INTO THE ABYSS WITH CANNABIS

by Ross Simon

INTRODUCTION

It is now well-known that in 2018 the Constitutional Court handed down the landmark judgment in Minister of *Justice and Constitutional Development and Others v Prince* which legalised the private use and possession of cannabis. In terms of the Prince case, the use, possession and/or cultivation of cannabis by adults is permitted "in private". Although the case does not define to any degree what “in private” cannabis use, possession and cultivation “entails”, it certainly excludes the workplace.

What the Prince case does not do is, repeal or declare any part of the Operational Health and Safety Act (OHSA), 85 of 1993 unconstitutional. We can therefore with certainty conclude that OHSA to date, still imposes on the employer the obligation to maintain a safe working environment for all its employees, which includes prohibiting employees who are "intoxicated" from entering the workplace.

The OHSA also forbids the operating of machinery whilst taking certain drugs or medications. Section 2A of the General Safety Regulations deals with prescriptions regarding” Intoxication” and states that 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. 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.

ENEVER V BARLOWORLD EQUIPMENT SOUTH AFRICA

In this matter the Labour Appeal Court was tasked with deciding whether the Employer’s decision to dismiss the employee, Enever, for the use of cannabis at home, was fair.

In summary, Enever was dismissed after numerous positive test results for cannabis, breaching the Employer’s zero-tolerance policy against drugs and alcohol. Evener utilized cannabis to manager her severe anxiety and to reduce her reliance on prescription medication, which had side effects. Evener argued that given the Prince judgment it was her right to do so, and the Employer’s zero-tolerance policy violated her right. As a cannabis user, she had been discriminated against, in that her dignity had been seriously infringed by being put through a *“humiliating process that portrayed her as a junkie”* and that her right to privacy was violated.

It must be noted that it was common cause that the employee’s ability to perform her job was not impaired and furthermore, she did not work in a safety critical environment, in fact, she occupied a desk job. There was no requirement of the employee to perform any duty where impairment from cannabis would present a risk to her or others in the workplace.

The employer, Barloworld argued that the justification for the violation of the employee’s right to privacy (restricting employee conduct in her private time outside the workplace) is on the basis of its legal obligations in terms of the OHSA which stipulates that the employer shall provide and maintain, as far as reasonably practicable, a

working environment that is safe and without risk to the health or safety of its employees. The court however rejected this argument and found this was no justification for the infringement of the employee's right to privacy and in this regard, referred to a principle established by the Constitutional Court that - overboard, unwarranted, and unjustifiable invasions to the right to privacy is unconstitutional.

The LAC held that the significance of the Prince decision implicates the nature of the right to privacy, which all employees have. The court concluded that the employer's policy is overboard and infringed the employee's right to privacy, however additionally confirmed that employers are not completely barred from asking their employees to completely refrain from certain conduct, remarking that the matter could have been different for an employee who was found to be intoxicated or impaired during work hours if it was an employee who operates or works with heavy and dangerous machinery (i.e. in a safety critical position).

WHERE TO FROM HERE?

The Enever case highlighted three important aspects which require consideration in moving forward:

i. The right to privy as enshrined by the Constitution and zero tolerance policies – the court confirmed that zero tolerance policies applied by an employer resulting in dismissal in cases where there is no proof of intoxication or impairment and/or the employee is not employed in a safety critical position, infringes the employee's right to privacy if he/she consumed cannabis at home.

ii. Impairment (OHSA) - the court confirmed the principle that employers are not absolutely barred from asking employees to completely refrain from certain conduct particularly in the context where the aim of a policy is to comply with an Act. If, however, an employee's cannabis consumption poses no safety risk (i.e. no proof of intoxication; not in a safety critical role) the reliance on an employer's duty to create a safe workplace as required by the OHSA will not be accepted by the courts as a justification for a violation of the right to privacy.

iii. Testing – the court confirmed that a positive cannabis test does not indicate whether an employee is impaired from carrying out his/her duties. The court remarked that the matter could be different if the employee was employed in a safety critical role. So that begs the question, would the judgment have been the same, given the same set of facts, save for the employee now occupying a safety critical role?

OUR VIEWS: BUT WHAT DOES THIS PRACTICALLY MEAN?

In the light of these judgments, we are of the view that the point of departure is to determine and assess whether the use of cannabis in private resulted in impairment / intoxication to the extent that the employee is unable to perform his or her duties. Adopting a similar approach to what we are already accustomed to for testing for alcohol impairment/intoxication. For example, in Canada, police officers have been trained to detect if a driver is under the influence of a drug. In terms of Canadian law, the Blood Concentration Regulations prescribe blood drug concentration for various drugs, and if found with a blood-drug concentration that is equal to or exceeds the blood-drug concentration for the drug that is prescribed by regulation, the driver may be charged with the criminal offence of impaired driving or one or more other criminal driving offences.

CONCLUSION

We are also led by the Constitutional Court's decision in *Mbana v Shepstone & Wylie*, where the court held that if an employer seeks to rationalize a policy based on its operational requirements, "an employer's business and operational needs will not simply be accepted on the employer's own say-so". In other words, where a policy prohibiting an employee from using cannabis is in place, the employer would need to show that its use was detrimental to occupational health and safety in the workplace.

As seen in Evener, for safety non-critical, it may be appropriate to approach these employees in a manner designed to counsel the employee whereby the employer educates and cautions the employee on the adverse effects of the use of cannabis and perhaps apply episodic testing to ensure compliance with any substance abuse policies. Once proof of impairment has been obtained, the nature of the employee's job should be taken into consideration in determining the disciplinary sanctions to be imposed.

In the same breath, those who occupy safety-critical positions, testing using one of the accepted methods such as oral fluid, should be conducted, with confirmatory testing being done with the aim of confirming the levels more than the "prescribed limits" (contained in substance abuse policies) together with supporting observations, (i.e. sobriety tests), to prove impairment on a balance of probabilities.

This approach has already proven to be persuasive in the matter of *Marasi v Petroleum, Oil and Gas Corporation of South Africa.*

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