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# EMPLOYMENT ALERT

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ISSUE

## GROUND-BREAKING ALERT

### THE CANNABIS JUDGMENT: IMPLICATIONS FOR SOCIETY AND THE WORKPLACE

South Africa's apex court has ruled on the issue of the use, possession and cultivation of cannabis by adult persons in private.

# THE CANNABIS JUDGMENT: IMPLICATIONS FOR SOCIETY AND THE WORKPLACE

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*In both matters, the Constitutional Court held in favour of the law society.*



## **South Africa's apex court has ruled on the issue of the use, possession and cultivation of cannabis by adult persons in private.**

On 18 September 2018, the Constitutional Court handed down its much-anticipated judgment in the consolidated matter 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 (Cannabis judgment).

The judgment deals with the constitutionality of the prohibition and criminalisation of the use of cannabis by adult persons in their private dwellings. The Drugs and Drug Trafficking Act 140 of 1992 (Drugs Act) read together with the Medicines and Related Substances Control Act 101 of 1965 (Medicines Act), prohibits and criminalises the use, possession, purchase and cultivation of cannabis by any individual in South Africa. The relevant provisions of the legislation are as follows:

### **1. Drug Act**

- Section 4(b) and 5(b)
- Part III of Schedule 2

### **2. Medicines Act**

- Section 22A(9)(a)(i)
- Schedule 7

### **History – previous legal challenges relating to cannabis**

Gareth Prince (Prince), one of the cited parties in the Cannabis judgment, is a practicing Rastafarian, and holder of a law degree, who resides in Cape Town.

When Prince applied to the Law Society of the Cape of Good Hope to register his contract of community service, the law society refused. Subsequently, when Prince applied to the law society to be admitted as an attorney, they refused once again.

The law society argued that Prince held two previous criminal convictions for possession of cannabis and that he openly admitted that he will continue smoking cannabis (even in the face of legal sanction). The law society therefore did not believe that Prince could be classified as a fit and proper person to practice as an attorney. Prince, on the other hand, argued that he was required to use cannabis as part of his religion and the law society's decision adversely affected his advancement in society and violated his right to freedom of religion.

In both matters, the Constitutional Court held in favour of the law society. In other words, Prince was unsuccessful on both occasions.

*Prince v President of the Law Society of the Cape of Good Hope and others* [1998] JOL 2202 (C)

*Prince v President of the Law Society of the Cape of Good Hope & others* [2002] JOL 9305 (CC)

After these judgments, it seemed to be settled that the use, possession and cultivation of cannabis in South Africa would continue to be illegal (except in the limited circumstances as prescribed by Drugs Act and Medicines Act). However, this was not the case.

# THE CANNABIS JUDGMENT: IMPLICATIONS FOR SOCIETY AND THE WORKPLACE

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*The court has called upon the legislature to effect certain changes to the Drugs Act and Medicines Act to align the legislation with the outcome of the Cannabis judgment.*



## Cannabis judgment

Three individuals separately challenged the constitutionality of certain provisions of the Drugs Act and Medicines Act in the High Court on the basis that these provisions violate the right to privacy (as contained in s14 of the Constitution). Since the challenge related to the same issue, the High Court elected to consolidate the matters.

At the High Court, the provisions of the Drugs Act that prohibits the use and cultivation of cannabis by an adult in private for personal consumption was declared as unconstitutional. The provision in the Medicines Act that criminalises the use and possession of cannabis by an adult in private for personal consumption was also declared as unconstitutional. The High Court found that the legislative provisions unjustifiably limited the right to privacy.

The unconstitutionality applied only to the extent that the provisions prohibit the use, possession or cultivation of cannabis by an adult person in private for personal consumption in a *private dwelling* (ie at home).

The order of the High Court was then referred to the Constitutional Court for confirmation (as required by the Constitution).

In a unanimous judgment, the Constitutional Court ultimately agreed with the order of the High Court. However, and interestingly, the court *removed* the High Court's limitation that the use, possession or cultivation of cannabis is restricted to one's "home" or "private dwelling".

The court held that the right to privacy extends *beyond* the boundaries of the home. The requirement that use, possession or cultivation must be private remains.

The Cannabis judgment effectively means that adult persons are now permitted to use, possession and cultivation of cannabis in a *private place for personal consumption*.

The court found that the criminalisation of cannabis (and its history) was characterised by racism and that many indigenous South Africans used cannabis. The court also found that the alleged harm of cannabis was not as severe as historically argued. It also makes little sense to allow the use and possession of alcohol and tobacco and criminalise cannabis.

The court has called upon the legislature to effect certain changes to the Drugs Act and Medicines Act to align the legislation with the outcome of the Cannabis judgment.

## Implications for society

The Cannabis judgment undoubtedly has implications for South African society.

Since the initial challenges launched by Prince (as far back as 2002 and 1998), there are now 33 countries (including Australia, Canada, Spain and Switzerland) around the world that have decriminalised and legalised the use of cannabis. Attitudes towards cannabis have changed, and continue to change, in many countries. These were facts that the High Courts used in support of its ruling and this was mentioned by the Constitutional Court in the Cannabis judgment.

# THE CANNABIS JUDGMENT: IMPLICATIONS FOR SOCIETY AND THE WORKPLACE

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*The Cannabis judgment does not strictly locate private to an adult person's home or private dwelling.*



For certain religious groups and persons who make use of cannabis for medicinal reasons, the Cannabis judgment will be seen as a victory for various constitutional rights (including, the right to freedom of religion and the right to privacy).

The implications for society can be summarised as follows:

1. adult individuals are now permitted;
2. to use, possess and cultivate cannabis;
3. in private; and
4. for personal consumption only

The use (including smoking) of cannabis in public or in the presence of children or non-consenting adults is *not permitted*.

In order to determine if a person is in possession of cannabis for personal consumption only, the amount of cannabis found in possession must be used to make that determination.

The higher the amount, the higher the likelihood that the cannabis is not only being used for personal consumption. The Constitutional Court has left it up to the legislature to determine the permissible amount of cannabis that can be legally possessed by an adult.

### Implications for the workplace

Given that the Cannabis judgment does not strictly locate private to an adult person's home or private dwelling, the implications for the workplace (both from the perspectives of the employer and employee) should be considered. The judgment also raises other employment-related questions relating to discipline, incapacity, occupation health and safety and vicarious liability within the context of drug (cannabis) use and abuse.

We consider the general implications for employers through a series of questions and answers in the table below:

Question	Answer
<p>1. What does it mean to use, possess or cultivate cannabis "in private"?</p>	<p>The judgment makes it clear that "in private" is not confined to one's "home or "private dwelling".</p> <p>Put differently, provided that an adult person uses, possesses or cultivates cannabis in a private space (that is not in the public), such conduct will not be subject to criminal sanction.</p> <p>Although many workplaces are located in private property, it is difficult to argue that workplaces should be considered as private enough for employees to use, possess or cultivate cannabis whilst at work. In fact, given that workplaces generally have other employees (some of whom may be non-consenting employees), workplaces should be seen as public spaces in this context.</p>



# THE CANNABIS JUDGMENT: IMPLICATIONS FOR SOCIETY AND THE WORKPLACE

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*The use (particularly smoking) of cannabis (and other drugs) at the workplace should be prohibited by the employer.*



<p>2. Is a workplace classified as a private space?</p>	<p>No. It will be difficult to sustain this argument, particularly in circumstances where the employer has numerous employees in the work place.</p>
<p>3. Can an employee use, possess or cultivate cannabis at the workplace?</p>	<p>The employer should regulate this issue within its disciplinary code.</p> <p>The possession and cultivation of cannabis at the workplace should expressly not be permitted and subject to disciplinary action if contravened by an employee. Such an employee may also be subject to criminal proceedings.</p> <p>The use (particularly smoking) of cannabis (and other drugs) at the workplace should be prohibited by the employer.</p> <p>The basis of the prohibition would be that workplace is a public space and that there are non-consenting employees who will be exposed to cannabis. Further, that the use of cannabis (or other drugs) whilst at work will in all likelihood have an impact on the conduct and/or capacity of the employee.</p> <p>Most employers already have policies in place that deal with alcohol and drug abuse. Following the Cannabis judgment, it may be a worthwhile exercise to reconsider those policies to ensure that they adequately deal with the issue of cannabis use in the workplace.</p>



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# THE CANNABIS JUDGMENT: IMPLICATIONS FOR SOCIETY AND THE WORKPLACE

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*The employer may, depending on the terms of disciplinary code and procedure, take disciplinary action against such an employee.*



<p><b>4. Is cannabis now regulated in the same manner as tobacco products?</b></p>	<p>No. Tobacco products are regulated in terms of its own legislative regime.</p> <p>There is currently draft legislation in the pipeline which, if promulgated, will change the way tobacco products (and e-cigarettes and vaping products) are regulated in South Africa. One of our previous Employment Alerts dealt with the draft legislation (<a href="https://www.cliffedekkerhofmeyr.com/en/news/publications/2018/Employment/employment-alert-20-august-public-comments-close-for-draft-tobacco-bill.html">https://www.cliffedekkerhofmeyr.com/en/news/publications/2018/Employment/employment-alert-20-august-public-comments-close-for-draft-tobacco-bill.html</a>)</p>
<p><b>5. What action can an employer take if an employee is found to use, possess or cultivate cannabis in the workplace?</b></p>	<p>The employer may, depending on the terms of disciplinary code and procedure, take disciplinary action against such an employee. Most employers adopt a zero tolerance policy on alcohol and drug use in the workplace. It may be worthwhile to consider whether such a policy includes provisions relating to testing of employees in defined circumstances.</p>



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# THE CANNABIS JUDGMENT: IMPLICATIONS FOR SOCIETY AND THE WORKPLACE

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*The employer should regulate cannabis in the same manner as alcohol and other drugs.*



<p>6. (a) How should an employee found in possession of cannabis whilst at work be handled by the employer?</p> <p>6. (b) How should an employee found to be under the influence of cannabis whilst at work be handled by the employer?</p>	<p>(a) In this case, the circumstances surrounding possession should be investigated by the employer. Likely, possession may mean that the employee is using cannabis whilst at work or dealing cannabis whilst at work.</p> <p>The Cannabis judgment is clear in holding that adult persons are now permitted to use, possess and cultivate cannabis in private for personal consumption only.</p> <p>An employee who is found in possession of cannabis whilst in the workplace should be investigated and depending on the outcome of that investigation, the employer may elect to institute disciplinary action against such an employee.</p> <p>(b) In a similar vein, such an employee should be investigated. Depending on the employer's policy on drug abuse in the workplace, the employee may be subject to medical testing. Direct drug testing of employees only if such testing complies with s7 of the Employment Equity Act, No 55 of 1998. Scientific research suggests that cannabis can be detected in urine 2-3 days after infrequent use and up to 2 weeks after frequent use.</p>
<p>7. How should the employer regulate cannabis in the workplace?</p>	<p>The employer should regulate cannabis in the same manner as alcohol and other drugs.</p> <p>There should be clear guidelines in place that prohibit employees from using such substances in the workplace.</p> <p>The workplace should be classified as a public space and the use of cannabis in the workplace should be prohibited on that basis.</p> <p>Employees found to be under the influence of alcohol and/or drugs (including cannabis) should be formally dealt with in terms of the employer's disciplinary code and procedure.</p> <p>We have included some interesting statistics on the number of CCMA referrals that have dealt with alcohol and drug abuse.</p>

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*Depending on the facts of and circumstances surrounding each case, an employee who is guilty of cannabis abuse may be disciplined by the employer.*



8. If the performance of an employee declines due to use of cannabis, can the employer take any action against such an employee?

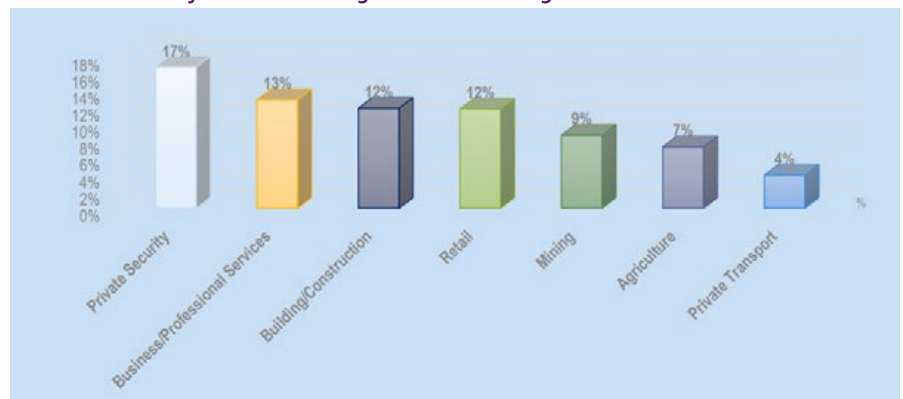
Substance abuse can constitute a dismissible offence particularly where it has resulted in an employee breaking a rule in the workplace (misconduct) or failing to meet set performance standards (incapacity).

Depending on the facts of and circumstances surrounding each case, an employee who is guilty of cannabis abuse may be disciplined by the employer. Unlike alcohol, the effects of cannabis use on the employee's ability to perform in the workplace are not as well known. This, however, does not detract from the ability of the employer to investigate and take action against an employee found to be under the influence of cannabis at work.

CCMA Referrals involving Alcohol and Drug Abuse



CCMA Referrals by Sector involving Alcohol and Drug Abuse



[Statistics derived from the CCMA, 2018]



# THE CANNABIS JUDGMENT: IMPLICATIONS FOR SOCIETY AND THE WORKPLACE

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*The Cannabis judgment will undoubtedly go down in history given the controversial nature of the topic.*



## Landmark judgment

The Cannabis judgment will undoubtedly go down in history not only given the controversial nature of the topic (ie the use, possession and cultivation of cannabis) but also for the progressive approach taken by the Constitutional Court.

For society, as much as adult persons can use cannabis privately, there are uncertainties surrounding enforcement and policing which must still be clarified by the amendments to the relevant legislation. Adult persons who seek to use, possess or cultivate cannabis should therefore ensure that they fall within the parameters of the judgment when doing so.

For employers, it is crucial that clear guidelines and rules are set in the workplace to avoid employees using this judgment to justify the use, possession or cultivation cannabis in the workplace.

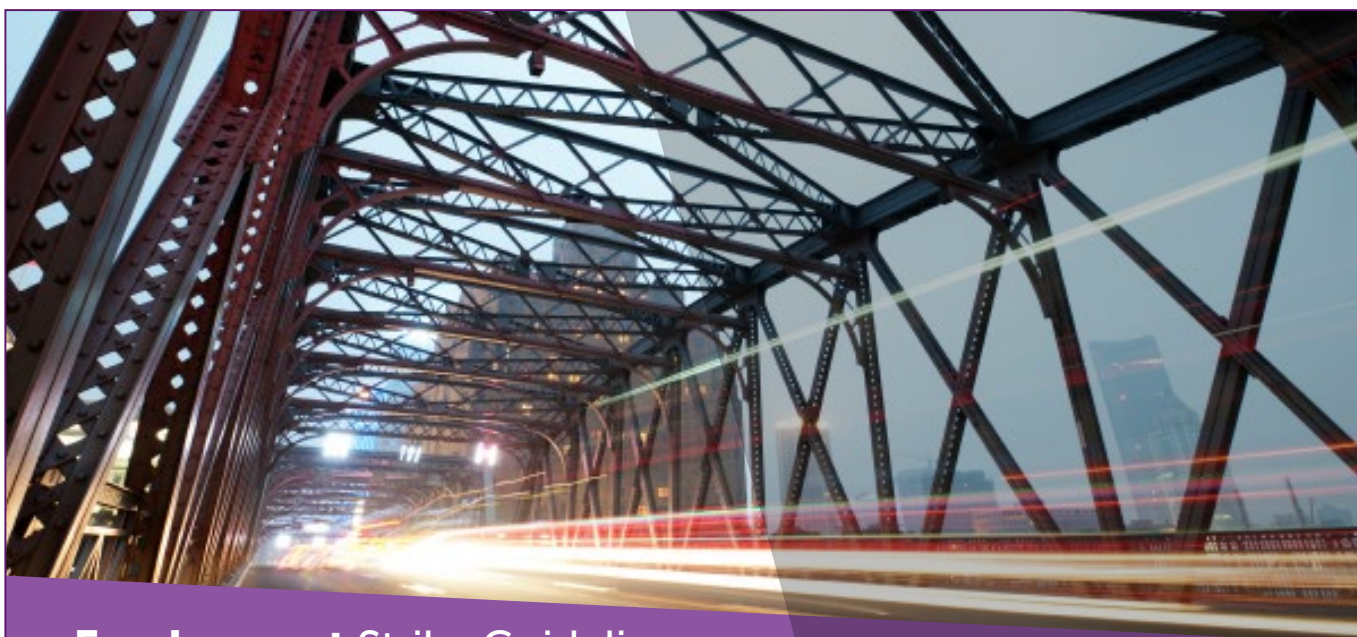
In order to access the full judgment, you can visit the following link: <https://collections.concourt.org.za/handle/20.500.12144/34547>.

*Gavin Stansfield, Michael Yeates, Shane Johnson and Khensani Hlongwane*



Michael Yeates was named the exclusive South African winner of the **ILO Client Choice Awards 2015 – 2016** in the category Employment and Benefits as well as in **2018** in the Immigration category.





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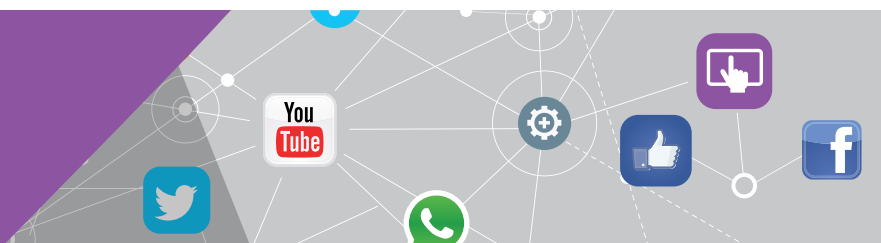
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