Constitutional Court could impact negatively on the best interests of children who are exposed to the possession and use of cannabis. The decriminalisation of the possession or use of cannabis, as stated above does not apply to children. Accordingly, children can still be prosecuted in terms of the Act for possession or use or cultivation of cannabis. It is submitted that this is a serious concern of which the legislature should take account when formulating the amendments flowing from this decision.

6 Conclusion

The decision under discussion dealt with a contentious area of criminal law that is not a novel dilemma – the use or possession of cannabis for personal consumption. From the outset, this contribution has indicated that the

judgment opens the door to a critical debate on a multitude of aspects. From *Prince* (*2*), it was already clear that courts grappled with this issue. It became clear from *Prince* (*2*) that merely catering for additional exemptions to the prohibition on the possession or use of cannabis could become problematic in terms of practical enforcement and implementation. The decision in *Mbatha* illustrated the injustices that could flow from the application of the relevant sections of the Act prior to their being declared constitutionally invalid and the effect of decriminalisation. From a constitutional perspective, the decision by the Constitutional Court seems in line with the basic principles enshrined in the Constitution.

However, there are various concerns in terms of the application of this judgment, with specific reference to the best interests of children within the realm of the decriminalisation of the use or possession of cannabis for private use. It is submitted that these are pivotal aspects of which Parliament should take heed in the ultimate pursuit of bringing the provisions of the Act in line with the foundational principles of the Constitution and further ensuring that other constitutional rights are not overlooked in the process.

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