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## DECRIMINALISATION OF POSSESSION AND USE OF CANNABIS FOR CHILDREN

## DEKRIMINALISERING VAN DIE BESIT EN GEBRUIK VAN KANNABIS DEUR KINDERS

Reading such a title can be misleading. The words of Judge Opperman in the recent matter of S v LM and 3 others do not necessarily clarify the position in the minds of most educators:

Die bostaande titel kan misleidend wees. Die woorde van Regter Opperman in die onlangse saak van S v LM en 3 ander help ook nie noodwendig om duidelikheid hieroor vir die meeste opvoeders te gee nie:

*"[1]... In this regard it needs to be emphasized that this case concerns the decriminalisation of the use and possession of cannabis by children and not the legalisation thereof."*

The gist of this judgement handed down on 31 of July 2020 concerns the fact that in our current legal dispensation, children can be dealt with in a disproportionately harsher manner compared to their adult counterparts when being prosecuted for the same offence.

Die kern van die uitspraak wat gelewer is op 31 Julie 2020, is die feit dat ons huidige regstelsel toelaat dat daar met kinders op 'n disproporsionele, strenger wyse gehandel word as met volwassenes, wanneer hul vir dieselfde misdryf vervolgt word.

Examples cited in the case are where children are ordered to attend 'compulsory residence' in a 'Child and Youth Care Centre', which amounts to little more than incarceration. Such incarceration is estimated at 4.75 months of compulsory residence as mentioned in the judgement, whereas an adult can get away with a suspended sentence, fine or even community service. (And this is only where adults are still prosecuted in light of the Prince Judgment, which decriminalised the private possession and consumption of cannabis).

Voorbeelde wat in die saak vermeld word is waar kinders vir verpligte inwoning deur die hof by 'n 'Kinder- en Jeugsorgsentrum' geplaas word. Dit kom in essensie neer op aanhouding. Hierdie "aanhouding" word beraam op 'n gemiddeld van 4.75 maande van 'verpligte inwoning' soos vermeld in die uitspraak. Daarenteen kan 'n volwassene wegkom met slegs 'n opgeskorte vonnis, 'n boete of selfs gemeenskapsdiens. (Hierdie bepaling is slegs van toepassing waar volwassenes vervolgt word in die lig van die Prince uitspraak, waarin die privaatbesit en gebruik van cannabis gedekriminaliseer is.)

In essence, the diversion programs and procedures which attempted to protect the child from the criminal justice system in the past, can currently lead to instances where the punishment meted out to a child is far harsher than

In essensie het die afwentelingsprogram en proses wat in die verlede bedoel was om die kind teen die kriminele regstelsel te beskerm, tot gevolg dat dit tans moontlik is dat die straf wat aan 'n kind opgelê word baie swaarder is

that of an adult. If the judgement is read together with the specific provisions of the Drugs and Drug Trafficking Act, the Child Justice Act and the Children’s Act, the attention of school governing bodies and educators are drawn to the following:

- Section 4(b) of the Drugs and Drug Trafficking Act is declared unconstitutional insofar as it criminalises the use and/or possession of cannabis by a child;
- There is currently a law reform program that will attempt to address all issues relating to cannabis (Due the Prince Judgment). A Bill has been approved by cabinet and will be submitted to parliament for consideration;
- It is still illegal to supply or sell cannabis to a child;
- This judgement in no way, shape or form prevents any person from utilising any civil process, procedure or program to ensure that a child receives the necessary intervention and assistance for cannabis use or dependency. (This includes the provisions of the South African Schools Act [SASA] and accompanying regulations.);
- In short, the use of cannabis is afforded the same status as that given to the abuse of alcohol and cigarettes by minors.

This does not change much to the current system of dealing with any substance abuse in schools when viewed from a school’s perspective.

Section 8A(14) of SASA states:

*“(14) No criminal proceedings may be instituted by the school against a learner in respect of whom —  
 (a) a search contemplated in subsection (2) was conducted and a dangerous object or illegal drug was found;  
 or  
 (b) a test contemplated in subsection (8) was conducted, which proved to be positive.”*

There is however one particular aspect that may cause problems in the future, i.e. Clause 4.6.3 of Annexure B of the regulation ‘DEVICES TO BE USED AND PROCEDURES

as die van ’n volwassene. As die uitspraak saam met die spesifieke bepalings van die Wet op Dwelms en Dwelmshandel, die Kinderegtergheidswet en die Kinderwet gelees word, moet beheerliggame en opvoeders veral op die volgende let:

- Artikel 4(b) van die Wet op Dwelms en Dwelmshandel word ongrondwetlik verklaar tot die mate wat dit die besit en gebruik van cannabis deur kinders kriminaliseer;
- Daar is tans ’n regshervormingsprogram gevestig wat poog om al die kwessies rakende cannabis aan te spreek (Vanweë die Prince Uitspraak). ’n Konsepwet is deur die kabinet goedgekeur en sal voorgehou word aan parlement vir oorweging.
- Dit is steeds onwettig om cannabis aan kinders te verkoop of te verskaf;
- Hierdie uitspraak verhoed geen persoon om gebruik te maak van enige siviele proses, prosedure of program om te verseker dat ’n kind die nodige intervensie en bystand met betrekking tot cannabisgebruik of -afhanklikheid verkry nie. (Dit sluit die bepalings van die Suid-Afrikaanse Skolewet [SASA] en die gepaardgaande regulasies in.);
- Dit kom daarop neer dat dieselfde status aan cannabis verleen word as dié van die misbruik van drank of sigarette deur minderjariges.

Hierdie verander nie veel aan die huidige stelsel ten opsigte van die hantering van dwelmmisbruik in skole vanuit die skool se perspektief nie:

Daar is egter een spesifieke aspek wat moontlik probleme in die toekoms kan veroorsaak, naamlik Klousule 4.6.3 van Aanhangel B van die regulasies ‘DEVICES TO BE USED

TO BE FOLLOWED FOR DRUG TESTING' published under GN 1140 in GG 31417 of 19 September 2008.

AND PROCEDURES TO BE FOLLOWED FOR DRUG TESTING' gepubliseer onder GN 1140 in GG 31417 van 19 September 2008.

*"4.6.3 If either the learner or the parent refuses to cooperate, the matter, and the learner, must be handed over to the police, so that they may conduct a search in terms of the Criminal Procedure Act. The outcome of such a search is linked to a Criminal Court Process with possible criminal prosecution."*

What this means is that theoretically, a school's hands may be bound where the learner and the parent refuse to cooperate in those cases when a search or drug test is required. Though it should be noted that this is only the case where the offending drug is cannabis

Dit kom daarop neer dat 'n skool se hande teoreties afgekap is indien die leerder en die ouers weier om hul samewerking te gee waar 'n deursoeking of dwelmtoets benodig word. Neem egter kennis dat dit slegs die geval is waar cannabis ter sprake is.

The main aim for a school should always be to assist the learners in overcoming their dependency problem and not attempt to criminalise their behaviour. It is common cause that schools serve more than just an education purpose in our country. Many of the life skills and values that used to be taught at home is increasingly becoming the responsibility of the school. It is not uncommon for a school to be the only safe haven for many South African learners.

Die doel vir 'n skool behoort altyd te wees om die leerders te ondersteun om hul afhanklikheidsprobleem te oorkom en nie poog om hul gedrag te kriminaliseer nie. Daar word ook algemeen aanvaar dat skole meer as net 'n opvoedkundige rol in ons land het. Talle van die lewensvaardighede en waardes wat in die verlede tuis gevestig was, word toenemend die verantwoordelikheid van die skool. Dit is nie ongewoon vir 'n skool om die enigste veilige hawe vir baie Suid-Afrikaanse leerders te wees nie.

In the light of the above the SAOU wishes to encourage schools to become pro-active in their engagement with the social ills in their communities. There are many NGOs and other civil organisations that are more than willing to partner with schools in an endeavour to build healthy and thriving communities.

In lig van die bogenoemde wil die SAOU graag skole aanmoedig om pro-aktief op te tree ten opsigte van hul betrokkenheid by die sosiale euwels in hul gemeenskappe. Daar is talle NRO's en ander burgerlike organisasies wat bereid is om in vennootskappe met skole te tree in 'n poging om gesonde en vooruitstrewende gemeenskappe te bou.

Assisting a learner through progressive and restorative discipline is increasingly seen as a viable alternative to traditional punitive discipline. But as with all things, change does not happen overnight, nor are the gains made today guaranteed to be there tomorrow. Addressing substance related problems in a school is

Die ondersteuning van leerders deur progressiewe- en regstellende of helende dissipline word toenemend as 'n werkbare alternatief beskou in teenstelling met tradisioneel bestraffende dissiplinêre stelsels. Maar soos met alle dinge vind verandering nie oornag plaas nie en is daar geen waarborg dat die vordering wat vandag

more often than not a slow and methodical process, with socio-economic conditions stacked against it. That is why reaching out and obtaining external assistance is just as important as internal changes to policy and procedure in our struggle to free our schools and communities from substance abuse and negative life styles.

Full judgement:

[S v L M and Others \(97/18; 98/18; 99/18; 100/18\) \[2020\]](#)

[ZAGPJHC 170 \(31 July 2020\)](#)

gemaak word in die toekoms steeds daar sal wees nie. Om dwelmmisbruik en verwante probleme in skole aan te spreek, is dikwels 'n stadige en metodiese proses, omdat sosio-ekonomiese omstandighede 'n struikelblok kan wees. Dit is waarom dit net so belangrik is om uit te reik en van eksterne hulp gebruik te maak, as wat dit is om interne beleide en prosedures te verander in ons stryd om skole en gemeenskappe van dwelmmisbruik en negatiewe lewenstyle te bevry.

Volledige uitspraak:

[S v L M and Others \(97/18; 98/18; 99/18; 100/18\) \[2020\]](#)

[ZAGPJHC 170 \(31 July 2020\)](#)

