THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case no: **2101/2021**

In the matter between:

THE HAZE CLUB (PTY) LTD	First Applicant
NEIL TRISTAN LIDDELL	Second Applicant
BEN ADAM VAN HOUTEN	Third Applicant

and

MINISTER OF POLICE	First Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Second Respondent
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Third Respondent
MINISTER OF TRADE, INDUSTRY AND COMPETITION	Fourth Respondent
THE REGIONAL MAGISTRATE, WYNBERG	Fifth Respondent

This judgment was handed down electronically by circulation to the parties' representatives by email.

JUDGMENT

SLINGERS J

[1] On 18 September 2018, the Constitutional Court handed down judgment in *Minister of Justice and Constitutional Development and Others v Prince (Clarke and Others Intervening); National Director of Public Prosecutions and Others v Rubin; National Director of Public Prosecutions and Others v Action* 2018 (6) SA 393 (CC) **(*'Prince 3'*)** and declared that, with effect from that day, the provisions of section 4(b) of the Drugs and Drug Trafficking Act, Act 140 of 1992 read with part III of schedule 2 to the Act and the provisions of section 22A(9)(a)(i) of the Medicines and Related Substances Control Act, 101 of 1965 read with schedule 7 of GN R509 of 2003 published in term of section 22A(2) of that Act were inconsistent with the right to privacy entrenched in section 14 of the Constitution, and therefore, invalid to the extent that they make the use or possession of cannabis in private by an adult person for his or her own consumption a criminal offence. The Constitutional Court similarly declared the provisions of section 5(b) of the Drugs and Drug Trafficking Act, Act 140 of 1992 read with part III of schedule 2 and the definition of the phrase *'deal in'* inconsistent with the Constitutional right to privacy and were, therefore, constitutionally invalid to the extent that they prohibited the cultivation of cannabis by an adult in a private place for his or her personal consumption in private.

[2] The declarations of invalidity were suspended for a period of 24 months to afford Parliament an opportunity to rectify the constitutional defects, during which period, the Constitutional Court provided that:

'(a) section 4(b) of the Drugs and Drug Trafficking Act 140 of 1992 shall be read as if it has sub-paragraph (vii) which reads as follows:

"(vii), in the case of an adult, the substance is cannabis and he or she uses it for or is in possession thereof in private for his or her personal consumption in private"

(b) the definition of the phrase "deal in" in section 1 of the Drugs and Drug Trafficking Act 140 of 1992 shall be read as if the words "other than the cultivation of cannabis by an adult in a private place for his or her personal consumption of cannabis in private" appear after the word "cultivation" but before the comma.

(c) the following words and commas are to be read into the provisions of section 22A(9)(a)(i) of the Medicines and Related Substances Control Act 101 of 1965 after the word "unless":

", in the case of cannabis, he or she, being an adult, uses it or is in possession thereof in private for his or her personal consumption in private or, in any other case,"

[3] On 23 May 2019 and on 22 May 2020, the Minister of Health amended the schedules to the Medicines Act which had the effect of *inter alia* removing the application of the Act to cannabis, rendering the Constitutional Court's alteration to the Medicines Act no longer operational.

[4] As Parliament failed to cure the constitutional defects within the 24 months afforded, the reading in became final, as per the order of the Constitutional Court. Therefore, following the *Prince 3* judgment an adult may lawfully cultivate and possess cannabis for his or her personal consumption in a private space.

[5] In this matter, the applicants instituted application proceedings wherein they sought a declaratory order that a

'"grow club" model, a socialised system of cannabis cultivation in terms of which the Applicants rent-out private space to the members by means of a sublease, wherein the members grow their own cannabis for personal consumption, while

employing the Applicants as professional horticulturalists to attend to the cultivation of said plants ... and the conduct of the Applicants in relation to the Grow Club Model is lawful and consistent with the 2018 Judgment

[6] Alternatively, the applicants seek to declare the provisions of:

(i) section 4(b) of the Drugs and Drug Trafficking Act 140 of 1992 **('the Drugs Act')** read with part III of schedule 2 thereto and the provisions of section 22A(9)(a)(i) of the Medicines and Related Substances Control Act 101 of 1965 read with schedule 7 of GN R509 of 2003 published in terms of section 22A(2) thereof as inconsistent with the Constitution and, therefore invalid to the extent that they make the use or possession of cannabis by an adult person through the grow club model, for his or her own consumption a criminal offence; and

(ii) section 5(b) of the Drugs and Drug Trafficking Act 140 of 1992 read with part III of schedule 2 to that Act and with the definition of the phrase *'deal in'* in section 1 of the Drugs Act inconsistent with the Constitution and are, constitutionally invalid to the extent that they prohibit the cultivation of cannabis by an adult in a private place rented out by such persons for this purpose, and for his or her personal consumption in private as is done through the grow club model.

[7] The applicants bring the application in their own right and interests; on behalf of other similarly placed persons who do not have the means or resources to approach the courts; and in the broader public interest.

[8] The founding affidavit is deposed to by the second applicant, who is the sole director and manager of the first applicant. The third applicant is an employee of the first applicant.

[9] The second and third applicants were arrested by South African Police Service **('SAPS')** members on 13 October 2020 at the first applicant's premises when 344 cannabis plants and approximately 2.5 kg of dried cannabis, valued at approximately R1 million was seized.

[10] Prior to the hearing of the matter, the applicants advised the court that they were only persisting with the relief pertaining to the grow club model in principle and that they were no longer persisting with the relief pertaining to the conduct of the applicants in relation to the grow club model.

[11] After reading and understanding the *Prince 3* judgment, the second applicant realised that the grow club model could constitute a legitimate business opportunity and sought legal advice about the legality of the grow club model prior to operating one. The applicants aver that in terms of the grow club model postulated by them, the ownership of the cannabis never changes hands, and always remain in the possession of the grow club member.

[12] The applicants state that growing cannabis is a specialised process which require specialised knowledge, research, tools, ingredients and start up funds. It is also alleged that growing cannabis is a costly enterprise. By joining a grow club, members can enjoy the benefits of cannabis without having the necessary skill, equipment or cash flow required to cultivate one's own cannabis.

[13] The first applicant would sub-lease space to the grow club members, and this would constitute the member's private space. Upon joining the grow club, the new member would conclude a contract with the first applicant, in terms whereof the first applicant and its employees were authorised to act as the agent of the member and to step into his or her shoes to do whatever is necessary to ensure

that the member's plant grows and yields a harvest of cannabis, albeit in small amounts suitable for personal use.

[14] The terms and conditions of the contract concluded between the member and the first applicant state *inter alia* that:

(i) the member must not permit any unauthorised person to access or use the services;

(ii) the member must not use the services to provide services to third parties;

(iii) the member must not use the services (a) in any way that is illegal, fraudulent or harmful; or in connection with any unlawful, illegal, fraudulent or harmful purpose or activity.

[15] The following definitions are contained in the terms and conditions of the contract:

(i) THC- The Haze Club;

(ii) cannabis plant- the plant grown by THC from the member's feminised seeds;

(iii) common areas- those parts of the THC growing facilities not actually sub-let to a member but intended to be let for general use in common by all the members, namely the drying and curing areas and the quarantine tent;

(iv) transfer date- the date on which a member's feminised seeds are delivered to THC; and

(v) the growing facilities- the portion of the premises utilised by THC to grow, dry and cure a member's cannabis plant.

[16] Below are the clauses of the contract which are deemed relevant to determining this matter:

(i) 2.2 *The Member shall, at all times, remain the owner of the feminised seed(s) and resultant Cannabis Plant being grown by THC on its behalf. It is recorded that, as the Cannabis Plant shall be grown in the Member Designated Area sub-leased by the Member, possession and effective control of the Cannabis Plant will remain with the Member for the duration of the Growth Cycle;*

(ii) *7.3.2 The Member's feminised seeds will be grown, dried and cured in the Members Designated Growing Area and the Common Areas;*

(iii) *7.3.3 The Member shall be allowed to access the Member's Designated Growing Area and the Common Areas (depending on the stage of the Cannabis Plant's Growth Cycle), and as agreed between the Member and THC;*

(iv) *11.1 Once the Cannabis Plant has been cured and the Member has been informed via the Website or THC App that it is ready to be collected, the Member may elect to-*

11.1.1 personally collect his/her cured Cannabis Plant from the Premises or

11.1.2 authorise THC to, on his/her behalf, arrange a courier service to deliver the cured Cannabis Plant directly to the Member's directed address;

If the Member elects 11.1.2 above as the mode of delivery, the Parties agree that THC will organise courier service in THC's capacity as a duly authorised agent of the Member for and on the Member's behalf. …;

(v) 12.1 Possession and control of the Member's feminised seeds and the resultant Cannabis Plant shall be given by the Member to THC on the Transfer Date; and

(vi) *17.2.2.2 Should the agreement between THC and Member created by these Terms and Conditions be terminated or cancelled for any reason, THC shall, without prejudice to any other rights which the Member may have- after the expiry of 2 week, an employee of THC or another Member, may claim ownership of a Cannabis Plant which has not been collected by the Member.*

[17] The first applicant uses the *'Sea of Green'* growing technique which yields an average of 30 grams of dried cannabis. The applicants ensure that the member's cannabis seed is carefully marked and that its progress from seedling to end cannabis product is carefully monitored and tracked, whilst keeping the member informed at every stage of the proceedings.

[18] The first applicant offers four membership streams. These are:

(i) registration for a 3-month trial membership at R1 320 payable as a monthly fee for 3 months;

(ii) registration for the services in respect of 1 cannabis plant at a monthly fee of R949 payable;

(iii) registration in respect of jointly-owned cannabis plant with each member paying a monthly amount of R699; and

(iv) registration with 3 members jointly owning a cannabis plant, resulting in each member paying a monthly amount of R485.

[19] It is the applicants' case that the grow club model is entirely consistent with the *Prince 3* judgment. To this end, they allege that the space sub-leased to the member constitutes the member's private space and private property and there is no communality or use of common space. Further, the cultivation occurs privately and the applicants only derive financial remuneration by availing their

expertise in cultivating the member's specific cannabis at a stipulated fee, similar to how a gardener employs his skill to tend to the member's garden. The grow technique employed by the applicants only yield a small quantity which is handed over to the member, whereafter the applicants cease to be involved.

[20] The submission that the cultivation occurs privately and that there is no use of common space or communality is contradicted by paragraph 7.3.2 and 7.3.3 as well as the definition of common areas contained in the contract concluded between the first applicant and the member.

[21] In summary, with a grow club model, the buyer does not purchase cannabis but rather the expertise, together with the tools to cultivate the cannabis and rents out the space where it may be cultivated. The grow club members supply the first applicant with feminised seeds, which will grow, harvest and cure the cannabis plant for the member.

[22] In advancing its case, the applicants argued that the word *'possess'* must be interpreted in such a way that it does not include within its purview instances where cannabis is being kept or stored or held in custody or held under control or supervision of a person, who: (a) has limited rights of rendering growing, harvesting and curing service; (b) in respect of seeds that are provided by and held by a person in respect of which ownership does not change hands; and (c) in circumstances where possession is for a limited period of time and occurs in a private place.

[23] The applicants also argued that a proper definition of *'deal in'* in relation to cultivation must include the collection, supply and transmission of the cannabis insofar as it relates to the cultivation by an adult in a private place for his or her

own personal consumption. In terms hereof, *'deal in'* would be defined as *'performing any act in connection with the transhipment, other than the cultivation which includes the collection, supply and transmission of cannabis by an adult in a private place for his or her personal consumption in private, collection, manufacture, supply, prescription, administration, sale, transmission or exportation of the drug.'*

[24] The application is opposed by the first to third respondents **('the respondents')**, with the fourth respondent filing a notice of intention to abide and the fifth respondent electing not to participate in the application.

[25] The answering affidavit is deposed to by Johan Smit, a Lieutenant Colonel **('Smit')** in the SAPS. Smit states that he has focused on and developed expertise in the policing of the trafficking of narcotic drugs and other drug-related offences. In the past 25 years he has been attached to the South African Narcotics Bureau and the Narcotics Section of the Organised Crime Unit.

[26] The respondents aver that the grow club model advanced by the applicants falls foul of section 4(b) of the Drugs Act read with the definition of *'possess'* in section 1(1) thereof and part III of schedule 2 thereto. Section 4(b) prohibits any person from using or possessing any dangerous dependence-producing substance or any undesirable dependence-producing substance. In section 1(1) *'possess'* is defined as *'in relation to a drug, includes to keep or to store the drug, or to have it in custody or under control or supervision.'* Part III of schedule 2 is headed *'Undesirable -Dependence Producing Substances'* and lists cannabis (dagga), the whole plant or any portion or product thereof, except dronabinol –[(-)-transdeltata-9-tetrahydrocannabinol] thereunder.

[27] The respondents further aver that the applicants' grow club model contravenes section 5(b) of the Drugs Act read with the definition of *'deal in'* in section 1(1) thereof and part III of schedule 2 thereto. Section 5(b) of the Drugs Act prohibits any person from dealing in any dangerous dependence-producing substance or any undesirable dependence-producing substance. Section 1(1) defines *'deal in'* as *'in relation to a drug, includes performing any act in connection with the transhipment, importation, cultivation* ***other than the cultivation of cannabis by an adult in a private place for his or her personal consumption of cannabis in private****, collection, manufacture, supply, prescription, administration, sale, transmission or exportation of the drug.'*[1]

[28] Section 13(d) of the Drugs Act provides that a contravention of section 4(b) will constitute a criminal offence and section 13(f) of the Drugs Act provides that a contravention of section 5(b) will constitute a criminal offence.

[29] The respondents argue that *Prince 3* only permits the cultivation of cannabis by an adult for his or her personal consumption in private. It does not allow the cultivation of cannabis belonging to another. Therefore, the establishment of a grow club which keeps and grows cannabis for others and which supplies cannabis to its members is illegal.

[30] It is clear from the founding affidavit and clause 12.1 of the contract concluded between THC and the member, that on the transfer date the members hand over the cannabis seeds to the first applicant who will have possession and control thereof. Given the definition of *'possess'*, the applicants have contravened section 4(b) of the Drugs Act. Furthermore, the respondents argue that because of the definition of 'possess' and *'deal* in', when the applicants receive, handle

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[1] The words in bold reflect the read in provided by Prince 3.

and store the member's cannabis they are also performing acts in connection with the cultivation and supply of the cannabis in contravention of section 5(b) of the Drugs Act.

[31] The first applicant keeps a number of mother plants on behalf of and at the request of various members. The first applicant takes clones from the mother plants (the member would have given permission) to be used by other members. This, the applicants state, entails the exchange, gifting, or donation of plants between members themselves. The first applicant offers the service and introduces members who wish to engage in this option. These actions, the respondents argue, would also constitute a contravention of section 5(b) of the Drugs Act, as a result of the definition of *'deal in'*.

[32] In opposing the application, the respondents highlighted the Constitutional Court's refusal to confirm the High Court's order of invalidity of the Drugs Act and the Medicines Act which prohibited the purchase of cannabis by adults for their personal consumption. The Constitutional Court stated that cannabis would be purchased from dealers of cannabis and if it confirmed the High Court's order of invalidity pertaining to the purchase of cannabis, it would be sanctioning dealing in cannabis, which was a serious problem in the country. The Constitutional Court went on to find that the prohibition of dealing in cannabis was a justifiable limitation of the right to privacy.

[33] The respondents aver that the grow club model is not consistent with *Prince 3* in that cannabis is not cultivated by the members themselves in a private place as envisaged and authorised by that judgment.

[34] *Prince 3* was determined within the context of the right to privacy set out in section 14 of the Constitution, with the Constitutional Court holding that it would not be in the interests of justice to widen the scope beyond the right of privacy as decided by the High Court.

[35] Section 14 of the Constitution provides that:

> *'14. Everyone has the right to privacy, which includes the right not to have –*
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> *(a) their person or home searched;*
>
> *(b) their property searched;*
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> *(c) their possessions seized; or*
>
> *(d) the privacy of their communications infringed.'*

[36] The High Court accepted that the core issue to be determined by it was whether the infringement of the right to privacy by the impugned legislation could be justified in terms of section 36 of the Constitution. This approach was informed by the following extract from the founding affidavit filed in the initial proceedings in the High Court:

> *' The substantive questions in this matter are to what extent and in what way government may dictate, regulate or proscribe conduct considered to be harmful as well as what is the threshold of the harm must cross for government to intervene? Can government legitimately dictate what people eat, drink or smoke in the confines of their own home or in properly designated places. Privacy concerns dictate and our constitution recognises that there should be an area of autonomy that precludes outside intervention.'*

[37] The basis for the High Court's declarations of constitutional invalidity was that the impugned 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 or her consumption in private. The High Court went on to find that section 4 and 5 of the Drugs Act had to be amended to ensure that they did not apply to persons using small quantities of cannabis for personal consumption in the privacy of a home as the sections unjustifiably limited the right to privacy, which is the right to be left alone.

[38] The Constitutional Court accepted that the High Court intended to declare section 5(b) read with the definition of *'deal in'*, invalid because it had the effect of prohibiting the performance of any act in connection with the cultivation of cannabis in a private dwelling or in private by an adult for his or her personal consumption in private.

[39] As the right to privacy was the basis for the High Court's decision, the Constitutional Court engaged with the scope and content of that right during the confirmation proceedings. It reiterated that the reasonable expectation of privacy test consists of two inquiries. Firstly, there must be a subjective expectation of privacy, and secondly the expectation must be recognised as reasonable by society. When the expectation to privacy relates to the inner sanctum such as that pertaining to an individual's home environment or family life, society is more likely to accept the reasonableness thereof than when the expectation to privacy relates to a commercial or transactional setting.

[40] The Constitutional Court also referred to its decision in *Bernstein*[2], when it stated that

'A very high level of protection is given to the individual's intimate personal sphere of life and the maintenance of its basic preconditions and there is a final

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[2] *Bernstein v Bester NO* 1996 (2) SA 751 (CC)

untouchable sphere of human freedom that is beyond interference from any public authority. So much so that, in regard to this most intimate core of privacy, no justifiable limitation thereof can take place. But this most intimate core is narrowly construed. This inviolable core is left behind once an individual enters into relationships with persons outside the closest intimate sphere; the individual's activities then acquire a social dimension and the right of privacy in this context becomes subject to limitation.'

[41] In *HLB International (South Africa) v MWRK Accountants and Consultants*[3], the rules for interpreting a court's judgment were restated. In interpreting a court's judgment, regard must be had to the language of the judgment and the reasons for giving it must be read as a whole to ascertain its intention. If the meaning of the order or judgment is clear and unambiguous, no intrinsic fact or evidence is admissible to contradict, vary, qualify or supplement it.

[42] The approach to interpretation was also set out in *Natal Joint Municipal Pension Fund v Endumeni Municipality.*[4] In terms hereof, the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed; and the material known at the time must be considered. Where more than one meaning is possible, each possibility must be weighed against these factors. Furthermore, the interpretative exercise is objective and not subjective, with a sensible meaning being preferred to one that leads to insensible or unbusinesslike results or which undermines the purpose of the document itself.

[43] As seem above, the judgment in *Prince 3* was determined considering the nature and scope of the constitutional right to privacy, and to ascertain whether the provisions of section 4(b) and 5(b) of the Drugs Act unjustifiably limited this right.

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[3] (113/2021) [2022] ZASCA 52 (12 April 2022)
[4] 2012 (4) SA 593 (SCA)

It was not determined to address the general legality of possession, use or cultivation of cannabis by adults. It is clear from the Constitutional Court's discussion of the right to privacy that it distinguished between the protection which would be afforded to this right when it operated within the inner sanctum of an individual's home and private life and the protection it would be afforded when the right was exercised within the commercial sphere.

[44] *Prince 3* must be understood within the context of an adult using, possession or cultivating cannabis in private for his or her personal consumption in private. This private space- whether it be for the use, possession or cultivation of cannabis or for the consumption thereto, is the private space which would be associated with an individual's inner sanctum, which would enjoy a high level of protection, where the right to be left alone is vigorously defended.

[45] The Notice of Motion describes the grow model as a socialised system of cannabis cultivation. This very description highlights the difference between the nature and scope of the private space exercised within the grow club model and the nature and scope of the private space referenced in *Prince 3,* with the grow club model moving away from an individual's inner sanctum to a more communal sphere.

[46] Given the socialised nature of the grow club model, the individual has left behind the inviolable core of the inner sanctum of private space to enter a relationship with his or her fellow members of the first applicant as well as a relationship with the first applicant. The activities of the members of the first applicant have thus acquired a social dimension, rendering the right of privacy subject to greater limitation.

[47] The applicants argued that the applicants are no different from a gardener cultivating cannabis in a home garden. This is not correct. There are differences between employing a gardener and accessing the grow club model. These differences include:

(i) with the grow club model the member has to lease private space whereas with a gardener you need not rent out a private space;

(ii) the grow club supplies the necessary equipment or supplies to cultivate and process the cannabis, with a gardener it is the home owners who generally supplies the necessary equipment;

(iii) with the grow club the equipment and supplies are shared amongst all the members, with a gardener the equipment is used solely for that particular garden;

(iv) with the grow club, it is the applicants who take control and possession of the cannabis plant, with a gardener control and possession of the plants do not change hands;

(v) with the grow club, it is the applicants who are in charge of the private space. Although the grow club members sub lease spaces from the grow club, the members never physically occupy or control those spaces which are at all times physically occupied and effectively controlled by the applicants, who also determine the location and extent of the private

space required by the member. With a gardener, the individual has direct, personal control over the private space.[5]

[48] This gardener argument is further undermined by the fact that the first applicant has membership options which allow for co-ownership of the cannabis plant. The applicants have not shown how co-ownership of the cannabis plant will operate within the context of private space used for private use. Co-ownership of the cannabis plant takes possession, cultivation and use of cannabis to the realm of increased social relationships, and away from the highly protected inner sanctum of privacy. You cannot claim the right to be left alone in circumstances where you actively associate with others.

[49] The grow club model attempts to extend the nature and scope of private space to the transactional sphere where lease agreements and remuneration for the cultivation, drying and processing of cannabis form the foundation for the claim to privacy. The second applicant unequivocally stated that the grow club model arose because he saw the possibility of a business opportunity.

[50] It is apparent from clause 7.3.2 and the definition of *'common areas'* contained in the contract concluded between the first applicant and the member, that part of the cultivation process occurs in the common area. Therefore, it must be accepted that the entire cultivation process is not undertaken in a private space. As the entire cultivation process does not occur within a private space, the grow club model, as proposed by the applicants, cannot be said to be consistent with *Prince 3*.

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[5] This comparison is done to highlight the differences between employing a gardener and subscribing to the grow club model. It should not be construed as an acceptance that *Prince 3* permits an individual to hire horticulturist or a gardener to cultivate cannabis.

[51] It is apparent from clause 7.3.3 of the contract concluded between the first applicant and the member, that the member does not have unregulated access to his or her designated private space and to the common area. The member may only access his or her designated space and the common area by agreement with the first applicant and depending on the stage of the growth cycle. The space subleased to the member by the first applicant is nothing more that the space within which to grow, cultivate and process the cannabis plant. This in itself does not render it a private space, as referenced by the Constitutional Court in *Prince 3*. The member does not have unrestricted access to this space, nor will he or she be performing any activity to which a legitimate expectation of privacy can be claimed.[6] The first applicant does not rent out private space to the members, but simply rents out space to the members.

[52] The applicants favour an interpretation of *'possess'* which would render possession and control by the applicants lawful. In favouring this definition, the applicants argue that the ordinary meaning of *'possess'* in the Drugs Act is neither helpful nor conclusive because it would catch within its purview a gardener tendering to a garden or to a person housesitting for an owner who has cannabis plants. I find myself unable to agree with this argument. A gardener works under instructions and can hardly be said to have the plants in the garden under his control or supervision as he is not the final decision maker pertaining thereto. A house-sitter may act as a caretaker of the house but a caretaker does not exercise any decision making power pertaining to the contents thereof to the extent that it can be said he or she is in control or that he or she is acting in a supervisory capacity. The definition of *'possess'* as set out in the Drugs Act requires that the possessor exercise some measure of decision making which is

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[6] Ian Currie and Johan De Waal *The Bill of Rights Handbook*, 6th edition, pg 297

absent from the scenarios postulated by the applicants. Furthermore, the definition favoured by the applicants fail to recognise that the reading-in provided by the Constitutional Court in *Prince 3* arose to protect the inner core of the right to privacy, and that it had to be narrowly construed.

[53] In *First National Bank Of Sa Ltd T/A Wesbank V Commissioner, South African Revenue Service And Another, First National Bank Of Sa Ltd T/A Wesbank V Minister Of Finance*[7] it was held that when possession is used in a statute, the context will determine what state of mind is required for possession in terms of such statute. The Drugs Act was enacted to *inter alia* provide for the prohibition of the use or possession of, or the dealing in drugs and of certain acts relating to the manufacture of certain substances.[8] The purpose of the Drugs Act, together with the Constitutional Court's recognition that dealing in cannabis remain a problem in the country are not consistent with the construction of *'possess'* advanced by the applicants.

[54] The definition advanced by the applicants of *'deal* in' is equally problematic. The Constitutional Court was very specific about the wording of the reading in as well as where it had to be placed. The ordinary grammar and syntax of the definition of *'deal in'*, as expanded by the *Prince 3* reading in, favours the conclusion that the only element qualified by the reading in was the element of cultivation, as argued by the respondents. The applicants argued that if their expanded definition of *'deal in'* is not accepted, it would result in adults not being able to acquire cannabis seeds as this would require collection and supply and they would not be able to transport the cannabis to the their private places on account of the prohibition on transmission.

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[7] 2002 (4) SA 768 (CC)
[8] The preamble to the Drugs Act.

[55] The applicants' argument that the extended definition of *'deal in'* has to include the collection and supply of cannabis seeds as they would not be able to otherwise acquire them would equally apply to the purchase of cannabis seeds. As the Constitutional Court refused to condone the purchase of cannabis seeds, this argument does not assist the applicants.

[56] Furthermore, the prohibition on the transmission of cannabis is indicative that the private place where the cannabis had to be cultivated is the same private place where it had to be consumed by an adult for his or her personal consumption, and that the outsourcing of the cannabis for consumption was not considered by the Constitutional Court when determining *Prince 3.*

[57] Recognising the grow club model would be impractical and non-sensical as it would allow the applicants to engage in conduct which would contravene sections 4(b) and 5(b) of the Drugs Act. When the member hands over feminised seeds/cannabis plant to the first applicant on the transfer date, the applicants would possess, control and keep the feminised seeds/ cannabis plant in contravention of section 4(b). When the applicants clone mother plants and make them available to members of the grow club, cultivates, dries and cures cannabis and facilitates the delivery thereof to the member, and even sub-leases space to the members for the growth and cultivation of the cannabis plant, they act in contravention of section 5(b) of the Drugs Act.

[58] The operation of grow club models, which are not subject to any statutory or legal guidelines or regulations could increase the possibility of dealing. In a grow club model, the individual does not purchase the end-product but he or she does purchase the cultivation process resulting in the end-product.

[59] The applicants seek to transpose the *Prince 3 d*ecision, which was determined within the context of the personal privacy, as protected by section 14 of the Constitution to a commercial context. The word *private* as used in *Prince 3* refers to a place which conforms to a person's private sphere under section 14 of the Constitution.[9] The applicants use of the word *private* is not used within the context of section 14 of the Constitution but within the context of a transactional relationship. The purported private spaces being sub-leased by the applicants to its members remain under the effective control of the applicants. As the grow club model does not result in the members cultivating cannabis for their own consumption in a private place, it has not been shown that it is consistent with *Prince 3* and therefore, lawful.

[60] I turn now to the alternative relief sought by the applicants.

[61] The supporting affidavits are deposed to by:[10]

(i) an adult male Devops Engineer:

He states that he was motivated to join the first applicant because (a) he has difficulty keeping the minor children who reside with him away from an location in which he would plant the cannabis; (b) he has no time available to grow or learn how to grow cannabis and (c) he does not have the necessary disposable income he would require to set up a growing operations, which would run into thousands.

Furthermore, the business, such as the first applicant guarantees him a certain level of quality of the cannabis.

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[9] Para 100 of the prince judgment
[10] I only reference the affidavits which have been properly signed and commissioned. I do not address the unsigned affidavits or affidavits which have not been properly signed and commissioned.

(ii) an adult male actuary:

He found the services offered by the first applicant to be of great value and of assistance to him.

He does not have the time or energy to cultivate cannabis in the property in which he lives. He does not possess the equipment, products, chemicals or tools for setting up a grow operation on his property which could costs as much as R50 000. He does not state who advised him that the costs would amount to R50 000.

The service offered by the first applicant allows him to access cannabis safely, through a controlled process, without which he would either be prevented from participating in the rights provided for by *Prince 3* or he would have to procure cannabis illegally.

(iii) an adult businessman:

He uses cannabis to fight insomnia.

He does not have the funds, expertise or time to properly cultivate cannabis.

He joined the first applicant, because he prefers to mandate professionals where his own skill set is lacking.

(iv) an adult male digital designer and developer:

He uses cannabis to treat his anxiety.

Without the services of the first applicant, he would be forced to engage the illicit market. He also does not have the time, space or complex knowledge required to cultivate cannabis.

[62] All the deponents to the supporting affidavits state that they do not have the skill set, the time or the funds to cultivate their own cannabis. However, none of them stated that they attempted to cultivate their own cannabis for private use but failed. It appears that they joined the first applicant because it was convenient to do so.

[63] The applicants allege that the impugned provisions of the Drugs Act as it applies to the grow club model is unconstitutional.

[64] The applicants allege that the *Prince 3* judgment creates a stark disparity between person who enjoy the benefits thereof by being allowed to have cannabis grown in their home gardens by gardeners and those persons who can't grow cannabis in their homes and are prevented from accessing the grow club model. This, the applicants allege amounts to an irrational disparity.

[65] *Prince 3* was determined within the context of the right to privacy and the narrow construction of the inviolable core of privacy. Therefore, it is not authority for persons to employ gardeners to grow cannabis in their gardens on their behalf- *Prince 3* requires the adult user of cannabis to grow it him/herself. The outsourcing of the cultivation process is not permitted. *Prince* 3 also does not require individuals to grow cannabis in their homes but in a private space.

[66] In the circumstances, there is no merit in the argument that there is an irrational distinction between allowing horticulturists or gardeners to mind and cultivate

cannabis in private gardens and prohibiting horticulturists and gardeners from minding and cultivating cannabis for a grow club as there is no such distinction.

[67] The applicants contend that the disparity created by *Prince 3* amounts to an arbitrary and irrational distinction and constitutes discrimination on the grounds of culture, belief and socio-economic status.

[68] The applicants also charge that the disparity created by *Prince 3* would result in unfair discrimination on the basis of race. The submission was made that – given the history of apartheid, poverty and access to resources have been disproportionately skewed along racial lines with black persons residing in informal settlements or apartments, unable to grow cannabis. This argument is opportunistic and stands to be rejected. Firstly, with the membership fees charged by the first applicant, it is highly doubtful that persons residing in informal settlements or apartments would be able to afford to become members. Secondly, no facts to support this allegation have been set out. Thirdly, this argument is rebutted by the respondents who state that cannabis can be grown in small spaces, including windowsills, or in backyards in informal settlements. As the applicants seek final relief, the respondents' version is to be accepted in terms of the application of the *Plascon- Evans* principle.[11]

[69] The applicants allege that it results in the infringement of the right to freedom of trade, occupation and profession, as set out in section 22 of the Constitution, which reads as:

'Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.'

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[11] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A)

[70] As stated in *Affordable Medicines*[12] section 22 consists of two components. The right to choose the profession, occupation or trade and the right to practice that profession, occupation or trade.

[71] The right to choose one's profession, occupation or trade will not be easily allowed and it will have to be established that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, and will have to be justified in terms of the broad public interest.[13] Section 36(1) reads as:

'The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonably and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.'

[72] The respondents conceded that the right to choose a cannabis grow -club trade, or to choose the trade of cannabis horticulturist or cannabis gardener is limited, but contends that the limitation is permitted by section 36(1) of the Constitution.

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[12] 2006(3) SA 27 (CC)
[13] Section 36 of the Constitution

Furthermore, the respondents aver that the present legal dispensation does not regulate the cannabis grow club trade but rather that it prohibits it.

[73] The Court in *Prince 3* was resolute that it would not confirm the invalidity of the impugned provisions pertaining to the purchase of cannabis for personal consumption as this would have the effect of condoning dealing in cannabis which remain a huge problem for the country. It cannot be disputed that the first applicant occupies the space of a large-scale provider of cannabis and that it does so as an alternative to illegal drug dealing. More than one member of the first applicant has stated that if they could not access the cannabis product from the applicants, then they would have to access the illicit market. Therefore, by sanctioning the grow club model, this court would be sanctioning the large-scale business in terms whereof members (customers) pay to have cannabis grown, cultivated and processed on their behalf. This would have the same potential to sanction dealing, just as the sanctioning of the purchase of cannabis would.

[74] The grow club model's modus is to cultivate cannabis for the consumption of others. This is a characteristic it shares with the dealers of cannabis. A further characteristic which the grow club model shares with dealers of cannabis is that it cultivates cannabis for the consumption of others in order to generate a profit. It may be that the applicants do not obtain remuneration for supplying the cannabis but they do earn remuneration from the cultivation thereof.

[75] The grow club model has the potential to cultivate cannabis on a large-scale and to generate huge amounts of money- this was evident from the number of plants and the weight of dried cannabis seized when the second and third applicants were arrested.

[76] In light of the shared characteristics between a dealer of cannabis and the grow club model, the limitation on the applicants right to choose a trade, profession or occupation as a cannabis grow club or cannabis horticulturist is reasonable. By allowing the applicants, either by way of a grow club or as a cannabis horticulturist, to cultivate cannabis on a large scale for consumption by others for remuneration would amount to condoning dealing therein, very similar to the manner in which allowing the purchase of cannabis would be condoning the dealing of cannabis. The Constitutional Court recognised that dealing in cannabis is serious problem in our country and a prohibition of dealing in cannabis is a justifiable limitation of the right to privacy. Similarly, it would be a justifiable limitation to the right to choose a trade, occupation or profession.

[77] To allow a grow club model, as proposed by the applicants, to operate in the absence of statutory and/or legal regulations and guidelines could have the practical effect of legalising dealing in cannabis. It may be that the legislature envisages the legislation hereof in the future, but this does not mean that this court should anticipate it. The legalisation of dealing in cannabis concerns policy issues and fall within the realm of the legislature, and not the judiciary.

[78] The applicants have alleged that their rights to bodily and psychological integrity and dignity are infringed by their failure to access the services of a grow club model.

[79] As seen above, all the deponents to the supporting affidavits have stated that they were motivated to join the first applicant because they do not have the necessary know how or skill, the equipment, the time or the funds to start growing their own cannabis. The applicants have stated that *'Growing cannabis is a fairly specialised process that cannot be undertaken without knowledge and*

research, along with specialised tools and ingredients. It makes the cultivation process difficult to access for certain members of society without access to such resources.'

[80] The respondents denied that the growing of cannabis requires specialised knowledge, equipment or funds and have stated that the outdoor growing or growing of cannabis in pot plants using natural light requires no specialised knowledge or tools and is freely available and relatively cheap. The respondents have also stated that for many years persons living in Southern Africa without limited or no access to specialised agricultural tools and know-how have successfully cultivated cannabis for personal use. As stated earlier in this judgment, as the applicants seek final relief, the allegation that the cultivation of cannabis does not require specialised skill, equipment or funds, must be accepted on the application of the *Plascon-Evans* principle.

[81] The applicants and their customers are not prevented from using and/or cultivating cannabis. They are merely prevented from outsourcing that right.

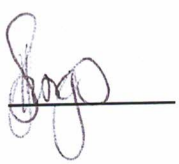
[82] The deponents to the supporting affidavits rely on hearsay evidence when they claim that the growing of cannabis requires vast amount of funds and do not disclose the source of this hearsay. Furthermore, none of these deponents state that they were prohibited from cultivating cannabis for their own consumption or that they were unable to do so. On the contrary, it is evident that they became members of the first applicant because it was a convenient way to access cannabis.

[83] The absence of convenience in exercising a right does not constitute an infringement thereof. In the circumstances, the applicants have not shown that their rights to bodily and psychological integrity and dignity have been infringed.

[84] In alleging an infringement of their rights to bodily and psychological integrity and dignity, the applicants have relied on *British American Tobacco South Africa (Pty) Ltd and Others v Minister of Co-operative Governance and Traditional Affairs and Others* ***('BATSA').***[14] In *BATSA*, the smoking of cigarettes was never a criminal offence. Rather, the selling of cigarettes became temporarily prohibited as part of the Covid 19 regulations, thereby preventing individuals from lawfully accessing cigarettes. Prior to *Prince 3* the possession, use and cultivation of cannabis was outlawed and *Prince 3* created a narrow exception hereto, as seen above. Therefore, the applicants reliance on *BATSA* in the circumstances of this application is misplaced.

[85] In the circumstances, the applicants have not made out a case for the main relief or alternative relief they seek and the application is dismissed.

[86] During the hearing of the matter, the respondents advised that they do not seek a costs order against the applicants, should their application be unsuccessful. Further, as the applicants sought to enforce their constitutional rights, it is appropriate that the *Biowatch*[15] principle be applied to the issue of costs. In the circumstances, no order is made in respect of costs.



Slingers, J

29 August 2022

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[14] (6118/2020) [2020] ZAWCHC 180
[15] *Biowatch Trust v Registrar, Genetic Resources, and Others* 2009 (6) SA 232 (CC)