

Case Study

Cannabis for Private Purposes Bill of 2020 vs Occupational Health Act of 1993: A Case Law

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Abstract

Background: The decriminalisation of cannabis for private use in South Africa workplace has been associated with controversy since 2018.

Purpose: The purpose of this article was to explore employees' interpretation of the Cannabis for Private Purposes Bill of 2020.

Method: This article adopted qualitative research and collected data through document analysis.

Results: Employees who singularly apply their rights to use cannabis and disregard the requirements of the Occupational Health Act of 1993, are at risk of losing their employment.

Conclusion: Cannabis for Private Purposes Bill of 2020 does not protect employees against the application of the Occupational Health Act of 1993 by employers.

Keywords: Cannabis for private purposes; Occupational health act; Employees; Drugs policy

Introduction

Cannabis contains cannabinoids which are narcotic substances that affect the behaviour of the users if consumed for non-medical purposes [1]. It also contains dopamine chemical that gives users Euphoria [2]. It takes seconds or minutes for users to experience euphoria after smoking, vaping, drinking or eating cannabis [3].

Cannabis users may experience anxiety and paranoia [4]. This puts cannabis users at risk of experiencing clinical depression, which leads to mental health issues that affect their senses and judgment [5,6]. For instance, cannabis users may see normal colours brighter and hear sounds louder [6]. Cannabis also distorts the sense of time and motor skills of the user, which has implications for operations in the workplace [4].

Moreover, cannabis decreases users' intelligence quotient (IQ) by about 8 points, which may be higher for users who

started using cannabis at an early stage [7]. Moreover, there is no empirical evidence that indicates quitting using cannabis can restore the loss of IQ, which suggests permanent mental impact of cannabis [8]. The consequences are that the use of cannabis lowers the users' career achievement [9].

Although studies have indicated the negative effects of using cannabis for non-medical purposes, the Constitution of the Republic of South African (RSA) court decriminalised the private use of cannabis in 2018 [10]. This judgement was then promulgated by the Cabinet of RSA as Cannabis for Private Purposes Bill in 2020. The purpose of this bill is to "respect the right to privacy of an adult person to possess cannabis plant cultivation material; to cultivate a prescribed quantity of cannabis plants; to possess a prescribed quantity of cannabis; and to smoke and consume cannabis; regulate the possession of cannabis plant cultivation material; the cultivation of cannabis plants; the possession of cannabis; and the smoking and consumption of cannabis by an adult person" [11].

However, this right to privacy was not specifically addressed on how it applies to situations where an individual uses cannabis in his private space but operates machinery in the workplace. Since the decriminalisation of cannabis by the Constitutional court in 2018, several employees who have tested positive for cannabis during working hours have been dismissed from their workplace [12]. Consequently, several dismissed employees have approached the labour court and Commission for Conciliation, Mediation and Arbitration (CCMA) to challenge the dismissal decision. In their defence, employers use occupational health and safety policies, which support workplace policies and actions to ensure sobriety [12].

Occupation health and safety policy

Common law places the duty to establish a safe working environment on the employer [13]. In fulfilling this duty, employers adopted the declaration of RSA's Occupational Health and Safety Act (OHSA) No 85 of 1993 preamble which announces that employers should

provide for the health and safety of persons at work and the health and safety of persons in connection with the use of plant and machinery; the protection of persons other than persons at work against hazards to health and safety arising out of or in connection with the activities of persons at work; to establish an advisory council for occupational health and safety; and to provide for matters connected therewith [14].

In line with the preamble of OHSA, employers established and implemented a zero tolerance for alcohol and drugs policy. This policy is in line with Section 2A (1-2) of OHSA of 1993 declares 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 [14].*
- *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 [14].*

Zero tolerance for alcohol and drugs policy

Zero tolerance for alcohol and drugs policy is aimed at ensuring that no person within the workplace would endanger him/herself or other persons or the property while under influence of drugs like cannabis [13]. It is for this reason that RSA's OHSA Regulation 2 (A1) of General Regulations and the company policy of 2009 stipulate that an employer shall not permit a person who is under the influence of cannabis in the workplace [15]. This regulation implies that an employer may conduct a drug test before or during working hours [16].

Employers that have adopted a zero tolerance for alcohol and drugs policy are advised by Section 7(b) of OHSA to ensure in writing that employees are aware of this policy [17]. Section 7(b) of OHSA also recommends that employers to ensure that employees are aware of the sanction(s) if found in breach of alcohol and drug policy. This guarantees a drug-free environment in the workplace [16].

Although there is adequate evidence on the effect of cannabis use on the abilities of an employee in the workplace, the relationship between the use of cannabis and occupational injury or negligence in the workplace has not been conclusively established [18]. Hence, the private use of cannabis remains a "source of controversy across the law, and occupational safety and health," which places the employer as the responsible person to prevent injuries and protect the workplace [19].

In the light of source of controversy, research indicates that cannabis testing instruments do not distinguish between an

employee who has used cannabis during or before working hours [20]. These instruments cannot differentiate use of cannabis in the recent few hours and the one who used it 10 days before being tested [21]. This jeopardises the employment of the employees who use cannabis with their friends and associates to have fun before they report for work [16].

Guided by the preceding discussions, this article seeks to understand how employees interpret the Cannabis for Private Bill of 2018. In so doing, this article analysed the documents containing the cases containing information about employees that were dismissed for testing positive for cannabis during working hours.

Document analysis

This article aimed to understand how employees interpret the constitutional court judgment that decriminalised the private use of cannabis in 2018. To achieve this aim, this article engaged document analysis as a method used to collect qualitative data from written documents [15].

The documents that were analysed in this article were 2 cases from the labour court and 2 cases from the CCMA. These cases were brought to the fore by employees who were dismissed for testing positive for cannabis during working hours. The period of these cases is between 2019 and 2022. Both labour court and CCMA cases were inductively analysed, and the information obtained from them was used to form a conclusion without any theoretical framework [15]. Thus, this article made a conclusion based on legislation and policies that deal use the use of cannabis.

Case Presentation

Labour court and CCMA cases analysis

Labour court case 1: Case was held at the labour court in Johannesburg on 22 November 2022 [22]. In this case, Mr Nhlabathi (Applicant) was dismissed from his workplace after he tested positive for cannabis during working hours. The applicants' dismissal by PFG Building Glass (PTY) (respondent) was based on the company policy which states that if an employee is "under the influence of alcohol or drugs within the workplace" may be dismissed from his/her duties.

Defending the decision to dismiss the applicant, the respondent declared to the court as shown in Figure 1.

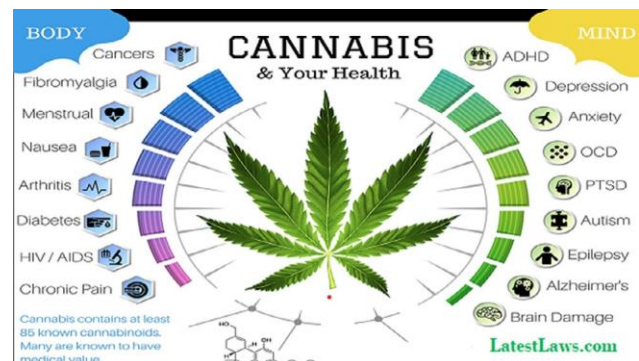


Figure 1: Cannabis effects on health

The Respondent further testified against the Applicant by declaring that

“PFG Building Glass (PTY) has to follow the regulations of the Occupational Health and Safety Act No 85 1 and is very serious about safety and ensuring that the workplace is safe. PFG Building Glass (PTY) has a zero-tolerance in terms of testing for alcohol or drugs. When employees are under the influence of alcohol or a drug at work, there is a high risk that they cannot perform their jobs to the required standard and within the required safety regulations, in that they might not realise what danger they are exposing themselves or their colleagues or the plant to.”

In his defence, the Applicant articulate that

“I was aware of the Respondent’s policy on alcohol and drugs, but I was not aware that if I was found to have cannabis in my system, it would constitute misconduct. I did not contravene the company policy because I did not use drugs but I had used cannabis 3 days before I reported for work. Cannabis is not a drug, because I was employed in 2016 and since I was employed, I had been smoking cannabis and had been doing my job properly. Whatever I did with cannabis, I did it at home and not when I was at work. The respondent was wrong to dismiss me because it is my right to smoke in my private space. I also do not have a dependency problem.”

After listening to both sides of the Applicant and Respondent, the court ruled against the Applicant. In this ruling for this case, the preceding judge mentioned the Constitutional court judgement that decriminalised the private use of cannabis in 2018 does not protect employees from contravening the company policies and code of conduct.

Labour court case 2: Case was held on 23 March at the labour court in Johannesburg [23]. In this case, Enever (Applicant) was dismissed for testing positive for cannabis by Barloworld Equipment, a division of Barloworld South Africa (Pty) Ltd (Responded) on 30 April 2020. Testifying before the commissioner the responded defended the decision to dismiss the applicant by stating as shown.

The applicant challenged the Respondent’s decision to dismiss her by saying that in challenging this decision, the applicant told the court that

The respondents’ decision to dismiss me from my employment discriminated against me on arbitrary grounds.

According to the summary of the court, discrimination on arbitrary grounds declares that

“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, or sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth [24].”

Based on Employment Equity Act No. 55 the Applicant told the court [24]

The Respondent discriminated against me on arbitrary grounds because I do not smoke cannabis at work but in my private space as I was authorised by the Constitutional court judgement in 2018. I did not plead guilty to being intoxicated or impaired at work, because I was never “stoned” at work and reiterated the importance of smoking rolled-up cannabis every evening as well as daily use of CBD oil to relax. Cannabis reduced my pharmaceutical drug dependency which helps me to relax. It also improved my bodily health, and outlook and my spirituality improved as a result thereof. Smoking cannabis makes me feel closer to God which also assists in my quest to address internal struggles.

Based on both the Applicants’ and Responded presentations, the court ruled against the applicant. Explaining this ruling the judge pronounced that

“Whilst the Applicant raises the Constitutional Court case which decriminalised/legalised the use of cannabis in private space, which case law I am aware of but I am not going to get into that fray at this stage, I am however strongly of the view that the Respondent, in light of its dangerous environment, is entitled to discipline and dismiss any employee who uses cannabis or is under the influence whilst at work in contravention of its policy. Unfortunately, the Constitutional Court judgement does not offer any protection to employees against disciplinary action should they act in contravention of company policies.”

CCMA case 1: A case was held at the CCMA on 20 April 2019 [3]. This case was enrolled at the CCMA following the dismissal of Mr Mthembu (Applicant) for testing positive for cannabis during working hours. NCT Durban Wood Chips (Respondent) defended the decision to dismiss the Applicant before the commissioner by asserting that

“There is a substance abuse policy in place at the workplace which was introduced in 2016. Employees were informed of the substance abuse policy in 2016 and signed the policy and the proof thereof is on page 9 of the employer’s bundle. Mr Mthembu who tested positive for cannabis during working hours is employed as a weighbridge clerk where he receives trucks. The substance abuse policy is a zero-tolerance policy. Page 3 of the policy reinforces this. It states that no one under the influence of drugs will be allowed on the premises. The policy further states that the company has a zero-tolerance approach to substance abuse. Paragraph 4 states that the possession, sale or use of illegal drugs is prohibited. It is immaterial that they use cannabis outside of the premises. Their policy is zero tolerance. He is responsible in terms of the OSH Act to prevent accidents on site. An accident would lead to an investigation that would bring the plant to a standstill.”

Arguing against his dismissal, the applicant alluded before the commissioner that

“I did not smoke cannabis during working hours. However, I was aware of the drug policy which stated that due to the highly dangerous operations in its factory, a zero-tolerance approach to working under the influence of alcohol or

drugs is necessary.”

In ruling on this matter, the Commissioner acknowledged the Constitutional Court judgement of 2018 which decriminalised the private use of cannabis. In acknowledging this judgment, the Commissioner affirmed that employers are entitled to discipline employees in line with their policies which in this case were working under the influence of cannabis during working hours. Based on this, the Commissioner ruled in favour of the respondent.

CCMA case 2: A case was held on 22 May 2020 at the CCMA in Johannesburg [25]. Rankeng (Applicant) was dismissed from his employment for testing positive for cannabis and working under the influence of under influence of cannabis during working hours. Signature Cosmetics and Fragrance (PTY) Ltd Ibileni (Respondent) called Mr Farhaad to testify on behalf of the Responded. In his testimony, Mr Farhaad alluded that

“When I was checking the attendance register on 29 May 2019 I discovered that the applicant had reported late for duty. I then asked him to report to my office to explain the reason why he was late. Upon the applicant’s arrival at my office, I realised that his eyes were red and watery. I initially thought that the applicant may be suffering from a bad cold or flu, but the applicant insisted that he was not sick. I then asked the applicant if he had taken drugs, and he responded that he did not use drugs but had smoked “dagga” (Cannabis). I, therefore, referred the Applicant to Lancet Laboratories where he tested positive for cannabis during working hours.”

The Applicant challenged the decision to dismiss him by stating that

“I have smoked cannabis at home, and I admit that. I do not smoke during lunch. I also agreed to take a drug test which came back positive. My argument here is that I was not under the influence of cannabis. The fact that I was allowed to continue working demonstrated that I was not under the influence of any drug.”

Having had the argument of the Applicant and the defence of the Responded, the Commissioner ruled in favour of the Applicant. Delivering his ruling, the commissioner indicated that

“The applicant was charged with being under the influence of Cannabis at the workplace. The disciplinary code of the respondent states that management should not allow any employee to remain on its premises if it is suspected that they (the employee) are under the influence of any drug. It further provides that whether or not an employee is fit to report for duty will be determined by the respondent’s management by exercising reasonable discretion. It would appear that in this case, the reasonable discretion of management was that the applicant was fit to continue working. They exercised reasonable discretion to restrict him to a particular area. The problem with a charge of being under the influence of drugs is that there has not been any scientific method of determining whether a person is under the

influence of the drug such that there is an impairment in their performance. It is suggested that the employer needs to prove that the employee was under the influence of a narcotic drug such as dagga or cannabis.”

Results and Discussion

Interpretation of legislation is a discipline that is carried out by law practitioners or experts [26]. However, a legal person which is a person that is aware of legislation that affects his/her daily life is expected to interpret that legislation [27]. According to interpretation of the legislation includes understanding that the rights are limited in terms of Section 36 [26]. (1) of the Bill of Rights which asserts that

rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

- *the nature of the right;*
- *the importance of the purpose of the limitation;*
- *the nature and extent of the limitation;*
- *the relation between the limitation and its purpose [11].*

The arguments of the applicants in Labour Court case 1 and 2 and CCMA case 1 and 2 made indicates that they ignored or were not aware that OHSA Act No. 85 of 1993 limits employees’ right to use cannabis privately. Also, judgements handed to applicants indicate that the Cannabis for Private use Bill of 2020 does protect employees from dismissal for testing positive for cannabis during working hours [28-30].

Conclusion

Research indicates that a concentration of Tetrahydrocannabinol (THC) may be present in the bloodstream of the users between 1 to 60 days. Also, study indicates that THC in the users’ bloodstream can be present for up to 120 days. The presence of cannabis in user’s bloodstream may affect his/her decision-making processes. It was, therefore, the conclusion of this article that no employer is willing to take a risk of occupational injury or negligence with an employee who has THC in his/her bloodstream.

Recommendation

The article recommended the amendment of the Private use of Cannabis Bill of 2020, to include details regarding its limitations for school or workplace implications.

It is further recommended that drug tests that can differentiate between periods of when cannabis was taken be developed, and until then the employees who use cannabis remain at risk of losing employment if they test positive for cannabis, irrespective of when it was used.

Acknowledgement

None.

Conflict of Interest

We confirm that this work is original and has not been published elsewhere, nor is it currently under consideration for publication elsewhere.

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