

Dispute Resolution and Agriculture, Aquaculture & Fishing Sector

ALERT

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IN THIS ISSUE

Overview of the (r)evolution of legislation governing the use of cannabis: Where to from here?

Cannabis has been a hot topic in the media and bold statements have been made by the Government regarding the economic potential that the cannabis sector can unlock in the country. President Cyril Ramaphosa has referred to the potential revenue that could be created in the sector on two separate occasions during his annual State of the Nation Address.



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It has also been highlighted that industrial hemp and cannabis will create a pathway to industrialisation by having a ripple effect through to various other sectors such as foreign investment, agriculture, employment and construction. Although the Government's stated intention to relax and review policies that hinder the growth of the industry is appreciated, South Africa is at a crossroads when it comes to competing with international cannabis industries developed within a regulatory framework.

In a series of articles to follow, for which this serves as an introduction, we will explore the environment of the cultivation and use of cannabis in South Africa.

The purpose of the series is to provide insight into the cannabis industry and the possibilities that can be created by the amendment of legislation and the industrialisation of cannabis.

International obligations

To have a comprehensive understanding of the legal and regulatory environment that governs the use of cannabis in South Africa, it is imperative to understand that the regulation of cannabis commences on an international level. South Africa, as a member of the United Nations, is a signatory to three United Nations Conventions that regulate international trade in narcotic substances. These conventions are:

- The Single Convention on Narcotic Drugs, 1961 (as amended by the 1972 Protocol).
- The Convention on Psychotropic Substances, 1971.
- The Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988.

As a signatory, South Africa is obliged to ratify the material terms of the conventions by promulgating local legislation to ensure that it remains compliant with the terms of the



Overview of the (r)evolution of legislation governing the use of cannabis: Where to from here?

CONTINUED

conventions. Essentially, the purpose of the conventions is to establish international control measures for psychoactive substances and, in doing so, these substances are provided or produced for medical and scientific purposes, while preventing the illegal use of them. In addition to the ratification of local legislation, South Africa is obliged to liaise and co-operate with the International Narcotics Control Board (INCB). The INCB is the governing body established within the conventions to ensure that signatory countries are compliant with the material terms of the conventions.

Local legislation

In South Africa the cultivation, production, manufacture and consumption of cannabis and cannabis related products are regulated by the following legislation:

- The Medicines and Related Substances Act 101 of 1965 (Medicines Act), as amended in 2008 and 2015 (Act 14 of 2015), read with their Regulations.
- The Drugs and Drug Trafficking Act 140 of 1992 (Drugs Act).
- The Plant Improvement Act 53 of 1976 (PIA).

The South African Health Products Regulatory Authority (SAHPRA) assumed the roles of both the Medicines Control Council and the Directorate of Radiation Control, which were previously housed within the National Department of Health. Subsequently, SAHPRA was independently constituted to regulate the availability of quality medicines and to apply proper standards for the manufacturing, distribution, selling and marketing of medicines, medical devices and scheduled substances, which includes cannabis.

The Drugs Act categorises cannabis as an “*undesirable dependence-producing substance*” and it is therefore a criminal offence to use, possess, deal in and/or cultivate cannabis and/or any part of the cannabis plant, with certain exceptions as provided for in the Medicines Act. The Medicines Act draws a distinction between tetrahydrocannabinol (THC), cannabidiol (CBD), the plant itself, and the components of the plant.

In terms of Schedule 7 of the Medicines Act, the cannabis plant, any part thereof and THC are deemed to have no legitimate medical uses. Section 22A(9)(a) provides that the Director-General of the Department of Health may authorise the acquisition, use, manufacturing, or supply of a Schedule 7 substance that may be provided to a medical practitioner,

Overview of the (r)evolution of legislation governing the use of cannabis: Where to from here?

CONTINUED

analyst, researcher or veterinarian. Furthermore, licenses must be issued (i) by the Director-General to authorised persons to compound and dispense medicines, as provided for in section 22C(1)(a); and (ii) by SAHPRA to a medical device establishment or manufacturers, wholesalers and distributors to import or export such medicine in terms of section 22C1(b). Therefore, only people or companies in possession of licenses duly issued in terms of the sections above may (i) dispense medicines and (ii) import and export a Schedule 7 substance.

If THC is intended for therapeutic use, it will fall within Schedule 6 of the Medicines Act. In terms of section 22A(5) only pharmacists, medical practitioners and dentists with the requisite authority to prescribe and dispense such substances may sell and prescribe Schedule 6 substances. Products containing CBD are listed in Schedule 4 of the Medicines Act, and are regulated in a similar fashion to substances listed in Schedule 6.

Therefore, any person who imports or manufactures medicines containing CBD must be in possession of a permit issued in terms of the Medicines Act, a license issued by SAHPRA and must be good manufacturing practice (GMP) compliant. Their products must be tested by an accredited laboratory to determine the concentration levels of THC and CBD.

From the above it is abundantly clear that the cultivation, manufacture, production and use of cannabis for medical purposes is heavily regulated, and that the use, possession, dealings in and/or cultivation of cannabis and/or any part of the cannabis plant is a criminal offence in South Africa (with certain exceptions, as mentioned below).

Exceptions

Regarding the exceptions, there have been developments in the decriminalisation of the possession and private use of cannabis in South Africa. The Constitutional

Court, in a landmark judgment in the matter of *The Minister of Justice and Constitutional Development and Others v Prince* [2018] (6) SA 393 (CC), decriminalised the private possession, cultivation and use of cannabis by adults in South Africa. The court also ordered Parliament to pass legislation to amend the Medicines Act and the Drugs Act by September 2020. The court further held that a “reading-in” approach should be followed until such time as Parliament is able to rectify the constitutional defects. The reading-in approach is a proactive remedy to grant Parliament time to cure defects in current legislation. So, at present, an adult who is criminally charged in respect of the use, possession, purchase or cultivation of cannabis for personal consumption in a private dwelling would have a defence to the charges, but the purchase and dealing in cannabis outside of a private dwelling that is not used for personal consumption, is still illegal.

Overview of the (r)evolution of legislation governing the use of cannabis: Where to from here?

CONTINUED

Cannabis for Private Use Bill

Since the passing of the judgment in the Prince matter the Legislation has prepared a draft bill known as the Cannabis for Private Use Bill (Bill) that has been tabled for comments numerous times. The Bill is yet to be enacted and until it is, the reading-in approach will be applied. If Parliament fails to cure the constitutional defect within the period of the suspension of the order of invalidity, the reading-in of the exception will continue to be part of the legislation. However, it is a misconception that all aspects of cannabis for private use are legal and that the restrictive legislation dealing with private use has been declared unconstitutional. The confusion in this regard creates a chasm in which various players find themselves, whether from a personal use or a commercial perspective.

Lastly, we cannot have a discussion on cannabis without discussing the legality of hemp. The PIA and its regulations provide a legal framework for the cultivation, distribution, and sale of hemp propagating material in South Africa and provides clear guidelines on compliance of activities undertaken with plants and propagating of hemp varieties intended for cultivation for agricultural and industrial purposes with a THC content not exceeding 0.2%. Permits are issued in terms of PIA for various activities such as the cultivation, import and export of seeds, seedlings, plants and propagating material, as well as the research and development of new and improved hemp varieties. Certain amendments have been proposed to the Bill to provide for further regulation of hemp.

It is evident that the use of cannabis and hemp, whether for private or commercial use, is strictly regulated in South Africa. We have been allowed some breathing space in certain areas but in general there is ample scope for improvement.

In the next article, we will discuss the potential requirements and approvals for cannabis and its commercialisation.

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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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