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DISPUTE RESOLUTION **ALERT**

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Marijuana, the Grateful Dead and the Constitutional Court: A curious intersect

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No good deed goes unpunished

There is much to be said for the phrase that "no good deed goes unpunished". The issue of whether certain agreements were defined as credit agreements in terms of s8(5) of the National Credit Act, No 34 of 2005 (NCA) arose in the case of *Jacobs v De Klerk and Another* [2019] JOL 45014 (FB).

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Marijuana, the Grateful Dead and the Constitutional Court: A curious intersect

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Somewhere in the industrial heartland of South Africa, a figure in a tie-dyed Grateful Dead hoodie looks out across a dimly-lit warehouse surveying an indoor jungle of flourishing marijuana plants.

Somewhere else in the verdant suburbs of Cape Town, a young woman returns home from work and falls onto the couch. Before settling in to choose a series on Netflix, she picks up a wooden box from the coffee table, no longer hidden under the couch she takes out a pack of Rizla papers and a little bag of sweet-smelling marijuana.

You're not seeing the connection between a warehouse full of cultivated marijuana and a stoner-hipster lying on her couch? Why is the stoner-hipster no longer hiding her wooden box under the couch? What has changed to make these two scenarios interesting?

Well it's 2019 and the use of cannabis "in private" and cultivating cannabis "in a private place" for personal consumption are no longer criminal offences in terms of the Drugs and Drug Trafficking Act 140 of 1992. In September 2018 the Constitutional Court confirmed the Western Cape High Court's unanimous judgment that flowing from the right to privacy entrenched in the Constitution, the use of cannabis "in private" and cultivating cannabis "in a private place" for personal consumption are no longer criminal offences in terms of the Act. The Court found that the criminalisation of these acts in a private place for personal use constitutes an unjustified infringement on the right to privacy. The Constitutional Court did not decriminalise "dealing" or trading in cannabis as the right to privacy has no impact on the purchase or sale of cannabis. Along with this judgment the South African Health Products Regulatory Authority earlier this year granted the first medical cannabis licence for the commercial production of medical cannabis.

Our Grateful Dead groupie is in fact an entrepreneurial farmer. He has established a Grow Club to exploit the decriminalisation of the personal use and cultivation of cannabis "in private". The Grow Club model sees the club's members rent space in a warehouse where professional cannabis farmers will grow a club member's "personal" stash. The theory is that the rented space at the grow club is the private place of the member. The membership fee includes the rent and also the professional cultivation service required to grow and harvest the plants. The theory is also that there is no buying or selling of cannabis in the process and neither the Grateful Dead groupie nor the stoner-hipster are doing anything unlawful.

Marijuana, the Grateful Dead and the Constitutional Court: A curious intersect*...continued*

The amendment of the legislation by an order of unconstitutionality may have created something of a "loophole" for Grow Clubs and for edgy entrepreneurs.

We return briefly to Cape Town where at 19h28, our stoner-hipster's doorbell rings. She gets up expecting to collect her sushi order from Mr D but instead she receives her personal marijuana, grown "by her" in her rented warehouse space and subsequently delivered to her at no additional charge. The first Grow Clubs in South Africa have already begun to pop up. The subscription fees are approximately R1,000 per month and members are restricted to two to four plants, depending on the club's rules.

The amendment of the legislation by an order of unconstitutionality may have created something of a "loophole" for Grow Clubs and for edgy entrepreneurs.

But Parliament will have the final say whether or not to follow global zeitgeist in favour of the legalisation of cannabis for medical and recreational purposes. In the meantime, there are a couple of questions worth mulling over.

- Is space in a warehouse, albeit rented for exclusive use, actually private?
- How is it possible that Rolling Stone magazine only ranked The Grateful Dead at 57 in its *Greatest Artists of All Time*?

Andrew MacPherson and Tim Fletcher

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No good deed goes unpunished

The first defendant stated that despite the underlying loan agreement falling outside the ambit of the Act, the Agreements were in fact credit agreements falling within the ambit of s8 of the Act.

There is much to be said for the phrase that "no good deed goes unpunished". The issue of whether certain agreements were defined as credit agreements in terms of s8(5) of the National Credit Act, No 34 of 2005 (NCA) arose in the case of *Jacobs v De Klerk and Another* [2019] JOL 45014 (FB).

The plaintiff's cause of action in the application for summary judgment was based on a partly oral and written resignation agreement, together with an acknowledgement of debt agreement (Agreements). The first defendant undertook to settle the second defendant's debt in the sum of R1,682,289 to the plaintiff on a stipulated date. Furthermore, the first defendant undertook to pay monthly instalments of R14,000 for a specified period on behalf of the second defendant. The first defendant subsequently failed to make sufficient payments in terms of the Agreements.

The underlying loan agreement concluded between the plaintiff and the second defendant was a large agreement as envisaged in s4(1)(b) read with s9(4) of the Act and therefore did not fall within the ambit of the Act.

The first defendant averred that he had a *bona fide* defence to the plaintiff's claim as he alleged that the Agreements were unlawful credit agreements in terms of s89(2)(d) read with s89(5) of the Act because the plaintiff was not registered as a credit provider. The first defendant stated that despite the underlying loan agreement falling outside the ambit of the Act, the Agreements were in fact credit agreements falling within the ambit of s8 of the Act. The first defendant further contended that the obligations of the original loan agreement and those of the Agreements differed significantly, so that it could not be said that the Agreements guaranteed the second defendant's obligations under the loan agreement.

Conversely, the plaintiff alleged that by virtue of the provisions of s4(2)(c) of the Act, the Act was not applicable to the Agreements as they constituted agreements in terms of which the first defendant undertook and promised to satisfy the second defendant's obligation to the plaintiff, which obligation did not arise from a transaction to which the Act applied. Therefore, the plaintiff did not have to register as a credit provider.

In concurrence with the plaintiff, the court held, in reference to the case of *Ratlou v Man Financial Services SA (Pty) Ltd* [2019] ZASCA 49 where the Supreme Court of Appeal found that the settlement agreement did not fall within the ambit of the Act; that if the underlying causa did not fall within the parameters of the Act, then its compromise in terms of the settlement agreement, could not logically result in the agreement being converted to one that did. Therefore, as the court held, the Act was not designed to regulate agreements where the underlying agreements or cause would not have been considered by the Act.

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No good deed goes unpunished

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The court therefore adopted the standpoint taken by the Supreme Court of Appeal that where an underlying agreement is exempted from the application of the Act, it follows that the subsequent credit guarantee cannot be converted into an agreement, which falls within the ambit of the Act.

The court held that the first defendant was not a party to the loan agreement between the plaintiff and the second defendant; and his involvement arose when he undertook to pay the admitted indebtedness of the second defendant. Consequently, the Agreements constituted credit guarantees in terms of s8(5) of the Act which states that an agreement, irrespective of its form but not including an agreement contemplated in subsection (2), constitutes a credit guarantee if, in terms of that agreement, a person undertakes or promises to satisfy upon demand any obligation of another consumer in terms of a credit facility or a credit transaction to which this Act applies.

Regardless of the above, the Agreements were held to be exempted from the Act in terms of s4(2)(c) of the Act because the loan agreement was not subject to the provisions of the Act. Section 4(2)(c) states that the Act applies to a credit guarantee only to the extent that the Act applies to a credit facility or credit transaction in respect of which the credit guarantee is granted.

The court therefore adopted the standpoint taken by the Supreme Court of Appeal that where an underlying agreement is exempted from the application of the Act, it follows that the subsequent credit guarantee cannot be converted into an agreement, which falls within the ambit of the Act.

Luanne Chance and Nomlayo Mabhena

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