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THE JUDICIARY · REPUBLIC OF SOUTH AFRICA ·

THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA86/22

In the matter between:

BERNADETTE ENEVER **Appellant**

and

BARLOWORLD EQUIPMENT SOUTH AFRICA,
A DIVISION OF BARLOWORLD SOUTH AFRICA (PTY) LTD **Respondent**

Heard: **01 November 2023**

Delivered: **23 April 2024**

Coram: **Waglay JP, Mlambo JA *et* Davis JA**

JUDGMENT

MLAMBO, JA

Introduction

[1] This is an appeal from the Labour Court which confirmed the fairness of the Appellant's dismissal after she tested positive for cannabis.

[2] The Appellant is Bernadette Enever, who was dismissed for testing non-negative for cannabis while on duty during a routine medical check. The Respondent is Barloworld Equipment, a division of Barloworld South Africa

(Pty) Ltd, a private company whose core business includes the provision and servicing of earthmoving equipment and power systems in the mining, civil engineering and related sectors.

Issue

[3] As will be evident from the background that follows, the main issue, as I see it, is the effect of the Constitutional Court's decision 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*[1](*Prince*), on workplace discipline, following a positive cannabis test. In that decision, the criminal prohibition against adults cultivating, possessing and using cannabis in the privacy of their homes was declared unconstitutional.

Background

[4] In July 2012, the Appellant had her employment contract transferred to the Respondent in terms of section 197 of the Labour Relations Act[2] (LRA). The result of this was that her employment with the Respondent was deemed to have begun on 11 April 2007, the date on which her contract with the previous employer began. Her employment at the time of the transfer was as an office manager. She was then promoted a number of times until her position as category analyst which she held at the time of her dismissal.

[5] The Respondent has an "Employee Policy Handbook" which was accepted and signed by the Appellant on 12 November 2012. In terms of item 4 under the heading "Conditions of Employment" it explicitly states that the Respondent may require their employees to undergo medical examinations during the course of their employment. Additionally, under item 10.7, it forbids the use and possession of alcohol while also prohibiting access to the workplace for anyone

[1] [2018] ZACC 30; 2018 (10) BCLR 1220 (CC); 2018 (6) SA 393 (CC); 2019 (1) SACR 14 (CC).
[2] Act 66 of 1995, as amended. In terms of this section, if a company is acquired by another, then the employment contracts of the employees at the acquired company are automatically transferred to those of the acquiring company.

under the influence of alcohol and/or drugs. It incorporates the Respondent's Alcohol and Substance Abuse Policy (policy) in this regard.

[6] The policy has a zero-tolerance approach to the possession and consumption of drugs and alcohol in the workplace. For drug testing, there is random, voluntary and scheduled testing. Testing is carried out by an occupational health practitioner during annual medicals; as part of pre-employment tests; after incidents in the workplace; where there is reason for suspicion; when an employee returns to work after a period of absence exceeding 14 days; and if use or possession is disclosed. Should an employee return a positive or non-negative result then it will be subjected to a confirmatory test.

[7] Where the confirmatory test result is also positive or non-negative, then the employee is sent home for a period of seven days, and they will be re-tested once they return after that period. This process will be repeated until the employee tests negative. During the time at home, the employee must use any remaining annual leave they may have, and if they do not have any, then they are placed on forced unpaid leave. Following a positive test, disciplinary action follows in line with the Respondent's zero-tolerance approach to the possession and use of alcohol and drugs in the workplace.

[8] On 18 April 2019 and in response to the Constitutional Court's decision in *Prince*[3] handed down on 18 September 2018, the Respondent sent out a document titled "*Cannabis is strictly prohibited in the Workplace*". In it, they state that while cannabis use was decriminalised for adults in the privacy of their homes, the decision would not have any bearing on the zero-tolerance policy regarding the possession and use of cannabis because the workplace was not a private space.

[9] From May 2012, the Appellant's general practitioner prescribed her medication for pain and sleep due to her severe anxiety. However, she suffered from side-effects from the prescribed medication. After the decriminalisation judgment in *Prince*[4], she began using cannabis which she says eventually helped reduce

[3] *Prince* above n 1.
[4] Id.

her reliance on the prescription medication. In essence, she says she saw improved relief from cannabis-based products, without any of the side effects. She says that she smokes a rolled-up cannabis cigarette (i.e. a "joint") every night and on weekends, along with daily use of cannabis-based products like cannabis oil.

[10] On 29 January 2020, in order for the Appellant to regain biometric access to the workplace,[5] she was required to undergo a medical test, which included a urine test. The test results came back positive for cannabis because, as shown above, the Appellant is a regular user of cannabis. She was denied access and told to go home and return after seven days. This happened on four further occasions being 5, 12, 20 and 27 February 2020, with all the results coming back positive because the Appellant did not stop using cannabis.

[11] A notice of disciplinary action followed on 25 February 2020 and the Appellant pleaded guilty on 28 February 2020. In mitigation, she spoke about the benefits she has seen from using cannabis, most especially how she has less anxiety, better sleep and is no longer reliant on the side-effect causing prescription medication. Her access to the workplace was denied and she was told that she would not be able to return until she tested negative. During this period, her attorneys advised her that the Respondent's policy was discriminatory and unfair because it differentiated between cannabis and alcohol users, and they even offered to help the Respondent update it at no cost. This was rejected by the Respondent who denied the assertion that their policy discriminated against cannabis users.

[12] The Appellant did not test negative during the period at home and on 30 April 2020, the outcome of her enquiry was delivered where she was summarily dismissed. While the Respondent's initiator had requested the sanction to be a final written warning, the chairperson found that this was futile because the Appellant made it clear that she would not stop using cannabis as it was her right to do so. It was accepted by the Respondent that, at the time of her testing, she was not impaired in the performance of any of her duties or suspected of

[5] Presumably because she returned to the workplace after a period exceeding 14 days following the Festive Season, see para 6 above.

being intoxicated, that she worked in an office without operating dangerous machinery nor that she was required to drive for the Respondent.

[13] The Appellant took the view that she was unfairly dismissed and referred a dispute to the CCMA. However, the conciliation did not take place as a result of the COVID-19 pandemic and it appears that no certificate of non-resolution was issued, despite the Appellant demanding it.[6] The Appellant then approached the Labour Court.

In the Labour Court

[14] The dispute in the Labour Court turned on four questions: whether there was differentiation between the Appellant and other employees regarding the policy; whether there was a direct causal link between her positive test and dismissal, thus constituting an act of discrimination against her based on spirituality, conscience, belief or an arbitrary ground; whether the policies were unfair and discriminatory; and whether the Respondent impaired the Appellant's dignity by adopting an insulting, degrading and humiliating approach.

[15] As to the differentiation, it found that the evidence before it showed that the policy was consistently applied to all employees in that any employee who tested positive for alcohol or other substances was immediately declared unfit for work, denied access to the workplace and sent home. They then had to undergo a "clean up" process and get re-tested weekly, with their leave being used or the employee being placed on unpaid leave during that period. In this case, the Appellant was treated the same way under the policy as other employees who tested positive and no evidence was presented showing any employee testing positive who was treated differently.

[16] It concluded on this issue that the policy creates a rule that applies consistently across the board and that differentiating between the Appellant and other employees regarding enforcement of the policy could set a dangerous

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[6] Section 135(5)*(a)* of the LRA provides:
'(5) When conciliation has failed, or at the end of the 30-day period or any further period agreed between the parties—
(a) the commissioner must issue a certificate stating whether or not the dispute has been resolved...'

precedent. Furthermore that the fact that the Appellant felt her cannabis use was medicinal does not mean the policy should not apply to her because she did not provide medical evidence. Thus, the policy had to be applied consistently, regardless of the rationale behind the positive test.

[17] As to the second issue, the Respondent conceded that there was a direct causal connection between the Appellant's positive cannabis test and her dismissal. The court *a quo* found that the true reason for her dismissal was not in dispute – it was the result of testing positive for cannabis, in breach of the policy. A secondary reason was that the Appellant stated she would not stop using cannabis and that this refusal suggested a final written warning would be ineffective. Thus, while the positive test triggered the process, her defiance of the policy was found to be what led the chairperson to conclude that dismissal was the appropriate sanction.

[18] On the third issue, it found that the Appellant had to show that the policy differentiates between employees, but her submissions were rejected because the policy was consistently applied to all employees testing positive. She failed to properly present evidence of discrimination or explain how the policy was discriminatory. Moreover, her alleged medicinal use was raised late, after being caught and without medical evidence to back it up. In the circumstances, her recreational use was found to contradict and diminish her medicinal argument. The policy was thus found to serve a legitimate safety purpose and it was rationally applied.

[19] As to her argument of an automatically unfair dismissal, the case was found to be of misconduct rather than discrimination because even though the Appellant was aware of the policy, she still breached it. Thus, the Respondent had valid reasons to dismiss her based on her wilful violation of the policy. The Constitutional Court's decision to decriminalise the use and possession of cannabis[7] was found not to have made any difference to the consequences of testing positive in the workplace, even in circumstances where an employee

[7] *Prince* above n 1.

smoked at home but the cannabis remained in their system even after they were no longer "*stoned*".

In this Court

[20] The Appellant raises four issues for determination in this Court. Firstly, whether the Respondent differentiated between her and its other employees. Secondly, whether there is a direct causal connection between her testing positive for cannabis and her dismissal, which constitutes an act of discrimination against her based on her spirituality, conscience and belief, alternatively, on an arbitrary ground in terms of section 187(1)*(f)* of the LRA. Thirdly, whether the Respondent's Alcohol Abuse and Cannabis policies are unfair and discriminatory. Lastly, whether the approach adopted by the Respondent was insulting, degrading and humiliating and an impairment of her dignity as a result of unfair discrimination.

[21] The direct causal connection between the positive test and the dismissal is accepted by the Respondent. I do not see this point assisting the resolution of the issues and consequently, I will say nothing further about this.

Unfair discrimination

[22] Section 6(1) of the Employment Equity Act[8] (EEA) prohibits unfair discrimination in the workplace.[9] As correctly applied by the court *a quo*, the test for discrimination is the well-established test set out in *Harksen v Lane NO and Others*[10] (*Harksen*). In *Mbana v Shepstone & Wylie*[11] (*Mabena*), in considering *Harksen*, the Constitutional Court said that "*[a]part from permitting differentiation on the basis of the internal requirements of a job ... the test for unfair discrimination in the context of labour law is comparable to that laid down*

[8] Act 55 of 1998.

[9] It provides at section 6(1) that:

'(1) No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, 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.'

[10] [1997] ZACC 12; 1997 (11) BCLR 1489; 1998 (1) SA 300.

[11] [2015] ZACC 11; 2015 (6) BCLR 693 (CC); (2015) 36 ILJ 1805 (CC).

by [the Constitutional] Court in Harksen".[12] It then summarised the three legs of the test as follows:

> 'The first step is to establish whether the respondent's policy differentiates between people. The second step entails establishing whether that differentiation amounts to discrimination. The third step involves determining whether the discrimination is unfair. If the discrimination is based on any of the listed grounds in section 9 of the Constitution, it is presumed to be unfair.'[13] (Footnotes omitted.)

[23] Section 11 of the EEA[14] creates a presumption that discrimination based on a listed ground is unfair, and places an onus of justifying or showing that it did not occur on the employer. If the discrimination alleged is based on an unlisted or arbitrary ground, then it is for the complainant to prove irrationality, discrimination and unfairness on a ground that impacts human dignity.[15] The Appellant bases her claims on the listed grounds of her conscience, belief and religion, and alternatively on the arbitrary ground of a violation of her right as an adult to use cannabis in private.

[24] I agree with the court *a quo* that there was no discrimination based on any listed ground. In this Court, she raises discrimination on the listed grounds of conscience, belief and spirituality. The Respondent argues that "spirituality" is not a listed ground and that the Appellant should not be permitted to raise it in this appeal under the guise of "religion" which, although is a listed ground, was not pleaded.

[25] This argument must be rejected. Although the Appellant did not explicitly plead the term "religion", the substance of her pleadings makes it clear that spirituality

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[12] Id at para 25.
[13] Id at para 26.
[14] It provides:
'(1) If unfair discrimination is alleged on a ground listed in section 6 (1), the employer against whom the allegation is made must prove, on a balance of probabilities, that such discrimination—
(a) did not take place as alleged; or
(b) is rational and not unfair, or is otherwise justifiable.
(2) If unfair discrimination is alleged on an arbitrary ground, the complainant must prove, on a balance of probabilities, that—
(a) the conduct complained of is not rational;
(b) the conduct complained of amounts to discrimination; and
(c) the discrimination is unfair.'
[15] *Mbana* above at para 27.

and religion were used interchangeably.[16] While speaking of spirituality, she did so in the context of feeling closer to God. For the purposes of this appeal, I will accept spirituality as being synonymous with the listed ground of religion.[17] In any event, this too does not assist the Appellant. The link between the dismissal and cannabis use was not because her religious or spiritual views caused her to smoke cannabis in that she admitted that she smoked it recreationally as well. This is enough to show that there was no discrimination on religious grounds. The conclusion that the Appellant's recreational use rendered this argument a non-starter is correct and the same goes for the arguments on conscience and belief.

[26] The argument that the policy differentiates against alcohol and cannabis users based on an arbitrary ground requires consideration. Quite plainly, in terms of the policy, if an employee is tested and found to have alcohol or cannabis in their blood while at work, they will be sent home. The same would happen should they be suspected of being intoxicated, tested and found positive, or found in possession of either. The medical test given to the Appellant is routinely given to other employees and thus she was not differentiated from alcohol users when the results came back positive and she was sent home to get clean – that is what the policy entails for both substances. During cross-examination, she accepted that the Respondent's zero-tolerance policy meant that use and not intoxication was the measure used for determining a breach of the policy. There is no differentiation for any of those processes.

[27] The exception for alcohol users being allowed to consume alcohol up to the limit of 0,05 gram per 100 millilitres as set out in section 65(2) of the National

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[16] It has long been held that pleadings are made for the court and not the court for pleadings, giving courts a discretion on whether to entertain a matter that is not explicitly pleaded but identifiable in the papers. See in this regard: *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd and Others* [2022] ZACC 44; 2023 (5) BCLR 527 (CC); 2023 (4) SA 325 (CC) at para 277; *Sibiya v South African Police Service* [2022] ZALAC 88; (2022) 43 ILJ 1805 (LAC); [2022] 9 BLLR 822 (LAC) at paras 30 - 31: *Butters v Mncora* [2014] ZASCA 86; [2014] 3 All SA 259 (SCA) at para 9.

[17] During the trial within the context of Ms Enever speaking about how cannabis made her feel closer to God, the following exchange which was not challenged occurred during examination in chief:

'MR LENNOX: If it is put to you that this is not a conventional religious outlook, how would you respond?

MS ENEVER: Most certainly my religious outlook is not mainstream. I think it is more…' (My emphasis.)

Road Traffic Act[18] while driving the Respondent's vehicles during working hours without sanction, does not help the Appellant. The blood-alcohol level allowed on public and national roads is part of explicit legislation that the Respondent cannot ignore. There is no similar legislation for cannabis users. Under cross-examination, Ms Panday[19] said if an employee arrived at work with an alcohol concentration in their body that is under the legal limit, but above 0%, they would be subjected to the same disciplinary process. However, their policy did not apply on public roads, they could only take action when those employees were on their premises.[20]

[28] So too does the policy give the CEO or directors powers to allow the consumption of alcohol on business premises after working hours, or in exceptional circumstances, during working hours. The Respondent says their stated purpose is to foster social interaction amongst employees, and that it is only in exceptional circumstances that this would happen during working hours. These events are said to take place around once a year like year-end functions, which are held onsite because not every employee would have the transport to meet at a restaurant. Further, that employees drinking at the Respondent's social events must leave the premises as soon as the event ends. A problem raised by the Appellant is that persons who use cannabis are not afforded the same privilege or exception to consume cannabis at those same once-a-year events. While I am of the view that this shows differentiation, I accept that it is rational. Alcohol can be easily consumed at and bought for a company year-end event, while cannabis cannot. As things stand, it can only be consumed privately in one's home, and it is accepted that the workplace is a public space.

[29] The last exception concerning a re-test and medication is irrelevant because as established above, this case is being adjudicated on the Appellant's recreational use. The crux of the matter, as I see it, arises from the reason cannabis users are immediately sent home for a minimum of seven days.

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[18] Act 93 of 1996.

[19] The Respondent's Head: Ethics and Compliance, who was their sole witness during the trial.

[20] The policy provides that:
'This exception is only valid while driving on Public and National roads. A blood alcohol concentration of 0% is mandatory when driving company or private vehicles on either a customer or Barloworld Equipment premises. The mandatory 0% blood alcohol concentration will also be seen as the limit for all employees reporting for duty on either a customer site or Barloworld Equipment site.'

During the trial it further emerged that alcohol users who test positive can, and often return the next day to be re-tested, and as long as they don't consume alcohol on that day, they are effectively guaranteed to test negative on a breathalyser. If a cannabis user is re-tested the next day, they are likely to still test positive with a blood test, despite not consuming cannabis on the day they were sent home.

[30] The Respondent was well aware that the *Prince*[21] decision meant that adults could consume cannabis in the privacy of their homes, so it sent out a note alerting its employees that if they tested positive for cannabis, they would be dealt with in terms of its zero-tolerance policy against alcohol and substance abuse. For the Appellant to show that there was discrimination based on an arbitrary ground then she must show that there was an impairment to her human dignity in a comparable manner to discrimination based on the listed grounds.[22] An arbitrary ground is not merely any ground that has not been listed. This Court has settled the debate on whether a wide or narrow interpretation should be given to the meaning of arbitrary ground. It endorsed the narrow interpretation as a measure of limiting every and any claim related to labour relations being raised as unfair discrimination, stating:

> 'The essential point is that the phrase to which meaning must be attributed is " ... any other arbitrary ground" and not the word "arbitrary," free from its context and function. In this context the word "arbitrary" is not a synonym for the word "capricious." The injunction in section 6(1) is to outlaw, not "arbitrariness", but rather to outlaw unfair discrimination that is rooted in "another" arbitrary ground (the syntax of " ... any other ..." cannot be understood as otherwise than looking back at what has been stipulated in the text that precedes it). Capriciousness, by definition, is bereft of a rationale, but unfair discrimination on a "ground" must have a rationale, albeit one that is proscribed. The glue that holds the listed grounds together is the *grundnorm* of Human Dignity.'[23]

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[21] *Prince* above.
[22] *Naidoo and Others v Parliament of the Republic of South Africa* [2020] ZALAC 38; (2020) 41 (ILJ) 1931 (LAC); [2020] 10 BLLR 1009 (LAC) at para 29.
[23] Id at para 26. See also *Ndudula and Others v Metrorail PRASA (Western Cape)* [2017] ZALCCT 12; [2017] 7 BLLR 706 (LC); (2017) 38 ILJ 2565 (LC) at paras 71 - 73.

[31] More recently in *Tshazibane v Montego Pet Nutrition and Others*,[24] the Labour Court having examined the relevant authorities, reached a similar conclusion, holding:

> 'To summarise, where reliance is placed on an arbitrary ground a complainant in an unfair discrimination claim is required to establish that [they have] been the object of unequal treatment based on attributes and characteristics [they] either possess or with which [they are] associated and which have the potential to sully or diminish [their] intrinsic humanity and that of others in [their] situation. It is the impact on the complainant which is decisive.'[25] (Footnotes omitted.)

[32] The Appellant must thus show that the discrimination she alleges impacted her dignity in a manner comparable to how dignity is impacted when discrimination is on a listed ground. The Appellant submits that the discrimination she faced as a cannabis user seriously infringed on her dignity by violating her right to privacy and subjecting her to a humiliating process that portrayed her as a "junkie". This is based on the common cause facts that when testing positive, the Appellant was not impaired in the performance of any of her duties. It is common cause that the appellant worked in an office and her job did not entail operating dangerous machinery. She was also not required to drive for the Respondent or perform any duty where impairment from cannabis would present a risk to her or others in the workplace.

[33] The Appellant says her use of cannabis in the evenings and on weekends in the privacy of her home is her right and that the policy violates it. The court *a quo*, in agreement with the Respondent, rejected this argument on the basis that *Prince* addressed criminality and not labour relations. Indeed, item 10 of the order explicitly addresses this point. Zondo ACJ (as he then was) ordered:

> 10. It is declared that, with effect from the date of the handing down of this judgment, the provisions of sections 4(b) of the Drugs and Drug Trafficking Act ... read with Part III of Schedule 2 of that Act and ... section 22A(9)(a)(i) of the Medicines and Related Substances Control Act ... read with Schedule 7 of GN R509 of 2003 published in terms of

[24] [2022] ZALCPE 19; (2022) 43 ILJ 2610 (LC); [2022] 12 BLLR 1151 (LC).
[25] Id at para 5.

> section 22A(2) of that Act are inconsistent with right to privacy entrenched in section 14 of the Constitution and, therefore, invalid to the extent that they make the use or possession of cannabis in private by an adult person for his or her own consumption in private a criminal offence.'[26] (Own emphasis.)

[34] While I agree that *Prince* did not involve labour matters, the significance of the decision implicates the nature of the right to privacy, which all employees have. An employer cannot disregard an employee's privacy when implementing or acting in terms of its policies. In *Prince*, the Constitutional Court pronounced upon this right.[27] Clearly, an objective consideration of the Respondent's policy is that any employee who works for it cannot smoke cannabis *at all*. Employers are not completely barred from asking their employees to completely refrain from certain conduct. Policies against drug and alcohol use are standard and are aimed at complying with section 8(1) of the Occupational Health and Safety Act.[28] It is on this basis that the Respondent justifies its violation of the Appellant's right to limiting what she does in her own private time outside the workplace.

[35] I do not find this a justifiable reason for the infringement of the Appellant's right to privacy. In *Case and Another v Minister of Safety and Security and Others, Curtis v Minister of Safety and Security and Others*,[29] the Constitutional Court invalidated section 2 of the now repealed Indecent or Obscene Photographic Matter Act.[30] That section had prohibited the private possession by any person, including adults, of "indecent or obscene photographic matter". Langa J said:

> 'With regard to the first question [the constitutionality of the provision creating the offence] and having regard to the definition which is couched in very wide terms, I am satisfied that the prohibition as framed is unconstitutional. I am in

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[26] *Prince* above at para 129.
[27] Id at paras 43 - 57.
[28] Act 85 of 1993. The section provides: "*[e]very employer shall provide and maintain, as far as is reasonably practicable, a working environment that is safe and without risk to the health of his employees*". This must be read with regulation 2A which reads:
'Subject to the provisions of subregulation (3), an employer or a user, as the case may be, shall not permit any person who is or who appears to be under the influence of intoxicating liquor or drugs, to enter or remain at a workplace.'
[29] [1996] ZACC 7; 1996 (3) SA 617; 1996 (5) BCLR 608 (*Case*).
[30] Act 37 of 1967. This Act was repealed by section 33 of the Films and Publications Act 65 of 1996.

> respectful agreement with the reasons so succinctly expressed by Didcott J, more particularly that a ban on possession of the material hit by section 2(1) of the Act infringes the right to personal privacy guaranteed by section 13 of the Constitution. The terms of the provision, read with the definition, are unquestionably overbroad and have the effect of sanctioning the unwarranted and unjustifiable invasion of the right to personal privacy regardless of the nature of the material possessed.'[31] (Footnote omitted and emphasis added.)

[36] The principle that overbroad, unwarranted and unjustifiable invasions of the right to privacy being unconstitutional is applicable to this case. In *Bernstein and Others v Bester NO and Others*,[32] the Constitutional Court quoted the Council of Europe on the scope of the right to privacy consisting of–

> '...essentially in the right to live one's own life with a minimum of interference. It concerns private, family and home life, physical and moral integrity, honour and reputation, avoidance of being placed in a false light, non-revelation of irrelevant and embarrassing facts, unauthorised publication of private photographs, protection from disclosure of information given or received by the individual confidentially.'[33]

[37] Noting the importance of the right to privacy and its association with the right to dignity, in *AmaBhungane Centre for Investigative Journalism NPC and Another v Minister of Justice and Correctional Services and Others; Minister of Police v AmaBhungane Centre for Investigative Journalism NPC and Others*,[34] Madlanga J for the majority of the Constitutional Court said:

> 'To this, one may add the fact that the invasion of an individual's privacy infringes the individual's cognate right to dignity, a right so important that it permeates virtually all other fundamental rights. About its importance, Ackermann J said "the right to dignity is a cornerstone of our Constitution". And in *Hugo* this Court quoted the words of L'Heureux-Dube J with approval. They are that "inherent human dignity is at the heart of individual rights in a free and democratic society.'[35] (Footnotes omitted.)

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[31] *Case* above at para 97.
[32] [1996] ZACC 2; 1996 (4) BCLR 449; 1996 (2) SA 751.
[33] Id at para 73.
[34] [2021] ZACC 3; 2021 (4) BCLR 349 (CC); 2021 (3) SA 246 (CC).
[35] Id at para 28.

[38] Within this context of the right to privacy, I can think of no more an irrelevant fact to the employer in this case than the Appellant enjoying a "joint" during her evenings in the privacy of her home. The use of a blood test alone without proof of impairment on the work premises is a violation of the Appellant's dignity and privacy. This as the policy prevents her from engaging in conduct that is of no effect to her employer, yet her employer is able to force her to choose between her job and the exercise of her right to consume cannabis. The Respondent has not shown that she was "stoned" or intoxicated at work as a result, that her work was adversely affected or that she created an unsafe working environment for herself or fellow employees. The Respondent would not have known – apart from the Appellant volunteering the information – that she smoked cannabis and the reason therefor.

[39] There are only a few judgments from this Court and the Labour Court regarding cannabis intoxication, but I am of the view that the principles from judgments dealing with zero-tolerance policies for alcohol intoxication are able to offer guidance and are similarly applicable to cannabis.

[40] In *National Union of Metal Workers of South Africa obo Cloete v Trentyre (Pty) Ltd and Others*,[36] Zondo JP (as he then was) said the following of zero-tolerance policies:

> 'In this regard it needs to be pointed out that it is not our law that the mere fact that an employee is found to be under the influence of liquor in the workplace on a particular day means that the only appropriate sanction in every case is dismissal.'[37]

While I accept that the Respondent requested a final written warning from the chairperson of the disciplinary enquiry, the effect of their policy is that their employees have to pick between cannabis or their jobs because the Appellant would continuously test positive.

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[36] [2008] ZALAC 18; [2016] JOL 35706 (LAC) (*Trentyre*).
[37] Id at para 2.

[41] In *Transnet Freight Rail v Transnet Bargaining Council and Others*,[38] the dismissal of a yard official, who marshalled and coupled trains was found to be fair after he tested positive for alcohol. Of importance in that case is that safety was a critical consideration and the employee was already on a written warning. In *Taxi-Trucks Parcel Express (Pty) Ltd v National Bargaining Council for the Road Freight Industry and Others*,[39] it was found in favour of the employee that dismissal was harsh and unfair. In this case, the employee was a general worker who was loading tyres onto trucks. After being suspected of being intoxicated, a blood test confirmed the presence of alcohol in his blood. In *Tosca Labs v Commission for Conciliation, Mediation and Arbitration and others*,[40] the Labour Court upheld a decision by the CCMA which found the dismissal of a concrete technician for testing positive for alcohol to be unfair. The employee in question was breathalysed after an altercation with a member of the public, and the test came back positive even though there was no evidence of intoxication. The CCMA and Labour Court upheld the unfairness of the decision to dismiss solely based on a breathalyser test.

[42] Underpinning these decisions is the principle that intoxication is a matter of degree, which this Court explained in *Shoprite Checkers (Pty) Ltd v Tokiso Dispute Settlement and Others*[41] as follows:

> '[17] A dismissal will only be fair if it is procedurally and substantively fair. A commissioner of the CCMA or other arbitrator is the initial and primary judge of whether a decision is fair. As the code of good practice enjoins, commissioners will accept a zero tolerance if the circumstances of the case warrant the employer adopting such an approach.
>
> [18] <u>But the law does not allow an employer to adopt a zero tolerance approach for all infractions, regardless of its appropriateness or proportionality to the offence, and then expect a commissioner to fall in line with such an approach</u>. The touchstone of the law of dismissal is fairness and an employer cannot contract out of it or fashion, as if it were, a "no go area" for commissioners. A zero tolerance policy would

[38] [2011] ZALCJHB 15; (2011) 32 ILJ 1766 (LC); [2011] 6 BLLR 594 (LC).
[39] [2012] ZALCCT 18; [2012] 12 BLLR 1301 (LC); (2012) 33 ILJ 2985 (LC).
[40] [2011] ZALCPE 23; (2012) 33 ILJ 1738 (LC); [2012] 5 BLLR 529 (LC).
[41] [2015] ZALAC 23; [2015] 9 BLLR 887 (LAC); (2015) 36 ILJ 2273 (LAC).

be appropriate where, for example, the stock is gold but it would not necessarily be appropriate where an employee of the same employer removes a crust of bread otherwise designed for the refuse bin.'[42] (Citation omitted and emphasis added.)

[43] This matter could well have been different for an employee who was found to be "stoned," intoxicated or impaired during work hours on the premises or if it was an employee who operates or works with heavy and dangerous machinery. Indeed in *Marasi v Petroleum, Oil and Gas Corporation of South Africa (SOC) Ltd*,[43] the Labour Court dismissed an unfair discrimination claim against an employee working as a rock drill operator at a petro-chemical plant who tested positive for cannabis that he had smoked outside the workplace. While in *SGB Cape Octorex (Pty) Ltd v Metal and Engineering Industries Bargaining Council and Others*,[44] this court upheld a dismissal for an employee who was smoking cannabis while on duty.

[44] Although no medical evidence was led, the Respondent conceded that, unlike alcohol, cannabis stays in the blood system for longer than is the case with alcohol. This underscores the point that a mere positive test for cannabis does not address the sobriety of the user or indicate whether they are impaired from carrying out their duties. A further consideration, as pointed out above, is that the Appellant does not operate or work with any heavy or dangerous machinery. Her job is plainly an office desk job. I do not accept that because the Respondent has a generally dangerous workplace the rule is justified or that, that is an inherent requirement of the job.

[45] The Respondent has not shown a similar inherent requirement. In *Department of Correctional Services and Another v Police and Prisons Civil Rights Union (POPCRU) and Others*,[45] the Supreme Court of Appeal established that:

'A policy is not justified if it restricts a practice of religious belief – and by

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[42] Id at paras 17-18.
[43] [2023] ZALCCT 38; [2023] 10 BLLR 1043 (LC); (2023) 44 ILJ 2261 (LC). A petition for leave to appeal in this matter has been made to this Court.
[44] [2022] ZALAC 118; (2023) 44 ILJ 179 (LAC); [2023] 2 BLLR 125 (LAC).
[45] [2013] ZASCA 40; (2013) 34 ILJ 1375 (SCA); 2013 (4) SA 176 (SCA); [2013] 7 BLLR 639 (SCA); 2013 (7) BCLR 809 (SCA); [2013] 3 All SA 1 (SCA).

> necessary extension, a cultural belief – that does not affect an employee's ability to perform his duties, nor jeopardise the safety of the public or other employees, nor cause undue hardship to the employer in a practical sense. No rational connection was established between purported purpose of the discrimination and the measure taken. Neither was it shown that the department would suffer an unreasonable burden if it had exempted the respondents.'[46] (Footnote omitted.)

[46] I find no reason why this reasoning cannot apply to unlisted grounds. During the trial, Ms Panday conceded that neither she nor the Appellant are required to wear PPE while at their desks. This is only a requirement when interacting with those areas of the workplace that are dangerous. The Appellant does not interact with those areas. The Respondent is thus faced with a situation where in one scenario, the Appellant smokes her joint at home, sobers up, and then in the morning goes to work where she does her office job ably and competently without posing a safety risk to herself or her fellow employees. In the alternative scenario, the Appellant does not consume any cannabis, and would thus be sober, she would then go to work in the morning where she would do her office job ably and competently without posing a safety risk to herself or her fellow employees. This shows that not smoking cannabis is not an inherent requirement of the Appellant's job in that in both cases she is able to competently perform her work obligations. The smoking of cannabis at home cannot be considered, in the context of the facts of this case, to impair on her ability to perform her designated job.

[47] It may be argued that alcohol intake also takes place in the privacy of a home, but the similarity ends there. Lack of impairment and working in a safe zone, for example, are relevant factors. A further relevant consideration is the quick dissipation of alcohol from the bloodstream. This, on its own shows the arbitrariness in the zero-tolerance application of the policy. This means one employee may imbibe alcohol in her home and have a negative test result the following day but the employee who enjoyed a joint the previous night would test positive. Even more so is the fact that an employee who tests positive for

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[46] Id at para 25.

alcohol and is sent home is guaranteed a negative test when re-tested on returning to work. Not so with employees who test positive for cannabis, in that they would still test positive on their return to work due to the longevity thereof, even if the employee abstained from using it on the day he or she is sent home. There is, in my view, no rational link between its zero-tolerance policy against personal cannabis use by all its employees in the privacy of their homes and the maintenance of safety in its workplace. I must emphasise at this point that this is not a radical re-statement of the law because this Court set out this position as far back as 1997, where in *Tanker Services (Pty) Limited v Magudulela*,[47] it stated that–

> 'The difficulty with proving the charge brought against the respondent is that intoxication is a matter of degree. The respondent would only be "under the influence of alcohol" if he was no longer able to perform the tasks entrusted to him, and particularly the driving of a heavy vehicle, with the skill expected of a sober person.
>
> Whether an employee is, by reason of the consumption of intoxicating liquor, unable to perform a task entrusted to him by an employer must depend on the nature of the task.'[48] (Own emphasis.)

[48] In cases where alcohol intoxication has been suspected, a breathalyser is not always conclusive on its own to justify dismissal.[49] Instead, it can be coupled with other evidence such as the employee having slurred speech; impaired coordination; loudness; and all the other known symptoms of alcohol intoxication.[50] A similar jurisprudence on the known symptoms of cannabis and their effect compared to the duties associated with the nature of the job should be allowed to develop. All this will depend – in addition to the test results (where available) – on the facts of each case and eyewitness accounts. This is not to

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[47] [1997] 12 BLLR 1552 (LAC).
[48] Id at 1553 G-I.
[49] *Palaborwa Mining Company Ltd v Cheetham and Others* [2007] ZALAC 11; [2008] 6 BLLR 553 (LAC); (2008) 29 ILJ 306 (LAC); *Mondi Paper Co v Dlamini* [1996] 9 BLLR 1109 (LAC).
[50] *Trentyre* above; *XStrata Coal South Africa v Commission for Conciliation Mediation And Arbitration and Others* [2014] ZALCJHB 14.

say that test results on their own are always insufficient, but that the nature of the job determines the amount of evidence required to justify dismissal.[51]

[49] I am aware that workplaces have different configurations and guided by this Court's previous decisions, the conclusion I have reached is merely a fact-specific one based on this case and the nature of the Appellant's job. It does not extend to every one of the Respondent's employees, some of whom perform drastically more dangerous jobs, and for whom not being able to smoke cannabis at all – should they wish to continue their employment with the Appellant – may be more justified.

[50] The Respondent was not convincing in its attempt to counter this position. It says that the policy must be uniform and enforced without exceptions because it has over 3 600 employees in multiple countries and that it cannot create specialised policies for everyone. Further, only around 10% of them do not "*work in areas where there is a lower risk of machinery either being manufactured, maintained, repaired or just driven around*". The Constitutional Court in *Mbana*[52] gave guidance on what to make of an employer's resort to operational requirements to rationalise a policy. Having accepted that the differentiation was justified, it said:

> '[I]t must be stressed that an employer's business and operational needs will not simply be accepted on the employer's own say-so. It must be shown, objectively, that there are genuine and legitimate business and operational needs that justify the differential treatment of employees.'[53] (My emphasis.)

[51] The application of the LRA cannot yield to the operational convenience of an employer like the Respondent so it can have uniformity across the various countries it operates in. Employees in South Africa are governed by the LRA. Similarly, the mere assertion without evidence that flexibility in the policy's application would result in them having to make personalised policies for each employee should be rejected. This is not a collective labour relations issue, but a claim brought by an individual applicant against alleged unfair discrimination.

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[51] *Jet Demolition (Pty) Ltd v AMCU obo Sehoshe and Others* [2022] ZALCJHB 55 at para 52.
[52] *Mbana* above.
[53] Id at para 38.

The Appellant is not being done a favour when their employer is asked to show proof of intoxication in addition to a positive test due to the nature of her job. That is the position in South African law, not a benefit from her employer.

[52] I conclude that the Respondent's policy is overbroad and infringes the Appellant's right to privacy. I find that her treatment as someone who was "intoxicated" when in fact she was not, is unfair discrimination because it singles out cannabis users compared to alcohol users, for what they do at home, even in situations where their conduct carries no risk for the employer.

[53] Before dealing with the remedy, I must comment on the Appellant's assertion that the Respondent adopted an approach that was insulting, degrading and humiliating. It can hardly be said that the Respondent adopted such an approach. My finding above is consistent with an employer that was mistaken on the correct legal position rather than a malicious one. They followed a procedurally fair process and the decision, although substantively unfair, would have been fair if the legal position they adopted was the correct one.

Remedy

[54] The Appellant has proven unfair discrimination in terms of section 6(1) of the EEA and because this is the reason she was dismissed, her dismissal was automatically unfair in terms of section 187(1)*(f)* of the LRA. In the court *a quo,* she sought reinstatement and alternatively compensation. In this Court, she only sought compensation for 24 months calculated at R43 199.75 per month.

[55] The Appellant has brought this claim under both the LRA and the EEA, and both statutes allow this Court to grant compensation.[54] Compensation in terms of the LRA is limited and the limit depends on the reason for the unfairness of the dismissal. If a dismissal is procedurally or substantively unfair then compensation is limited to 12 months of the employee's remuneration on the date of dismissal.[55] If the dismissal was automatically unfair then compensation is limited to 24 months' remuneration.[56]

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[54] Section 193(1)*(c)* of the LRA and section 50(1)*(d)* read with section 50(2)*(a)* of the EEA.
[55] Section 194(1) of the LRA.
[56] Section 194(3) of the LRA.

[56] In *ARB Electrical Wholesalers (Pty) Ltd v Hibbert*[57] (*Hibbert*), this Court held that bringing a claim under both Acts based on the same conduct should not result in two separate amounts under each Act. The guiding principle is what would be just and equitable to remedy the harm to the appellant's dignity.[58] The factors to consider are similar to those in delict for the *actio iniuriarum*. They are not a closed list and were set out in *Minister for Justice and Constitutional Development and Another v Tshishonga*,[59] as follows:

> 'Factors regarded by the court as relevant to the assessment of damages generally included the nature and seriousness of the *iniuria*, the circumstances in which the infringement took place, the behaviour of the defendant (especially whether the motive was honourable or malicious), the extent of the plaintiff's humiliation or distress, the abuse of a relationship between the parties, and the attitude of the defendant after the *iniuria* had taken place.'[60]

[57] Further to this, the compensation granted is not to make up for the employee's lost job but to afford them relief to their injured dignity. In *Hibbert*,[61] this Court explained the *solatium* as follows:

> 'This monetary relief is referred to as a *solatium* and it constitutes a solace to provide satisfaction to an employee whose constitutionally protected right to fair labour practice has been violated. The *solatium* must be seen as a monetary offering or pacifier to satisfy the hurt feeling of the employee while at the same time penalising the employer. It is not however a token amount hence the need for it to be "just and equitable" and to this end salary is used as one of the tools to determine what is "just and equitable."'[62] (Footnotes omitted.)

[58] The Appellant seeks the maximum of 24 months compensation for an automatically unfair dismissal but neither made arguments for or against the amount. The Respondent used an invasive blood test to find evidence of what the Appellant did in the privacy of her home, then used that evidence to dismiss her in circumstances where that conduct posed no risk to it. This is a serious

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[57] [2015] ZALAC 34; [2015] 11 BLLR 1081 (LAC); (2015) 36 ILJ 2989 (LAC).
[58] Id at para 33.
[59] [2009] ZALAC 5; [2009] 9 BLLR 862 (LAC); (2009) 30 ILJ 1799 (LAC).
[60] Id at para 18.
[61] *Hibbert* above.
[62] Id at para 23.

infringement of the Appellant's right to privacy as it provides an employer with more private information about an employee's conduct than is necessary, in circumstances where there is no rational connection to workplace safety and the conduct undertaken by an employee in the privacy of their home.

[59] This however is mitigated by the circumstances in which the tests take place. It was an annual medical, and in any event, there are no equivalents to a breathalyser used in alcohol tests for cannabis. This places the employer in a difficult but not unreasonable position. Merely having a zero-tolerance policy on the basis of workplace safety does not give an employer the right to have a uniform policy that does not consider the nature of an employee's job and the environment the employer operates in. Despite pursuing the legitimate reason of workplace safety, the Respondent's insistence that testing positive for cannabis after a blood test was the same as testing positive for alcohol after a breathalyser and that sobriety at the time of the test was always of no relevance regardless of the nature of the employee's job, failed to adequately consider the position cannabis users have been placed in.

[60] This is shown in the impact on the Appellant. Ultimately, she lost her job, and what led to this was the employer forcing her to choose between her job and consuming cannabis in the privacy of her home. This is severe when considering that the Respondent has failed to show how her consuming cannabis in the type of job she performed increased the risk of occupational health and safety in the workplace.

[61] Considering all these factors, I award 24 months compensation to the Appellant because the Respondent made no effort to meaningfully consider workplace safety in light of cannabis use after the Constitutional Court's decision in *Prince*. All it did was maintain a zero-tolerance approach without showing how it has considered the risk that would be caused by any of its employees consuming cannabis.

[62] Whilst the appellant was successful, this is not a matter where costs should be awarded. The respondent applied a zero-tolerance policy without any overt

malice against the appellant. I see no reason why costs should be ordered in this matter.

[63] I therefore make the following order:

Order

1. The appeal is upheld.

2. The order of the Labour Court is set aside and replaced with an order that:

   "1. It is declared that the Respondent's Alcohol and Substance Abuse Policy is irrational and violates the right to privacy in section 14 of the Constitution, to the extent that it prohibits office-based employees that do not work with or within an environment that has, heavy, dangerous and similar equipment, from consuming cannabis in the privacy of their homes.

   2. It is declared that the Respondent subjected the Applicant to unfair discrimination in terms of section 6(1) of the Employment Equity Act 55 of 1998.

   3. It is declared that the Applicant's dismissal was automatically unfair in terms of section 187(1)*(f)* of the Labour Relations Act 66 of 1995, as amended.

   4. The Respondent is ordered to compensate the Applicant by paying her 24 months compensation calculated at R43 199.75 per month.

   5. There is no order as to costs."

3. Each party is to pay their own costs in this Court.

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MLAMBO JA

Waglay JP and Davis JA concur.

APPEARANCES:

FOR THE APPELLANT:	M.A. Lennox instructed by Schindlers Attorneys
FOR THE RESPONDENT:	H.C. Nieuwoudt instructed by Norton Rose Fulbright South Africa Inc