

HIGH FLYERS BEWARE – CANNABIS IN THE WORKPLACE

By Wanya Cloete

Introduction:

On 18 September 2018 the Constitutional Court in the *Prince*^[1] Judgment declared parts of the Drugs and Drug Trafficking Act^[2] and the Medicines and Related Substances Control Act^[3] inconsistent with the Constitution to the extent that they encroach upon private use and consumption of cannabis for personal purposes.

In the recent *Mthembu and others v NCT Durban Wood Chip*^[4] CCMA award the Commissioner had to decide whether the dismissal of employees who tested positive for cannabis while at work was indeed lawful and fair.

MTHUMBU AND OTHERS V NCT DURBAN WOOD CHIPS [2019] 4 BALR 369 (CCMA)

In this case the employees were employed in a wood and chip industry. Their work involves working with large machinery and extremely dangerous vehicles coming in and out of the premises throughout the day. The products the employees work with can also cause fatalities. Based on these dangers the employer implemented a “zero-tolerance” policy for substance abuse in 2016.

The employees were informed of the substance abuse policy and signed acknowledging the policy. Tool-box talks were also conducted to educate employees on substance abuse in the workplace.

In the middle of 2017, four employees tested positive for Cannabis by way of urine samples, the urine samples were then sent for further testing at a laboratory.

The employees indicated that they did not smoke Cannabis at work but did however smoke Cannabis in their private time at home.

The Commissioner found that the applicants were all aware that the respondent has a “zero tolerance” view towards substance abuse and were aware of the possibility of dismissal if they tested positive. It was for the employees to make sure that when they smoke for private use it must not result in them reporting for work under the influence thereof.

This is no different to consuming alcohol to such a degree the night before that the employee reports for duty under the influence the next day placing himself and other employees and the company at risk and exposes the company to unnecessary financial claims and fines. Accordingly, he found that dismissal was the appropriate sanction.

Conclusion:

It is clear from the *Mthembu* award that although the Constitutional court has legalised the use of Cannabis for private use this does not give employees licence to attend work under the influence. In the event of an employee being under the influence of cannabis the same scenario applies as when under the influence of alcohol. If the employee is unable to act according to the standards, care and skill required by the employer, the employer is entitled to take disciplinary action.

It is however to remain cognisant of the difference between an employee’s being under the influence at work and testing positive for traces of a substance in their body. These are significantly different in fact and in the manner of charging an employee during disciplinary action wherein the first misconduct is focussed on the employee reporting to work while under the influence whereas the second option results in a charge of breaching a zero tolerance policy.

^[1] Prince v Minister of Justice and Constitutional Development and Others [2017] ZAWCHC 30

^[2] Drugs and Drug Trafficking Act^[2], No 140 of 1992

^[3] Medicines and Related Substances Control Act 101 of 1965

^[4] Mthembu and others v NCT Durban Wood Chip [2019] 4 BALR 369 (CCMA)