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# SACHRA Breakfast Seminar

## The use of dagga – *in private*

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# Introduction

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- *Minister of Justice and Constitutional Development & Others v Prince; National Director of Public Prosecutions and Others v Rubin; National Director of Public Prosecutions and Others v Acton & Others* [2018] ZACC 30
- Three proceedings under three different case numbers in the High Court – these were consolidated and heard as one
- At the core was the constitutional right to privacy

## The High Court held:

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- S4(b) and 5(b) of the Drugs and Drug Trafficking Act read with Part III of Schedule 2, and s22A(9)(a)(i) and 22A(10) of the Medicines and Related Substances Control Act -inconsistent with the Constitution and invalid:

*"only to the extent that extent that they prohibit the use of cannabis by an adult in private dwellings where the possession, purchase or cultivation of cannabis is for personal consumption by an adult."*

# The High Court *continued*

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- ConCourt's summation – those provisions which prohibit the use or possession of cannabis in a private dwelling, and the purchase and cultivation of cannabis in a private dwelling or home.
  - **s4(b) of the Drugs and Drug Trafficking Act** – prohibits the use or possession of dangerous dependence-producing substance or any undesirable dependence-producing substance save in the exceptions listed in the Act
  - **s5(b) of the Drugs and Drug Trafficking Act** – prohibits dealing in any dangerous dependence-producing substance or any undesirable dependence-producing substance save in the exceptions listed in the Act.
  - **s22A(9)(a)(i) and s22A(10) of the Medicines and Related Substances Control Act** – prohibit the acquisition, use, possession, manufacturing, supply, sale and administering of any substances listed in Schedules 5, 6, 7 and 8, unless issued with a permit, for any purpose other than medicinal purposes.

# The High Court *continued*

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- The provisions were inconsistent with the right to privacy when an adult uses or is in possession of or cultivates cannabis in a private dwelling or at home for his/her consumption in private.
- The High Court did not declare invalid provisions prohibiting the sale, administration or purchase of cannabis.



# The Constitutional Court held...

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- ConCourt was required to satisfy itself whether the High Court was correct.
- Whether the impugned provisions limit the right to privacy – s14 of the Constitution.
- Zondo ACJ for the majority:
  - The right to privacy entitles an adult person to use, cultivate or possess cannabis in private for his personal consumption
  - To the extent that the provisions criminalise such cultivation, possession or use, they limit the right to privacy
  - The State did not plead or argue that the impugned provisions did not limit the right to privacy

# The Constitutional Court *continued*

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- Considered whether limitation was justifiable in terms of section 36 of the Constitution – concluded that the State had failed to show that the limitation was reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.
- An adult would not be committing any crime by using, possessing or cultivating cannabis in a private dwelling or in a home for his [personal] consumption.
- If they step out of the private dwelling or house, it becomes a criminal offence.
- An adult may not sell or administer cannabis, even in your private dwelling or home.
- Order of the Constitutional Court does not have retrospective effect.
- The Order is suspended for 24 months from date of the Judgment, 18 September 2018.

# The Constitutional Court *continued*

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- In the interim, no one may be arrested, charged or convicted for using, possessing or cultivating cannabis in their private dwelling or home for personal consumption in private – no longer a criminal offence.
- The use, including smoking, of cannabis in public or in the presence of children or non-consenting adults is prohibited.
- An adult may not or use, possess or cultivate for another person's consumption.
- Possession or use of cannabis by an adult for use other than personal use is prohibited



# What does this mean for the workplace?

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- Policies on zero tolerance for intoxication, reporting for duty under the influence of ability impairing substances, are vital. They must be clearly communicated.
- Judgment not a licence to use or possess dagga in the workplace, or report for duty under its influence. Cannot be used as a defence. Employer's premises are not a private dwelling or house.
- It is not only a breach of policy, but also a criminal offence.
- Depending on the amount of dagga taken, the effects could last anything up to 12 hours, especially if ingested and not smoked.
- The mere presence of dagga will not be sufficient to prove that a person is under its influence. Whether action may be taken depends on whether the substance is still affecting the employee's ability to function and perform normally.
- At this stage, the tests for cannabis cannot accurately determine this effect.

# What does this mean for the workplace? *continued*

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- In certain occupations such as operating heavy machinery, pilots, medical staff or other circumstances, intoxication may pose a high risk to the property of the employer or the safety of the employee or others.
- It is arguable that the mere presence of dagga or any other intoxicating substance in the blood may render the employee unsuitable for the job.
- An employer could, in respect of such occupations, implement a rule stating that a first transgression of a positive test may justify summary dismissal.
- Employer may conduct tests in line with s7 of the Employment Equity Act.
- Where an employee has a problem with abuse or excessive use of cannabis – must be treated similarly to alcohol abuse, through employee assistance programmes. Where an employee denies having a problem, consequently refuses assistances, it will then be treated as misconduct.



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