

Finding South Africa's place in the emerging cannabis industry

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The *African Cannabis Report* (March 2019) by Prohibition Partners has estimated that in 2023 the total market value of South African cannabis industry will be around \$1.8 billion (assuming there is wholesale legislation and regulation of the cannabis industry).



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The global legal cannabis market is estimated to reach \$146 billion by the end of 2025 and South Africa's progressive stance towards the green plant sets it up nicely to become a major player in the international market, says South African economist, Jee-A van der Linde.

It cannot be denied that the cannabis industry is proving to be an emerging market and South Africa has the potential to be a major player in the exciting new growth sector, if well-regulated. The Minister of Finance, Tito Mboweni in his Budget Speech, opined on policy changes in the cannabis industry, which can result in a potential source of revenue for South Africa.

It therefore did not come as a surprise when the City of Cape Town, along with Wesgro, recently announced the release of vacant land for the production of medical cannabis, which will set the foundation to unlock Cape Town's potential in this untapped sector. It is said that the facility will bring with it investment to the value of R638 million in capital expenditure during the construction phase and an additional, R1.5 billion will be invested during phase two.

Likewise, the Eastern Cape premier Oscar Mabuyane, recently stated that he wants to make Eastern Cape home to South Africa's first cannabis industry.

Our neighboring African countries like Lesotho and Zimbabwe have already made significant changes to their laws and policies on legalising cannabis for medical and research purposes. In 2017, Lesotho became the first African nation to grant a license for the cultivation of medical cannabis.

The South African legislative framework on cannabis

South Africa is a signatory to the United Nations Single Convention on Narcotic Drugs (1961), an international treaty that prohibits the production and supply of specific narcotic (including cannabis) except under license for specific purposes, such as medical treatment and research.

The Drugs and Drug Trafficking Act No 140 of 1992 ("Drugs Act")

The Drugs Act was enacted to outlaw the production, possession and supply of drugs (including cannabis). The Drugs Act prescribes and imposes criminal penalties for the production, possession and supply of cannabis (listed as an *undesirable dependence-producing substance*).

Section 4(b) of the Drugs Act states that no person shall *use* or *have* in his possession any undesirable dependence-producing substance; this read with section 5(b) which states that no person shall *deal* in any undesirable dependence-producing substance, unless the exceptions listed in the provision apply. It is important to note that section 5(b) covers the activity of cultivation and sale of cannabis.

Medicinal and Related Substances Act No 101 of 1995 ("Medicines Act")

The Medicines Act regulates the use of cannabis, among other substances. The Medicines Act prohibits the acquisition, use, possession, manufacture, supply, sale or administration of cannabis unless it is done for medicinal or research purposes (section 22A(9)(a)(i) and Section 22A(10) read with schedule 7 of the Medicines Act).

Constitutional Court Judgment

In September 2018, the Constitutional Court delivered a land mark judgment on the constitutionality of cannabis use and cultivation: in the case 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 ("Constitutional Court Judgment").

It was held that:

- a. the provisions of section 4(b) of the Drugs Act was inconsistent with right to privacy entrenched in section 14 of the Constitution and, therefore, invalid to the extent that it makes the use or possession of cannabis in *private* by an *adult person* for his or her *own consumption*;
- b. the provisions of section 5(b) of the Drugs Act was inconsistent with the right to privacy entrenched in section 14 of the Constitution and, therefore, constitutionally invalid to the extent that it prohibits the *cultivation of cannabis by an adult* in a *private place* for his or her *personal consumption*; and
- c. the provisions of section 22A(9)(a)(i) read with Schedule 7 the Medicines Act was inconsistent with right to privacy

entrenched in section 14 of the Constitution and, therefore, invalid to the extent that it makes the *use or possession of cannabis in private* by an *adult person* for his or her *own consumption in private* a criminal offence.

The Constitutional Court held that the right to privacy extends beyond the boundaries of a home.

Parliament was given 24 months (until September 2020) to cure the constitutional defect in the stated provisions and to decriminalise the *cultivation, use or possession* of cannabis by an adult in a private place for his or her personal consumption.

South African Health Products Regulatory Authority (“SAHPRA”)

SAHPRA formally known as the Medicines Control Council (MCC) was formed by the South African government to oversee the regulation of health products. SAHPRA regulates the licence application under section 22C(1)(b) of the Medicines Act and provides guidelines and licence requirements for any commercial enterprise that wishes to cultivate, extract and/or test cannabis and cannabis resin, including the manufacture, import, export and/or distribution of cannabinoid-containing products.

The two main objectives of the cannabis cultivation license application can be crystallised as follows:

- i. Firstly, the legitimacy of the cannabis must not be compromised; and
- ii. Secondly, all necessary steps must be taken to prevent the deviation of cannabis for illegal purposes.

Encapsulating from these objectives – the license application must address the following:

- the personal information regarding the license holder, their businesses associates and their employees;
- training programs for employees;
- security protocol;
- building and infrastructure;
- storage and distribution;
- equipment;
- record keeping and reporting; and
- proper procedures for the harvesting and production of the cannabis.

The application process is extremely thorough, with stringent regulations and also requires immense financial resources for a business to be granted a cannabis cultivation licence – in order to capitalise on this rapidly growing market. The amount of issues that need to be addressed in the application can be overwhelming. However, it is imperative to ensure that the application addresses each and every issue which aims to meet these twin-objectives.

To date, only a handful of cannabis cultivation licences have been granted by SAHPRA. We will see over time the number of licences that will be issued by SAHPRA and the value-chain it will bring to the South African cannabis industry, including the legislative and regulatory changes.

Conclusion

Until then, the manufacturing, harvesting, growing or cultivation of cannabis for commercial, research and medicinal purposes without the cannabis cultivation licence is prohibited and illegal in terms of the Drugs Act read with the Medicines Act, unless it is for private and personal consumption as held in the Constitutional Court judgment.

Even though there are still doubts as to how the Constitutional Court ruling will be implemented in practice, these include the scope that will be given to the definitions of '*private*' and '*personal consumption*', and how the South African Police Service would ascertain that cannabis was for private or personal consumption. The country awaits to see the coming development

in legislation (Drugs Act and Medicine Act) as ruled by the Constitutional Court.

It will be interesting to see whether this development in legislation will transform to the overall regulatory and policy change for South Africa to tap into this emerging cannabis industry and to capitalise on the full economic benefits and commercial opportunities that the cannabis industry has to offer.

To implement and develop effective legislation, the Department of Health (through SAHPRA) should work together with the Department of Agriculture, Forestry and Fisheries to regulate and promote the local growing and production of cannabis for medical and research purposes – including the manufacture, import, export and/or distribution of cannabinoid-containing products – with the aim to position South Africa as one of the leading players in the emerging cannabis industry and be a potential source of revenue for South Africa.

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