Substance abuse in the workplace

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An employer is obliged to create and maintain a safe and healthy working environment. This includes ensuring that employees are not under the influence of intoxicants while on duty. Dealing with employees who are under the influence of intoxicants can be perplexing for employers, especially when an employer is unsure of its obligations, what the appropriate measures are to combat substance abuse in the workplace, and how to effectively deal with an employee who is under the influence of alcohol or drugs. Monitoring substance abuse in the workplace has been further complicated by remote working, as employees are no longer subjected to tests for intoxication and employers are unable to monitor common signs of intoxication displayed through body language or physical appearance. Management of substance abuse has also been affected by the legalisation of cannabis for private use. Employers must respect the rights of employees to consume cannabis in private, while also maintaining safety within the workplace. This is not always an easy balance to strike, and many factors need to be taken into account.

The relevant legislation and policies

Employers are obliged to provide and maintain a safe and healthy working environment. To this end, section 8(1) of the Occupational Health and Safety Act 58 of 1993 (OHSA), provides that "every employer shall provide and maintain, as far as is reasonably practicable, a working environment that is safe and without risk to the health of [its] employees".

In terms of section 2(1)(i) of the Mine Health and Safety Act 29 of 1996 (MHSA), every owner of a mine that is operational must "*insofar as reasonably practicable, ensure that the mine is designed, constructed and equipped to provide for conditions for safe operation and a healthy working environment*".

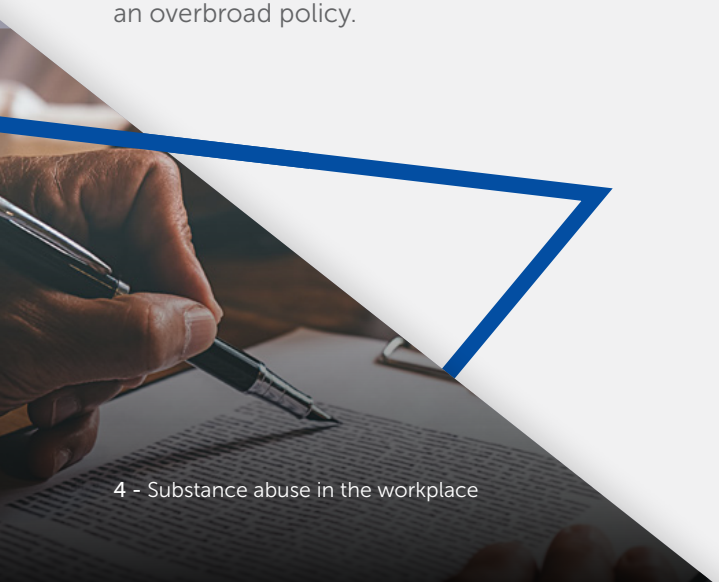
In addition, Regulation 2A of the OHSA addresses the issue of intoxication and states that any employer or user shall not permit any person who is, or who appears to be, under the influence of intoxicating liquor or drugs, to enter or to remain at a workplace. Furthermore, no person at a workplace shall be under the influence of, have in their possession, partake of, or offer to any other person intoxicating liquor or drugs.

In addition, in terms of section 22 of the MHSA, employees have a duty to ensure the health and safety of other employees who may be affected by their acts or omissions.

The obligation to ensure employees are not intoxicated while on duty is for the safety of the intoxicated employee as well as all other persons in the workplace. Intoxication is not only a safety concern, but also has the potential to cause reputational damage and damage to property.

How should an employer regulate alcohol and drugs in the workplace?

Employers should have a zero-tolerance alcohol and drug policy that clearly and accurately reflects the employer's position. The policy should prohibit any trace of alcohol or drugs in an employee's system when the employee reports for duty and/or performs their work. This policy must, however, take into account that cannabis is legal for private use and the inherent requirements of the jobs of employees in relation to the levels of cannabis in the bloodstream when reporting for work. In the recent judgment of *Enever v Barloworld Equipment South Africa, a Division of Barloworld South Africa (Pty) Ltd* (JA86/22) [2024] ZALAC (23 April 2024), the Labour Appeal Court (LAC) held that an employer may not have a blanket zero-tolerance stance that inhibits an employee's right to the private use of cannabis. A policy that prohibits an employee from engaging in legal activity, notwithstanding that it per se has no impact on the employer, would constitute an overbroad policy.



What does a zero-tolerance substance abuse policy mean in practice? What factors must be considered when implementing the policy?

Zero-tolerance means that employees may not arrive at work smelling of alcohol and that failing a breathalyser test is not necessary for a breach of the policy. To be accused of "having arrived for work after having consumed alcohol (or drugs), or with alcohol smelling on the breath", the employee does not necessarily have to be plainly intoxicated or to have consumed alcohol over the legal limit.

The employer's policy regarding alcohol or drug use while on duty, off duty or before coming to work, must be very specific, clear and unambiguous and must make clear to employees what sanctions will ensue should the rule be contravened.

In *Enever*, the LAC cautioned against overbroad policies that impact an employee's ability to exercise their right to use cannabis privately. The court held that the inherent requirements of the job, the role performed by the employee, the reason for use and the impact for the employer must be assessed when determining whether an employee using cannabis has an impact on the safety of the workplace and whether disciplinary action should follow after a positive cannabis test. In the particular circumstances of this case, the court found the dismissal of the employee to be substantively unfair. The LAC emphasised that the outcome might have differed if the employee had been impaired during working hours or had been required to operate heavy or dangerous machinery etc. The LAC clarified that its decision did not apply universally to all employees in all workplaces, but only to those employees who were desk bound and not required to carry out hazardous or risk-based work. In contrast, in *Marasi v Petroleum Oil and Gas Corporation of South Africa* (C219/2020) [2023] ZALCCT 34, an employee was permitted to attend traditional healer training that involved the use of cannabis. The employer, however, did not permit the employee entry into its workplace after the employee tested positive for cannabis on the basis of its zero-tolerance substance abuse policy. The employee was asked to return to work when he could test negative for cannabis. The employee claimed, inter alia, that he was being unfairly discriminated against and that the employer's policy should be reviewed and set aside. The court held that the employee was not being unfairly discriminated against. The court held that the employee was permitted to exercise his right to use cannabis and that discrimination did not amount to unfair discrimination where the inherent requirements of the job require the employer to have said policy. The court considered the nature of the working environment of PetroSA as well as its obligations in terms of the MHSA, upheld the employer's policy and found there to be no unfair discrimination.

The inherent requirements of the job and the nature of the working environment are therefore key considerations when determining whether a zero-tolerance policy, resulting in dismissal, in relation to testing positive for cannabis is acceptable.

Why is it important to have an alcohol and substance abuse policy in place?

If an employer has no such policy in place, it may be challenging to take disciplinary action against an employee for breaking a rule that may not exist in the workplace.

What are some of the rules that an employer may have in place in relation to the use or abuse of alcohol and drugs in the workplace?

Rules that are designed to discourage or prevent the use or abuse of alcohol or drugs during working hours, may take one of the following forms:

- a prohibition on the possession, distribution, sale or consumption of alcohol and/or drugs in the workplace;
- a prohibition on being under the influence of alcohol and/or drugs during working hours;
- a prohibition on being under the influence of alcohol and/or drugs to the extent that the employee's work performance is impaired; and/or
- a rule precluding the alcohol content in employees' bloodstream from exceeding a certain level.

An employer must ensure that employees are well informed of its rules and its zero-tolerance approach, as per its alcohol and drug policy as well as its disciplinary code and procedure.

Additionally, whatever the nature of the rule, the employer must prove the employee's knowledge of the rule and that the rule has been contravened when taking disciplinary action for any contravention.

The disciplinary action taken and the severity of the sanction will also depend on the nature of the employee's role and the impact that the off-duty conduct of an employee will have on an employer's business. *Enever* does not provide a blanket exception to all zero-tolerance policies and must not be interpreted to mean that all employees will be allowed on site when there are traces of cannabis in their bloodstream. The court held that a distinction must be made between cannabis and alcohol, in that cannabis remains in the bloodstream for a longer period of time long after its effects wear off. The nature of the substance, the inherent requirements of the job, the reason for the use of the substance and the impact that the employee's use of the substance has on the employer's business are all factors that must be taken into account when determining disciplinary processes and sanctions.

Factors to consider when determining the appropriate sanction following a positive test:

- Inherent requirements of the job
- Nature of the employee's working environment
- The effect that the substance has on the business and other employees
- Reason for use (whether there was the relevant disclosure)
- The nature and purpose of the policy
- The reason for the rule
- The reliability of the test results
- Mitigating factors

Steps to be taken in relation to substance abuse in the workplace

- Develop a policy
  - Test regularly
    - When a test is positive determine the following
      - Is the test reliable?
        - If yes, consider the policy, if disciplianry action should be taken, and what the appropriate sanction is
        - If no, re-test and consider other forms of testing to establish intoxication
      - Are there other common signs of intoxication? If yes, test again or perform a different test
    - When a test is negative
  - Ensure you have consent for testing
    - Ensure contract of employment aligns with policy and testing requirements
  - Request employees to make disclosures regarding the use of prescription medication or cannabis for medical use

Can a zero-tolerance policy provide for an exemption to the rule in relation to consumption of alcohol during work functions or a limited exception for cannabis for medical use?

Yes. However, an employer should not condone employees driving home under the influence of alcohol. Neither should an employer accept any liability for any harm which may arise from an employee driving over the legal limit or under the influence of cannabis. Any exceptions in relation to cannabis for medical use should be supported by a medical certificate from a registered medical practitioner confirming the nature of the substance, the duration of use, the reason for use and the impact, if any, that the substance will have on an employee's ability to perform their functions. It remains illegal for people to drive under the influence of cannabis and therefore even employees who use cannabis for medical reasons should not be permitted to drive vehicles of any kind.

An employer may not, however, provide exemptions contrary to law.

What are some of the measures an employer may implement to ensure that employees do not drive under the influence following work functions?

Measures to prevent employees from driving over the legal limit may include:

- making breathalysers available for employees to test whether they are within the legal limit before driving home;
- restricting the amount of alcohol each employee may consume;
- prohibiting employees from using their private vehicles if they consume alcohol at work functions;
- providing the details of a taxi service; and/or
- arranging transport for employees.

What are some of the common signs that an employee may be intoxicated?

The following may be indicative signs that an employee is under the influence of alcohol or drugs:

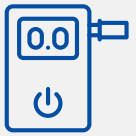
- the smell of alcohol on the breath of an employee;
- bloodshot eyes;
- slurred speech;
- being unsteady on their feet;
- aggressive or confrontational behaviour;
- turning their face away while being spoken to;
- shielding the mouth with a hand when speaking; and/or
- unusually dishevelled appearance.

Is it sufficient for an employee to only exhibit one of the common signs of intoxication to be considered under the influence, or should a further test be performed?

It is not sufficient for an employer to dismiss an employee on the basis that they arrived at work showing one or more of the common signs of intoxication. The common signs of intoxication exhibited by the employee should lead the employer to undertake the relevant tests to confirm whether the employee is indeed intoxicated.

In *Ramoitshane v Dixon Batteries (Pty) Ltd* [2009] 18 NBCCI the employee was dismissed for being under the influence of alcohol due to the fact that his eyes were bloodshot and that he arrived late for work. The employee contended that his eyes were bloodshot since he suffered from a chronic problem resulting in red eyes. The employee's bloodshot eyes coupled with a previous warning for arriving at work under the influence of alcohol led the employer to believe that the employee was once more under the influence of alcohol and the employee was subsequently dismissed. The Commission for Conciliation, Mediation and Arbitration (CCMA) commissioner found it strange that the employer did not have any breathalyser tests available when the employee insisted on being tested and questioned the requirement of the zero-tolerance policy enforced by the employer if breathalyser tests were not available when required. The commissioner also added that an employee who is under the influence of alcohol would not insist on being tested if he was indeed intoxicated. The dismissal was found to be substantively unfair and the employee was reinstated with back pay.

In *Rankeng v Signature Cosmetics and Fragrance (Pty) Ltd* [2020] 10 BALR 1128 (CCMA), the CCMA reinstated an employee who tested positive for cannabis. The employer had a strict zero-tolerance stance towards drugs and alcohol, which could result in dismissal on the first offence. The employee was dismissed after having tested positive for cannabis and admitting to smoking cannabis in the workplace earlier in the day. The CCMA set aside the employee's dismissal on the basis that the employer had not shown that there was any impairment of the employee's ability to perform their functions notwithstanding the positive cannabis test. The CCMA found that the only sign of being "*under the influence*" that the employer could evidence was red and watery eyes. The CCMA therefore found that dismissal was an inappropriate sanction, and a final written warning would have sufficed. This award must, however, be distinguished from a zero-tolerance policy in a dangerous working environment.



What is a breathalyser?

A breathalyser is an electronic device for measuring the breath alcohol content. The breath alcohol content can be used to accurately measure a person's blood alcohol content.

There is a direct correlation between a person's breath alcohol content and their blood alcohol concentration. During respiration, alcohol in the blood vaporizes and is carried out of the lungs in the exhaled breath. There are several types of breath alcohol testers available today.

Are employers permitted to perform a breathalyser test on employees whom they suspect may be intoxicated?

The breathalyser test can be carried out by an employer, at the workplace, or by a person who has been trained in the proper use of the instrument. The employee's consent to undergo testing must be obtained in writing. The employee is entitled to the presence of a representative to witness the procedure (*National Union of Metalworkers of South Africa obo Johnson/Trident Steel (Pty) Ltd* [2013] 1 BALR 27 (MEIBC)). The employer is also entitled to the presence of a witness.

The employer should ensure that the breathalyser equipment is properly calibrated in the presence of the employee and their representative. In addition, the employer's zero-tolerance policy must clearly state what level of intoxication, if any, will be allowed. Alternatively, the policy must state that even if the employee tests for an amount under the legal limit that they may face disciplinary action in terms of the employer's substance abuse policy. It is imperative that the manner in which the employer will address the results of the breathalyser test is clearly dealt with in the substance abuse policy.

Are breathalyser tests definitive proof of intoxication?

It depends. While breathalysers are a generally reliable and easy method for employers to determine whether employees are under the influence of alcohol, it does not permit an employer from disregarding any other evidence that may point to whether an employee is under the influence of alcohol or not.

In the labour court judgment of *Samancor Chrome Ltd (Western Chrome Mines) v Willemse and Others* (JR 312/2020) [2023] ZALCJHB 150, an employee was dismissed for breach of the employer's zero-tolerance alcohol policy after testing positive for alcohol, three times on two separate breathalyser machines. Aggrieved by the results of the breathalyser, the employee went to perform a blood test to confirm his blood alcohol levels. The results of the blood test were negative. The employee was dismissed as a breach of the policy constituted gross misconduct and warranted summary dismissal. The Labour Court, on review, agreed with the CCMA findings that the dismissal of the employee was substantively unfair on the basis that the chairperson at the disciplinary hearing failed to take into account the results of the blood test. The court held that blood tests were more reliable and that breathalyser tests could give a false positive depending on various factors. The court held further that the employer failed to prove the improbability of the breathalyser giving a false positive and should have taken into account the results of the blood test when determining whether the employee was under the influence of alcohol. On this basis, the court held that the employer had failed to prove that the employee had breached its zero-tolerance policy.

What are field sobriety tests for determining alcohol intoxication?

Field sobriety tests are commonly used by police officers to determine if a driver is impaired. The tests assess balance, co-ordination, and the driver's ability to give their attention to more than one task.

Examples of the field sobriety tests include:

Horizontal gaze test:

This involves following an object with the eyes (such as a pen) to determine characteristic eye movement reaction.

Walk-and-turn (heel-to-toe in a straight line):

This test is designed to measure a person's ability to follow directions and remember a series of steps while dividing attention between physical and mental tasks.

Standing on one leg.

Count backwards:

Counting from a number such as 30 or 100.

Modified-position-of-attention:

The subject has to put their feet together, head back, and close their eyes for 30 seconds. It is also known as the Romberg test.

Finger-to-nose:

The subject has to tip their head back and close their eyes, and then touch the tip of their nose with the tip of their index finger.

(1, 2, 3, 4, 4, 3, 2, 1).

Touch each finger of hand to thumb counting with each touch

Is the employee's consent required prior to subjecting the employee to a test for intoxication?

Yes. It is advisable to obtain the employee's consent either at the beginning of the employment relationship by means of a clause in the employment contract or by way of consent to an employer's substance abuse policy.

Can a negative inference be drawn from an employee's refusal to undergo testing?

No. If the employee had consented to testing in their contract of employment, but when called upon for a test, refuses, the employee should be disciplined for such refusal.

May an employee who refuses to undergo testing be found guilty based on their refusal?

No. However they may be guilty of another offence. In *Arangie and Abedare Cables* [2007] 28 ILJ 249 (CCMA), the employee was aware of the employer's policy that allowed for random alcohol testing when it appeared that employees may be under the influence of alcohol and that stipulated that if an employee refused to be tested, the employee had to leave the workplace. The employee refused to undergo the test or to leave the workplace. The employee was charged with insubordination. The employee was found guilty and subsequently dismissed. The commissioner found that the employee had deliberately disobeyed the instructions given to them either to take the test or to leave the premises, and that at the time they were already on a written warning for insubordination. The commissioner found that the employee's offence was sufficiently grave to render the continued employment relationship intolerable. Dismissal was found to be an appropriate sanction.

What are some indications that an employee may have an alcohol or drug problem?

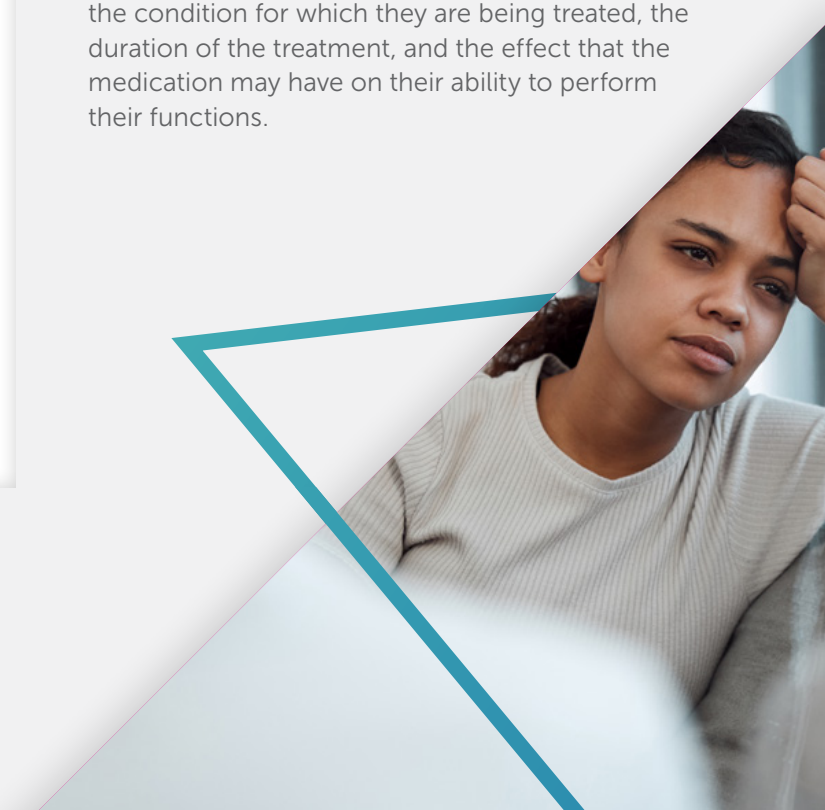
The following may be indicative of an alcohol or drug problem:

- Deterioration in the output, quality and quantity of work delivered by the employee.
- Frequent absenteeism.
- Excessive use of sick leave without producing a medical certificate.
- Excessive absenteeism from work particularly on a Friday and/or Monday.
- Constant unexplainable absences from the employee's workstation.
- Frequent excuses for non-attendance at work for extended periods.
- Frequent excuses for failing to meet deadlines at work.
- Constant requests for advances on wages/salary.
- Constant displays of common signs of intoxication.

What is the position regarding employees at the workplace who take prescription medication that may have side effects that impair their ability to perform their duties?

In terms of Regulation 2A of the OHSA, an employer or a user may only allow a person taking medication to perform their duties at the workplace if the side effects of such medicines do not constitute a threat to the health or safety of the person concerned or other people at that workplace.

In appropriate cases, where an employee is placed on prescription medication, they must disclose it to the employer together with a medical certificate from a registered medical practitioner confirming the condition for which they are being treated, the duration of the treatment, and the effect that the medication may have on their ability to perform their functions.



Does an employer have the right to discipline employees for their conduct outside of the workplace?

Yes. An employer has an interest in its employee's conduct outside the workplace only to the extent that it may have affected their capacity to perform during working hours or where the employee's conduct can be shown to have brought the reputation of the employer into disrepute.

Is disciplinary action an appropriate sanction for alcohol abuse?

Item 10 of the Code of Good Practice on Dismissal (Code) endorses the view that disciplinary action may not always be appropriate in dealing with alcohol or drug abuse and that counselling and rehabilitation may be appropriate. It states: *"In the case of certain kinds of incapacity, for example alcoholism or drug abuse, counselling and rehabilitation may be appropriate steps for an employer to consider."*

When may an employer dismiss an employee for substance abuse? Should the dismissal be based on misconduct or incapacity?

If an employee regularly drinks at work or regularly arrives at work drunk, then it certainly affects their ability to perform, and also affects their relationships with fellow employees and clients. This becomes an issue of incapacity, rather than misconduct. However, if it is a once-off offence and it is not a health issue as such, the conduct lends itself to misconduct.

Is an employer obliged to provide rehabilitation to an employee who has a problem with substance abuse?

In *Transnet Freight Rail v Transnet Bargaining Council & Others* [2011] JOL 2699 (LC), the Labour Court held:

"In fact, the requirement to assist such employees by providing them with treatment has been widely accepted. 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. The distinction between incapacity and misconduct is a direct result of the fact that it is now accepted in scientific and medical circles that alcoholism is a disease and that it should be treated as such."

The Labour Court further stated that:

"Where an employee is suffering under incapacity as a result of their alcoholism, the employer is under an obligation to counsel and assist the employee in accessing treatment for their disease. The purpose of placing such a duty on an employer is based on the current medical understanding of alcoholism – that it is a diagnosable and treatable disease. This disease results in the incapacity of the employee. In terms of how to deal with the employee, the distinguishing feature in such cases of alcoholism appears to be, as with all instances of incapacity, that the employee is not at fault for her behaviour – the employee cannot be blamed for their disease and its impact on their behaviour and discipline would be inappropriate in the circumstances."

Does an employer have to assist an employee financially with treatment?

In *Transnet*, the Labour Court stated that: *"Rehabilitative steps need not be undertaken at the employer's expense, unless provision is made for them in a medical aid scheme."*

Generally, assistance to employees in the case of smaller companies may take the form of providing the employee with details of counselling groups and rehabilitation centres, while in the case of larger companies, they may establish or align themselves with employee assistance programmes.

What is the position when an employer has assisted an employee with rehabilitation and the employee has relapsed?

If an employee undergoes a rehabilitation programme provided by an employer as stated in the alcohol and drug policy, and later reverts to their old habits, then the employer does not have an obligation to offer the programme to the employee again. An employer may follow a process to secure the fair dismissal of the employee.

What is an employer required to prove when charging an employee with being under the influence?

In *NUMSA obo Mbali and Schrader Automotive SA (Pty) Ltd* [2005](MEIBC) the employee arrived at work reeking of alcohol and his blood alcohol level registered 0,05% per 100ml. The employee was charged with and dismissed for being under the influence of alcohol during working hours. The employee claimed that he was not under the influence of alcohol and last consumed alcohol the night before at 21h00. Witnesses testified that the employee reeked of alcohol but did not exhibit any other signs of being under the influence of alcohol. The commissioner found the dismissal unfair and reinstated the employee, since the employer could not prove that the employee was under the influence of alcohol, that is that the employer was unable to prove that the employee was unable to perform his normal duties as a result of being under the influence of alcohol.

Notably, breaches of some rules are easier to prove than others. A breach of a rule prohibiting possession of alcohol is proved by the mere possession. A rule prohibiting being under the influence of alcohol requires far less rigorous proof than a rule that prohibits being under the influence to the extent that the employee's work performance is diminished. Therefore, employers should carefully consider what rules they require in their alcohol and drug policies.

What was decided by the constitutional court in relation to the use of cannabis?

In *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* 2018 (10) BCLR 1220 (CC); 2018 (6) SA 393 (CC); 2019 (1) SACR 14 (CC), the Constitutional Court permitted the use, possession and cultivation of cannabis in a private place for personal consumption, by adults. "*In private*" is not confined to one's "*home*" or "*private dwelling*". Additionally, as long as the adult person uses, possesses or cultivates cannabis in a private space they will not be subject to criminal sanction.

Does the Cannabis for Private Purposes Act 7 of 2024 (CPPA) impact the rules of the workplace?

The CPPA does not change the outcome of the judgment of Minister of Justice and Constitutional Development in that the use of cannabis remains illegal in public spaces, around children and around non-consenting adults. The CPPA merely regulates quantities and the prohibition of the sale of cannabis, notwithstanding that it has been cultivated privately. The law in relation to the workplace remains the same and the employer may have a zero-tolerance stance. Cannabis is still regarded as an intoxicating substance and driving vehicles while under the influence is prohibited.

Is a workplace a private space for purposes of the CPPA?

No. The workplace is not a private space, particularly in the case where an employer has numerous employees in the workplace.

In *Mthembu and others/NCT Durban Wood Chips* [2019] 4 BALR 369 CCMA, it was confirmed that employers are still permitted to discipline employees for using cannabis or being under the influence of cannabis during working hours notwithstanding the legalisation of cannabis for private use.

What remains prohibited in relation to cannabis terms of the CPPA?

The following may be indicative of an alcohol or drug problem:

cultivating cannabis in public spaces or for public use;

smoking cannabis in the presence of non-consenting adults;

selling cannabis;

smoking cannabis in the presence of children; and

smoking cannabis in public spaces;

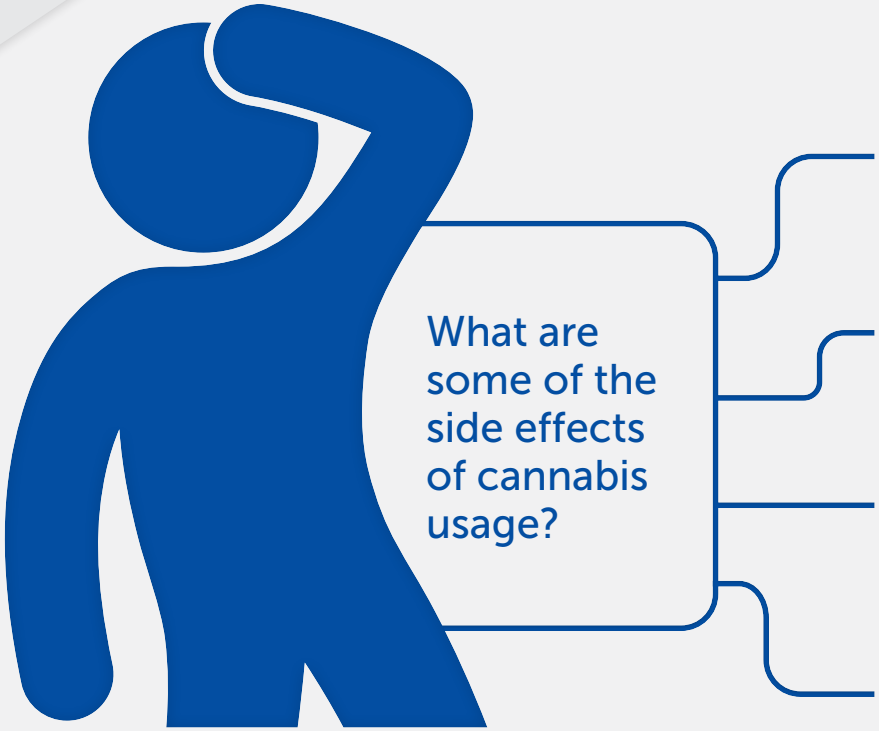
driving a vehicle under the influence of cannabis;

Can employees use, possess and cultivate cannabis in the workplace?

The cultivation of cannabis within the workplace remains prohibited. The employer should regulate this issue within its disciplinary code and substance use policy. The use, possession, smoking and cultivation of cannabis at the workplace should be expressly prohibited and subject to disciplinary action if contravened by an employee. Such an employee may also be subject to criminal proceedings. Where cannabis is used for medical purposes, a letter from a registered medical practitioner should be provided by an employee.

What is the basis for the prohibition of use, possession and cultivation of cannabis at the workplace?

The basis of the prohibition would be that the workplace is a public space and that there are non-consenting people who will be exposed to cannabis. Further, that the use of cannabis while at work will in all probability have an impact on the conduct or capacity of the employee and on the employer's business, especially in relation to employees who operate machinery, drive vehicles or undertake dangerous work. It is also still a criminal offence to consume or possess cannabis in public.



What action can an employer take if an employee is found to use, possess or cultivate cannabis in the workplace?

The employer may, depending on the terms of the disciplinary code and procedure and its policy, take disciplinary action against such an employee. The nature of the sanction will depend on the nature of the employee's role, the inherent requirements of the job, the exact nature of the workplace rule, the impact that the employee's transgression of the rule has on the employer and other relevant factors.

What is the position in case law in relation to employees who were found guilty of cannabis usage and who were subsequently dismissed?

In *Moodley and Clover SA (Pty) Ltd* [2019] 40 ILJ 2857 (CCMA), the employee (who previously underwent two months of drug rehabilitation) had allegedly been smoking cannabis at work while in the company motor vehicle. The employee underwent a urine test to confirm that he had in fact been smoking cannabis. The urine test confirmed high levels of Tetrahydrocannabinol (THC) in the employee's system. The employee indicated that the high levels of THC had been from "*space cookies*" that he consumed at a family function the week before. It was common cause that the employer had a zero-tolerance policy towards employees being under the influence of drugs or alcohol at the workplace; that the employee's job required him to be able to enter any division on the site; that different divisions operated large or dangerous machinery; and that it was part of his job function to 'police' other employees' compliance with the employer's policies. The employee admitted to being aware of the rule but denied seeing the employer's policy titled "*Guidelines: cannabis legislation*" before his hearing. Witnesses had testified to the smell that emanated from the vehicle as well as to the employee's behaviour once he emerged from the vehicle. The commissioner found the evidence presented favoured the employer's version that the employee had indeed been smoking cannabis. The commissioner found that the employee's dismissal was fair.

In *Mthembu* the commissioner confirmed that it was clear that the employer had a zero-tolerance rule in place, and that the policy was known to its employees. The question was whether the rule was reasonable, given the employees' claim that they used cannabis only in their private time. The commissioner stated that, as with alcohol, where there was an indication that intoxication could impair one's ability to work to the standard, care and skill required by the employer, the employer was entitled to take disciplinary action. In this case, the nature of the employer's business was such that a rule prohibiting employees from working under the influence of any intoxicating substance was reasonable. In particular, the employer had explained the nature of each employee's duties and the dangers they would face if at work under the influence of cannabis. The respective employees were fully aware of the rules and had sufficient skill and knowledge to be aware of the risk of presenting themselves for duty under the influence of cannabis. Furthermore, the employees knew about the zero-tolerance rule. They had sufficient time to adjust their private use of cannabis to the working environment and the onus fell on them to ensure that such use did not result in them reporting for duty under the influence. They showed no genuine remorse, nor did they undertake not to repeat the offence. As such, no rehabilitation or training would have had an impact and the commissioner was satisfied that the employer had justified the sanction of dismissal.

In *NUMSA obo Nhlabathi and One Other v PFG Building Glass (PTY) Ltd* (JR 1826 /2020) [2022] ZALCJHB 292, two employees were dismissed for testing positive for cannabis while at work after pleading guilty. The employer had a zero-tolerance policy against drugs and alcohol at the workplace. The employees, however, later challenged their dismissal on the basis that they were under the influence of cannabis and were not under the influence of "*drugs*". The Labour Court upheld the dismissal of the employees. The court found that the judgment in *Minister of Justice and Constitutional Development* did not offer protection to employees who contravene the policies of their employer. The court also referred to the Labour Court decision in *Enever* and held that in that case the matter involved an office employee who was using cannabis to improve her heath and her dependency on prescription medication. The court held that the nature of her role did not require her to perform dangerous functions and her use of the substance did not impact other employees. The court held that it was therefore distinguishable from the facts before it and the review application brought by the employees was accordingly dismissed.

In *SGB Cape Octorex (PTY) Ltd v Metal and Engineering Industries Bargaining Council and Others* (2023) 44 ILJ 179 (LAC); [2023] 2 BLLR 125 (LAC), the LAC found the dismissal of an employee to be substantively fair after the employee was found smoking cannabis at the workplace. The court held that, notwithstanding the mitigating factors such as a clean disciplinary record and that the employee had four years of service, the employer was permitted to determine the standard of conduct of its employees and the employer's zero-tolerance policy was clear. The LAC also found that dismissal was the appropriate sanction in light of the fact that the employee had also been dishonest, the nature of the work performed required the employee to work at heights and that the employee was working on the ninth floor on the day in question. The court also held that the fact that the employee was a supervisor was an aggravating factor, in that he was required to lead by example. Finally, the court held that on the employee's own admission, he was addicted to drugs and therefore would be a repeat offender. Dismissal was therefore the appropriate sanction.

Is an employee expected to be sober while working from home?

The OHSA defines a workplace as any premises or place where a person performs their work in the course of their employment. This sufficiently includes the employee's workspace while working remotely and therefore, the labour laws and employer policies still apply to remote working; and this includes the consumption of alcohol and drugs during working hours, even though the employer may not physically be able to see the employee. An employer's zero-tolerance policy may extend to the remote working environment during work hours.

May an alcohol and drug policy discriminate between classes of employees?

Yes. An alcohol and drug policy may fairly discriminate between the rules of one class of employee and that of another class. For example, an office worker who arrives at work smelling of alcohol is not endangering life or limb by sitting at their desk and working, even though not at peak efficiency. However, if a truck driver arrives at work smelling of alcohol and the employer allows them to drive and an accident ensues wherein a life is lost, then the employer could easily be held liable because it permitted the employee to drive.

The court's decision in *Enever* indicates that employers may vary their policies on the basis of the inherent requirements of the job and the nature of the functions performed by the employee and the impact that the conduct of the employee will have on the employer's business.

What are the penalties for non-compliance with the OSHA and the MHSA?

An employer that fails to comply with its duties in terms the OHSA shall be guilty of an offence in terms of section 38(1) of the OHSA and shall be liable on conviction to a fine not exceeding R50,000 or imprisonment for a period not exceeding one year, or both.

In terms of section 92 of the MHSA, non-compliance with the MHSA may result in various penalties including, but not limited to, fines, imprisonment and other penalties to be decided by presiding officers.

May an employer require a job applicant to undergo alcohol or drug testing?

Certain jobs require a higher degree of alertness or responsibility or may involve considerations of public safety. Simply put, it is possible for an employer to argue that, due to the "*inherent requirements*" of a particular job, compelling reasons exist to allow it to subject an applicant to alcohol and drug testing. As with all forms of pre-employment medical testing, one of the main considerations is privacy, which must be carefully balanced with the considerations outlined above.

What is the impact of the Protection of Personal Information Act 4 of 2013 (POPI) on alcohol and drug policies and the processing of employees' medical information?

The provisions of POPI will apply when requesting employees or job applicants to make disclosures regarding their health as a part of their medical records, records obtained as part of pre-employment medical questionnaires or examinations, and various drug or alcohol test results. Therefore, the employee's consent may be mandatory. It is, however, debatable whether an employer may rely on other sources of law, the public interest, or the contract of employment as a basis upon which to process the said special personal information.

In addition, in terms of section 7 of the Employment Equity Act 55 of 1998, medical testing may not be performed without the consent of an employee.

How does international case law in relation to substance abuse in the workplace compare to the South African position?

In *Jacobsen v Nike Canada Ltd.,* [1996] CanLII 3429 (BCSC) (a Canadian case) the employee consumed eight beers at work. While driving home, he fell asleep and had an accident that rendered him a quadriplegic. Even though the employee had voluntarily consumed the beers, the court held that Nike was 75% responsible for the employee's injuries. It made the decision based on the fact that Nike had a common law duty to take reasonable care for the safety of its employees to arrive home safely after finishing work at a location that was not their regular workplace, and especially because it had supplied the initial eight beers that the employee had consumed.

The court further held that if the employer had at least attempted to prevent its employee from driving home by confiscating his keys or by calling him a taxi, it would have been absolved of a considerable amount of its liability. Although not the position in South Africa, this case does indicate how an employer that failed to take preventive measures and that allowed its employee to drive under the influence could be held liable.

In *Lunsford v Sterilite of Ohio, L.L.C.* [2020] Ohio 4193 (Supreme Court of Ohio) the employer implemented a substance abuse policy that required employees to submit a urine sample for drug testing. The employees claimed that this was an invasion of privacy. However, the Supreme Court found that the trial court correctly determined that the former employees failed to sufficiently plead invasion of privacy claims, because the employees consented, without objection, to the collection of their urine samples under the direct-observation method. Furthermore, the employees' claim that their consent was involuntary due to their fear of termination lacked merit because the employer had the right to condition employment on consent to drug testing under the direct-observation method. The employees had the right to refuse to submit to the direct-observation method, and the employer had the right to terminate the employees for their failure to submit.

However, in South Africa, an employer would require the employees' consent prior to requiring its employees to undergo drug or alcohol testing. As previously mentioned, the provisions of POPI will apply.

MARKET RECOGNITION

Our Employment Law team is externally praised for its depth of resources, capabilities and experience.

Chambers Global 2014–2024 ranked our Employment Law practice in Band 2 for employment. *The Legal 500 EMEA 2020–2024* recommended the South African practice in Tier 1. *The Legal 500 EMEA 2023–2024* recommended the Kenyan practice in Tier 3 for employment.

The way we support and interact with our clients attracts significant external recognition.

Aadil Patel is the Practice Head of our Employment Law team, and the Head of our Government & State-Owned Entities sector. *Chambers Global 2024* ranked Aadil in Band 1 for employment. *Chambers Global 2015–2023* ranked him in Band 2 for employment. *The Legal 500 EMEA 2021–2024* recommended Aadil as a 'Leading Individual' for employment and recommended him from *2012–2020.*

The Legal 500 EMEA 2021–2024 recommended Anli Bezuidenhout for employment.

Chambers Global 2018–2024 ranked Fiona Leppan in Band 2 for employment. *The Legal 500 EMEA 2022–2024* recommend Fiona for mining. *The Legal 500 EMEA 2019–2024* recommended her as a 'Leading Individual' for employment, and recommended her from *2012–2018.*

Chambers Global 2021–2024 ranked Imraan Mahomed in Band 2 for employment and in Band 3 from *2014–2020. The Legal 500 EMEA 2020–2024* recommended him for employment.

The Legal 500 EMEA 2023–2024 recommended Phetheni Nkuna for employment.

The Legal 500 EMEA 2022–2024 recommended Desmond Odhiambo for dispute resolution.

The Legal 500 EMEA 2023 recommended Thabang Rapuleng for employment.

Chambers Global 2024 ranked Njeri Wagacha in Band 3 for FinTech. *The Legal 500 EMEA 2022–2024* recommended Njeri for employment. *The Legal 500 EMEA 2023–2024* recommends her for corporate, commercial/M&A.

BBBEE STATUS: LEVEL ONE CONTRIBUTOR
Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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