

Review of the Labour Court of appeal Judgement in the matter between Barloworld Equipment (Respondent) and employee Bernadette Enever (Appellant).

Heard: 01 Nov 2023. Delivered: 23 April 2024

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(Note: The author acknowledges an article by legal specialists at Bowmans Law Firm, from whom some content was used. See references below.¹³)

Date: 06 June 2024

Introduction

In the recent case of Enever vs Barloworld Equipment South Africa, a Division of Barloworld South Africa (Pty) Ltd (JA86/22) [2024] ZALAC (23 April 2024)¹, the Labour Appeal Court (LAC) set aside the order of the Labour Court where it was held that the dismissal of an employee who tested positive for cannabis in the workplace was fair.

Since the Constitutional Court's decision in Minister of Justice and Constitutional Development and Others v Prince², it has been a known fact that it is not a criminal offence for adults to cultivate, possess and use cannabis in the privacy of their homes.

However, what happens when the private use of cannabis at home results in an employee presenting themselves in the workplace and testing positive for cannabis? In 2022 the Labour Court found against the Appellant, saying as cannabis is an intoxicating substance employers may implement their own rules or policies to ensure occupational health and safety.

On 23 April 2024, however, the Labour Appeal Court found in the appellant's favour, saying she had been unfairly dismissed.

Brief Overview of the key issues / messages

1. The LAC found that Barloworld'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 home.

This is because cannabis stays in the body much longer than alcohol, the only way the Appellant could comply with the Policy is by not smoking cannabis at all. This meant that she had to choose between her job and her right to smoke cannabis in private. That the employer had a zero-tolerance approach was irrelevant in this regard and there was no justifiable reason to limit the Appellant's rights.

Importantly, however, the LAC stressed that this finding may not be true for other employees of the Respondent whose circumstances and work environment may have greater safety sensitivity.

Interestingly, the LAC alluded that the Appellant had been dismissed for intoxication in circumstances where she was not intoxicated. However, this not the case, as was noted in paragraph 12, which noted that the Respondent, at the time of the Appellant's testing, "accepted that she was not impaired in the performance of any of her duties or suspected of being intoxicated".

2. The Labour Appeal Court found that Barloworld's policy was "overbroad" and infringed on Enever's right to privacy.

Employers need to reconsider their substance abuse policies and ensure that they are drafted in a manner that will not be seen to be infringing unjustifiably on the rights of their employees. A practical approach to this will be required and not a reliance on a broad-brushed zero-tolerance policy.

This report argues that the inclusion of an oral fluid test for cannabis after a non-negative urine test avoids this problem of unjustifiable infringement of the rights of the employee.

3. Various alcohol related cases in the Labour Courts have held that a breathalyser is not conclusive to justify dismissal and should be coupled with other evidence such as the employee's behaviour which is generally associated with alcohol intoxication.

The judgement refers to previous Court cases, pointing to the need to demonstrate procedural fairness and substantive fairness. Examples cited included applying a final written warning prior to dismissal or adapting the sanction to the risk.

4. The LAC, in this case, stated that a similar jurisprudence should develop in relation to the known symptoms of cannabis consumption and their effect compared to the duties associated with the nature of the employee's job.

Such jurisprudence exists for driving under the influence of drugs in any many jurisdictions, but not South Africa.

5. According to Bowmans law Firm¹³, an important outcome of this case is that when relying on a substance abuse policy, intoxication must be proven, unless it can be shown that a zero-tolerance approach is an inherent requirement of the job for the particular employee/s concerned.

6. Several other important themes were addressed in the case, including:

- a. A review of the limitations on what an employer may construe to be an inherent requirement of a job.
- b. "Listed ground" versus "arbitrary grounds" with regard to the prohibition of unfair labour practice.
- c. A reminder that the Courts seem to be unaware of the critical differences between a urine test for cannabis, a blood test for cannabis and a breathalyser test for alcohol. In this case, notwithstanding the misunderstanding, the judgement was not affected - but it may affect employer policy development and/or future cases involving employees in safety-sensitive jobs.

Setting

The employee had worked for Barloworld Equipment in an admin position. She had been promoted a number of times until her position as category analyst, which she held at the time of her dismissal.

The employer has an "Employee Policy Handbook" which details the employer's zero tolerance for "the use and possession of alcohol while also prohibiting access to the workplace for anyone under the influence of alcohol and/or drugs. It incorporates the Respondent's Alcohol and Substance Abuse Policy (policy) in this regard."

The employee began using cannabis for medicinal reasons, which she says eventually helped reduce her reliance on the prescription medication. Subsequently she also mentioned that she used it for "spiritual reasons".

The employee was dismissed for testing non- negative for cannabis while on duty during a routine "medical check".

On 29 January 2020, the employee was subjected to a medical test, which included a urine test - which tested positive for cannabis.

The employer acknowledged that 1. The employee was not impaired nor was impairment part of the reason for the sanction. 2. The employee's job did not include safety-sensitive work.

The outcome of her disciplinary enquiry on 20 April 2020 was she was summarily dismissed.

The Labour Appeal Court ruling

The dispute in the Labour Appeal Court turned on four questions: (paragraph [20])

1. whether the Respondent differentiated between the Appellant and its other employees;
2. whether there was a direct causal connection between the Appellant 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";
3. whether the Policy was unfair and discriminatory; and
4. whether the Respondent's approach was insulting, degrading and humiliating and an impairment of the Appellant's dignity.

The dismissal in connection with a positive cannabis test

The LAC did not deal with the issue as to whether there was a direct causal connection between the Appellant's positive test and her dismissal as this was accepted by the Respondent.

The Respondent's approach being insulting, etc.

The LAC disagreed with the assertion that "the Respondent subjected the Appellant to a humiliating process that portrayed her as a junkie" when testing positive for cannabis, but that the respondent simply misunderstood the legal issue. (paragraph 53). ("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.”)

The Appellant being subject to unfair discrimination on a **listed ground**.

In determining whether the Appellant was subject to unfair discrimination on a listed ground*, the LAC interpreted ‘spirituality’ to be synonymous with the listed ground of religion. The LAC agreed with the Labour Court that the link between the Appellant’s dismissal and the use of cannabis was not because of her spiritual views, conscience or beliefs – or for medicinal reasons, in that she admitted that she smoked cannabis recreationally.

* “Listed ground” refers to the list of reasons (“grounds”) prohibited by Section 6(1) of the Employment Equity Act 55 of 1998 (EEA) in which an employer shows favour, prejudice or bias for or against a person.

Section 6(1) states as follows: “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, ethnical social origin, colour, sexual orientation, age, disability, religion, HIV status, conscious, belief, political opinion, culture, language, birth or on any other arbitrary ground.”

The Appellant being subject to unfair discrimination on an **arbitrary ground**.

When determining whether the Policy differentiated between alcohol and cannabis users on an **arbitrary ground** (see 187(1)(f) of the LRA), the Appellant was required to show that there was an impairment to her human dignity in a comparable manner to discrimination on a listed ground.

Whilst alcohol and cannabis users were subjected to the same treatment by being sent home if they tested positive, alcohol users could return to work the following day and test negative. However, this would not be the case for cannabis users as cannabis has been found to stay in the body for a longer period.

Paragraphs that address this important aspect of this case:

Paragraph 29

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. 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.

Paragraph 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. 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. 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.

Paragraph 35

I do not find this a justifiable reason for the infringement of the Appellant's right to privacy.

Paragraph 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.

Following the points above, the LAC argued that a positive urine cannabis result thus does not address the sobriety of the cannabis user and whether they are impaired from carrying out their duties.

- The Appellant submitted that she faced discrimination as a cannabis user which impaired her dignity by violating her right to privacy (specifically to use cannabis in the privacy of her home) which did not mean that she was impaired in the performance of her duties.
- The LAC stated that the decision in the Prince case impacted on the nature of an employee's right to privacy and that an employer cannot disregard an employee's privacy when implementing or acting in terms of its policies.

Whilst employers may have justifiable occupational health and safety reasons to bar certain conduct of its employees, the LAC found that this was not a justifiable reason for the infringement of the Appellant's right to privacy. In reaching this conclusion, the LAC reasoned that:

- 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;
- the Policy prevented the Appellant from engaging in conduct that is of no effect to the Respondent;
- the Policy placed the Appellant in a situation where she was forced to choose between her job and the exercise of her right to consume cannabis; and
- the Respondent could not show that the Appellant's work was adversely affected or that she created an unsafe working environment for herself or fellow employees.

The LAC stated that while the Respondent did operate in an environment with heavy machinery, the Policy was unjustifiably overbroad, and the same standards could not be applied to an employee who works in an office outside of the dangerous environment.

The LAC did not accept that the zero-tolerance rule was justifiable because the Respondent had a generally dangerous working environment or that it was an inherent requirement of the job not to consume cannabis.

In this regard, the LAC upheld the appeal, and her dismissal was found to be automatically unfair on the basis of unfair discrimination. The Appellant was awarded 24 months' compensation.

Paragraphs that address this important aspect of this case:

Paragraph 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.

Paragraph 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.

Paragraph 46

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.

Paragraph 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 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.

Paragraph 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.

Paragraph 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 is "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.

Other important features of this case

Breathalyser test for alcohol versus urine test for cannabis

1. The LAC showed a misunderstanding of workplace testing for the presence of cannabis. The cannabis test applied in this case was a urine test, which is common practice in workplace cannabis testing. It was not a blood test, yet the LAC repeatedly referred to a blood test or the presence of cannabis in the blood (eg paragraphs P26 & 29). Also, in paragraph 39, the LAC incorrectly suggested that a positive urine cannabis test should be interpreted in the same way as a positive breathalyser test.
2. A urine test for cannabis is NOT the same as a breathalyser test for alcohol.
 - a. A **breathalyser test for alcohol** establishes the presence of the psycho-active substance *ethanol* on the breath, which has been shown to be reliably correlated to the levels in the blood. In this way, it is used as a means to infer possible cognitive impairment.
 - b. A **urine test for cannabis** establishes the presence of an inactive metabolite *carboxy-THC* that indicates previous use of cannabis, sometimes days or even weeks before. The test cannot determine (i) when the cannabis was last consumed, (ii) how much was consumed, and (iii) it has no correlation whatsoever with levels of psychoactive Δ^9 THC in the blood. A urine test for cannabis is effectively a test of abstinence. It cannot be used to infer the presence of an intoxicating substance in the body. Therefore, it cannot be used as a means to infer possible cognitive impairment.

Table 1: Summary of the key tests for alcohol and cannabis use

	Alcohol Test		Cannabis Test	
Medium tested	Urine or saliva	Breath	Urine cannabis test	Saliva (oral fluid) cannabis test
Target analyte	Detects cognitively inactive ethyl glucuronide or EtG.	Detects cognitively active ethanol (BrAC).	Detects cognitively inactive carboxy-THC.	Detects cognitively active delta-9 tetrahydrocannabinol or Δ9 THC.
Outcome interpretation	Reasonable evidence of alcohol use (ie a test for <i>alcohol abstinence</i>) (May be used by the EAP service)	The presence of the cognitively active substance is reasonable evidence that <i>the user is likely to be impaired</i> .	Reasonable evidence of cannabis use (ie a test for <i>cannabis abstinence</i>)	The presence of the cognitively active substance is reasonable evidence that <i>the user is likely to be impaired</i> .

* In the setting of workplace screening, blood testing for either cannabis or alcohol is only applied in exceptional circumstances.

3. It is this feature of the urine test that makes it an unfairly discriminatory arrangement against cannabis users.
 - a. Cannabis users are tested for *abstinence*, whereas alcohol users are tested for *very recent use* (ie potential impairment).
 - b. The inactive carboxy THC in the urine remains present for *far longer* than ethanol in the breath.
4. **Importantly**, this unfair arrangement is easily corrected by using an inexpensive and non-invasive ORAL cannabis test as the equivalent screen to a breathalyser test. The oral cannabis test, like the alcohol breathalyser test, identifies the psycho-active substance (Δ9THC) in the oral fluid⁸, which has been shown to correlate acceptably well with the levels in the blood⁹.

Why is this technicality so important?

- An oral fluid test becomes negative for Δ9THC very rapidly (usually in the order of 4-6 hours) after consumption of cannabis. Therefore, if an oral fluid test is used as the means to ascertain access to work, not a urine cannabis test, this would very closely resemble the process adopted for alcohol users and breathalyser outcomes.
- This would mean that a cannabis user would be free to use cannabis on weekends or at home, without this causing a sanctionable positive test at work – as for alcohol users.
- This removes argument of unfair discrimination on arbitrary grounds.

Importantly though, notwithstanding this misunderstanding of the urine cannabis test, the LAC judgement focussed correctly on the implications of the results of a urine test on the privacy of an employee. (Paragraphs 29, 34, 35, 38, 47)

Reminder – the 5 issues to consider when considering a sanction of misconduct.

1. There must be a rule (ie a policy).

2. **The policy must be fair.**
3. The employee must know the policy.
4. The employee must have broken the rule in the policy.
5. The employee must have failed to correct the issue, despite being given the opportunity to do so.

In this case, the LAC judgement found the policy to be unfair.

Prohibition of cannabis use for employees in safety-sensitive jobs.

1. Paragraph 49 of the LAC judgement opens the door to policies that prohibit a positive urine test for employee is in a safety sensitive job. Noting that a urine test screens for abstinence, such a policy prohibits any cannabis use, even in private, for employees in safety-sensitive jobs.
2. My difficulty with this prohibition is that it unfairly discriminates against users of cannabis, in that this requirement of abstinence is not imposed on alcohol users. Fairness would require the employer to conduct a similar test for abstinence of alcohol on these employees. A screening test for alcohol abstinence similar to the urine test for cannabis exists (see Table 1) but is rarely (if ever) implemented as a part of routine workplace drug testing.
3. Alternatively, the employer must show that cannabis use carries a higher risk of injury than alcohol use. (Note – “use” not “intoxication”)

Thresholds of allowable levels of blood alcohol in the workplace

Two interesting issues are touched on in paragraph 27.

1. It makes the distinction between the legal threshold applied by the National Road Traffic Act (NRTA), 0.05gram per 100ml of blood, versus the threshold versus what is allowable under the Occupational Health and Safety Act (OHSA). In terms of the OHSA, the employer may apply its own (lower) threshold than the NRTA, as it applies to the workplace not the national roads.
2. It states that whilst the NRTA prescribes the maximum allowable alcohol levels for drivers on public roads, there is no similar legislation for cannabis. This is true for South Africa but is not true for many jurisdictions around the world, where legal thresholds for “drug driving” are prescribed, as cited various reports^{5-7, 10-12}. Importantly, though, these legal thresholds are for blood levels not oral fluid levels.
3. Nonetheless, even though blood levels may be required for criminal prosecution, a 2018 study showed that oral fluid testing is a highly valid method for detecting the presence of $\Delta 9$ THC in the blood. (Overall, 79.4% sensitivity and 98.3% specificity; strong correlation between the oral fluid concentrations and the blood THC concentrations)⁹. This makes a strong case for using oral fluid levels as a proxy for blood levels in the occupational setting, where the burden of proof is not “beyond reasonable doubt”.

Consumption at the workplace: cannabis versus alcohol.

Two interesting issues are touched on in paragraph 28.

1. Alcohol can be bought & sold, whereas cannabis cannot - making it reasonable to differentiate between the two for **company events**. (Bear in mind that consumption of alcohol at the workplace is an infringement of General Safety Regulation 2A)
2. It is accepted that the workplace is a **public space**, not a private space as contemplated in the Constitutional Court ruling that decriminalised cannabis use. Therefore the “privacy” argument does not apply at workplaces.

Reasonable sanctions in the event of a positive breathalyser test or cannabis test.

1. [P40]. This paragraph reminds us 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”.
2. [P38]. 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.
3. [P41]. The CCMA and Labour Court upheld the unfairness of the decision to dismiss solely based on a breathalyser test.
4. [P48]. In cases where alcohol intoxication has been suspected, a breathalyser is not always conclusive on its own to justify dismissal. 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. 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 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.

References

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