THE LEGAL DILEMMA OF MANAGING AND REGULATING PRIVATE CONSUMPTION OF CANNABIS IN RELATION TO THE WORKPLACE

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ABSTRACT

In South Africa, consumption of cannabis was a criminal offence in past decades. However, in September 2018, the Constitutional Court judgment in the *Prince* case decriminalised the private consumption of cannabis. Although the judgment was welcomed by many South Africans, including employees, its interpretation and implementation has been marred by legal ambiguity. The Constitutional Court did not prescribe how employers should manage and regulate the private consumption of cannabis in relation to the workplace. In order to maintain workplace safety, a majority of employers have adopted and enforced a zero-tolerance policy on alcohol, drugs and substance abuse. A majority of employers have relied on urinalysis testing to detect cannabis in the workplace. Some employees, after testing positive for cannabis, have been dismissed for contravening their employer's zero-tolerance policy, without conclusive evidence of impairment. This thorny issue is explored in this article. First, it seeks to examine whether merely testing positive for cannabis is sufficient to prove intoxication that may result in an employee's impairment. Secondly, the question is whether urinalysis testing precisely determines whether an employee cannot function and perform their duties normally.

1 INTRODUCTION

On 18 September 2018, the Constitutional Court – in the case of *Minister of Justice and Constitutional Development v Prince; National Director of Public Prosecutions v Rubin; National Director of Public Prosecutions v Acton*[1] – delivered a landmark judgment to decriminalise the private use, possession and cultivation of cannabis by an adult for private consumption. Although the judgment has been welcomed by many South Africans, its implementation has paved the way for numerous academic debates and legal uncertainty for law enforcement agencies, the South African National Prosecution Authority,

[1] 2018 (6) SA 393 (CC).

employers and employees in the workplace. In the aftermath of the *Prince* judgment, an employee contended that it was legal for an individual employee to use cannabis for personal consumption in their private space, and accordingly there was nothing that forbade the individual employee from coming to work after such use.[2] However, the Labour Court has dismissed the contention, ruling that the Constitutional Court judgment did not offer any protection to employees against disciplinary action should they act in contravention of company policies or disciplinary codes.[3]

In a nutshell, the failure of the Constitutional Court to provide necessary guidance on how employers should deal with the private consumption of cannabis by employees has contributed to this confusion. This article examines the thorny issue, first by examining whether merely testing positive for cannabis is sufficient to prove intoxication that may result in an employee's impairment. Secondly, it looks at whether urinalysis testing precisely determines that an employee cannot at that time function and perform their duties normally.

In order to tackle the dual issue, this article undertakes to examine the impact of the *Prince* judgment and consequences thereof, the employer's obligation to maintain workplace safety, the judicial approach on the private use of cannabis outside the workplace, and the challenges to urinalysis testing. Lastly, this article endeavours to reflect on the judicial approach to cannabis cases and provides recommendations that may pave a way forward to address the contentious issue.

2 THE RIGHT TO PRIVACY ESPOUSED BY THE *PRINCE* CASE AND ITS IMPACT IN EMPLOYMENT LAW

Over many decades, the Drugs and Drug Trafficking Act[4] criminalised the possession, cultivation or use of cannabis in South Africa. However, recently, the Constitutional Court in the landmark case of *Prince*,[5] declared certain provisions of the Drugs and Drug Trafficking Act[6] to be unconstitutional, as they infringed on the right to privacy entrenched in the Constitution. However, the terrain of the right to privacy espoused by the Constitutional Court was not clearly defined although it was extended. Contrary to the judgment of the High Court in the same matter, the Constitutional Court limited privacy to homes. The scope of the right to privacy was defined by the High Court as follows:

> "If privacy, considered to be analysed as a continuum of rights which starts with an inviolable inner core moving from the private to the public realm where

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2 *NUMSA obo Nhlabathi v PFG Building Glass (Pty) Ltd* (2023) 44 *ILJ* 231 (LC) par 48.

3 *NUMSA obo Nhlabathi v PFG Building Glass (Pty) Ltd supra* par 63.

4 140 of 1992.

5 *Supra*.

6 140 of 1992. The Constitutional Court declared that the provisions of s 4(*b*), read with Part III of Schedule 2; the provisions of s 5(*b*) of the Drugs and Drug Trafficking Act, read with Part III of Schedule 2 and with the definition of the phrase "deal in" in s 1 of the Drugs and Drug Trafficking Act, were inconsistent with the right to privacy entrenched in s 14 of the Constitution.

> privacy is only remotely implicated by interference, it must follow that those who wish to partake of a small quantity of cannabis in the intimacy of their home do exercise a right to autonomy which, without clear justification, does not merit interference from the outside community or the State."[7]

The Constitutional Court conducted a thorough analysis of the nature and ambit of the right to privacy in terms of section 14 of the Constitution. Accordingly, Zondo ACJ held as follows:

> "What this means is that the right to privacy entitles an adult person to use or cultivate or possess cannabis in private for his or her personal consumption. Therefore, to the extent that the impugned provisions criminalise such cultivation, possession or use of cannabis, they limit the right to privacy."[8]

In addition, the Constitutional Court held that the declaration of invalidity of the prohibition of the use, or possession, or cultivation of cannabis should extend further than only when it occurs in a home or private dwelling as stipulated by the High Court order.[9] In extending the right to privacy, the Constitutional Court used an example of an adult who has cannabis in their pocket for their personal consumption within the boundaries of a private dwelling or home.[10] The court emphasised that such a person is protected not only while in a home or private dwelling, but also upon stepping out of the boundary of a home or private dwelling, provided that the cannabis remains in their pocket.[11] It was accordingly held by Zondo ACJ:

> "In my view, as long as the use or possession of cannabis is for the personal consumption of an adult, it is protected. Therefore, provided the use or possession of cannabis is by an adult person in private for his or her personal consumption, it is protected by the right to privacy entrenched in s 14 of our Constitution."[12]

Nabeelah Mia[13] contends that in its judgment, the Constitutional Court attempted to go beyond the High Court's scope of protection to include all use in private, yet it failed to clearly articulate what "in private" means. She further contends that no clear justification was pronounced by the court for extending the scope of the right to privacy.[14]

In the aftermath, the failure of the Constitutional Court to provide necessary guidance on the scope of the right to privacy has become a challenge for many employers, in particular, on how best to manage and regulate the private use of cannabis in and outside the workplace. In an *obiter dictum,* Coetzee AJ highlighted that the grey area of workplace cannabis testing emanates from the fact that urine tests disclose previous

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7 *Prince v Minister of Justice and Constitutional Development; Rubin v National Director of Public Prosecutions; Acton v National Director of Public Prosecutions* (2017) ZAWCHC 30 (Prince (HC)) par 25.

8 *Prince (CC) supra* par 58.

9 *Prince (CC) supra* par 98.

10 *Ibid*.

11 *Ibid*.

12 *Prince (CC) supra* par 100.

13 Mia "The Problems with *Prince*: A Critical Analysis of *Minister of Justice and Constitutional Development v Prince*" 2020 10 *Constitutional Court Review* 413.

14 *Ibid*.

drug impairment and not accurate or current drug impairment.[15] Despite the *Prince* judgment protecting the right to use cannabis privately, employees have faced dismissal on the basis of a positive cannabis result in the workplace.[16] In addition, our courts have categorically denied employees any protection provided by the *Prince* judgment against disciplinary action in the workplace.[17]

3 A SAFE AND HEALTHY WORK ENVIRONMENT

The employer's common-law duty to provide safe working conditions for employees originates from the law of contract and delict:

> "An employee affected by his or her employer's breach of this duty has a claim for damages against the employer. Should the employer's negligent conduct lead to injury the employee will clearly have a delictual claim. However, should the employer be in breach of an agreement to provide safety clothing, for example, the employer's failure to do so would give rise to a contractual claim."[18]

The employer's common-law duty has been supplemented by the Occupational Health and Safety Act[19] (OHSA). In terms of section 8(1) of OHSA, every employer must 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 addition, section 8(2)*(b)* of OHSA requires employers to take steps that may be reasonably practicable to eliminate or mitigate any hazard or potential hazard to the safety or health of employees, before resorting to personal protective equipment. It is eminently conceivable that an employee who is at work in an intoxicated state poses a greater risk to the health and safety of other employees than one who is not inebriated.[20] Thus, an employer may not allow any person who is or who appears to be under the influence of an intoxicating substance access to the workplace.[21] Neither may an employer allow any person to have intoxicating substances in their possession in the workplace.[22]

Therefore, in line with OHSA and its regulations, employers may adopt a zero-tolerance policy on alcohol, drugs and substance abuse. As a result of the high degree of safety required by companies using heavy machinery, dangerous equipment and hazardous substances, it is reasonable for such employers to have in place rules prohibiting the consumption of alcohol, drugs and substances at the workplace.[23]

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15 *NUMSA v Bargaining Council* (2015) ZALCJHB 413 par 1–12.

16 *NUMSA obo Nhlabathi v PFG Building Glass supra* par 23.

17 *NUMSA obo Nhlabathi v PFG Building Glass supra* par 63; *Enever v Barloworld Equipment, A Division of Barloworld SA* (2022) 43 *ILJ* 2025 (LC) par 23.

18 Van Niekerk and Smit *Law@Work* 5ed (2019) 97.

19 95 of 1993.

20 Fleming "Employers' Responses to Alcohol Addiction in South Africa: The Role of the Legislative Framework" 2022 43 *ILJ* 17 23.

21 Regulation 2A of the General Safety Regulations under the Occupational Health and Safety Act 85 of 1993.

22 *Ibid.*

23 *Mthembu v NCT Durban Wood Chips* [2019] 4 BALR 369 (CCMA) par 50.

Prinsloo J, in the *Nhlabathi* case, highlighted that zero tolerance means that a particular type of behaviour or activity will not be tolerated at all and a zero-tolerance policy does not allow any violations of a rule.[24] The court pointed out that an employee's clean disciplinary record, years of service or any other mitigating factor becomes irrelevant where a zero-tolerance policy is followed and consistently applied.[25] Accordingly, the only factors considered are: whether the employee was aware of the zero-tolerance policy; whether it was consistently applied; and, whether it is justified in the workplace.[26] In upholding the application of the employer's zero-tolerance policy, the court concluded that the applicants were aware of the zero-tolerance policy, it was applied consistently, and it was justified owing to the hazardous nature of the workplace and the respondent's duty to provide a safe working environment.[27]

Tokota AJA emphasised that the adoption of such a policy creates certainty and consistency in the enforcement of discipline.[28] He further stated that such a policy must be made clear and be readily available to employees in a manner that is easily understood.[29] The application of the employer's zero-tolerance policy on the consumption of cannabis has been challenged in our various courts.

4 JUDICIAL APPROACH TO CANNABIS CASES POST THE *PRINCE* CASE

This article focuses on the judicial approach to cannabis cases in the workplace post the *Prince* judgment.

In the aftermath of the *Prince* case, the CCMA dealt with the *Mthembu*[30] case. In this case, the applicants were charged with being under the influence of intoxicating substances while on duty.[31] The applicants admitted to having smoked cannabis but argued that they had done so outside the workplace. The applicants were tested by means of a urine test and found to be under the influence of cannabis, which the applicants had admitted to. The respondent employer conducted business in the wood and chip industry, and the applicants' work involved large machinery and extremely dangerous vehicles coming in and out of the premises throughout the day. In reaching its decision, the CCMA considered the degree of danger involved in the employment.[32] The arbitrator concluded that because of the high degree of safety required of companies with heavy machinery and generally dangerous equipment, it is reasonable for employers to have in place rules prohibiting the consumption of such substances at the workplace or

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24 *NUMSA obo Nhlabathi v PFG Building Glass supra* par 85.
25 *Ibid.*
26 *Ibid*.
27 *Ibid*.
28 *SGB Cape Octorex (Pty) Ltd v Metal & Engineering Industries Bargaining Council* (2023) 44 *ILJ* 179 (LAC) par 17.
29 *Ibid.*
30 *Mthembu v NCT Durban Wood Chips supra*.
31 *Ibid.*
32 *Mthembu v NCT Durban Wood Chips supra* par 71–72.

reporting to work under the influence of such substances.[33] The arbitrator further stated that notwithstanding the *Prince* case declaring cannabis legal, employers are still entitled to discipline employees who use cannabis or who are under the influence during working hours.[34] The arbitrator concluded that the employer's interests in ensuring health and safety in the workplace outweigh the employee's right to privacy.[35]

In March and November 2022, the Labour Court dealt with the *Enever*[36] and *Nhlabathi*[37] cases respectively. In the *Enever* case, the applicant was dismissed as a result of repeatedly testing positive for the cannabis drug, in breach of the respondent's alcohol and substance abuse policy.[38] At the time of her dismissal, the applicant occupied the position of category analyst, which was a typical office or desk position. Her position did not constitute a safety sensitive job, in that she was neither required to operate heavy machinery nor to drive any of the respondent's vehicles.[39] The applicant suffered severe constant migraines and anxiety, and she was taking medication prescribed by her doctor.[40] However, after the *Prince* judgment, she started smoking cannabis instead of taking medication.[41] Recreationally, she smoked cannabis every evening to assist with insomnia and anxiety.[42] The applicant tested positive for cannabis after a urine test was conducted and then she was placed on a seven-day cleaning-up process. Even after the seven days of cleaning-up, the urine tests continued to detect cannabis in her system.

It was not disputed that at the time of undergoing the urine test, the applicant was not impaired or suspected of being impaired in the performance of her duties, and nor was she performing any duties for which the use of cannabis would be said to be a risk to her own safety or that of her fellow employees.[43]

Ntsoane AJ rejected the employee's reliance on the *Prince* judgment decriminalising the private use of cannabis on the premise that the judgment did not excuse a breach of company policy.

In rejecting the applicant's argument, he stated:

> "I am however strongly of the view that the respondent, in the 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 judgment does not offer any protection to employees against disciplinary action should they act in contravention of company policies."[44]

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33 *Ibid.*
34 *Mthembu v NCT Durban Wood Chips supra* par 69.
35 *Ibid.*
36 *Enever v Barloworld Equipment, A Division of Barloworld SA supra*.
37 *NUMSA obo Nhlabathi v PFG Building Glass supra*.
38 *Enever v Barloworld Equipment, A Division of Barloworld SA supra*.
39 *Enever v Barloworld Equipment, A Division of Barloworld SA supra* par 3.
40 *Enever v Barloworld Equipment, A Division of Barloworld SA supra* par 5.
41 *Enever v Barloworld Equipment, A Division of Barloworld SA supra* par 6.
42 *Ibid.*
43 *Enever v Barloworld Equipment, A Division of Barloworld SA supra* par 8.
44 *Enever v Barloworld Equipment, A Division of Barloworld SA supra* par 23.

The court concluded that the fact that an employee was not impaired to perform duties was irrelevant as it did not in itself absolve the employee from misconduct in terms of the employer's policy.[45] The court noted a difference between the effects of alcohol and cannabis and held that there was no question that, unlike alcohol, which leaves an individual's bloodstream within a few hours after consumption, cannabis may remain present in an individual's system for a number of days or up to weeks, and that tests for cannabis do not demonstrate the degree of impairment of an employee's ability to perform their duties.[46] Unlike alcohol, the court highlighted that one cannot determine a level of impairment based on test results.[47] Accordingly, the court concluded that proof of impairment was not required (as it was with alcohol) because, with a positive result, it is automatically assumed that one is under the influence of cannabis owing to its intoxicating nature.[48]

In the case of *SGB Cape Octorex*,[49] the applicant employee (supervisor) was allegedly seen smoking dagga while on duty. The applicant denied the allegations, which resulted in urine and saliva tests being conducted. Both tests confirmed the presence of tetrahydrocannabinol (THC), and the employee was subsequently dismissed for testing positive for tetrahydrocannabinol. The applicant referred a dispute of unfair dismissal to the bargaining council and the arbitrator ruled in favour of the applicant.

On review, the Labour Court held that the contention that the commissioner had ignored the zero-tolerance approach had no substance since no evidence was adduced at the arbitration.[50] The court further held that there was no evidence that the employee had compromised the safety and integrity of other workers.[51]

On appeal, the Labour Appeal Court dealt with the implementation of the employer's zero-tolerance policy or approach. The court held that an employer is entitled to set its own standards to enforce discipline in its workplace and accordingly, the Labour Court had failed to appreciate the importance of the zero-tolerance policy.[52]

The court highlighted the importance of workplace policies as follows:

> "Where an employer sets out the code of conduct for the employees, it is expected from its employees that breaching such code undermines the authority of the employer. A breach thereof is therefore prejudicial to the administration of discipline. Furthermore, the employer in this case was

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45 *Enever v Barloworld Equipment, A Division of Barloworld SA supra* par 20 and 25. The court noted that the applicant tested positive for cannabis and continued to test positive simply on her perpetuated act of consumption of the substance from which she made it rather clear she will not refrain.

46 *Enever v Barloworld Equipment, A Division of Barloworld SA supra* par 26.

47 *Ibid*.

48 *Ibid.*

49 *SGB Cape Octorex v Metal & Engineering Industries Bargaining Council supra*.

50 *SGB Cape Octorex v Metal & Engineering Industries Bargaining Council supra* par 7.

51 *SGB Cape Octorex v Metal & Engineering Industries Bargaining Council supra* par 16 and 17.

52 *SGB Cape Octorex v Metal & Engineering Industries Bargaining Council supra* par 7.

> concerned about the safety of its employees since they were working on heights."[53]

Tokota AJA concluded that the applicant's dismissal was fair, taking into account the nature of the employer's business and the fact that similar sanctions had been imposed on other offending employees.[54]

Subsequent to the *SGB Cape Octorex* case, Prinsloo J delivered the *Nhlabathi*[55] judgment on the eve of December 2022. This was a case in which the applicants relied on an ill-conceived defence, premised on a misinterpretation of the *Prince* judgment.[56] In this case, the applicants were dismissed after testing positive for cannabis while on duty in contravention of the employer's zero-tolerance policy on alcohol and drug abuse. The employer conducted its business in a dangerous or hazardous environment. Therefore, the employer adopted a zero-tolerance policy to maintain a safe working environment in line with OHSA.

In challenging the fairness of their dismissal, the applicants argued that the employer did not have a policy that forbade the use of dagga, as dagga was not a drug or substance.[57] The applicants further contended that they did not use dagga in the course of their duty but used it for medical reasons in their private spaces, which was in line with the *Prince* judgment, which legalised the private use of dagga.[58]

In finding that the applicants' dismissal was fair, the arbitrator acknowledged the *Prince* judgment, but maintained that the judgment did not overrule the provisions of OHSA, and that the employer was by law required to provide a safe working place.[59] The arbitrator further found that despite the decriminalisation of dagga, there was a rule, and the applicant was aware of the rule. The arbitrator concluded that the rule was valid and reasonable owing to the hazardous nature of the employer's business.[60]

On review, the Labour Court found that the Constitutional Court in its judgment did not interfere with the definition of a drug, nor did it declare dagga or cannabis to be a plant or a herb.[61]

The court lamented the applicants' misinterpretation of the *Prince* judgment:

> "The applicants' understanding of the judgments they relied upon was either very limited or totally wrong and they moved from a wrong premise when they approached their case as one where dagga was no longer to be regarded as

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53 *SGB Cape Octorex v Metal & Engineering Industries Bargaining Council supra* par 12.

54 *SGB Cape Octorex v Metal & Engineering Industries Bargaining Council supra* par 21.

55 *NUMSA obo Nhlabathi v PFG Building Glass supra*.

56 *NUMSA obo Nhlabathi v PFG Building Glass supra* par 47. The applicant's approach was that dagga was not a drug but a herb, and that therefore it was no longer illegal to use dagga. Consequently, the use of dagga should not find its way into an employer's disciplinary code, as it was legal and could not constitute misconduct.

57 *NUMSA obo Nhlabathi v PFG Building Glass supra* par 41.

58 *NUMSA obo Nhlabathi v PFG Building Glass supra* par 65.

59 *NUMSA obo Nhlabathi v PFG Building Glass supra* par 42.

60 *NUMSA obo Nhlabathi v PFG Building Glass supra* par 43.

61 *NUMSA obo Nhlabathi v PFG Building Glass supra* par 62.

> a drug and thus automatically excluded from the Respondent's alcohol and drug policy."[62]

Prinsloo J's interpretation was similar to that of Ntsoane AJ in the *Enever* case in finding that the Constitutional Court judgment did not offer any protection to employees against disciplinary action should they act in contravention of company policies or disciplinary codes.[63]

5 CHALLENGES POSED BY URINALYSIS TESTING

In terms of South African employment law, the medical testing of an employee is permissible if it is justifiable in light of employment conditions.[64] Consequently, conducting cannabis tests in the workplace is possible and crucially important to determine whether an employee has contravened a workplace policy on alcohol, drugs and substance abuse. According to Stansfield, there is, however, no reliable test that is able to determine the immediate state of cannabis intoxication as compared to a breathalyser test for alcohol.[65] In this light, it is evident from decided case law that South African employers have relied on urine and saliva tests to detect cannabis in the workplace.[66]

The urine test analysis commonly used by employers looks for a tetrahydrocannabinol (THC) metabolite that can be present in a person's system for weeks after use.[67] According to Phifer it remains relatively easy to detect the presence of tetrahydrocannabinol metabolites in the bloodstream, but impossible to tell exactly when it was ingested.[68] He further stated that tetrahydrocannabinol can remain at low but detectable levels of 1 to 2 ng/ml for 8 hours or more without any measurable signs of impairment in one-time users.[69] However, in respect of chronic users, detectable amounts of blood tetrahydrocannabinol can persist for days.[70] In contrast, a breathalyser test can indicate a blood-alcohol level that will be considered intoxication.

Accordingly, an argument can be levelled against urinalysis testing for cannabis in that it does not give an indication of current impairment but only prior use, and is therefore not indicative of an individual's present ability to perform the job.[71] Dr Calvin Yagan (a University of KwaZulu-Natal occupational medicine registrar) stated that an employee who has smoked marijuana in the morning before coming to work may be able to function

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62 *NUMSA obo Nhlabathi v PFG Building Glass supra* par 74.

63 *NUMSA obo Nhlabathi v PFG Building Glass supra* par 63.

64 S 7(1) of the Employment Equity Act 55 of 1998.

65 Visser "How to Deal with Cannabis in the Workplace" (January 2018) https://journals.co.za/doi/epdf/10.10520/EJC-113a482227 (accessed 2023-02-06) 45.

66 *SGB Cape Octorex v Metal & Engineering Industries Bargaining Council supra*; *NUMSA obo Nhlabathi v PFG Building Glass supra*; *Mthembu and NCT Durban Woodchips* (2019) 40 *ILJ* 2429 (CCMA).

67 *Kumalo v Lafarge Gypsum* [2013] 7 BALR 697 (MEIBC).

68 Phifer "A Sensible Approach to Workplace Drug Testing for Cannabis" 2017 2 *Journal of Chemical Health & Safety* 24 35.

69 *Ibid.*

70 *Ibid.*

71 *Kumalo v Lafarge Gypsum supra*.

optimally at work even though technically they may be under the influence.[72] He further noted that an employee who legally used cannabis on a Friday evening is likely to show traces of the drug if tested at work on Monday, even though the employee is no longer under the influence and is unlikely to be impaired.[73]

In this light, judge Coetzee AJ stressed that a distinction must be drawn between testing positive and being under the influence.[74] Accordingly, he was of the view that an employee with a positive cannabis test should not be dismissed on that account.[75] This is because cannabis consumed a few days before (which is detectable) does not mean that the person is still under the influence.[76] Urine drug testing shows past drug impairment, not accurate or current drug impairment.[77]

In an *obiter dictum*, the judge stated:

> "No reasonable commissioner could have come to the conclusion that the employee was under the influence, merely for having tested positive for cannabis. That is so unreasonable that it stands to be reviewed and set aside."[78]

Foreign jurisdictions have also made remarkable rulings on the uncertainty created by urine tests. In the Canadian case of *Entrop,*[79] the court compared and contrasted cannabis and alcohol testing. *In casu*, the court lamented that testing for cannabis through urine does not disclose that the person is impaired at the time of the test, but only shows the presence of metabolites, which only discloses cannabis consumed in the past, whereas alcohol testing by breathalyser detects the actual impairment.[80] Similarly to the *Entrop* case, the court in the Australian case *Endeavour Energy*[81] also highlighted the challenges of urine testing. The court stressed that urine testing is potentially less capable of identifying someone who is under the influence of cannabis.[82] In addition, urine testing has the disadvantage that it may show a positive result even several days after the person smoked the substance.[83] Consequently, the court pointed out that a person may be found to have breached the policy even though their actions were taken in their own time and in no way affected their capacity to do their job safely.[84]

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72 Nair "Careful: Smoking Weed at Home Could See Your Job Go Up in Smoke" (2 June 2019) https://www.timeslive.co.za/sunday-times/news/2019-06-02-careful-smoking-weed-at-home-could-see-your-job-go-up-in-smoke/ (accessed 2023-02-02) 1.

73 Nair https://www.timeslive.co.za/sunday-times/news/2019-06-02-careful-smoking-weed-at-home-could-see-your-job-go-up-in-smoke/ 1.

74 *NUMSA v Bargaining Council supra* 413.

75 *NUMSA v Bargaining Council supra* par 17–18.

76 *Ibid*.

77 *Ibid*.

78 *NUMSA v Bargaining Council supra* par 25.

79 *Entrop v Imperial Oil Ltd* (2000), 50 O.R. (3d) 18 (C.A.).

80 *Entrop v Imperial Oil Ltd supra* par 91.

81 *Endeavour Energy v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* (2012) FWAFB 4998 (14 August 2012).

82 *Endeavour Energy v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia supra* par 41.

83 *Ibid.*

84 *Ibid.*

6 REFLECTING ON THE JUDICIAL APPROACH TO CANNABIS CASES

For almost five years after the *Prince* judgment, managing and regulating cannabis in the workplace has been a thorn in the side of the employment relationship. In addition, in light of the *Prince* judgment, our courts have grappled with resolving the contentious issue of managing and regulating the private consumption of cannabis in relation to the workplace. One may argue that none of the labour disputes resolution forums have offered clear judicial insight into the terrain of the private consumption of cannabis outside the workplace. Rather, our courts have categorically denied any immunity provided by the *Prince* judgment to employees against disciplinary action should they act in contravention of company policies or disciplinary codes.[85] However, it may be argued that our courts have missed an opportunity to reconcile the employer's interests (ensuring a safe working environment) with the employee's interest (private consumption of cannabis) in order to achieve fairness in the employment relationship.

From decided case law, it is evident that our courts have generally accepted urinalysis results as valid and reliable without scrutinising the unfortunate consequences of such testing. Consequently, it is submitted that too much emphasis has been placed on a positive cannabis test without a further enquiry to determine an employee's impairment. The grave consequences of such an approach have included the dismissal of employees who have tested positive but who at the time of testing were not in fact impaired.

For example, in the *Enever* case, it was undisputed that, at the time of the urine test, the applicant was not impaired or suspected of being impaired in the performance of her duties, nor was she performing any duties for which the use of cannabis would be said to be a risk to her own safety or that of her fellow employees.[86] However, in its judgment, it is clear that the court rubber-stamped the positive test without having due regard to the importance of impairment. As a result, the applicant employee was dismissed.

One may thus argue that the court erred in finding that proof of impairment was not required as with alcohol because it is automatically assumed that one is under the influence of cannabis owing to its intoxicating nature.[87] It is submitted that such an argument is supported by academic literature, which revealed that traces of tetrahydrocannabinol metabolites can be detected in the bloodstream even if cannabis has been consumed a few days before. Thus, despite a positive test, one cannot conclusively say that an employee poses a threat to workplace safety if they are not impaired. In an *obiter dictum,* Coetzee J appreciated the unfortunate consequences of urinalysis testing, stating that urine drug testing shows past drug impairment and not accurate or current drug impairment.[88]

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85 *NUMSA obo Nhlabathi v PFG Building Glass (Pty) Ltd supra* par 63.

86 *Enever v Barloworld Equipment, A Division of Barloworld SA (Pty) Ltd supra* par 8.

87 *Enever v Barloworld Equipment, A Division of Barloworld SA (Pty) Ltd supra* par 26.

88 *NUMSA v Bargaining Council supra* par 17–18.

Accordingly, it may be concluded that despite ample opportunity, our courts have missed an opportunity to scrutinise the challenges associated with urinalysis testing.

7 RECOMMENDATIONS

It remains undisputed that extra caution should be exercised when dealing with the issue of managing and regulating the private use of cannabis in relation to the workplace. Needless to say, this contentious issue involves two competing interests that require a balance to be struck in order to achieve fairness in the employment relationship. It follows that a fair approach would require weighing the interests of the employer in ensuring workplace safety (taking into account the degree of danger in the workplace environment), against an employee's right to use cannabis privately, as espoused by the *Prince* judgment and the Constitution. Implicit in the enquiry is the assumption that both employer and employee are the beneficiaries of the constitutional right to fair labour practices, and that the enquiry commences with the scales evenly balanced.[89]

It is submitted that the assertion that the employer's interests in ensuring health and safety in the workplace outweighs the employee's right to privacy is flawed.[90] The Constitutional Court comprehensively canvassed the implementation of fairness in the employment relationship as follows:

> "The focus of s 23(1) is, broadly speaking, the relationship between the worker and the employer and the continuation of that relationship on the terms that are fair to both. In giving content to that right, it is important to bear in mind the tension between the interests of workers and the interests of employers which is inherent to labour relations. Care must therefore be taken to accommodate, where possible, these interests so as to arrive at a balance required by the concept of fair labour practice. It is in this context that the LRA must be construed."[91]

While acknowledging the employer's obligation to uphold workplace safety, academic literature and judicial pronouncements have exposed the grave challenges associated with urinalysis testing as discussed above. Despite the problems with urinalysis testing, it is not submitted that private consumption of cannabis should not be managed and regulated, as a failure to do so may jeopardise workplace safety. However, it is also submitted that elevating workplace safety infringes employees' right to privacy. Accordingly, an employee's positive cannabis test should not be used as the only yardstick for dismissal in the absence of conclusive evidence of impairment that could place workplace safety at peril. In his remark in the *Tanker Services* case,[92] Grogan highlighted that whether employees are unable to perform their work depends to some extent on its nature.[93] In the *Tanker Services* case, the question was whether Mr Magudulela's faculties had

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89 Van Niekerk *"*Dismissal for Misconduct: Ghosts of Justice Past, Present and Future" 2012 *Acta Juridica* 113.

90 *Mthembu v NCT Durban Wood Chips supra* par 69.

91 *NEHAWU v UCT* (2003) 24 *ILJ* 95 (CC) par 40.

92 *Tankers Services (Pty) Ltd v Magudulela* (1996) 9 BLLR 1109 (LAC).

93 Grogan *Workplace Law* 11ed (2016*)* 224.

been impaired to the extent that he could no longer perform the skilled, technically, complex and highly responsible task of driving an extraordinary vehicle carrying a hazardous substance. Having found that he could not safely do so in his condition, the court concluded that Magudulela's condition amounted to an offence sufficient enough to warrant dismissal.[94]

Since urinalysis testing is incapable of determining impairment after cannabis consumption, it is suggested that physical impairment testing may be useful. The recommended test would determine whether the level of tetrahydrocannabinol affects an employee's ability to perform their duties with the required capacity, care and skills. It is submitted that employers might find it challenging to adopt practical methods to detect physical impairment in cannabis matters. However, this does not mean implementation of the test is practically impossible. To address that challenge, the Standard Field Sobriety Test applied in the United States to test physical impairment may be adopted in the South African workplace.

The Standard Field Sobriety Test is a battery of three tests made up of the Horizontal Gaze Nystagmus, the walk-and-turn, and the one-leg stand test.[95] The Horizontal Gaze Nystagmus test measures an involuntary jerking of the eyeball to tracking an object using peripheral vision. Phifer stated that when an individual is impaired, nystagmus is exaggerated and may occur at lesser angles.[96] In addition, an impaired person will also often have difficulty smoothly tracking a moving object.[97] Both the walk-and-turn and one-leg stand tests are divided-attention tests that require a subject to listen and follow instructions while performing simple physical movements.[98] He concluded that impaired persons have difficulty with tasks requiring them to divide their attention between simple mental and physical exercises.[99]

8 CONCLUSION

While the *Prince* judgment has been welcomed by many South Africans – especially consumers of cannabis – the interpretation and implementation of the judgment has been contentious in the workplace. The *Prince* judgment first extended the right to privacy beyond private homes without explicitly articulating the meaning of privacy. Secondly, the Constitutional Court did not prescribe how employers should manage and regulate private consumption of cannabis in relation to the workplace. As a result of onerous safety requirements for companies using heavy machinery, dangerous equipment and hazardous substances, many employers adopted a zero alcohol, drugs and substance abuse policy to regulate the private consumption of cannabis. At loggerheads are two opposing interests: the employer's obligation to ensure a safe working environment; and the employee's right to consume cannabis privately as encapsulated in the *Prince* judgment.

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94 *Ibid.*
95 Phifer 2017 *Journal of Chemical Health & Safety* 24 36.
96 *Ibid.*
97 *Ibid*
98 *Ibid.*
99 *Ibid.*

Practically, to ensure that employees do not jeopardise workplace safety, employers have relied on urinalysis testing to determine whether an employee has contravened a workplace zero-tolerance policy on alcohol, drugs and substance abuse. Consequently, judicial precedents have demonstrated that employees who privately consumed cannabis tested positive leading to their dismissal. However, academic literature and judicial precedent has exposed the problems with urinalysis testing in that it fails to prove current impairment. Even though South African courts have dismissed the relevance of impairment, it has been argued that if an employee tests positive without conclusive proof of current impairment, an employee may pose no threat to workplace safety. Hence, it has been recommended that employees should undergo a physical impairment test to curb the loopholes created by urinalysis testing.