



The Workplace Health and Safety Legal Framework for Cannabis Use by Adv. Hendrik Terblanche

WORKING AT HEIGHT THEATRE



Content

- The Constitutional Court ruling.
- The science.
- What is meant by “under the influence” as, and if, referenced in occupational health and safety legislation?
- What are the legal requirements in health and safety legislation regarding persons “under the influence”?
- What tests can the employer use to determine if a person is “under the influence”?

Constitutional Court

- 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 Acton (CCT108/17) [2018] ZACC 30; 2018 (10) BCLR 1220 (CC) (18 September 2018)
- <http://www.saflii.org/za/cases/ZACC/2018/>

Constitutional Court

- It is declared that, with effect from the date of the handing down of this judgment, the provisions of sections 4(b) of the Drugs and Drug Trafficking Act 140 of 1992 read with Part III of Schedule 2 of that 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 terms of section 22A(2) of that Act
- are inconsistent with 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 in private a criminal offence.

Constitutional Court

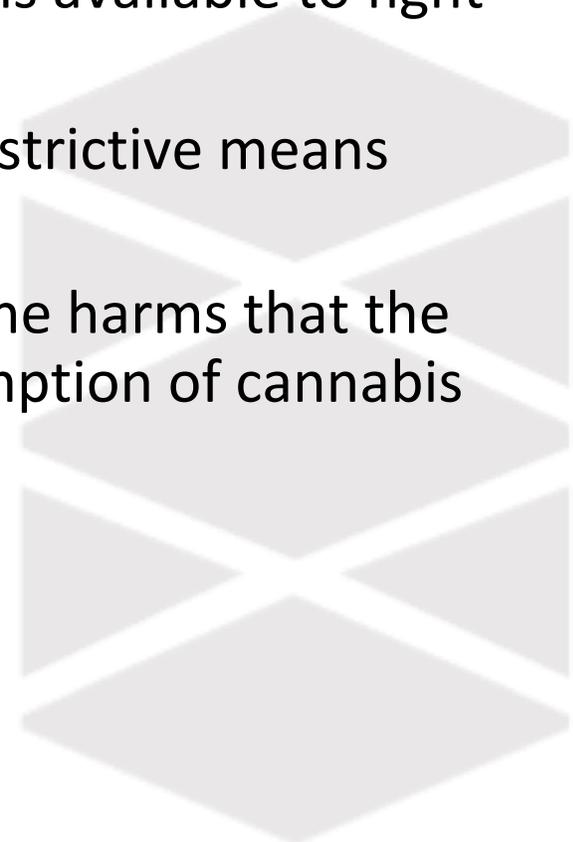
- It is declared that, with effect from the date of the handing down of this judgment, the provisions of section 5(b) of the Drugs and Drug Trafficking Act 140 of 1992 read with Part III of Schedule 2 of that Act and with the definition of the phrase “deal in” in section 1 of the Drugs and Drug Trafficking Act 140 of 1992
- are inconsistent with the right to privacy entrenched in section 14 of the Constitution and, are, therefore, constitutionally invalid to the extent that they prohibit the cultivation of cannabis by an adult in a private place for his or her personal consumption in private.

Constitutional Court

- The operation of these orders is hereby suspended for a period of 24 months from the date of the handing down of this judgment to enable Parliament to rectify the constitutional defects.
- During this period, the abovementioned legislation must be read as if it has certain exemptions stipulated by the Constitutional Court are part of the legislation.
- Should Parliament fail to cure the constitutional defects within 24 months, the reading-in in this order will become final.

Constitutional Court

- The point of this judgment is that there are a multitude of options available to fight this problem as opposed to the blunt use of the criminal law.
- It is precisely for this reason that this Court contends that less restrictive means must be employed to deal with the problem.
- The blunt instrument of the criminal law is disproportionate to the harms that the legislation seeks to curb in so far as the personal use and consumption of cannabis are concerned.



Constitutional Court

- The potential harmful effects of cannabis use are noted, however, on the medical evidence on record it is equally clear that there is a level of consumption that is safe in that it is unlikely to pose any risk of harm.
- The medical evidence on record is silent on what that level of consumption is.
- Nor is there any evidence suggesting that it would be impossible to regulate the consumption of cannabis by restricting its consumption to that safe level.

Constitutional Court

- World Health Organisation (WHO) The Health and Social Effects of Nonmedical Cannabis Use:
 - Suggests that alcohol is more harmful than cannabis use.
 - Supports the general proposition that the authority of the state to exert control over the individual extends only to activities of the individual which affect others, or the public at large, as it relates to matters of public health or safety or to provide for the general welfare.
 - We believe this tenet to be basic to the free society. The state cannot impose its own notions of morality, propriety, or fashion on individuals when the public has no legitimate interest in the affairs of those individuals.

Constitutional Court

- The right of the individual to do as he pleases is not absolute, of course: It can be made to yield when it ... infringe[s] on the rights and welfare of others.
- The High Court's conclusion that the limitation was not reasonable and justifiable was based on, amongst others, the position taken by the South African Central Drug Authority as reflected in its position statement issued in 2016 in the South African Medical Journal.

Constitutional Court

- An assessment of currently available data in other countries indicates that alcohol is the substance that causes the most individual and societal harm and is therefore key to put particular efforts into implementing the most evidence based policies and interventions for combatting such harm.
- We have no intention of decriminalising dealing in cannabis.
 - Police have arrested a cannabis shop owner barely a week after he opened his business in the central business area in Sedgefield near Knysna in the Southern Cape at the weekend
www.cbn.co.za April 23, 2019

WHO Report

- http://www.who.int/substance_abuse/publications/msbcannabis.pdf
- The principal cannabinoids in the cannabis plant include delta-9-tetrahydrocannabinol (THC), cannabidiol (CBD), and cannabinol (CBN).
- The cannabinoid that is primarily responsible for the psychoactive effects sought by cannabis users is THC.

WHO Report

- Inhalation by smoking or vaporization releases maximal levels of THC into the blood within minutes, peaking at 15–30 minutes and decreasing within 2–3 hours.
- Even with a fixed dose of THC in a cannabis cigarette, its effects vary as a function of the weight of the cannabis cigarette, the THC potency in the cigarette, its preparation, the concentration of other cannabinoids, the rate of inhalation, the depth and duration of puffs, the volume inhaled, the extent of breath-holding, the vital capacity and the escaped smoke and dose titration.

WHO Report

- Cannabis intoxication is defined as the following:
 - Recent use of cannabis
 - Clinically significant problematic behavioural or psychological changes (i.e. impaired motor coordination, euphoria, anxiety, sensation of slowed time, impaired judgment, social withdrawal) that developed during, or shortly after, cannabis use.
- Data are required on the typical doses of THC and other cannabinoids (e.g. cannabidiol or CBD) that users receive through different modes of use (smoked, vaporized, ingested).
- There are limited data on cannabis potency trends over time and their impact on health (e.g. cognition, psychosis, accidents, motivation, emergency department mentions, cannabis-use disorders).

WHO Report

- THC can be detected in plasma within seconds of smoking cannabis and it has a half-life of two hours.
- Peak plasma levels of THC are around 100 $\mu\text{g}/\text{L}$ after smoking 10–15 mg of cannabis over a 5–7 minute period.
- μg = microgram = 1 millionth of a gram
- ng = nanogram = 1 billionth of a gram
- dl = decilitre = 100 millilitres



WHO Report

- Cannabis alters time perception and coordination by acting on cannabinoid receptors in the basal ganglia, frontal cortex and cerebellum, which are brain regions involved in motor control and memory.
- Cannabis also affects psychomotor function.
- It impairs movement and coordination, manipulation and dexterity, grace, strength and speed.



WHO Report

- Evidence suggests that recent smoking and/or having a THC blood concentration of 25 ng/mL are associated with substantial driving impairment, particularly in occasional smokers.
- Cannabis acutely impairs several components of cognitive function, with the most robust effects on short term episodic and working memory, planning and decision-making, response speed, accuracy and latency.
- Some studies also report increased risk-taking and impulsivity.

WHO Report

- Less experienced cannabis users undergo stronger intoxicating effects on attention and concentration than those with established drug tolerance.
- Cannabis also acutely impairs motor coordination, interferes with driving skills and increases the risk of injuries.
- Evidence suggests that recent cannabis smoking is associated with substantial driving impairment, particularly in occasional smokers, with implications for work in safety-sensitive positions.
- Complex human/machine performance can be impaired as long as 24 hours after smoking a moderate dose of cannabis and the user may be unaware of the drug's influence.

WHO Report

- The Driving Under the Influence of Drugs, Alcohol, and Medicines (DRUID) study was a population-based study of accident risks related to the use of cannabis and other drugs in nine EU countries (Hels et al., 2012).
- A pooled analysis found that drivers who tested positive for THC were 1–3 times more likely to be in an accident than sober drivers.
- This is comparable to a blood-alcohol level of 0.05 g/dl to <0.10 g/dl but the confidence intervals around these estimates were wide.
- A Department of Transportation case-control study in the USA found that drivers who tested positive for THC had 1.25 times higher risk of collision than a sober driver, but the association disappeared when age, gender, ethnicity and blood-alcohol (BAC) levels were taken into account.

WHO Report

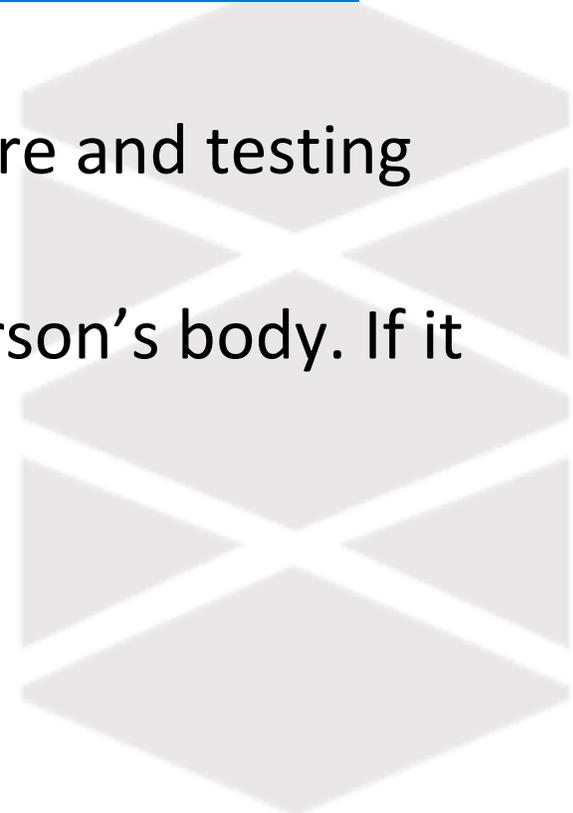
- Overall, even though the effect is small compared to the effects of alcohol, traffic injury may be the most important adverse public health outcome for cannabis in terms of mortality in high-income countries.
- The effects of cannabis use on cognition in the context of work and everyday life, and whether off-site cannabis use endangers a worker or his colleagues while at work, are of concern.
- This topic has not been systematically investigated in recent years.
- We need to know more about the duration of acute impairments produced by cannabis (the length of time after using cannabis that psychomotor and cognitive performance are impaired).

WHO Report

- Chronic heavy drinkers develop tolerance to alcohol and show fewer obvious signs of intoxication even at extremely high BAC levels.
- They can in many cases drive a car with BAC levels at which others with a lower tolerance would not be able to drive.
- Differences in impairments for the same dose of THC also need to be investigated in naïve and experienced users.
- Studies are needed to investigate the effects of high THC levels on driving.
- Studies are required to compare the effects of smoking and of ingested cannabis on driving.

Other Sources

- <https://www.denverpost.com/2017/08/25/marijuana-impairment-testing/>
- There was a time when marijuana was illegal everywhere and testing for it was as easy as could be.
- It didn't matter the level of cannabinoids found in a person's body. If it was there, they were breaking the law.
- It's different now.



Other Sources

- THC is not the same as alcohol.
- It reacts differently in the body, it metabolizes differently and its impairing impact is different.
- Unlike the 0.08 blood-alcohol level that's widely accepted as indicative of drunken driving, establishing a credible level for THC has been elusive.

Other Sources

- We spent 25 or 30 years figuring out where we were with alcohol, and finally got to breathalysers.
- Colorado has established that a THC level of 5 ng/mL is enough to charge someone with Driving under the Influence (DUI).
- Unlike alcohol, where a reading of 0.08 is enough to convict someone of drunken driving — known as *per se* evidence that a driver is impaired — THC levels are only considered as “permissible inference” of impairment.
- That means that despite the level of Delta-9 THC found in a driver’s blood, a Colorado jury or judge decides whether the driver was impaired or not.

Other Sources

- Washington and Montana, unlike Colorado, treat the same 5 ng/mL level of THC as if it were alcohol, where no other proof of impairment is needed to convict a driver charged with DUI.
- However, 12 states — including Arizona and Utah — have zero-tolerance policies, so any detectable amount of THC can lead to a conviction.

Other Sources

- A number of states have set a THC limit ... indicating that if a suspect's THC concentration is above that level, ... then the suspect is to be considered impaired," the National Highway Traffic Safety Administration said in a report.
- This *per se* limit appears to have been based on something other than scientific evidence.

South African Legislation

- Relevant legislation that regulates intoxication in the workplace is:
 - The Occupational Health and Safety Act, Act 85 of 1993 (the “OHSA”)
 - The Mine Health and Safety Act, Act 29 of 1996 (the “MHSA”)
 - Employment Equity Act, Act 55 of 1998 (“EEA”)



OHSA

- *General Safety Regulation 2A Intoxication*
- *(1) Subject to the provisions of subregulation (3), an employer or a user, as the case may be, shall not permit any person who is or who appears to be under the influence of intoxicating liquor or drugs, to enter or remain at a workplace.*
- *(2) Subject to the provisions of subregulation (3), no person at a workplace shall be under the influence of or have in his or her possession or partake of or offer any other person intoxicating liquor or drugs.*
- *(3) An employer or a user, as the case may be, shall, in the case where a person is taking medicines, only allow such person to perform duties at the workplace if the side effects of such medicine do not constitute a threat to the health or safety of the person concerned or other persons at such workplace.*

Comments

- If the prohibition on possessing intoxicating liquor at a workplace is to be taken literally, the following would be illegal:
 - Restaurants with liquor licences (workplace for waiters and other staff).
 - Bottle stores and supermarkets that sell alcohol (people work there).
 - Breweries and distilleries.
 - Alcohol in private homes with domestic workers.
 - Workplace bars.

MHSA

- *Section 9 Codes of practice*
- *(1) Any employer may prepare and implement a code of practice on any matter affecting the health or safety of employees and other persons who may be directly affected by activities at the mine.*
- *(2) An employer must prepare and implement a code of practice on any matter affecting the health or safety of employees and other persons who may be directly affected by activities at the mine if the Chief Inspector of Mines requires it.*
- *(3) A code of practice required by the Chief Inspector of Mines must comply with guidelines issued by the Chief Inspector of Mines.*

- *Guideline for the Compilation of a Mandatory Code of Practice on Minimum Standards of Fitness to Perform Work at a Mine* in August 2000, with an effective date of 16 February 2001.
- *8.3.4.2.1 Persistent alcohol or substance abuse affecting health by causing physical or behavioural disorder may render a person unfit for a particular category of work. Such persons will not be certified fit for employment by the OMP as drivers of passenger or dangerous goods conveyances.*
- *8.3.4.2.2 Any person being considered for employment as a driver of passenger or dangerous goods conveyance should be screened for alcohol or substance abuse. It is advised that an alcohol and substance abuse policy, which has been agreed by the Health and Safety Committee, be in place on mines.*

MHSA Mines and Works Regulations

- 4.7.1 No person in a state of intoxication or in any other condition which may render or be likely to render him incapable of taking care of himself or of persons under his charge,
- shall be allowed to enter the workings of a mine or be in the proximity of any working place or near any machinery on the surface of a mine or at a works,
- and any person who may have entered the workings of a mine or who is found in the proximity of any workings or near any machinery on the surface of a mine or at any works in a state of intoxication may be arrested immediately by the manager or some person duly appointed by him and immediately handed over to the police, and shall be deemed to be guilty of an offence under these Regulations.

Employment Equity Act

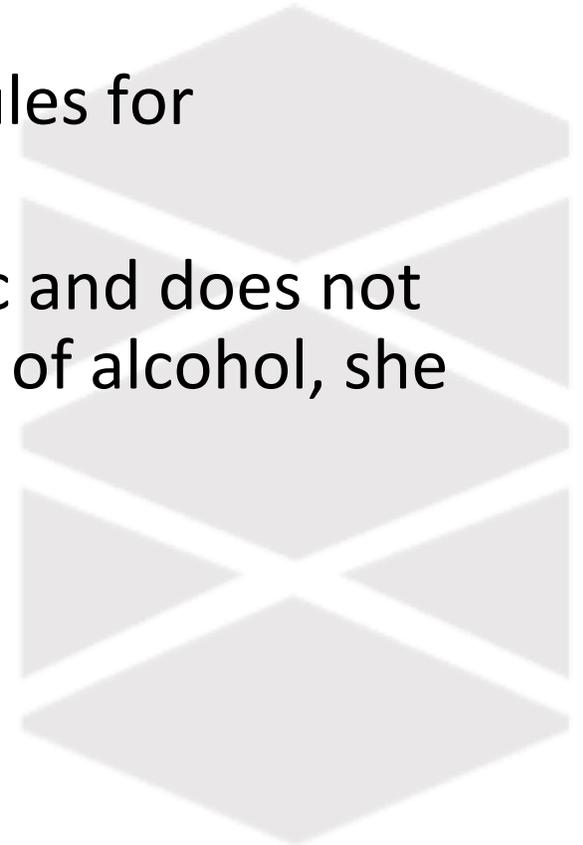
- *Section 6 Prohibition of unfair discrimination*
- *(1) No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or on any other arbitrary ground.*
- *(2) It is not unfair discrimination to-*
 - *(b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.*

Employment Equity Act

- *Code of Good Practice on Employment of Persons with Disabilities – GN 1085 of 2015*
- For reasons of public policy, certain conditions or impairments may not be considered disabilities.
- These include but are not limited to-
 - disorders that affect a person's mental or physical state if they are caused by current use of illegal drugs or alcohol, unless the affected person is participating in a recognised programme of treatment;
- Employers must reasonably accommodate the needs of persons with disabilities.

Case Law

- Mainly sourced from labour law – CCMA
- Alcoholism is recognised as a disease and the legal rules for incapacity must be followed.
- However, when an employee, who is not an alcoholic and does not claim to be one, reports for duty under the influence of alcohol, she will be guilty of misconduct.



Under the Influence

- An employee is 'under the influence of (alcohol)' if he is unable to perform the tasks entrusted to him with the skill expected of a sober person. (Tanker Services (Pty) Ltd v Magudulela [1997] 12 BLLR 1552 (LAC) (a Labour Appeal Court decision))
- The evidence depends on the offence with which the employee is charged.
- If employees are charged with being 'under the influence', evidence must be led to prove that their faculties were impaired to the extent that they were incapable of working properly.

Under the Influence

- This may be done by administering blood or breathalyser tests, evidence of their behaviour, smell of alcohol and slurred speech.
- Also stated as such in **Builders Trade Depot vs. CCMA and others**

Impairment

- *'However the plea that the moral culpability of a person who is drunk in charge of a vehicle or machinery is diminished because he failed to have an accident before being apprehended, is clearly preposterous. Were that defence to be upheld in traffic courts, the offence of driving under the influence of liquor would be rendered unenforceable, except when the accused had had an accident.'*
- Do not have to show actual impairment, but reasonable expectation of impairment.
- *NUMSA obo Davids v Bosal Africa (Pty) Ltd [1999] 10 BALR 1240 (IMSSA)*

Dismissal

- *“A dismissal is not an expression of moral outrage; much less is it an act of vengeance. It is, or should be, a sensible operational response to risk management in the particular enterprise.*
- *That is why supermarket shelf packers who steal small items are routinely dismissed.*
- *Their dismissal has little to do with society's moral opprobrium of a minor theft; it has everything to do with the operational requirements of the employer's enterprise.”*
- *De Beers Consolidated Mines Ltd v Commission for Conciliation, Mediation & Arbitration & others (2000) 21 ILJ 1051 (LAC)*

Zero Tolerance

- *“I find this approach (Zero Tolerance) to be unfair. A clerk for example would not be a danger to himself or to others and would not tarnish the image of the company as he would seldom, if ever, deal directly with clients or customers.*
- *However this would be totally different for an individual who held the position of a driver, a pilot or a managing director.”*
- Taxi-Trucks Parcel Express (Pty) Ltd vs. National Bargaining Council For The Road Freight Industry and others

Own Disciplinary Guidelines

- Labour Court held in **South African Breweries vs. CCMA and others**
- *“The conclusion that the employee had not placed the business at risk must also be seen in the light of the applicant’s own disciplinary guidelines.*
- *Those guidelines specify that it is an offence to work on a SAB production site while “being intoxicated and/or under the influence of alcohol.” That, in turn, is defined as having a breath alcohol content of more than 0,24 mg/1000ml.*
- *In this case, there was no such evidence; in fact, the employee’s breath alcohol level was 0.*
- *There was no evidence to show that he was intoxicated or under the influence of alcohol;*

Medical fitness certification

- **Hoffmann v South African Airways (Constitutional Court)**
- The medical facts did not support the employer's approach.
- *“Legitimate commercial requirements are, of course, an important consideration in determining whether to employ an individual. However, we must guard against allowing stereotyping and prejudice to creep in under the guise of commercial interests.”*
- *The fact that some people who are HIV positive may, under certain circumstances, be unsuitable for employment as cabin attendants does not justify a blanket exclusion from the position of cabin attendant of all people who are HIV positive.*

Discussion

- The health and safety legislation does not require that an employee must in fact be under the influence, but the employer must not allow such an employee to work even if it only “**appears**” that the person is under the influence. (Intoxication)
- The MHSA also contains requirement relating to employees having any “persistent” problem. (Fitness or not for a particular position)

Discussion

- General duty of care to ensure that reasonably practicable measures are implemented in the workplace to ensure the safety of persons.
- A biological test by itself may not be sufficient evidence of “being under the influence”, and it is also not the only acceptable evidence; other evidence such as behaviour, slurred speech, etc. could also be relevant.
- No clear guidelines or sufficient case law on substances other than alcohol.

Discussion

- A blanket approach could be unfair, and each individual has to be evaluated on his or her own ability to perform the work safely.
- The acute effects that alcohol (and possibly other substances) may have on one person may not be the same for another person.
- However to determine for example a person-specific blood alcohol level at which such a person is no longer “able to perform the tasks entrusted to him with the skill expected of a sober person” is obviously ridiculously impractical, and would be the same for cannabis use.

Discussion

- National Road Traffic Act and Regulations: 3 different offences:
 - Driving a motor vehicle “under the influence of intoxicating liquor or a drug having a narcotic effect” (smell, slurred speech, unsteadiness).
 - Blood alcohol level above certain limits.
 - Breath alcohol level above certain limits.

Discussion

- Many employers either follow the National Road Traffic Act guidelines for breath- and blood alcohol levels, while many employers have adopted a zero tolerance approach, meaning that breath- and blood alcohol levels must be zero.
- Applied at the point of entry to the workplace, standard or random testing, for the purposes of determining whether an employee should be allowed to go to work or not.
- Should ideally be supported with additional evidence.

Controls

- Prevent a person who is under the influence from entering the workplace, where this may endanger someone's health and safety.
- Have clear, written guidelines on how it will be decided if a person is under the influence, and train all relevant persons on this.
- Have clear, written guidelines on how this will affect a person's pay, leave, disciplinary record.
- Employees must preferably agree to this in some way, by way of collective agreement, individual employment contracts, etc.

Recent Case

- <https://businesstech.co.za>, 13 April 2019
- In a recent CCMA case the arbitrator had to decide whether the dismissal of employees who tested positive for cannabis at work was fair.
- The employer adopted a zero-tolerance stance on substance abuse.
- The arbitrator held that the employees, by being under the influence of intoxicating substances whilst on duty, had wilfully disregarded the employer's safety rules.
- They were aware of the employer's zero-tolerance policy and the possibility of dismissal if they tested positive.
- Found that dismissal was the appropriate sanction

It could be a risk to:

- Apply zero tolerance for THC in biological samples in the same manner as alcohol.
- Refuse to employ someone purely on the result of a pre-employment blood test that shows presence of THC. This will now be almost similar to refusing to employ someone with nicotine in their blood.
- Have policies and tests that are “skewed”, namely focus on THC and alcohol only, and not other intoxicating substances, such as cocaine, crack, Ecstasy, tik, crystal meth or methamphetamine, amphetamines, ephedrine, khat, heroin, mandrax, LSD, etc.

Recommendation

- Written policy and procedures on alcohol and drug testing, drawn up in consultation with, and preferably with the approval of the health and safety committee and trade unions, as part of employment conditions.
- The policy must state the reasons for it, namely safety and productivity.
- Job categories and descriptions should clearly indicate for which jobs intoxication is not allowed.
- Employees must be trained on the implications of intoxication in the workplace

Recommendation

- Be pro-active, don't wait for Parliament or the courts.
- Train persons on meaning and outcome of Constitutional Court judgment.
- Request persons to declare any medicinal use (cannabis oil), subject to medical privacy rules.
- First try to understand before being understood.



Concerns

- Intellectual laziness (one size fits all).
- THC levels in blood, urine, and possibly even saliva may not have the same evidentiary value to prove intoxication as alcohol levels.
- Inconsistency in managing intoxication for different substances.
- Lack of scientific evidence.



THANK YOU

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