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The decriminalisation of cannabis use and/or possession for minors: A significant shift in South African drug law reform

In 2019, the Constitutional Court in *Minister of Justice and Constitutional Development and Others v Prince and Others* [2019] (1) SA 14 (CC), partially confirmed the judgment in *Prince v Minister of Justice and Others* [2017] (4) SA 299 (WCC), which declared provisions of the Drugs and Drug Trafficking Act 140 of 1992 (Drugs Act) and the Medicines and Related Substances Act 101 of 1965 unconstitutional. In doing so, the Constitutional Court decriminalised the use, possession and cultivation of cannabis by adults for their personal use in private.



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The decriminalisation of cannabis use and/or possession for minors: A significant shift in South African drug law reform

In 2019, the Constitutional Court in *Minister of Justice and Constitutional Development and Others v Prince and Others* [2019] (1) SA 14 (CC), partially confirmed the judgment in *Prince v Minister of Justice and Others* [2017] (4) SA 299 (WCC), which declared provisions of the Drugs and Drug Trafficking Act 140 of 1992 (Drugs Act) and the Medicines and Related Substances Act 101 of 1965 unconstitutional. In doing so, the Constitutional Court decriminalised the use, possession and cultivation of cannabis by adults for their personal use in private.

The judgment, heralded as a progressive step against the controversial “*War on Drugs*”, was not short of its own issues, with the consequences of its complicated order soon becoming apparent. Specifically, the order failed to take cognisance of the criminal status of offending minors. This issue was dealt with in 2020 in *S v LM and Others* [2020] (2) SACR 509 (GJ), which regarded the *Prince* judgments as having caused a “*legal quagmire for children*”.

Before assessing the *LM* judgment, it is necessary to distinguish between decriminalisation and legalisation, terms often incorrectly used interchangeably, specifically following the *Prince* judgment. Decriminalisation refers to the abolishing of an associated criminal punishment from an illegal act. Otherwise put, decriminalisation means that the act remains illegal, but can no longer be

punished criminally. In the case of cannabis, the associated acts of use, possession, cultivation, purchasing and distribution are still illegal – however, following *Prince*, adults can no longer be criminally prosecuted and/or punished for the use, possession and cultivation of cannabis when used personally in private. Legalisation, on the other hand, refers to the process of making a previously prohibited and/or criminal act entirely legal. In other words, there would be no illegality nor punishment associated with the act in any respect, bar any regulation thereof.

The High Court’s finding

In light of *Prince*, the Drugs Act still criminalised minors who used or possessed cannabis, even in private. This was the issue in question in *LM*, which saw the High Court tasked with determining if cannabis was a substance of such threat that it warranted exposing minors to the “*criminal-type penalties*” by which



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adults are no longer visited. The court emphatically noted that the case was not about the legalisation of cannabis for children, but rather the addressing of the “invidious position” children were left in after *Prince*. At paragraph 36, the court states:

“The problem with this situation is that the criminality attached to the conduct of possessing and/or using and/or cultivating cannabis is no longer based on deviant behaviours that are considered to violate prevailing social norms, but rather based on age and timing. This is constitutionally indefensible.”

Having found the use and possession of cannabis “now considered to be socially, morally and legally acceptable for [adults]”, the court found the use and possession of cannabis to be a ‘status offense’ (that being an offence that criminalises actions for certain groups of people), on the basis of age, in respect of minors.

In the court’s opinion, the Drugs Act was found to be an unjustifiable infringement of the right to equality – as unfair discrimination based on age – and the rights permitted to children, specifically the best interests of the child principle and the right not to be detained except as a measure of last resort, as per sections 28(2) and 28(1)(g) of the Constitution, respectively. The parties and the court agreed that there were far less restrictive means available to prevent child cannabis use than exposing minors to the criminal-justice system – a system which, as contended, may actually expose children to drug use, as opposed to deterring them. Lastly, and importantly, the court at paragraph 79 commented on the utility of the Prevention of and Treatment for Substance Abuse Act 70 of 2008 – which views drug use and addiction as a public health issue, not as a criminal issue – claiming this lens to be the

“most appropriate way to deal with this issue”. This obiter remark may be seen as an indication of the judiciary’s approach to drug law reform going forward.

Constitutional Court confirmation

In 2022, a full bench of the Constitutional Court in *Centre for Child Law v Director of Public Prosecutions, Johannesburg and Others* [2022] (2) SACR 629 (CC) unanimously confirmed the LM order of constitutional invalidity. However, in conducting its limitation analysis, the Constitutional Court found recourse in terms of the right to dignity and the best interest of the child principle, noting that privacy and equality were difficult lenses through which to determine this issue. The reason lies in this case not being an extension of *Prince* – the matter was “not about protecting the child’s right to privacy in order to use and/or possess cannabis in private”, rather,



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the court emphasised the best interest principle in respect of not exposing a child to the dangers of, and associated with, the criminal justice system. To this extent, the court confirmed that *"there is a need, and an obligation, for decriminalisation and for the [state] to rather implement a nonpunitive, rehabilitative alternative to prevent children from using cannabis"*. Furthermore, the court cited the Drugs Act's infringement upon a child's right to dignity, insofar as the societal stigmatisation faced by a criminally accused child was recognised as being unacceptably degrading and invasive, in respect of the 'severity' of the use and/or possession of cannabis.

The Constitutional Court, in concluding its judgment, confirmed the constitutional invalidity of the impugned provisions of the Drugs Act, and further confirmed a moratorium on all arrests, prosecutions, and/or diversions of minors for the use and/or possession of cannabis. Lastly, the court declared

that any child convicted for the use and/or possession of cannabis, may, on application to the relevant Minister, have their criminal record, containing the conviction and sentence in question of that child in respect of that offence, expunged.

Conclusion

In conclusion, both the High Court and Constitutional Court took noticeably progressive stances towards reformation of contemporary drug laws. First, the courts correctly identified that the criminality of cannabis use is no longer based on *"deviant behaviour"* – indicating a clear shift in societal outlook towards cannabis. Secondly, the Constitutional Court indicated *"that the use and/or possession of narcotic drugs and psychotropic substances by the child must be decriminalised, and dealt with by putting in place prevention, harm-reduction and dependence-treatment services, as well as alternatives to punitive or repressive drug-control policies"*.

As this matter only concerned cannabis, the court did not need to go so far as to make a judgment on the far wider issues associated with drug laws, but their sentiment is of crucial import in considering future drug law reform. Thirdly, the courts accepted that the social stigma attached to being an accused or convicted criminal, albeit for use and/or possession of cannabis, was considerably worse than the act itself.

Our Pro Bono practice has an interest in ongoing drug law reform, specifically as it relates to basic human rights. It gives comfort that our courts have begun to recognise the importance of de-stigmatisation when considering cases such as these, where the core issue is in fact not the War on Drugs, but rather the appropriate balancing and upholding of constitutionally enshrined rights.

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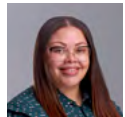
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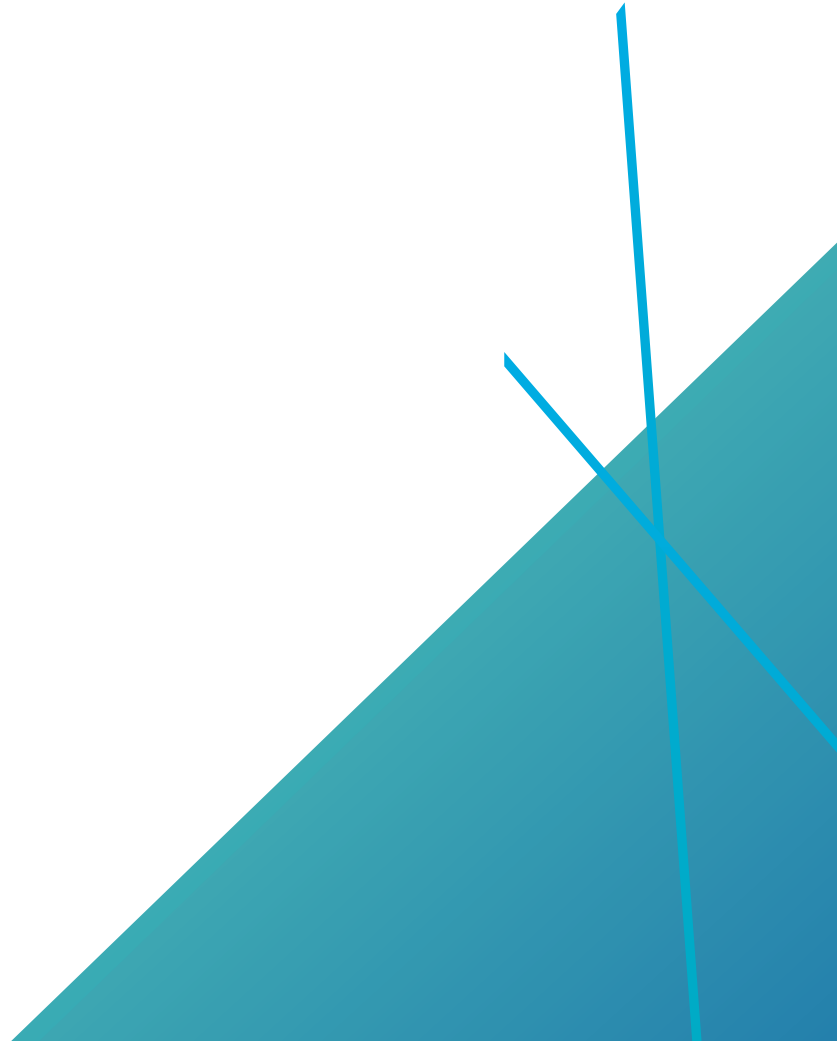
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