Employment Law

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Navigating the legal landscape for private cannabis use and how that may impact the workplace: A case of unfair dismissal

In the recent case 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) considered the effect of the Constitutional Court's decision that decriminalised the use, possession and cultivation of cannabis for personal use in private on workplace discipline following an employee testing positive for cannabis.

Brief facts of the case

Ms Bernadette Enever (the employee) was employed by Barloworld Equipment South Africa (the employer) as a category analyst. The Employee Policy Handbook (Handbook) explicitly states that the employer may require its employees to undergo medical examinations during the course of their employment. Additionally, the Handbook forbids the use and possession of alcohol while also prohibiting access to the workplace for anyone under the influence of alcohol or drugs. The Handbook incorporates the employer's Alcohol and Substance Abuse Policy (Policy) which adopted a zero-tolerance approach to the possession and consumption of drugs and alcohol in the workplace. The employee accepted and signed acknowledgment of the Handbook.

On 29 January 2020, the employee was required to undergo a medical test, including a urine test, the results of which came back positive for the use of cannabis. The employee was instructed to go home and told to return for a repeat test after seven days, but on four further occasions the employee tested positive for cannabis. A notice of disciplinary action followed on 25 February 2020. The employee pleaded guilty, but in mitigation of sanction, the employee mentioned the benefits she experienced, including reduced anxiety levels as a result of using cannabis for that purpose. On 30 April 2020, she was summarily dismissed when an independent disciplinary enquiry chairperson saw little reason to issue a less severe outcome given her stated intention to continue with her treatment regime of using cannabis for her medical ailments.

The employee then referred a dispute to the Commission for Conciliation, Mediation and Arbitration, however, the conciliation did not take place as a result of the COVID-19 pandemic. The employee then approached the Labour Court.

The Labour Court

The employee challenged the fairness of her dismissal and alleged that she had been unfairly discriminated against based on the grounds of her spirituality, conscience, belief, or other such arbitrary ground. The Labour Court dismissed her claim.

The employee referred the matter to the LAC.

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The Labour Appeal Court

The employee raised four issues for determination:

1. Whether the employer had differentiated between the employee and its other employees in relation to the use of cannabis for medicinal reasons.
2. Whether there was a direct causal connection between the employee testing positive for cannabis and her dismissal, which could have constituted an act of discrimination against her based on her spirituality, conscience or belief, or on an arbitrary ground in terms of section 187(1)(f) of the Labour Relations Act 66 of 1995.
3. Whether the employer's Policy was in and of itself unfair and discriminatory.
4. Whether the approach adopted by the employer was insulting, degrading and humiliating, and an impairment of the employee's dignity as a result of such unfair discrimination.

The LAC did not deal with the issue of the direct causal connection between the positive test and the dismissal as this was conceded by the employer.

When assessing whether the employee experienced unfair discrimination based on a listed ground, the LAC accepted "*spirituality*" as being synonymous with the listed ground of religion. The LAC agreed with the court a quo that there was no evidence of discrimination based on any listed ground *per se*, because the employee's dismissal was not based on her spiritual beliefs where she had admitted using cannabis for recreational purposes and not just medicinally.

Regarding the argument that the relevant policy differentiated between alcohol and cannabis users based on an arbitrary ground, the employee was required to show that there had been an impairment of her human dignity in a comparable manner to discrimination based on a listed ground. While both groups of users faced being sent home pursuant to a positive test result, alcohol users could return after testing negative the following day. This was not the case for cannabis users where traces of the drug remain in the blood stream for an appreciably longer period. Therefore, the fact of a positive test for cannabis use would not address the sobriety of the user or indicate whether the user was impaired when carrying out duties and functions for the employer.

The employee argued that the discrimination she faced as a cannabis user seriously infringed upon her dignity by violating her right to privacy and subjecting her to a humiliating process that portrayed her as a "*junkie*", because when testing positive, the employee had not been shown to have been impaired in the performance of any of her duties.

An objective consideration of the employer's Policy was that any employee who worked for the employer could never use cannabis at all. However, employers are not barred in justifiable circumstances from asking their

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employees to completely refrain from certain conduct where an employee is required to operate heavy or dangerous machinery or equipment, or work in a high-risk environment. Policies against drug and alcohol use are standard and are aimed at compliance with the employer's obligations to maintain a safe and healthy working environment in terms of applicable occupational health and safety legislation. However, the LAC did not find this aspect a compelling reason for the infringement of the employee's right to privacy. The employee had been employed in an administrative role in an office environment. Within the context of the right to privacy, the LAC reasoned that the reliance on a blood test alone, without proof of potential or actual impairment on the work to be performed, was insufficient.

The LAC found there had been a violation of the employee's dignity and privacy as the policy prevented her from engaging in conduct that had no impact on the employer *per se*, yet the employer was able to compel her to choose between her job and the exercising of her rights. The employer had not been able to show that she was intoxicated at work, that her work was adversely affected or that she had created an unsafe working environment for herself, her fellow employees or other people at the workplace.

The LAC did not accept that because the employer had a generally dangerous workplace, that the zero-tolerance rule was justified or that it constituted an inherent requirement of the job not to consume cannabis after hours or over weekends. 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.

The LAC concluded that the employee's dismissal was automatically unfair based on unfair discrimination and awarded her 24 months' remuneration as compensation.

Look out for our updated guideline on substance abuse in the workplace which will be published soon.

Fiona Leppan, Kgodisho Phashe and Leah Williams

New legislation: The criminalisation of hate offences and the workplace

On 9 May 2024, the Presidency reported that the President assented to the Prevention and Combating of Hate Crimes and Hate Speech Bill (Act). The purpose of the Act is to give effect to constitutionally enshrined rights, including human dignity, equality and the right to freedom and security.

On the face of it, the Act does not refer to any employment legislation. However, it is important to read the Act in relation to the Employment Equity Act 55 of 1998 (EEA) and the harassment code published under the EEA (Code). The EEA prohibits unfair discrimination against an employee on the basis of race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or on any other arbitrary ground. The EEA and the Code prohibit harassment on the basis of these grounds in the workplace and state that harassment is a form of unfair discrimination.

The Act codifies conduct, that can potentially constitute harassment in terms of the Code, as a "*hate crime*" or "*hate speech*". A hate crime is conduct that is motivated by prejudice and intolerance on one or more of the following grounds:

- Albinism
- Ethnic or social origin
- Gender
- HIV or AIDS status
- Nationality, migrant, refugee or asylum seeker status
- Race
- Religion
- Sex
- Sexual orientation, gender identity or expression, or sex characteristics
- Skin colour

Hate speech is the publication, propagation or advocation with the clear intention to harm or incite harm or promote or propagate hatred based on the listed grounds above.

One of the consequences of the criminalisation of hate crimes and hate speech is that it may assist an employer to take disciplinary action against an employee whose conduct is covered by the Act. Such conduct may negatively impact the employer's reputation, detract from a harmonious working environment and diminish the value of human dignity in the workplace.

While the tests for harassment in terms of the Code and the test for hate crimes and hate speech in the Act are different, the bona fide defences in relation to hate speech, if relevant, may be raised by an employee in disciplinary proceedings that deal with verbal harassment or discrimination in the workplace.

CDH will be publishing a guideline in the near future on the various pieces of legislation that deal with discrimination, harassment, hate crimes and hate speech and how these impact the workplace.

Employment Law Practice

Determining whether the OHS Act or MHSA's safety legislation applies to processing activities

In *UASA-The Union v Anglo American Platinum Ltd & Others* (10 May 2024: J400/23), UASA-The Union sought a declaratory order in the Labour Court against Anglo American Platinum (AAP) and its subsidiary, Rustenburg Platinum Mines Limited (RPM), declaring that certain of AAP and RPM's "*Retained Operations*" fell under the purview of the Mine Health and Safety Act 29 of 1996, as amended (MHSA) as opposed to the Occupational Health and Safety Act 85 of 1993, as amended (OHS Act).

A number of interested parties were cited, namely the Minister of Minerals and Energy as well as the Minister of Employment and Labour, together with the relevant chief and principal inspectors, who all chose to abide with the decision of the court. The Association of Mineworkers and Construction Union did likewise, but the National Union of Mineworkers pinned its colours to UASA's mast.

The retained operations comprised certain processing activities, which included certain smelters, convertor plants, precious metal and base metal refineries. In the period 2016–2018, AAP sold particular mining rights to third parties but kept the retained operations, which had previously been "*coupled*" to those mining rights. Once the sale was complete, AAP and RPM applied the provisions of the OHS Act to the retained operations, as opposed to the MHSA. This sparked a controversy with UASA, which insisted that the provisions of the MHSA should continue to apply regardless of the disposal of those mining assets.

The Labour Court had to grapple not only with the question of whether the MHSA had continued application, but also whether the processing activities carried out by the retained operations constituted "*a mine*", "*mining area*" or "*works*" as defined by the MHSA.

Determining the scope of jurisdiction

UASA's primary contention was that the migration process undertaken by AAP and RPM from the MHSA to the OHS Act was not "*recognised by law*" and that the reach of the MHSA necessarily spread across all the retained operations because their respective activities were incidental or ancillary to mining. UASA contended that employees enjoy better protection under the MHSA and that the inspectorate under the MHSA has a "*better experience and competency*" than their counterparts under the OHS Act.

UASA argued that if AAP and RPM wanted to remove the retained operations from the scope of jurisdiction of the MHSA, then a substantive application for an exemption had to be launched in terms of the MHSA, and so neither AAP nor RPM could do so unilaterally. UASA further argued that AAP and RPM were seeking to escape the more onerous provisions of the MHSA in favour of the OHS Act, an argument that AAP and RPM rightly disputed.

AAP and RPM argued that a distinction had to be drawn between mining operations and processing operations, where they had always applied the MHSA to the relevant mines and processing operations, but not after the sale of the underlying mining rights as they were no longer the recognised mining rights holders thereof. AAP and RPM argued that the retained operations, being processing

Determining whether the OHS Act or MHSA's safety legislation applies to processing activities

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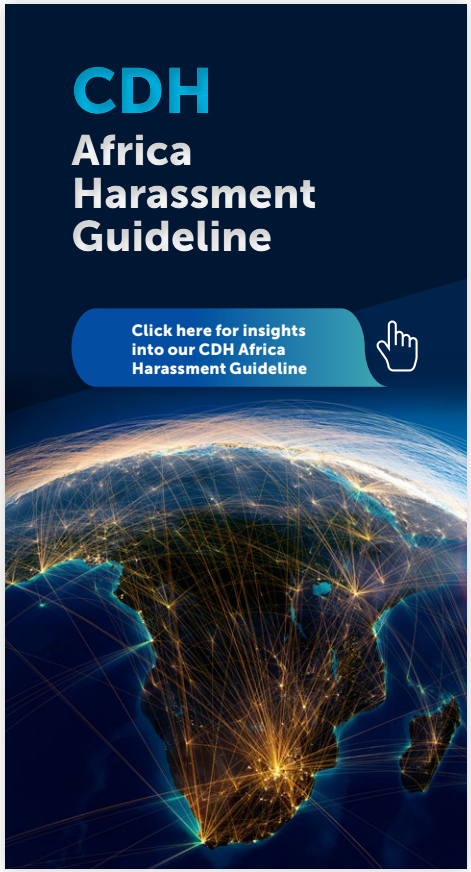

activities, were of a *"non-mining"* nature and were not taking place within the footprint of any mining right held by them. It necessarily meant that such processing activities did not require either of them to hold a mining right.

The Labour Court noted that UASA was under a misconception that RPM was purchasing ore from the third parties for processing and smelting at the retained operations when in fact the metal concentrate purchased by RPM had already undergone a *"multi-step concentrator process at mine level"*. Concentrate is not a mineral that naturally occurs in the earth. Processing activities produce a separate and distinct product that was not as a result of AAP or RPM conducting mining activities.

The Labour Court considered the requirements for a declaratory order, namely a live dispute that must be resolved over the existence or otherwise of a legal right or entitlement. Declaratory relief will not be awarded if what is sought amounts to a court dispensing advice to the parties.

Clarifying statutory definitions

The Labour Court carefully unpacked the statutory definitions of *"a mine"* and *"incidental mining activities"* in terms of various pieces of prevailing legislation. This was necessary given that the OHS Act does not apply to *"a mine"* or *"mining area"* or *"works"*. The court found that neither AAP nor RPM were conducting mining *per se* as the third parties that had purchased the mining rights had become the rightful holders of the mining rights to conduct the extraction of ore. There cannot be overlapping rights in that regard as this would be an absurdity.

A *"mining area"* is not necessarily a mine, because it needs to be a place where a mineral deposit is being extracted, won and exploited. This did not happen where the only activities embarked upon by AAP and RPM were of a processing nature. The Labour Court also found that the retained operations did not constitute *"incidental mining activities"* to the third parties' mining operations as the retained operations were separate and distinct activities independent of such third parties' mining operations.

UASA's contention that AAP and RPM should have sought an exemption from the MHSA did not have merit where the Labour Court found that the activities undertaken by the retained operations did not constitute mining or incidental mining activities and hence the MHSA did not apply.

The Labour Court dismissed UASA's application with costs. An important aspect which influenced the adverse costs order was UASA's participation in similar litigation between the parties in a different forum, the High Court, concerning the same or similar relief.

Fiona Leppan, Kgodisho Phashe and Biron Madisa

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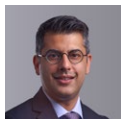

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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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