



The decriminalisation of private cannabis possession and use and the workplace

by Tricia Tsoeu

In the recent decision in the consolidated matter of *Minister of Justice and Constitutional Development and Others v Prince; National Director of Public Prosecutions and Others v Rubin; National Director of Public Prosecutions and Others v Acton and Others* (the “cannabis judgment”), the Constitutional Court considered whether it should confirm the decision of the High Court which declared various provisions the Drugs and Drug Trafficking Act, 1992 and the Medicines and Related Substances Control Act, 1965 unconstitutional, in so far as these provisions prohibit the use of cannabis by an adult in a private dwelling and where the possession, purchase or cultivation of cannabis is for personal consumption by an adult.

The Constitutional Court embarked on an exercise of determining whether the various impugned statutory provisions infringed the constitutional right to privacy and, if so, whether this limitation of the right to privacy was reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Save for a few exceptions, the Constitutional Court confirmed the High Court’s decision. It accepted that most of the impugned provisions infringed the right to privacy and that this limitation of the right to privacy could not be justified. It issued a declaration to the effect that the impugned provisions were invalid: to the extent that they made the use of cannabis in private by an adult person for his or her own consumption a criminal offence; and, to the extent that they prohibited the cultivation of cannabis by an adult for his or her own consumption in private. This order was suspended for a period of 24 months in order to enable Parliament to rectify these constitutional defects. However, it also granted interim relief pending Parliament amending the impugned statutory provisions. The Constitutional Court summarised the interim relief granted as follows:

- an adult person may use or be in possession of cannabis in private for his or her personal consumption in private;
- the use, including smoking, of cannabis in public or in the presence of children or in the presence of non-consenting adult persons is not permitted;
- the use or possession of cannabis in private other than by an adult for his or her personal consumption is not permitted; and
- the cultivation of cannabis by an adult in a private place for his or her personal consumption in private is no longer a criminal offence.

Importantly, the Constitutional Court removed the High Court’s limitation that the use, possession or cultivation of cannabis is restricted to one’s “home” or “private dwelling”. The Constitutional Court preferred the use of the words “in private” for purposes of use and possession of cannabis and ruled that cannabis can be cultivated in a “private place” for personal consumption.

Cannabis and the workplace

The fact that the law now permits the possession and use of cannabis in certain circumstances may result in employees making increasing use of cannabis and this may impact on the workplace – especially in the area of discipline. But the fact that the use or possession of

cannabis is no longer a criminal offence in certain circumstances does not mean that an employer may not introduce or enforce disciplinary rules relating to the use or possession of cannabis.

Typically, employers have implemented the following disciplinary rules in this regard.

The first is a rule that prohibits an employee from being “under the influence” of cannabis while at work to the extent that the employee cannot do his or her work properly and safely. The reasonableness and validity of this type of rule is not affected by the decision. However, there may be greater scrutiny of the tests to apply in establishing whether an employee is “under the influence of cannabis”. It is worth stating that the mere fact that some form of test establishes that an employee has utilised cannabis in the past does not necessarily mean that the employee is “under the influence of cannabis” when he is tested.

The second is a “zero tolerance rule” which provides that it is a disciplinary offence if an employee reports for duty, or is at work, in the circumstances where a test establishes that the employee has made use of cannabis some time in the recent past. The potential problem with this type of rule is that an employee may be subjected to discipline arising from the fact that he or she used cannabis in the privacy of his or her home several days before he or she was tested in circumstances where it cannot be shown that he or she was under the influence of cannabis when he or she reported for duty. An employer will have to be able to justify the imposition of such a rule in these circumstances.

The third is a rule prohibiting the possession of cannabis while at work or while on company property. It seems clear that the employer’s premises will generally speaking not constitute a private place for the employee. However, there may be some areas of uncertainty in this regard. For example, could it be argued that an employee’s locker or office, or the employee’s vehicle parked on the employer’s premises, is a private place? Furthermore, it is possible to argue that accommodation provided to an employee by the employer on company premises could constitute a place where the possession or use of cannabis would be in private.

The Constitutional Court emphasised that the possession of cannabis must be for personal consumption in private. If the employee is found to be in possession of a large amount of cannabis, it may be inferred that the possession was for another use ie, (dealing in cannabis).

In the light of the above, employers will be well advised to consider the appropriateness of their disciplinary policies in this regard. Employers would also be well advised to consider the validity and appropriateness of the tests that they may wish to subject employees to.

The above discussion has concentrated on discipline in the workplace. If it appears that an employee who is found to be “under the influence of cannabis”, or is found in the possession of cannabis, is actually addicted to the substance, this should be treated as an incapacity issue rather than a disciplinary issue.

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