

# Implications of the Constitutional Court ruling regarding marijuana on the duties of employers in terms of Occupational Health & Safety

## 1 INTRODUCTION

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On the 18<sup>th</sup> of September 2018, the High Court made an unprecedented ruling deeming certain sections of the Drugs and Drug Trafficking Act 140 of 1992 ("Drugs Act") and the Medicines and Related Substances Control Act 101 of 1965 ("Medicines Act") constitutionally invalid as it infringes on the right to privacy.

The ruling came without any directive or explanatory notes from the Department of Labor, and employers were left wanting as to how to adapt to the new ruling regarding Occupational Health & Safety.

South Africa clearly has a market for cannabis and businesses are eagerly waiting for what appears to be the inevitable full legalization of marijuana in South Africa which would allow for the regulated sale of cannabis. The City of Cape Town recently released vacant land in Atlantis earmarked to produce medical cannabis. This development is attracting international investors and is estimated to bring with it an investment of R638 million in expenditure during construction of phase 1. It is further estimated that phase 2 will bring a further R 1.5 billion investment. It is clear that the legislative landscape is changing, and all sectors of business will have to adapt.

## 2 MARIJUANA FACTS AND EFFECTS

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Marijuana is one of the most commonly used drugs in the world and is derived from the dried flowering tops, leaves, stem, and seeds of the *Cannabis Sativa* plant. Recently marijuana has shown great promise in the medical field (e.g Cancer Treatment, Antibiotics). However, marijuana is predominantly used as a recreational drug.



Figure 1: Dried Cannabis Sativa ("bud")



Figure 2: Dried Cannabis Sativa ("bud")



Figure 3: Cannabis Sativa Plant



Figure 4: Cannabis Sativa Plant

*Cannabis Sativa* is made up of at least 120 different compounds (cannabinoids). Of these compounds only two are significant to the Constitutional Court Ruling:

- **Tetrahydrocannabinol (THC)** – Psychoactive compound in Cannabis which is consumed to provide a high to the user. Currently researched for medicinal properties.
- **Cannabidiol (CBD)** – Non-Psychoactive compound. Mainly used for medicinal purposes.

## 2.1 EFFECTS

When marijuana is smoked it quickly enters the bloodstream and reaches the brain within minutes. Marijuana can also be consumed orally and will then slowly make its way into the blood stream and brain via the bodies digestive system. Other means of consumption have also been developed through processing of the plant which include “Dabs”, a highly potent form of THC which is produced by isolating the THC from other compounds. Marijuana can also be processed into an oil which contains high levels of CBD.

THC when consumed disrupts the brain and adversely affects balance, posture, coordination and reaction time. Persons who have ingested marijuana (in any form) may experience the following:

- changes in perception due to a slight hallucinogenic effect that can create a distorted illusion of time and space
- mood changes, leading to euphoria, feelings of energy, or a state of relaxation

- higher heart rate
- anxiousness
- reduction in blood pressure
- impairment of concentration and memory
- reduced psychomotor coordination
- nausea, even though some cannabinoids may help reduce nausea
- increase in appetite
- faster breathing

It should be noted that the degree to which a person is affected by the drug is determined by many factors which include:

- quantity of marijuana ingested
- pre-existing psychological conditions
- method of ingestion
- local environment
- individual tolerance

Marijuana is only detectable in the bloodstream whilst a person is intoxicated. However, traces of marijuana can be detected in a person's metabolism (mostly inactive) months after ingestion depending on the amount and frequency since last consumed.

### 3 LEGISLATION

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The following legislation was deemed constitutionally invalid during the ruling (see Court Ruling in [green](#)):

- **Sections 4(a - b) of the Drugs and Drug Trafficking Act 140 of 1992** – *“No person shall use or have in his possession –*
  - *(a) any dependence-producing substance; or*
  - *(b) any dangerous dependence-producing substance or any undesirable dependence-producing substance”*

**Note: the above is to be read with Part III of Schedule 2 of this Act**

**Section 4(b) of the Drugs and Drug Trafficking Act 140 of 1992 shall be read as if it has sub-paragraph (vii) which reads as follows: “(vii) , in the case of an adult, the substance is cannabis and he or she uses it or is in possession thereof in private for his or her personal consumption in private.**

- **Sections 5(a - b) of the Drugs and Drug Trafficking Act 140 of 1992** – *“No persons shall deal in –*
  - *(a) any dependence-producing substance; or*
  - *(b) any dangerous dependence-producing substance or any undesirable dependence-producing substance”*

(b) the definition of the phrase “deal in” in section 1 of the Drugs and Drug Trafficking Act 140 of 1992 shall be read as if the words “other than the cultivation of cannabis by an adult in a private place for his or her personal consumption in private” appear after the word “cultivation” but before the comma.

- **Section 22A(9)(a)( i ) of the Medicines and Related Substances Control Act 101 of 1965 –** “acquire, use, possess, manufacture, or supply any Schedule 7 or Schedule 8 substance, or manufacture any specified Schedule 5 or Schedule 6 substance unless he or she has been issued with a permit by the Director General for such acquisition, use, possession, manufacture, or supply: Provided that the Director-General may, subject to such conditions as he or she may determine, acquire or authorise the use of any Schedule 7 or Schedule 8 substance in order to provide a medical practitioner, analyst, researcher or veterinarian therewith on the prescribed conditions for the treatment or prevention of a medical condition in a particular patient, or for the purposes of education, analysis or research”

(c) the following words and commas are to be read into the provisions of section 22A(9)(a)(i) of the Medicines and Related Substances Control Act 101 of 1965 after the word “unless”: ZONDO ACJ 6 “, in the case of cannabis, he or she, being an adult, uses it or is in possession thereof in private for his or her personal consumption in private or, in any other case,

**Order number 13 of the Court Ruling applies the above changes in legislation with immediate effect, regardless of parliaments awarded 24 months to change the affected laws**

The above was deemed invalid as it conflicts with Section 14 of the Constitution of South Africa-

- “Everyone has the right to privacy, which includes the right not to have-
  - (a) their person or home searched;
  - (b) their property searched;
  - (c) their possessions seized; or
  - (d) the privacy of their communications infringed.”

### 3.1 OCCUPATIONAL HEALTH & SAFETY REGULATIONS PERTAINING TO DRUGS AND INTOXICATION AT WORK

**General Duties of Employers to their employees - Section 8 (1) of the Occupational Health & Safety Act 85 of 1993 –** “Every 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.**”

**General duties of employers and self-employed persons to persons other than their employees – Section 9 (1) of the Occupational Health & Safety Act 85 of 1993 –** “Every employer shall conduct his undertaking in such a manner as to ensure, **as far as is reasonably practicable**, that persons other than those in his employment who may be directly affected by his activities are not thereby exposed to hazards to their health or safety.”

### **Intoxication - General Safety Regulation 2A; -**

(1) 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.

(2) Subject to the provisions of subregulation (3), no person at a workplace shall be **under the influence** of or **have in his or her possession** or partake of or offer any other person **intoxicating liquor or drugs**.

(3) An employer or a user, as the case may be, shall, in the case where a person is **taking medicines**, only allow such person to perform duties at the workplace if the **side effects of such medicine do not constitute a threat to the health or safety of the person concerned or other persons at such workplace**.

## **3.2 IMPLICATION**

The Constitutional Court ruling came abruptly and afforded no guidelines/directive from the department of labor on how the industry should adapt to this new ruling and legal landscape. The following is pertinent:

- Adults may consume marijuana in a “private place” for his/her personal consumption
- No person may be under the influence at work
- Traces of THC in a person’s metabolism (urine) is no longer sufficient justification not to take someone into your employ
  - This is not a blanket rule as the type of occupation (risk based) has bearing on your drug and alcohol policies which an employee can be subjected to without it being deemed discrimination. For example, deep sea diving and similar high-risk activities could reasonably apply such restrictions to employees. Policies to be written in relation to the type of work being performed.
- Persons may not perform any work under the influence of marijuana, other drugs or alcohol
- Marijuana may not be kept on your person at work or distributed/sold.
- Employers do not have to prove that a person is intoxicated to refuse them to work **on a particular day**, reasonable suspicion in terms of appearance is deemed sufficient
- No regulatory testing methods for intoxication or legal blood THC limit have been set (See SATAWU probe - <https://www.medicalnewstoday.com/articles/246392.php>)
- HR departments should adapt to the ruling an offer employee assistance programs for persons using marijuana should they request it
- Blood testing may be used to determine THC whole blood levels “beyond a reasonable doubt”
- Saliva testing may be used to ascertain “balance of probability”
- Treat marijuana the same as alcohol in the workplace
- Due care should be taken when terminating contracts based on positive urine tests as this could be deemed discriminatory and/or unfair dismissal

- Employers to update their policies and or testing procedures
  - Cheek swabs are available (see testing section)

## 4 TESTING EQUIPMENT

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Proof of intoxication is critical area on which the legislation falls silent. In the absence of this, it can be proven that a person is impaired, however the degree of impairment cannot be correlated to any limits. The law has not been tested in this respect and a legal precedent has not been set.

### **The following testing methods are available currently:**

**Urine Testing** – indicates the presence of THC (mostly inactive) found in a person’s metabolism. Does not indicate if a person is currently under the influence or intoxicated. Traces of THC can be detected months after use.

**Saliva testing** – indicate the presence of Psychoactive THC in the persons saliva. This can be used as an approximation of what is considered “under the influence”. However, no limits have been set. In labour law cases this type of testing may be used and the employer only has to demonstrate a “balance of probability”. A saliva test would be sufficient.

**Blood testing** – indicates that a person has recently ingested marijuana (within a window of a few hours) and provides a unit (ng/ml THC in whole blood or in serum) of marijuana in the blood. No limits have been set, beyond which a person is considered under the influence. If this testing is to be used to prove a person guilty of an offence under criminal law, the employer must provide proof “beyond a reasonable doubt”.

### 4.1 INTERNATIONAL PRECEDENT

Canada is arguably creating the mould for how countries should adopt cannabis in their legislation and provides critical insight into what should be considered when changing legislation. In addition, Canada is one of the only countries in the world which has set a legal cannabis limit and thoroughly defined what is deemed to be “*under the influence*” or “*over the limit*”. The Cannabis Act S.C 2018, c.16 read in conjunction with Bill C-46 passed by parliament on 26<sup>th</sup> June 2018 outlined the minimum limit for THC in blood at or over 2ng/ml of whole blood. It also outlines other categories of conviction such as individuals being under the influence of multiple stimulants/drugs. Specific legal limits are also set for a combination of THC and Alcohol intoxication. Persons found driving on public roads with THC in whole blood exceeding the legal limits are guilty of an offence.

These legal thresholds appear to have been set with specific reference to the Driving Under the Influence of Drugs (DRUID) Report which was based on a 5-year multinational study spanning from 2006 to 2011. This study concluded that a measurement of 2ng/ml THC in whole blood displayed impairment in individuals likened to 0.5 g/l BAC (Blood Alcohol Concentration) which is the legal limit in South Africa.

## 5 CONCLUSION

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The Constitutional Court ruling has caused a shift in legislation and subsequently the manner in which all employers manage their employees. In the absence of any legal directive from the department of labor, this report provided insight into the duties of employers towards employees. The role of policy should not be under emphasized. The lack of regulatory testers and/or legal limits to not inhibit the employer's powers to remove persons from site/workplace if they appear to be under the influence, nor inhibits the employer's ability to take further disciplinary action against employees who report for duty under the influence.

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