

The cannabis-induced impairment of an employee in the workplace: what is the employer's legal position?

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ABSTRACT

Since the legalisation of the cultivation, possession and use of cannabis in South Africa, the recreational use of cannabis amongst the population has been on the rise. As a result of the impact of cannabis consumption on the human body, persons consuming cannabis usually experience a period of impairment. Tetrahydrocannabinol, one of the main active components found in cannabis, is responsible for causing impairment in persons consuming cannabis. When an impaired person enters the workplace environment, it often compromises the safety and efficiency in the working environment. Employers have a duty to ensure that all reasonable precautions are taken to maintain a safe working environment for all persons in it. This is usually done by implementing workplace policies. For employers to be able to implement policies preventing employees under the influence of cannabis from entering the workplace, employers must be able to identify instances of cannabis-induced impairment. Unlike alcohol, there is no direct correlation between the amount of tetrahydrocannabinol in a person's blood stream and impairment. Tetrahydrocannabinol causes impairment, but remains in the human body long after impairment has subsided. This study investigates the employers' legal position when employees report for work while being under the influence of cannabis. Employment policies are proposed for identifying and dealing with employees who are under the influence of cannabis in the workplace.

KEY WORDS

Cannabis; impairment; testing; workplace policies; employment relationship; misconduct; disciplinary sanctions; prevention; workplace safety; policy considerations.

TABLE OF CONTENT

ACKNOWLEDGEMENTS.....	II
ABSTRACT	III
LIST OF ABBREVIATIONS	VI
Chapter 1 Introduction	1
1.1 <i>Problem statement</i>	1
1.1.1 <i>Background to study</i>	1
1.1.2 <i>Literature review</i>	3
1.2 <i>Scope and limitations of the study</i>	8
1.3 <i>Rationale and justification</i>.....	9
1.4 <i>Assumptions and hypothesis</i>	9
1.4.1 <i>Assumptions</i>	9
1.4.2 <i>Hypothesis</i>	10
1.5 <i>Aims and objectives of the study</i>.....	11
1.6 <i>Framework of study</i>	12
1.7 <i>Research methods</i>	14
1.8 <i>Relevance to the Research Unit</i>.....	15
1.9 <i>Research ethics</i>.....	15
Chapter 2 History, attributes, cultivation and effects of cannabis consumption on human beings.....	16
2.1 <i>Defining cannabis and cannabinoids</i>	16

2.2	<i>The composition of cannabis</i>	17
2.2.1	<i>Delta-9 tetrahydrocannabinol (THC)</i>	17
2.2.2	<i>Cannabidiol (CBD)</i>	17
2.3	<i>The ancient history of cannabis</i>	18
2.3.1	<i>The origin of cannabis</i>	18
2.3.1.1	The history of cannabis in Asia	18
2.3.1.2	The history of cannabis in Europe and the Mediterranean area.....	19
2.3.1.3	The history of cannabis in the Middle East.....	20
2.3.1.4	The history of cannabis in Africa.....	20
2.4	<i>The beginning and end of international restrictions relating to cannabis</i>	22
2.5	<i>How cannabis is cultivated, the different strains and potency levels thereof</i>	24
2.5.1	<i>Strains</i>	24
2.5.2	<i>Sex</i>	25
2.5.3	<i>Cultivation</i>	25
2.5.4	<i>Harvesting and preparation</i>	26
2.6	<i>The effects of cannabis on the human body</i>	27
2.6.1	<i>Beneficial effects of cannabis consumption on humans</i>	27
2.6.2	<i>Detrimental effects of cannabis consumption on humans</i>	28
2.7	<i>Methods in which cannabis is consumed</i>	29
2.8	<i>Conclusion</i>	29

Chapter 3	History of cannabis from a South African legal perspective.....	30
3.1	Legislation.....	30
3.1.1	<i>Prohibition of dagga by the Dutch East India Company in the 1680's</i>	<i>30</i>
3.1.2	<i>Prohibition of sativa by Natal's Coolie Law Consolidation in 1870</i>	<i>31</i>
3.1.3	<i>Outlaw of cannabis by the Cape Colony in 1891</i>	<i>31</i>
3.1.4	<i>Customs and Excises Duty Amendment Act of 1922.....</i>	<i>32</i>
3.1.5	<i>League of Nations, 1923 to 1925.....</i>	<i>32</i>
3.1.6	<i>The Medical, Dental and Pharmacy Act of 1928.....</i>	<i>33</i>
3.1.7	<i>The Weeds Act 42 of 1937.....</i>	<i>33</i>
3.1.8	<i>The Abuse of Dependence-producing Substances and Rehabilitation Centres Act</i>	<i>33</i>
3.1.9	<i>Medicines and Related Substances Control Act 101 of 1965 and the Drugs and Drug Trafficking Act of 1992</i>	<i>34</i>
3.2	Case law – The Prince of cannabis & Co.	34
3.2.1	<i>Prince v The President of the Law Society of the Cape of Good Hope in the High Court (1998).....</i>	<i>35</i>
3.2.2	<i>Prince v President of the Law Society of the Cape of Good Hope in the Supreme Court of Appeal (2002)</i>	<i>37</i>
3.2.3	<i>Prince v South Africa before the African Commission on Human and Peoples' Rights.....</i>	<i>38</i>
3.2.4	<i>Prince v South Africa before the Human Rights Committee of the United Nations (2007).....</i>	<i>40</i>
3.2.5	<i>Prince v Minister of Justice and Constitutional Development and Others (2017)</i>	<i>42</i>

3.2.6	<i>Minister of Justice and Constitutional Development and Others v Prince and Others (2018)</i>	46
Chapter 4	The influence of cannabis on the employment relationship	50
4.1	<i>The employment relationship: A brief overview</i>	50
4.2	<i>Rights and duties of the employment relationship affected by cannabis induced impairment at the workplace</i>	51
4.2.1	<i>Breach of duties by the employee as a result of impairment</i>	52
4.2.1.1	To enter and remain in service	52
4.2.1.2	To maintain reasonable efficiency	52
4.2.1.3	To further the employer’s business interests.....	54
4.2.1.4	To be respectful and obedient	54
4.2.1.5	4.2.1.5 To refrain from misconduct generally	55
4.2.2	<i>Duties of the employer towards the employee</i>	57
4.2.2.1	To receive the employee into service	57
4.2.2.2	To ensure safe working conditions.....	58
4.3	<i>Conclusion</i>	59
Chapter 5	Identification of cannabis induced impairment	60
5.1	<i>South Africa: The status quo for determining cannabis induced impairment in the workplace</i>	60
5.2	<i>Alternative methods to drug testing for determining cannabis-induced impairment</i>	62
5.3	<i>International and foreign perspectives relating to cannabis-induced impairment</i>	63

5.3.1	<i>International law</i>	64
5.3.2	<i>Foreign law</i>	68
5.3.2.1	The Netherlands	Error! Bookmark not defined.
5.3.2.2	Canada	73
5.4	<i>Conclusion</i>	77
6.1	<i>Considerations from Cannabis for Private Purposes Bill</i>	79
6.2	<i>Substance policy proposals</i>	81
6.2.1	<i>Considerations when drafting a substance policy</i>	81
6.2.2	<i>Policy proposals for the identification of cannabis induced impairment</i> ...	84
6.2.3	<i>Proposed sanctions for the contravention of cannabis policy</i>	85
6.2.4	<i>Proposed sanctions for a workplace without inherent dangers</i>	86
6.2.5	<i>Proposed sanctions for a workplace with inherent dangers</i>	86
6.3	<i>Conclusion</i>	87
Chapter 7	Conclusion	88
7.1	<i>Summary of main findings</i>	88
7.2	<i>Recommendations</i>	92
7.3	<i>Closing remarks</i>	93
BIBLIOGRAPHY	94

LIST OF ABBREVIATIONS

AJIM	American Journal of Industrial Medicine
BCEA	Basic Conditions of Employment Act
Bill C-45	Cannabis Act
CAC	Cannabis Act of Canada
CBD	Cannabidiol
CCMA	Commission for Conciliation, Mediation and Arbitration
DDTA	Drugs and Drug Trafficking Act
EEA	Employment Equity Act
LRA	Labour Relations Act
MHSA	Mine Health and Safety Act
MRSCA	Medicines and Related Substances Control Act 101 of 1965
OHSA	Occupational Health and Safety Act
VOC	Verenigde Oost-Indische Compagnie
THC	Tetrahydrocannabinol

Chapter 1 Introduction

1.1 Problem statement

1.1.1 Background to study

Initially cannabis was regarded in South Africa as an undesirable dependence-producing substance.¹ The use and possession of cannabis was prohibited by section 4 of the *Drugs and Drug Trafficking Act* 140 of 1992 (hereafter *DDTA*).² The cultivation, possession and use of cannabis is, however, no longer a criminal offence.³ Adult persons are now permitted to possess, use and cultivate cannabis for personal consumption in private.⁴

It is well known that cannabis is a psychoactive drug,⁵ although the effects and duration of its influence on the human body vary from person to person.⁶ The method of cannabis consumption also causes varying degrees of absorption in the human body.⁷ Screening methods have been developed to scientifically show whether a person has traces of cannabis in his or her body.⁸ Cannabinoids, the components in cannabis, remain in the body long after impairment has subsided.⁹ Therefore, there is no direct correlation between impairment caused by the use of cannabis and the amount of cannabinoids in the human body.¹⁰ Thus, testing positive for the use of cannabis does not necessarily mean testing positive for impairment.¹¹ Last mentioned is the issue at hand; the impairment caused by the use of cannabis as well as the practical implementation of regulations pertaining thereto.

¹ *Drugs and Drug Trafficking Act* 140 of 1992, Schedule 2, Part 3.

² Section 4 of the *Drugs and Drug Trafficking Act* 140 of 1992.

³ *Minister of Justice and Constitutional Development and Others v Prince* 2019 1 SACR 14 (CC) para 101.

⁴ *Minister of Justice and Constitutional Development and Others v Prince* 2019 1 SACR 14 (CC) para 101.

⁵ Macdonald *et al* 2010 *Addiction* 408-416; Howard and Osborne 2020 *American Journal of Industrial Medicine* 2.

⁶ Bowles, Herzig and Shea 2017 *Nature and Science of Sleep* 249-251.

⁷ Bowles, Herzig and Shea 2017 *Nature and Science of Sleep* 249-251.

⁸ Howatt, VanBuskirk and Chin 2018 *Business Expert Press* 1-15.

⁹ Wyllie 2019 <https://www.policemag.com/505866/testing-drivers-for-marijuana-impairment>.

¹⁰ Fanie 2020 <https://www.labourguide.co.za/law-firms/cliffe-dekker-hofmeyr/2455-flying-high-weed-in-the-workplace>; Phifer 2017 *Journal of Chemical Health & Safety* 34-38; Room *et al Cannabis Policy: Moving Beyond Stalemate* 5; Schillack, Wentzel and Essack 2019 *Occupational Health Southern Africa* 77-78.

¹¹ Fanie 2020 <https://www.labourguide.co.za/law-firms/cliffe-dekker-hofmeyr/2455-flying-high-weed-in-the-workplace>.

Employees that report to work impaired due to the legal use of cannabis in private creates a challenging scenario for employers to manoeuvre. Amongst other things employers are not only responsible for creating a safe and efficient working environment, but also to respect their employees' right to privacy.¹² There is a duty on employers to prohibit impaired employees from compromising the safety of the workplace environment and also the right to ensure a working environment that is productive.¹³ Employees on the other hand have a duty to submit themselves to the rules made by the employer and to remain disciplined and productive. The mentioned rules include and deal with, amongst other things, the prohibition of the use of marijuana at work or reporting to work under the influence of marijuana. The contravention of these workplace rules by an employee may lead to disciplinary action initiated by the employer, including dismissal.¹⁴ This study will consider matters such as occupational health and safety misconduct policies with regard to cannabis-induced impairment in the workplace. The challenge lies therein that there is no scientifically viable and objective test for testing impairment caused by the use of cannabis, therefore the implementation of these policies are challenging for employers.¹⁵ The legal uncertainty lies therein that employers must satisfy the onus of ensuring an impairment free working environment thereby ensuring a safe working environment, complying with the *Occupational Health and Safety Act* (hereafter *OHSA*) and/or the *Mine Health and Safety Act* (hereafter *MHSA*), without pragmatic and objective methods of testing and evaluating levels of cannabis-induced impairment.¹⁶

Best practices by foreign employers and foreign legislatures will be taken into account when identifying possible viable methods in which policies relating to the regulation of cannabis and cannabis induced-impairment can be implemented. Specific consideration will be given to the jurisprudence of countries like Canada and The Netherlands where the recreational use of cannabis is also permitted, specifically with reference to the best practices of employers and the state in those jurisdictions.¹⁷ The approaches taken by

¹² Pons "Rights and Duties of Employers and Employees"; Section 8 of the *Occupational Health and Safety Act* 85 of 1993.

¹³ Pons "Rights and Duties of Employers and Employees".

¹⁴ Section 3(1) of the *Labour Relations Act* 66 of 1995.

¹⁵ Visser 2018 *Finweek* 44-45.

¹⁶ Section 5(1) of the *Mine Health and Safety Act* 29 of 1996; Section 8(2)(h) of the *Occupational Health and Safety Act* 85 of 1993.

¹⁷ Canada 2021 <https://www.justice.gc.ca/eng/cj-jp/cannabis/>; Blokland 2020 <https://nortonrosefulbright.com/en-za/knowledge/publications/24014f2b/netherlands-legislative-overview>.

these countries regarding the regulation of cannabis are widely regarded as revolutionary in that, unlike other countries where the recreational use of cannabis is permitted, the low volume sale of cannabis is also permitted.¹⁸ Countries like The Netherlands and Canada face similar issues as those faced by South Africa with regard to cannabis-induced impairment in the workplace. The legalisation of cannabis in these jurisdictions caused employers to develop their workplace policies accordingly. Therefore, because these countries had a head start in developing, testing and implementing regulations and policies with regard to cannabis-induced impairment at the workplace, the methods and regulations followed by them, with regard to recreational use of cannabis and impairment in the workplace, can possibly serve as a viable example for South Africa.

In The Netherlands cannabis is not *per se* legalised, but laws prohibiting cannabis are not applied as a result of the *Gedooogbeleid*.¹⁹ As stated in the *Aanwijzing Opiumwet*, private persons who are in possession of less than 5 grams of cannabis or 5 cannabis plants are not prosecuted.²⁰ Cannabis is therefore *de facto* legalised in certain circumstances.

In Canada cannabis is regulated under the *Cannabis Act* (Also known as Bill C-45). According to section 8(1) of the *Cannabis Act* of Canada an individual who is older than 18 years of age may possess no more than 30 grams of dried cannabis for personal use.²¹

1.1.2 Literature review

The point of departure in this study is the *Constitution of the Republic of South Africa* (hereafter the *Constitution*).²² The *Constitution* is the supreme law of the Republic of South Africa; any legislation and policies that are inconsistent with the *Constitution* are invalid.²³ Amongst other rights, the *Constitution* not only ensures that everyone has the right to privacy, but also the right to fair labour practices.²⁴ Section 36 of the *Constitution* states that the rights in the *Bill of Rights* may however be limited if such limitation is

¹⁸ Ferreras 2018 <https://globalnews.ca/news/4559085/marijuana-legalization-canada-midnight>.

¹⁹ Rijksoverheid 2021 <https://www.rijksoverheid.nl/onderwerpen/drugs/gedoogbeleid-softdrugs-en-coffeeshops>.

²⁰ *Aanwijzing Opiumwet* of 2015.

²¹ *The Cannabis Act Bill C-45* 2018.

²² *The Constitution of the Republic of South Africa*, 1996.

²³ Section 2 of *The Constitution of the Republic of South Africa*, 1996.

²⁴ Section 14 and section 23(1) of *The Constitution of the Republic of South Africa*, 1996.

reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.²⁵

The Medicines and Related Substances Control Act 101 of 1965 (hereafter *MRSCA*) prohibited the use and possession of cannabis for recreational purposes in that tetrahydrocannabinol (hereafter *THC*), the psychoactive compound found in cannabis, was regarded as a Schedule 7 substance.²⁶

According to the *DDTA* cannabis was categorised as an undesirable dependence producing substance.²⁷ Section 4(b) of the *DDTA* prohibited the possession and use of undesirable dependence-producing substances, except for the circumstances that were listed in section 4(b).²⁸

Section 5(b) of the *DDTA*, which dealt with dealing in drugs, prohibited the dealing of any undesirable dependence-producing substances, except for the exceptional circumstances that were listed in section 5(b).²⁹

The definition of "drug" in Section 1 of the *DDTA* included any undesirable dependence-producing substance.³⁰ Thus, cannabis was included in the definition of a "drug". Section 1 of the *DDTA* also included within the definition of 'dealing in drugs' the performing of any act in connection with transshipment, importation, cultivation, collection, manufacture, supply, prescription, administration, sale, transmission or exportation of a drug. The cultivation of cannabis was thus also prohibited.

The position taken on cannabis by the *DDTA*, *Medicines Act*, as well as the *Related Substances Control Act* was, however, changed in the judgement that was handed down by the Constitutional Court in *Minister of Justice and Constitutional Development and Others v Prince and Others*, (hereafter Prince Judgement).³¹ In this case, the Court found that the limitations imposed by the *DDTA* as well as the *MRSCA* relating to the cultivation,

²⁵ Section 36 of *The Constitution of the Republic of South Africa*, 1996.

²⁶ Section 22A(9)(a)(i) and Schedule 7 of the *Medicines and Related Substances Control Act 101 of 1965*; Holland 2018 <https://www.healthline.com/health/what-is-cannabis>.

²⁷ Schedule 2 part 3 of the *Drugs and Drug Trafficking Act 140 of 1992*.

²⁸ Section 4(b) of the *Drugs and Drug Trafficking Act 140 of 1992*.

²⁹ Section 5(b) of the *Drugs and Drug Trafficking Act 140 of 1992*.

³⁰ Section 1 of the *Drugs and Drug Trafficking Act 140 of 1992*.

³¹ *Minister of Justice and Constitutional Development and Others v Prince* 2019 1 SACR 14 (CC) para 129.

possession and use of cannabis for recreational purposes, in private, unjustifiably limited one's right to privacy under section 14 of the *Constitution*.³² The limitation of the right to privacy could not be justified according to the criterion listed under section 36 of the *Constitution*.³³ Since the handing down of the *Prince Judgement* by the Constitutional Court, adult persons were permitted to consume and cultivate cannabis for personal recreational purposes.³⁴

It is widely recognised that *THC*, the cannabinoid that is one of the main components found in cannabis, is a psychoactive substance.³⁵ Psychoactive substances, when consumed, have a negative effect on the functioning of the central nervous system and affects mental processes that leads to impairment.³⁶ Studies show that new methods used in the cultivation of cannabis cause cannabis to be more potent, with higher levels of *THC* than before.³⁷ This will lead to longer impairment periods for consumers thereof.³⁸

In many instances, impairment compromises the safety of not just the person that is impaired, but also the persons that are in the vicinity of the impaired person. It is thus foreseeable that the safety of the general public and the safety of the impaired person may be compromised when a person consumes cannabis and ventures into the public domain in an impaired state of mind.

Generally the workplace environment is regarded as a public domain.³⁹ The workplace environment is however different from other public domains in that employers are primarily responsible for the safety of their employees, as far as reasonably practicable, within this domain.⁴⁰ For employers to ensure the safety of the workplace environment for everyone in it, employers have to put in place a code of conduct and supporting policies that all employees must adhere to.⁴¹ The employers' rules as set in the code of

³² *Minister of Justice and Constitutional Development and Others v Prince* 2019 1 SACR 14 (CC) para 86.

³³ Section 36(1) of *The Constitution of the Republic of South Africa*, 1996.

³⁴ *Minister of Justice and Constitutional Development and Others v Prince* 2019 1 SACR 14 (CC) 129.

³⁵ Holland 2018 <https://www.healthline.com/health/what-is-cannabis>; Schillack, Wentzel and Essack 2019 *Occupational Health Southern Africa* 77-78.

³⁶ Anonymous 2020 https://www.who.int/substance_abuse/terminology/psychoactive_substances/en.

³⁷ Chandra et al 2019 *European Archives of Psychiatry and Clinical Neuroscience* 5-15.

³⁸ Sample *The Guardian*.

³⁹ *Bernstein v Bester* 1996 2 SA 751 (CC) para 67.

⁴⁰ Pons 2007 "Rights and duties of employers and employees" 1-14; Section 8(1) of the *Occupational Health and Safety Act* 85 of 1993.

⁴¹ Pons 2007 "Rights and duties of employers and employees" 1-14.

conduct and supporting policies in most cases limit the rights of employees, but these limitations usually serve the greater good in order to ensure workplace safety for and efficiency of all. However, these limitations still have to comply with section 36 of the *Constitution* mentioned earlier.⁴² For the right to privacy to be limited in terms of section 36 of the *Constitution*, the following factors need to be taken into account: the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and possible less restrictive means to achieve the purpose.⁴³

Amongst others, many of the rules in the code of conduct and supporting policies are primarily aimed at creating a safe working environment and to comply with the OHS Act 85 of 1993 and other relevant legislation.⁴⁴ With workplace safety in mind, employers are now faced with the task of developing, drafting and applying a code of conduct, with its supporting workplace policies, to prevent cannabis-induced impairment in the workplace. Employers will either have to take on a zero-tolerance policy towards cannabis-induced impairment, or have a tolerant policy towards cannabis-induced impairment whereby cannabis-induced impairment receives less serious sanctions. This will depend on the nature of the work and the possible dangers that are associated with the specific workplace environment.⁴⁵

Employees that do not adhere to the code of conduct and supporting policies developed by employers make themselves guilty of misconduct.⁴⁶ When an employee commits any offence in the employers' code of conduct, the employer is mandated to institute disciplinary sanctions against such employee.⁴⁷ The process and merits relating to the disciplinary action must however be substantively and procedurally fair.⁴⁸

In the case of *Mthembu & Others v NCT Durban Wood Chips* the commissioner found that, depending on the inherent nature of the risk associated with the specific workplace, it is reasonable and justifiable for an employer to develop a zero-tolerance policy towards

⁴² Section 36 of *The Constitution of the Republic of South Africa*, 1996.

⁴³ Section 36(1) of *The Constitution of the Republic of South Africa*, 1996.

⁴⁴ *Occupational Health and Safety Act 85* of 1993.

⁴⁵ *Taxi-Trucks Parcel Express (Pty) Ltd v National Bargaining Council for the Road Freight Industry* 2012 33 ILJ 2985 (LC) para 31.

⁴⁶ Pons and Deale *Labour Relations Handbook*.

⁴⁷ Pons and Deale "Rights and Duties of Employers and Employees" Chapter 2.

⁴⁸ Schedule 8 of the *Labour Relations Act* - The Code of Good Practice: Dismissal.

cannabis-induced impairment in the workplace, meaning that dismissal for such an offence would be regarded as substantively fair after the first offence.⁴⁹ In cases where there is no inherent risk to employees being impaired on duty, the employer may not dismiss employees for compromising workplace safety.⁵⁰

Employers should be mindful to distinguish between misconduct and incapacity when dealing with employees that are impaired because of the use of cannabis.⁵¹ Employees that consume cannabis as treatment for an illness, on the prescription of a medical doctor, cannot be regarded as having made themselves guilty of misconduct. The same is true for persons that are addicted to the substance and struggling to overcome their dependencies thereon. Employers should thus focus on instances where employees wilfully abuse substances, which constitutes misconduct. Employees' rights, such as the right to privacy, may have to be limited to ensure substance abuse does not take place at work.

Section 39(1) of the *Constitution* states that when interpreting the rights in *the Bill of Rights*, such as the right to privacy in section 14, consideration must be given to international law.⁵² Thus, consideration must be given to the *ILO* when limiting employees' right to privacy in the workplace. The *ILO* published the *Code Of Practice For The Management Of Alcohol-And Drug-Related Issues In The Workplace*, that can serve as a point of departure for South Africa when developing and implementing policies with regard to cannabis-induced impairment in the workplace.⁵³ It is foreseeable that applying policies relating to cannabis-induced impairment can become problematic in practice because there is currently no scientifically viable and objective test for determining impairment caused by the consumption of cannabis.⁵⁴ The question that then arises is how employers can develop and apply their workplace policies to comply with legislation, that places a duty on employers to ensure a safe working environment, if they cannot

⁴⁹ *Mthembu v NCT Durban Wood Chips* 2019 4 BALR 369 (CCMA) para 72.

⁵⁰ *Taxi-Trucks Parcel Express (Pty) Ltd v National Bargaining Council for the Road Freight Industry* 2012 33 ILJ 2985 (LC) para 33.

⁵¹ Item 8 of the Schedule 8 of the *Labour Relations Act* - The Code of Good Practice: Dismissal.

⁵² Section 39(1) of *The Constitution of the Republic of South Africa*, 1996.

⁵³ *The ILO Code of Practice for the Management of Alcohol- and Drug-Related Issues in the Workplace* (1996).

⁵⁴ Fanie 2020 <https://www.labourguide.co.za/law-firms/cliffe-dekker-hofmeyr/2455-flying-high-weed-in-the-workplace>.

determine if persons that are entering their premises are impaired and possibly causing safety risks for other employees.⁵⁵

1.2 Scope and limitations of the study

This study will critically analyse how employers can manage and apply policies relating to cannabis-induced impairment in the workplace. This study will explore the various risks, considerations and effects that are to be taken into account by employers in preventing and/or managing impairment in the workplace. One example of this could be the possible breach in workplace safety as a result of impaired employees not being sober when working with dangerous equipment. Another example could be the possible compromise in the common-law duties an employee has towards his or her employer, that could result in misconduct when an employee conducts themselves in an inappropriate manner as a result of their impairment. In the context of cannabis-induced impairment, specific attention will be given to workplace safety according to the *OHSA*, misconduct according to the *LRA*, as well as incapacity according to the *Code of Good Practice regarding dismissals in schedule 8 of the LRA*.⁵⁶

The study will be limited to instances where cannabis was legitimately used by employees, in private as the law permits, but reported to work impaired because of the use of cannabis. Instances where cannabis was unlawfully used will not be taken into account. This study will be limited to the implementation and application of policies relating to cannabis-induced impairment in South African labour law. International law perspectives such as *ILO's Code of Practice For The Management Of Alcohol- And Drug- Related Issues In The Workplace* will be considered.⁵⁷ Foreign law policies and practices of countries such as The Netherlands and Canada will be taken into account for determining and identifying best practices on how cannabis-induced impairment can be prevented and addressed in the workplace.

⁵⁵ Section 8(1) of the *Occupational Health and Safety Act* 85 of 1993 places a duty on employers to provide a safe working environment for their employees.

⁵⁶ *Occupational Health and Safety Act* 85 of 1993; Schedule 8 of the *Labour Relations Act* - The Code of Good Practice: Dismissal.

⁵⁷ The *ILO Code of Practice for the Management of Alcohol- and Drug-Related Issues in the Workplace* (1996).

1.3 Rationale and justification

Since the legalisation of the use of cannabis for recreational purposes, the courts and legislature have not given sufficient guidance to the development of workplace policies and practical application of legislation relating to the prevention of cannabis-induced impairment in the workplace. When an employer develops and applies policies relating to workplace safety, the burden of proof relating to misconduct falls on the employer when disciplinary action is to be taken for an employee's failure to abide by said policies. Therefore, the question for employers arises as to how the burden of proof relating to impairment caused by the consumption of cannabis can be satisfied if no scientifically objective and viable method for proving impairment exists.

Countries where cannabis have been legalised, like The Netherlands and Canada, had to overcome similar issues when implementing policies relating to cannabis-induced impairment. The Netherlands and Canada are prominent countries in cannabis culture, known for their unconventional approaches in the regulation of cannabis.⁵⁸ It is therefore hoped that South Africa can learn from the countries like The Netherlands and Canada that has had more time to develop, test and implement their policies and have determined which policies are a success and which policies are not.

1.4 Assumptions and hypothesis

1.4.1 Assumptions

1. Every person over the age of 18 and within the borders of South Africa has the right to use cannabis in private.
2. The use of cannabis leads to impairment which may have serious repercussions in the workplace.
3. Traces of cannabis remain in the human body long after impairment subsides.
4. The effects of cannabis and the severity thereof on the human body differ from person to person.
5. Testing positive for the use of cannabis does not mean testing positive for impairment.

⁵⁸ Sinclair 2010 <https://www.metrotimes.com/detroit/amsterdam-is-viper-central/Content?oid=2150854>.

6. Every employer and employee have the right to substantive and procedural fair labour practices with regard to sanctions taken against them for cannabis-induced impairment.
7. The Netherlands and Canada have a well-developed approaches with regard to policies relating to cannabis.
8. South African labour law does not give guidance to employers with regard to the regulation of cannabis and impairment caused by cannabis in the workplace.

1.4.2 Hypothesis

This study hypothesises that shortcomings exist in the practical implementation of regulations, such as section 8(1) of the *OSHA*, pertaining to impairment caused by the use of cannabis in the context of South African labour law. If regulations pertaining to cannabis-induced impairment cannot be implemented in a practical manner, because impairment cannot be proven on a balance of probabilities, the rights that exist within the employer-employee relationship may become jeopardised.

This hypothesis encompasses the following:

1. With regard to cannabis-induced impairment in the workplace, employers are faced with the challenge of adhering to the *Code of Good Practice* in the *LRA*, whilst also implementing safety regulations that ensure compliance with section 8(1) of the *OHSA*.
2. No scientifically viable and objective test exists for identifying impairment caused by the use of cannabis.
3. Reporting to work under the influence of cannabis could be viewed as misconduct or incapacity, depending on the circumstances.
4. Impairment caused by the use of cannabis in the workplace infringes on the rights of the employer within the working relationship.
5. Reporting to work under the influence of cannabis could jeopardise other employees' right to a safe working environment.
6. Impairment causes safety risks within the workplace environment.
7. Impairment negatively affects the working relationship between an employer and an employee.
8. Impairment negatively affects the working relationships between employees.

9. Countries where the recreational use of cannabis have been legalised had to overcome similar hurdles as South Africa with regard to regulation of cannabis impairment in the workplace.

1.5 Aims and objectives of the study

The study aims to prove that *lacunae* exist in South African labour legislation, as well as *lacunae* in health and safety legislation pertaining to the regulation and prevention of cannabis-induced impairment in the workplace. This study will briefly examine the effects of cannabis on the human body, thereafter the study will shift towards the effects of the legalisation of cannabis in the workplace and implications thereof for employers and employees. If these *lacunae* do exist and are not addressed, it could lead to the possible infringement of the rights of both employers and employees which exist within the working relationship. If *lacunae* in labour legislation exists, this study will examine and evaluate possible solutions of dealing with the *lacunae* as well as the effects of these possible solutions on employers and employees. Moreover, this study will discuss the possible course of action available to the employers when dealing with misconduct, incapacity and health and safety of employees who report to work under the influence of cannabis. Consideration will be given to the regulations of countries where the use of cannabis for recreational purposes has also been legalised. Specific attention will be given to Canada and The Netherlands in this regard.

The research seeks to:

1. Identify the *lacunae* in South African labour legislation relating to the regulation of impairment caused by the use of cannabis.
2. Identify what rights and responsibilities are at stake for both the employer and employee if impairment caused by the use of cannabis cannot be regulated.
3. To ascertain what international obligations and/or standards are imposed on South African employers.
4. To identify best practices in the implementation of foreign policies from The Netherlands and Canada relating the regulation of impairment caused by the use of cannabis.

5. To propose possible solutions to the *lacunae* in South African labour law with regard to the implementation of policies that regulate impairment caused by the use of cannabis in the workplace.
6. Develop a fair policy guideline that will enable employers to develop a practical policy for the workplace that will aid employers in maintaining an impairment free workplace, with minimal infringement and limitation of rights.

1.6 Framework of study

This research study will have seven chapters:

Chapter one of this study will serve as the introduction to the study and will define the research question to the reader. To give insight and prepare the reader for what is to follow, the writer sets out below the topics that will be discussed as well as what is hoped to be achieved or discovered at the end of the study.

Chapter two of this study will give a background into the history, attributes, cultivation and effects of cannabis consumption on humans. The history of cannabis will be discussed from the moment of its initial discovery to the present day. This will give the reader a thorough background as to what cannabis is, where it originated from, and how the use of cannabis started in the world as well as in South Africa. Both the prevalence of cannabis globally and in South Africa specifically will be discussed. Regarding the nature and effects of cannabis, the different strains of cannabis will be discussed as well as the attributes of the different cross breeds of cannabis. The composition of cannabis and the varying strength of the different strains will be briefly discussed. The attributes of the female and male cannabis plant will be discussed to give the reader insight as to how cannabis is cultivated. Thereafter, the effects of the different compounds of cannabis on the human body will be discussed. The different effects of cannabis will also be discussed in view of the different methods in which cannabis can be consumed, further diversifying the effects of cannabis on the human body. Finally, the benefits and side effects of the different compounds of cannabis will be put to the reader and discussed.

Chapter three will discuss the history of cannabis from a South African legal perspective. This chapter will have two main subheadings that will consist of legislation and case law

of cannabis in South Africa. Under the first subheading regarding legislation, the history of legislation pertaining to cannabis in the South African legal system will be discussed, from the first regulations to the *status quo*. Furthermore, under this subheading there will be an investigation into the prohibition of dagga by the *Dutch East India Company* in the 1700's, the prohibition of *sativa* by *Natal's Coolie Law Consolidation* in 1870, the prohibition of cannabis by the *Cape Colony*, the outlaw of cannabis by the *Free State* in 1921, the *Customs and Excises Duty Act* that criminalized habit forming drugs in 1922, the *Medical, Dental and Pharmacy Act* that wholly criminalized cannabis in 1928, the *Weeds Act* of 1937 that made the owner of weed accountable, the *Abuse of Dependence-producing Substances and Rehabilitation Centres Act* as well as the *DDTA*. Under the second subheading regarding case law, the previous rulings of the Prince-case will be discussed up until the *High Court* decision. Other relevant South African case laws regarding cannabis in the build up to the Constitutional Court decision of the *Prince-case* will be discussed. Thereafter, the Constitutional Court decision of the Prince-case will be considered and the effects thereof on the legalisation of cannabis for recreational purposes.

Chapter four of the study will discuss the use of cannabis *vis a vis* the individual employment relationship. In order to fully understand how the use of cannabis may affect the South African labour law, the rights and responsibilities that arise out of the employer-employee relationship must be set out and discussed. Emphasis will be placed on recognising the possible risks of the use of cannabis, and impairment caused by the use of cannabis that could lead to the jeopardising of rights arising from the employment relationship. The possible effects of cannabis, and the impairment caused by the use of cannabis, on the rights and responsibilities arising out of the employment relationship will be critically discussed and analysed from both the employers' and the employees' perspectives.

Chapter five will focus on possible solutions and best practices in the identification of cannabis-induced impairment. South African case law where the identification of cannabis-induced impairment had been a point of contention will first be discussed. Possible alternative methods of identifying cannabis-induced impairment will thereafter be investigated. A comparison of international and foreign perspectives relating to the

identification of cannabis-induced impairment will then follow, after which a best practice will be identified.

Chapter six of the study will, after analysing the proposed *Cannabis Bill*, discuss the considerations employers must take into account to ensure that a policy is fair and reasonable. In light of the knowledge gained by the research done, recommendations will be made to employers with regard to the identification of cannabis-induced impairment in the workplace. Together with the onus placed on employers wanting to prove impairment, the probative value of the proposed method for identifying cannabis-induced impairment will be discussed. Finally, should an employer be able to prove impairment, possible sanctions will be proposed, taking into account the specific nature of the working environment.

Chapter seven will serve as the conclusion to this study. In this chapter the findings of the study will be highlighted, and an answer to the research question will be provided along with recommendations.

1.7 Research methods

This study will be conducted by way of a literature review. The relevant case law, legislation, academic publications, books and internet sources will be critically analysed, discussed and taken into account when determining the effect of cannabis in the South African workplace. The aforementioned will also be utilised in identifying how legislation and policies relating to cannabis impairment can be implemented by employers in the South African workplace. South Africa is a member of the International Labour Organisation, an agency of the United Nations, tasked with setting international labour standards.⁵⁹ There is a duty on member states to implement these international labour standards. Therefore, this study will take into account recommendations and publications of the *ILO* with regard to the subject of cannabis and cannabis-induced impairment in the workplace as well as foreign law best practices from countries such as Canada and The Netherlands where the recreational use of cannabis has been legalised. This study

⁵⁹ ILO <https://www.ilo.org/global/about-the-ilo/lang--en/index.htm> (1996).

may occasionally make use of the findings of studies that were empirical in nature to prove a submission or claim.

1.8 Relevance to the Research Unit

This study will fall within the Research Unit theme of *Law, Justice and Sustainability*. The relevance of this study will be to prove that there exist certain *lacunae* in South African labour legislation with regard to cannabis-induced impairment in the workplace. These *lacunae* place an impractical and unsustainable burden on employers. The legislation employers are bound by in terms of South African labour law are imposing an unfair burden on employers if no practical methods of implementation exist. This could result in possible liability incurred by employers for not complying with legislation such as section 8(1) of *OHSA*, without there being any practical methods for the implementation of the said legislation. This study will therefore investigate and recommend possible solutions to the development and implementation of policies relating to cannabis and cannabis impairment in the workplace in order for employers to maintain discipline and workplace safety.

1.9 Research ethics

When research is conducted ethics are of primary concern. At all times the researcher must remain ethical and unbiased in the interpretation and reporting of data and sources. Sources may not be used out of context nor be falsely reported to further unfounded claims by the researcher. No ethical concerns are foreseen that could influence the writer in his objectivity relating to the research that will need to be done in this study. No empirical data will be gathered by the researcher, there may however exist instances where findings of other studies based on empirical research will be used to prove a submission. No ethical concerns are foreseen which should be brought to the attention of the *Ethical Research Committee*.

Chapter 2 History, attributes, cultivation and effects of cannabis consumption on human beings

This chapter will acquaint the reader with the definition of cannabis and its components, the history of cannabis, how it spread to Africa, as well as the effects of cannabis consumption on the human body. The goal of this chapter will be to give the reader sufficient background information of cannabis and its effects on the human body before delving into the main objectives of the study. The relevancy hereof is that the aforementioned knowledge will enable the reader to understand the challenges created as a result of cannabis use.

2.1 Defining cannabis and cannabinoids

Cannabis, weed, pot and marijuana are terms that are widely accepted to be used interchangeably.⁶⁰ These terms can either refer to a type of plant, or in certain contexts, they can refer to the drug that is made from the plant.⁶¹ Hemp also refers to cannabis, because it is in essence the same species of plant, but the term usually only refers to the plant itself or the plant fibres that have low levels of psychoactive content.⁶² Because hemp contains low levels of psychoactive content, it is almost never used for consumption by persons wanting to experience a high.⁶³

From an etymological point of view, some believe that cannabis derives its meaning from the junction of the words "*kan*" and "*bis*". *Kan* meaning cane and *bis* meaning good scented.⁶⁴ The Cambridge Dictionary defines cannabis as:

A drug, illegal in many countries, that is made from dried leaves and flowers of the hemp plant. Cannabis produces a pleasant feeling of being relaxed if smoked or eaten.⁶⁵

⁶⁰ Holland 2020 <https://www.healthline.com/health/what-is-cannabis>

⁶¹ Pisanti and Bifulco 2019 *Journal of Cellular Physiology* 8342; Cambridge 2020 *Cambridge Dictionary*.

⁶² Ferguson 2020 <https://www.healthline.com/health/hemp-vs-marijuana>; Warf 2014 *Geographical Review* 416.

⁶³ Ferguson 2020 <https://www.healthline.com/health/hemp-vs-marijuana>.

⁶⁴ Pisanti and Bifulco 2019 *Journal of Cellular Physiology* 8342.

⁶⁵ Cambridge 2020 *Cambridge Dictionary*.

The cannabis plant is a type of flowering herb that was previously classified into two main species, namely cannabis *sativa* and cannabis *indica*.⁶⁶ A third species of cannabis is now recognised under the name of cannabis *ruderalis*; cannabis *ruderalis* is considered to be a hybrid plant between cannabis *indica* and cannabis *sativa*.⁶⁷

The active components in cannabis are known as cannabinoids, these are the components of cannabis that react with the human body, but specifically with the cannabinoid receptors in the brain.⁶⁸ The three main species of cannabis have different levels of cannabinoid content, as well as different physical attributes, which will later be referred to in greater detail.

2.2 The composition of cannabis

It is estimated that cannabis consists of more than 120 different cannabinoids, the active components of cannabis that react with the human brain.⁶⁹ Little is known about how these cannabinoids react with the human body and scientists are now only beginning to understand the effects of two of the cannabinoids on the human body, which are *THC* and *CBD*.⁷⁰

2.2.1 Delta-9 tetrahydrocannabinol (THC)

THC is the psychoactive component found in cannabis and is the cannabinoid responsible for cognitive impairment.⁷¹ THC binds with the CB1 cannabinoid receptors in the brain, and at high doses may cause adverse behavioural effects on persons consuming it.⁷² Further effects of THC on the human body will be dealt with by the writer at a later stage.

2.2.2 Cannabidiol (CBD)

CBD is a non-psychoactive component of cannabis and is the cannabinoid associated with various health benefits and little to no side effects.⁷³ Unlike THC, the consumption of CBD

⁶⁶ Pisanti and Bifulco 2019 *Journal of Cellular Physiology* 8342.

⁶⁷ Holland 2020 <https://www.healthline.com/health/what-is-cannabis>.

⁶⁸ Ameri 1999 *Progress in Neurobiology* 316.

⁶⁹ Holland 2020 <https://www.healthline.com/health/what-is-cannabis>.

⁷⁰ Holland 2020 <https://www.healthline.com/health/what-is-cannabis>.

⁷¹ Sample *The Guardian*; Volkow *et al* 2016 *JAMA Psychiatry* E3.

⁷² Ameri 1999 *Progress in Neurobiology* 317; Iversen 2003 *Brain* 1256.

⁷³ Pisanti and Bifulco 2017 *Trends in Pharmacological Sciences* 198.

does not cause a person to become impaired. Evidence suggests that CBD can, to a certain extent, thwart the effects of THC.⁷⁴ Because CBD does not cause adverse behavioural effects on humans, the effects of CBD will only be taken into account as a motivation for users that advocate the use of cannabis for its health benefits.⁷⁵

2.3 The ancient history of cannabis

2.3.1 The origin of cannabis

Cannabis is considered to be one of the oldest plants that have been used by humans, from the early development of our species to the present day, for its properties as food, a drug and a fibrous material in the manufacturing of fabric and paper.⁷⁶ It has been suggested that the use of cannabis by humans dates back to the end of the Ice Age, more than 12 000 years ago.⁷⁷ Cannabis is known to be a plant that is highly adaptable to different climates and is therefore able to grow abundantly in a wide variety of habitats.⁷⁸

2.3.1.1 The history of cannabis in Asia

The cannabis plant was first domesticated during the Neolithic period in Central China.⁷⁹ The Chinese used the fruit, oil and fibres derived from the plant for the manufacturing of clothes, mats and paper.⁸⁰ Well-preserved traces of cannabis were discovered in the remains of a long-deceased male body in Western China. Some historians assume the Chinese man to have been a shaman, who may have used cannabis as an entheogen.⁸¹ A shaman is a person in the religious practice of Shamanism and someone who is believed to have the powers to communicate with the spiritual world from a tranced state.⁸² It is well known that Shamans even today use cannabis to help induce a tranced

⁷⁴ Volkow *et al* 2016 *JAMA Psychiatry* E2.

⁷⁵ Iffland and Grotenhermen 2017 *Cannabis and Cannabinoid Research* 149.

⁷⁶ Pisanti and Bifulco 2019 *Journal of Cellular Physiology* 8344.

⁷⁷ Warf 2014 *Geographical Review* 419.

⁷⁸ Noshiro and Sasaki 2014 *Journal of Archaeological Science* 102.

⁷⁹ Underhill 1997 *Journal of World Prehistory* 125.

⁸⁰ Crawford *The Origins of Agriculture: An International Perspective* 27.

⁸¹ Pisanti and Bifulco 2019 *Journal of Cellular Physiology* 8344. Definition of entheogen: a psychoactive, hallucinogenic substance or preparation when derived from plants or fungi and used in religious, spiritual, or ritualistic contexts.

⁸² Shamanism 1999.

state from which they can communicate with the spiritual world.⁸³ In China there was also a tradition to wear clothes made from hemp fibres during a period of mourning.⁸⁴ Hemp fibre even played an important role in the invention and manufacturing of paper by the Chinese.⁸⁵

Cannabis was also found to be widespread in India as it was seen as a source of happiness and was used in many religious practices.⁸⁶ The Indian people came to know cannabis for its healing properties against numerous ailments.⁸⁷

From the abovementioned it is clear that cannabis played a central role in the development of the Chinese and Indian people from a religious, industrial and medical point of view.

2.3.1.2 The history of cannabis in Europe and the Mediterranean area

Remains of cannabis were discovered at the graves of Scythian people that date back to roughly 450 B.C. in Germany, Siberia and Ukraine. The Scythian people were known to be a nomadic tribe, hence historians believe that cannabis made its way from Asia to Europe as a result of the Scythian people.⁸⁸ Furthermore, historians assert that the Scythian people used cannabis as a medicine, during funeral rituals and as a fibre for the production of tools.⁸⁹

The Greek and Roman people were also known to use the fibres of cannabis as an everyday item for the manufacturing of sails, ropes, clothes and shoes.⁹⁰ The Roman emperor, Aurelian, was known to introduce a tax on cannabis in the 2nd Century AD.⁹¹ Apart from using cannabis for manufacturing purposes, the use of cannabis as a medicine and psychoactive plant by the Greeks was also recognised.⁹²

⁸³ Warf 2014 *Geographical Review* 419.

⁸⁴ Pisanti and Bifulco 2019 *Journal of Cellular Physiology* 8344.

⁸⁵ Rubin *Cannabis and Culture* 54.

⁸⁶ Pisanti and Bifulco 2019 *Journal of Cellular Physiology* 8344.

⁸⁷ Pisanti and Bifulco 2019 *Journal of Cellular Physiology* 8344.

⁸⁸ Warf 2014 *Geographical Review* 420; Encyclopaedia 2018 <https://www.britannica.com/art/Scythian-art>.

⁸⁹ Pisanti and Bifulco 2019 *Journal of Cellular Physiology* 8345.

⁹⁰ Warf 2014 *Geographical Review* 416.

⁹¹ Abel *Marihuana: The First Twelve Thousand Years* 16.

⁹² Sumler *Cannabis in the Ancient Greek and Roman World* 1.

2.3.1.3 The history of cannabis in the Middle East

Allegedly, cannabis had already been used in the Middle East centuries before the birth of Christ and once again, the Scythian people also played a central role in the introduction of cannabis to the Middle East.⁹³ The Assyrians and Hebrews were known to burn cannabis as an incense as early as 1000 BC.⁹⁴ It is generally accepted that the Arabs made an edible paste from cannabis called hashish and historians have speculated on the possibility that references relating to grass eaten by Nebuchadnezzar, was actually hashish.⁹⁵

2.3.1.4 The history of cannabis in Africa

The sources that exist regarding the history of cannabis in pre-colonial Africa were written by Europeans during the colonisation of Africa.⁹⁶ It is unfortunate that African writers did not deal with the introduction of cannabis into pre-colonial Africa, hence one can only rely on the limited and sometimes inaccurate writings by the Europeans that colonised Africa.⁹⁷ It can however be stated with certainty that cannabis had already been present in Africa well before its colonisation.⁹⁸

Unlike other civilisations that found many uses for cannabis, its use in Africa was almost exclusively for smoking as an intoxicant.⁹⁹ The most prominent theory is that cannabis found its introduction into Africa as a result of Arab traders that ventured into Africa with the goal of establishing trade routes.¹⁰⁰ Du Toit, the leading authority on the African history of cannabis, hypothesised that cannabis found its way into Africa in two phases. The first was as a result of Arab traders establishing a trade route and bringing cannabis with them from India to the East Coast of Africa; and the second phase was the resulting diffusion of cannabis into the rest of Africa via the Great Lakes into the Congo River

⁹³ Warf 2014 *Geographical Review* 420.

⁹⁴ Warf 2014 *Geographical Review* 422.

⁹⁵ Abel *Marihuana: The First Twelve Thousand Years* 17.

⁹⁶ Paterson *Prohibition & Resistance: A Socio-Political Exploration of the Changing Dynamics of the Southern African Cannabis Trade* 8.

⁹⁷ Paterson *Prohibition & Resistance: A Socio-Political Exploration of the Changing Dynamics of the Southern African Cannabis Trade* 8.

⁹⁸ *National Road Traffic Act* 93 of 1996.

⁹⁹ Paterson *Prohibition & Resistance: A Socio-Political Exploration of the Changing Dynamics of the Southern African Cannabis Trade* 17.

¹⁰⁰ Warf 2014 *Geographical Review* 424; Paterson *Prohibition & Resistance: A Socio-Political Exploration of the Changing Dynamics of the Southern African Cannabis Trade* 20.

basin.¹⁰¹ When the Portuguese arrived in the Congo in 1531, while making their way up the Zambezi River to establish a trading post, they discovered an established Arab community in the area.¹⁰²

It was hypothesised by Walton that the spread of cannabis to southern Africa was the result of Bantu invaders that came in contact with Arab traders who gave them cannabis. According to his theory, the Bantu invaders later migrated from central Africa down to southern Africa, bringing cannabis with them.¹⁰³ It is accepted that cannabis is not an indigenous plant in southern Africa, and Walton's theory might serve as a plausible explanation for the spread of cannabis to southern Africa.¹⁰⁴ It is estimated that cannabis has only been growing in the southern parts of Africa for the past four to five centuries.¹⁰⁵ It was the Bantu people knew how to cultivate cannabis for personal use.¹⁰⁶ It was a known practice for Zulu warriors to have smoked cannabis before an attack because they believed that it would make them capable of accomplishing almost any feat.¹⁰⁷

The Bantu people eventually came in contact with the Hottentot and Bushmen people, the occupiers of southern Africa at the time, and also spreading cannabis to them.¹⁰⁸ Because of the dry areas in southern Africa that the Khoikhoi and San people inhabited, they were unable to cultivate their own cannabis and were reliant on their northern Bantu neighbours for cannabis.¹⁰⁹ The Hottentot herders smoked cannabis in a similar way as they do tobacco and called it "*daXab*", meaning "green tobacco".¹¹⁰ This eventually gave rise to the term "*dagga*".¹¹¹ The first written reference of *dagga* was in the diary of Jan van Riebeeck, the governor of the newly established Dutch trading post that was situated in the Cape of Good Hope, where he noticed that the Khoikhoi people found great value

¹⁰¹ Du Toit 1975 *Cannabis and Culture* 84.

¹⁰² Paterson *Prohibition & Resistance: A Socio-Political Exploration of the Changing Dynamics of the Southern African Cannabis Trade* 21.

¹⁰³ Walton 1953 *Navorsing van die Nasionale Museum: Researches of the National Museum* 85.

¹⁰⁴ Du Toit 1975 *Cannabis and Culture* 83; Morley and Bensusan "Dagga: Tribal uses and customs" 409.

¹⁰⁵ Du Toit 1975 *Cannabis and Culture* 88.

¹⁰⁶ Watt 1961 *Bulletin on Narcotics*.

¹⁰⁷ Du Toit 1975 *Cannabis and Culture* 97.

¹⁰⁸ Du Toit 1975 *Cannabis and Culture* 83.

¹⁰⁹ Paterson *Prohibition & Resistance: A Socio-Political Exploration of the Changing Dynamics of the Southern African Cannabis Trade* 24.

¹¹⁰ Du Toit 1975 *Cannabis and Culture* 87; Paterson *Prohibition & Resistance: A Socio-Political Exploration of the Changing Dynamics of the Southern African Cannabis Trade* 33.

¹¹¹ Du Toit 1975 *Cannabis and Culture* 86; Paterson *Prohibition & Resistance: A Socio-Political Exploration of the Changing Dynamics of the Southern African Cannabis Trade* 22.

in the herb called "*daccha*".¹¹² Although sometimes confused with *Leonotis*, an indigenous plant that has similar intoxicating effects as cannabis, *dagga* was eventually identified to be the cannabis hemp plant they knew from Europe.¹¹³ The Dutch were known to trade cannabis as a commodity to the Khoikhoi and San, thereby breaking the monopoly that the northern traders had over them.¹¹⁴ Jan Van Riebeeck gave orders to the officers on board the *Voorman*, a ship from the East India Trading Company, to purchase cannabis in Natal so that they could trade with the Hottentots in the Cape.¹¹⁵

Later in the 18th and early 19th centuries it was not uncommon for farmers to cultivate cannabis for their labourers who were happy to receive it as a partial payment for their labour.¹¹⁶

2.4 The beginning and end of international restrictions relating to cannabis

At the beginning of the 19th century the first concerns regarding the detrimental effects of the heavy use of cannabis were raised by the Indian Hemp Drugs Commission.¹¹⁷ Initially the international community only focused on the regulation of opium as a psychoactive substance.¹¹⁸ In 1928 the Second International Opium Conference was held by the League of Nations, where the first recommendation for restrictions on the recreational use of cannabis as well as on the export of cannabis for recreational purposes, were proposed to countries that were signatories to the convention.¹¹⁹ As a result of the recommendations made at the League of Nations Conference, signatory States were inclined to pass more prohibition-orientated legislation. One significant example of such a policy was the *Marijuana Tax Act* adopted by the United States of America in 1937.¹²⁰ This Act imposed a 1 USD tax on any business transaction involving

¹¹² *National Road Traffic Act* 93 of 1996; Du Toit 1975 *Cannabis and Culture* 88.

¹¹³ Du Toit 1975 *Cannabis and Culture* 93-94.

¹¹⁴ Paterson *Prohibition & Resistance: A Socio-Political Exploration of the Changing Dynamics of the Southern African Cannabis Trade* 32.

¹¹⁵ Paterson *Prohibition & Resistance: A Socio-Political Exploration of the Changing Dynamics of the Southern African Cannabis Trade* 33.

¹¹⁶ Paterson *Prohibition & Resistance: A Socio-Political Exploration of the Changing Dynamics of the Southern African Cannabis Trade* 34.

¹¹⁷ Volkow *et al* 2016 *JAMA Psychiatry* E2.

¹¹⁸ Bewley-Taylor, Blickman and Jelsma 2014 *Global Drug Policy Observatory* 2.

Opium: A reddish-brown heavy-scented addictive drug prepared from the juice of the opium poppy, used illicitly as a narcotic.

¹¹⁹ *Second International Opium Convention*.

¹²⁰ Pisanti and Bifulco 2019 *Journal of Cellular Physiology* 8348.

the sale of cannabis sold for medical or industrial use and a 100 USD tax on any other transaction relating to cannabis which was not for medical or industrial use.¹²¹ Cannabis was thus not banned, but as a result of the regulatory costs associated with the trade in cannabis the commercial sale thereof declined. After the Second World War the United States of America used its influence, as an international superpower within the United Nations, to push for policies that were more stringent on the use of cannabis.¹²² Eventually, the United States of America succeeded in its quest for stricter international regulation of cannabis in the 1961 *Single Convention on Narcotic Drugs*, within which cannabis was condemned as a drug with dangerous properties.¹²³ As a result hereof, cannabis was regarded as one of the most dangerous psychoactive substances under international control.¹²⁴

The goal of the 1971 *Convention on Psychotropic Substances* was to expand the control of substances that were not included in the 1961 Convention. THC was then also included as a controlled substance in schedule 2 of the Convention.¹²⁵ The 1988 *Convention Against Illicit Traffic In Narcotic Drugs And Psychotropic Substances*, of which South Africa became a signatory thereto and ratified it in 1998, made it mandatory for signatory states to make it a criminal offence under its domestic law for individuals to possess, purchase or cultivate cannabis for personal consumption or contrary to any of the provisions in the 1971 Convention.¹²⁶

While the United Nations were trying its best to stop cannabis "abuse", the recreational use of cannabis became increasingly popular and started a cultural movement.¹²⁷ As a result of the widespread use of cannabis that increased in popularity amongst the youth, the legislatures of some countries, of which The Netherlands is an example, experienced a fundamental shift away from stringent prohibitionist policies towards more tolerant regulatory policies.¹²⁸ Parties to the United Nations drug control conventions were able to

¹²¹ *Marihuana Tax Act* by the Congress of the United States of America.

¹²² Bewley-Taylor, Blickman and Jelsma 2014 *Global Drug Policy Observatory* 3.

¹²³ Article 28 and 36 of the *Single Convention on Narcotic Drugs* of 1961.

¹²⁴ Bewley-Taylor, Blickman and Jelsma 2014 *Global Drug Policy Observatory* 3.

¹²⁵ Schedule 2 of the *Convention on Psychotropic Substances*, 1971.

¹²⁶ Article 3(2) of the *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* 1988; Nations https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VI-19&chapter=6&clang=_en#EndDec.

¹²⁷ Bewley-Taylor, Blickman and Jelsma 2014 *Global Drug Policy Observatory* 3.

¹²⁸ Bewley-Taylor, Blickman and Jelsma 2014 *Global Drug Policy Observatory* 4.

use the built-in flexibility of the conventions to enable them to be more tolerant towards the possession of cannabis for personal use.¹²⁹ This resulted in numerous countries decriminalising the possession and consumption of cannabis for personal use. For example, The Netherlands that chose to not to prosecute a person for the possession of cannabis under certain circumstances.¹³⁰ The decision by some countries to have a tolerant view towards cannabis use remains a highly debated point of contention in the international community.¹³¹

2.5 How cannabis is cultivated, the different strains and potency levels thereof

As recognised earlier by Holland, there are three recognised strains of cannabis, being cannabis *sativa*, cannabis *indica* and cannabis *ruderalis*.¹³² It is speculated that cannabis may actually be one of the oldest plants cultivated by man.¹³³ Today, cannabis grows wild on every continent except Antarctica.¹³⁴ Cannabis is able to grow in a wide range of climates and due to its fast-growing ability in most climates, is considered to be an unwanted weed by some.¹³⁵

2.5.1 Strains

Cannabis *sativa* is recognised as being the tall and narrow leaf variant with high THC content.¹³⁶ Cannabis *indica* is identified as the short and broad leaf variant which usually has equal levels of THC and CBD content.¹³⁷ Finally, cannabis *ruderalis* is also short, but has low levels of cannabinoid content.¹³⁸ The different strains of cannabis vary in their THC and CBD potency, timing of flowering, number of flowers and the general height of the plants.¹³⁹

¹²⁹ Bewley-Taylor, Blickman and Jelsma 2014 *Global Drug Policy Observatory* 4.

¹³⁰ *Aanwijzing Opiumwet* in of 2015.

¹³¹ Bewley-Taylor, Blickman and Jelsma 2014 *Global Drug Policy Observatory* 4.

¹³² Holland 2020 <https://www.healthline.com/health/what-is-cannabis>.

¹³³ Russo 2007 *Chemistry & Biodiversity* 1614.

¹³⁴ Potter, Bouchard and Decorte "The Globalization of Cannabis Cultivation" 2.

¹³⁵ Potter, Bouchard and Decorte "The Globalization of Cannabis Cultivation" 3.

¹³⁶ Russo 2007 *Chemistry & Biodiversity* 1614.

¹³⁷ Russo 2007 *Chemistry & Biodiversity* 1614.

¹³⁸ Russo 2007 *Chemistry & Biodiversity* 1614.

¹³⁹ Beutler and Marderosian *Economic Botany*.

2.5.2 Sex

In order to cultivate cannabis with high THC content, determining the sex of the cannabis plant is crucial. Female plants tend to produce higher levels of cannabinoid content than male plants.¹⁴⁰ This is especially true for female plants that were never exposed to the pollen of male plants. If not exposed to pollen, the female plants use their extra energy, that was initially meant for reproduction, to produce more psychoactive resin in their flowers.¹⁴¹ The potent flower buds that come from unfertilised female cannabis plants are called *sinsemilla*, meaning "seedless".¹⁴² As male plants are counterproductive in the production of psychoactive resin, cultivators usually remove the male plants once the sex of the plant becomes apparent.¹⁴³

2.5.3 Cultivation

Cannabis can be cultivated by one of two methods, either planting or cloning.

The process of planting cannabis with the use of seeds is similar to that of other seeding plants. Once a seed is left to germinate in moist soil, roots start to develop and a small plant starts to sprout.¹⁴⁴ The problem with this method, compared to cloning, is that the cannabis plant only reveals its sex at the flowering stage, which is four to six weeks after the seed has been planted.¹⁴⁵ This usually results in half of the plants being unwanted male plants resulting in wasted time, labour and costs.

The second method of cannabis cultivation is by way of cloning. A clone is made by cutting off a piece from the mother plant and giving the "cutting" the opportunity to make

¹⁴⁰ Anonymous 2020 <https://infinitecal.com/2020/01/15/male-vs-female-cannabis-why-its-important-to-know-before-you-grow/#:~:text=Removing%20males%20will%20allow%20the,CBD%2C%20depending%20on%20the%20strain.>

¹⁴¹ Anonymous 2020 <https://infinitecal.com/2020/01/15/male-vs-female-cannabis-why-its-important-to-know-before-you-grow/#:~:text=Removing%20males%20will%20allow%20the,CBD%2C%20depending%20on%20the%20strain.>

¹⁴² Anonymous 2021 <https://www.leafly.com/learn/growing/marijuana-plant-anatomy.>

¹⁴³ Casey 2021 [https://www.dummies.com/health/how-to-grow-marijuana-from-seed/.](https://www.dummies.com/health/how-to-grow-marijuana-from-seed/)

¹⁴⁴ Brennan 2021 <https://dengarden.com/gardening/How-to-Sow-Seeds.>

¹⁴⁵ Anonymous 2020 <https://infinitecal.com/2020/01/15/male-vs-female-cannabis-why-its-important-to-know-before-you-grow/#:~:text=Removing%20males%20will%20allow%20the,CBD%2C%20depending%20on%20the%20strain.>

roots of its own.¹⁴⁶ This results in the creation of a new plant with exactly the same genetics and sex as the plant it was cut from.¹⁴⁷ The benefit of cloning, over the planting of seeds, is that: you do not have to germinate seeds, thereby saving a month in the growing process; the sex of the plant is known from the moment it is planted and the genetics are replicated whereby the attributes of the mother plant is replicated.¹⁴⁸ A major benefit of cloning is that cultivators do not have to wait 4-6 weeks after the cannabis seeds were planted to determine the sex of the plant.¹⁴⁹

2.5.4 Harvesting and preparation

Once the leaves of the plant begin to turn yellow; the buds seem to have stopped growing and the branches become heavy under the weight of the flowers, the *sinsemilla* is finally ready for inspection under a magnifying glass.¹⁵⁰ Flower buds are inspected for the colour of the trichomes. Trichomes are the hairy-looking parts of the flower that have a sticky resin on it.¹⁵¹ If the resin is clear, it is still too early to harvest. Once the resin changes colour, the buds are finally ready to be harvested.¹⁵²

Harvesting is done by cutting down the plant and hanging it upside down to dry for several days before trimming the buds off.¹⁵³ The buds are left to dry in a sealed container just before all moisture leaves the bud for curing to take place.¹⁵⁴ The container may be opened daily for three to four weeks and once this process is completed the buds are ready for consumption.¹⁵⁵

¹⁴⁶ Haze 2021 <https://www.growweedeasy.com/cloning-marijuana-guide>.

¹⁴⁷ Hennings 2020 <https://www.leafly.com/learn/growing/how-to-clone-cannabis#whatis>.

¹⁴⁸ Hennings 2020 <https://www.leafly.com/learn/growing/how-to-clone-cannabis#whatis>.

¹⁴⁹ Anonymous 2020 <https://infinitecal.com/2020/01/15/male-vs-female-cannabis-why-its-important-to-know-before-you-grow/#:~:text=Removing%20males%20will%20allow%20the,CBD%2C%20depending%20on%20the%20strain>.

¹⁵⁰ DeannaCat 2019 <https://homesteadandchill.com/how-to-harvest-cure-store-cannabis/>.

¹⁵¹ Bennett 2016 <https://www.leafly.com/news/cannabis-101/what-are-trichomes-on-cannabis>.

¹⁵² DeannaCat 2019 <https://homesteadandchill.com/how-to-harvest-cure-store-cannabis/>.

¹⁵³ Hennings date unknown <https://www.leafly.com/learn/growing/harvesting-marijuana>.

¹⁵⁴ Hyde 2021 <https://www.leafly.com/learn/growing/harvesting-marijuana/drying-curing-cannabis>.

¹⁵⁵ Hyde 2021 <https://www.leafly.com/learn/growing/harvesting-marijuana/drying-curing-cannabis>.

2.6 The effects of cannabis on the human body

Cannabis affects almost every system in the human body.¹⁵⁶ In 1964 two Israeli scientists identified the chemical structure of THC and CBD, the two main active ingredients in cannabis.¹⁵⁷ The discovery of these two chemical structures enabled scientists to determine how they react with the human body and in turn this led to the discovery of the endocannabinoid system and its receptors in the human brain.¹⁵⁸ The discovery of the endocannabinoid receptors led to a newfound interest in cannabinoids, resulting in thousands of studies being done on the pharmacological potential and the dangers of cannabis consumption by humans.¹⁵⁹ A large number of these endocannabinoid receptors are found in the hippocampus, cerebellum and basal ganglia areas of the brain.¹⁶⁰ These are the parts of the brain that are responsible for the regulation of memory, coordination and movement.¹⁶¹ THC binds particularly well with the CB1 receptors in the endocannabinoid system found in the brain.¹⁶² Traces of THC can then remain in the blood of consumers for days or even weeks after initial use.¹⁶³

There are numerous positive and negative effects on the human body associated with the consumption of cannabis. A distinction must however be drawn between THC and CBD when the positive and negative effects of cannabis are analysed, as their effects vary.¹⁶⁴

2.6.1 Beneficial effects of cannabis consumption on humans

Both CBD and THC are known for numerous positive medical benefits.¹⁶⁵ Firstly, as identified earlier, the main differentiator between THC and CBD for the purposes of this study is that CBD does not cause the euphoric effects as is the case with THC.¹⁶⁶ When consumed, CBD also does not have an effect on a person's locomotive ability or memory,

¹⁵⁶ Ashton 2001 *British Journal of Psychiatry* 104.

¹⁵⁷ Gaoni and Mechoulam 1964 *Journal of the American Chemical Society*.

¹⁵⁸ Devane *et al* 1992 *Science* 1948 - 1949.

¹⁵⁹ Pisanti and Bifulco 2017 *Trends in Pharmacological Sciences* 197.

¹⁶⁰ Sample *The Guardian*.

¹⁶¹ Howatt, VanBuskirk and Chin 2018 *Business Expert Press* 5; Sample *The Guardian*.

¹⁶² Howatt, VanBuskirk and Chin 2018 *Business Expert Press* 5.

¹⁶³ Wyllie 2019 <https://www.policemag.com/505866/testing-drivers-for-marijuana-impairment>.

¹⁶⁴ Holland 2020 <https://www.healthline.com/health/cbd-vs-thc>.

¹⁶⁵ Atakan 2012 *Therapeutic Advances in Psychopharmacology* 245.

¹⁶⁶ Holland 2020 <https://www.healthline.com/health/cbd-vs-thc>.

unlike THC. As a matter of fact, CBD is known to even help alleviate some of the effects of THC.¹⁶⁷

Secondly, studies have shown that CBD consumption resulted in a decline in seizure incidents in patients suffering from seizures.¹⁶⁸ However, studies are inconclusive on whether CBD alleviates the effects of anxiety.¹⁶⁹ Some studies suggest that CBD may additionally help with Parkinson Disease and may also serve as a sedative for pain, even though this remains disputed.¹⁷⁰

The consumption of THC is known to be beneficial for the treatment of pain, insomnia, nausea and anxiety to name a few.¹⁷¹

2.6.2 Detrimental effects of cannabis consumption on humans

The adverse effects of CBD are not as prominent as that of THC as CBD does not alter a persons' behaviour negatively. It is however recognised that high quantities of CBD may cause decrease in appetite and in some instances diarrhoea.¹⁷²

Dependant on the doses, known side effects of THC on the other hand include hypoactivity, short-term memory loss, increased pulse rate, disrupted spatial coordination and induced psychological reactions that are out of the control of the impaired user.¹⁷³

There is considerable evidence that suggests that persons who consume cannabis are 40% more likely to develop mental illness, as opposed to non-cannabis users, due to the long-term effects of THC on the brain.¹⁷⁴ The above mentioned are reasons for concern with regard to possible health and workplace safety risks emanating from the negative effects of THC use.¹⁷⁵ These concerns will be discussed in chapter 4.

¹⁶⁷ Atakan 2012 *Therapeutic Advances in Psychopharmacology* 245.

¹⁶⁸ White 2019 *The Journal of Clinical Pharmacology* 926.

¹⁶⁹ White 2019 *The Journal of Clinical Pharmacology* 927.

¹⁷⁰ White 2019 *The Journal of Clinical Pharmacology* 930-931.

¹⁷¹ Holland 2020 <https://www.healthline.com/health/cbd-vs-thc>.

¹⁷² Devinsky *et al* 2018 *New England Journal of Medicine* 1888.

¹⁷³ Atakan 2012 *Therapeutic Advances in Psychopharmacology* 245.

¹⁷⁴ Moore *et al* 2007 *The Lancet* 325.

¹⁷⁵ Atakan 2012 *Therapeutic Advances in Psychopharmacology* 249.

2.7 Methods in which cannabis is consumed

Humans are becoming ever more creative in the methods that they employ to consume cannabis. The conventional method of cannabis consumption has always been by way of smoking the cannabis leaves or flowers in a rolled cigarette known as a joint, spliff or blunt.¹⁷⁶ Other methods include the use of hashish, a processed and compressed version of cannabis, smoked in pipes, bongs or included in edibles.¹⁷⁷ Cannabis extract is also used in the manufacturing of a wide variety of cannabis products for human consumption such as cannabis beverages.¹⁷⁸ The different methods of consumption usually have varying effects on the consumer.¹⁷⁹ This stems from the fact that the rate of consumption and the amount at which THC and CBD are absorbed by the human body, differ depending on the consumption method.¹⁸⁰ For example, the psychoactive effects of cannabis when digested may take longer to manifest and will last longer when compared to inhaling the fumes when smoking cannabis.¹⁸¹ By inhalation, THC typically peaks within 4 hours after it was smoked, but when ingested it may remain in the bloodstream for up to 24 hours.¹⁸²

2.8 Conclusion

From the above chapter it is the intention of the writer that the reader will now have a thorough understanding of what are defined as cannabis and cannabinoids, what the main components of cannabis are, including their effects on the human body, how cannabis had spread to southern Africa, how the international community viewed and regulated cannabis, and finally the different methods in which cannabis could be consumed.

¹⁷⁶ Dictionary <https://www.etymonline.com/word/spliff>; Rubin *Cannabis and Culture* 509.

¹⁷⁷ Zeisser *et al* 2012 *Addiction Research & Theory* 83.

¹⁷⁸ Ashton 2001 *British Journal of Psychiatry* 101-102.

¹⁷⁹ Holland 2020 <https://www.healthline.com/health/what-is-cannabis>.

¹⁸⁰ Ashton 2001 *British Journal of Psychiatry* 101-102.

¹⁸¹ Bowles, Herzig and Shea 2017 *Nature and Science of Sleep* 249.

¹⁸² Howatt, VanBuskirk and Chin 2018 *Business Expert Press* 5.

Chapter 3 History of cannabis from a South African legal perspective

The aim of this chapter is to provide insight as to how it came about that cannabis was declared a banned substance in South Africa, as well as the reasoning thereof. A brief history of cannabis from a South African legislative perspective will now follow, whereafter the different Prince cases will be analysed to gain an understanding on the rationale of the Courts that led to the legalisation of cannabis, and possibly causing *lacunae* in South African labour legislation.

3.1 Legislation

3.1.1 Prohibition of dagga by the Dutch East India Company in the 1680's

The Dutch East India Company, also known as the *Verenigde Oost-Indische Compagnie* (hereafter VOC) was a large multinational company founded in The Netherlands.¹⁸³ Upon the instruction of the VOC, Jan van Riebeeck was sent to southern Africa with the task of establishing a refreshment station for sailors in the Cape of Good Hope.¹⁸⁴ The refreshment station eventually grew to what is today known as Cape Town.¹⁸⁵ Van Riebeeck became known as the Dutch Merchant, commander and founder of the first permanent European settlement in the Cape.¹⁸⁶ Eventually Van Riebeeck noticed that some of the natives were particularly fond of a plant they called "dacha" that made them intoxicated when they ingested it.¹⁸⁷ In the 1680's the VOC tried to establish a monopoly on this plant (cannabis), as they did in the case of tobacco and alcohol, by banning settlers from cultivating it.¹⁸⁸ However, this ban was lifted in the year 1700 when the VOC realised that it was unfeasible to ban cannabis cultivation when it was growing wild and readily available through trade with indigenous people.¹⁸⁹ During the era of colonisation

¹⁸³ Lucassen 2005 *International Labor and Working-Class History* 12.

¹⁸⁴ Pooley 2009 *Environment and History* 8.

¹⁸⁵ Pooley 2009 *Environment and History* 11.

¹⁸⁶ Pooley 2009 *Environment and History* 10.

¹⁸⁷ Clarke and Merlin *Cannabis: Evolution and Ethnobotany* 235.

¹⁸⁸ Paterson *Prohibition & Resistance: A Socio-Political Exploration of the Changing Dynamics of the Southern African Cannabis Trade* 33.

¹⁸⁹ Anonymous 2020 <https://www.medicalcannabisdispensary.co.za/articles/current-cannabis-laws-in-south-africa>.

in Africa, the psychoactive use of cannabis by native Africans was a common occurrence.¹⁹⁰

3.1.2 Prohibition of sativa by Natal's Coolie Law Consolidation in 1870

Until the passing of the *Coolie Law Consolidation* in 1870, the use of cannabis remained unregulated for almost two centuries.¹⁹¹ Due to the findings of a study that was conducted in Indian insanity asylums at the time when India was also a British colony, the British colonialists were convinced that there existed a link between cannabis use and insanity.¹⁹² However, it must be highlighted that this was not British colonialists' main motivation for ultimately outlawing cannabis use; their rationale was rather to ban the use of cannabis because it was seen as a drug that resulted in a person becoming lazy and susceptible to committing crime.¹⁹³ This law, which was only applicable to Indians, banned them from possessing, smoking, using, bartering or gifting the plant in the province of Natal.¹⁹⁴ The ban on cannabis thus effectively prohibited Indian workers from indulging in cannabis use as they may have done in their home country.¹⁹⁵

3.1.3 Outlaw of cannabis by the Cape Colony in 1891

The Cape Colony also eventually prohibited cannabis possession and consumption with the introduction of the *Cape Colony Act 34* of 1891.¹⁹⁶ The same motivations given for the ban of cannabis in Natal were also given for the ban of cannabis in the Cape, being fear of crime and labourer indolence that were believed to be a result of cannabis use.¹⁹⁷

¹⁹⁰ Clarke and Merlin *Cannabis: Evolution and Ethnobotany* 236-237.

¹⁹¹ Anonymous 2020 <https://www.medicalcannabisdispensary.co.za/articles/current-cannabis-laws-in-south-africa>

¹⁹² Paterson *Prohibition & Resistance: A Socio-Political Exploration of the Changing Dynamics of the Southern African Cannabis Trade* 43.

¹⁹³ Anonymous 2020 <https://www.medicalcannabisdispensary.co.za/articles/current-cannabis-laws-in-south-africa>; Paterson *Prohibition & Resistance: A Socio-Political Exploration of the Changing Dynamics of the Southern African Cannabis Trade* 45.

¹⁹⁴ Anonymous 2020 <https://www.medicalcannabisdispensary.co.za/articles/current-cannabis-laws-in-south-africa>.

¹⁹⁵ Clarke and Merlin *Cannabis: Evolution and Ethnobotany* 236-237.

¹⁹⁶ Paterson *Prohibition & resistance: a socio-political exploration of the changing dynamics of the Southern African cannabis trade* 47; *Cape Colony Act 34* of 1891.

¹⁹⁷ Paterson *Prohibition & Resistance: A Socio-Political Exploration of the Changing Dynamics of the Southern African Cannabis Trade* 47.

3.1.4 Customs and Excises Duty Amendment Act of 1922

While cannabis had already been banned in Natal and the Cape provinces by 1922, it was still not regulated in the remainder of South Africa.¹⁹⁸ In this year the legislature decided to finally ban cannabis nationwide by amending regulation 14 of the *Customs and Excises Duties Act* to criminalise the cultivation, possession, use and sale of cannabis nationwide.¹⁹⁹ The motivation for this was that the government of the time was of the view that the use of cannabis resulted in a relaxed attitude towards the policies implemented by the then government.²⁰⁰

3.1.5 League of Nations, 1923 to 1925

The United States and South Africa viewed cannabis in a similar light and pushed for the international ban of cannabis in 1923.²⁰¹ The government of South Africa at the time wrote a letter to the 'Advisory Committee on the Traffic in Opium and Dangerous Drugs', asking the committee to include cannabis on the list of habit-forming drugs in the international convention on drugs.²⁰² The request was recognised at the Second Opium Conference in 1924 and was eventually included in international law in 1925.²⁰³

The amendments made at the Second Opium Conference created a legal obligation for countries that were signatories to the *Treaty of Versailles* to regulate and ban cannabis in their national legislation.²⁰⁴

¹⁹⁸ Vos 2017 <https://constitutionallyspeaking.co.za/dagga-judgment-there-are-less-drastic-ways-to-deal-with-its-harmful-effects/>.

¹⁹⁹ Anonymous 2020 <https://www.medicalcannabisdispensary.co.za/articles/current-cannabis-laws-in-south-africa/>; Paterson *Prohibition & Resistance: A Socio-Political Exploration of the Changing Dynamics of the Southern African Cannabis Trade* 52.

²⁰⁰ Anonymous 2020 <https://www.medicalcannabisdispensary.co.za/articles/current-cannabis-laws-in-south-africa/>.

²⁰¹ Anonymous 2020 <https://www.medicalcannabisdispensary.co.za/articles/current-cannabis-laws-in-south-africa/>.

²⁰² Du Toit 1975 *Cannabis and Culture* 107; Paterson *Prohibition & Resistance: A Socio-Political Exploration of the Changing Dynamics of the Southern African Cannabis Trade* 53.

²⁰³ Paterson *Prohibition & Resistance: A Socio-Political Exploration of the Changing Dynamics of the Southern African Cannabis Trade* 53.

²⁰⁴ Paterson *Prohibition & Resistance: A Socio-Political Exploration of the Changing Dynamics of the Southern African Cannabis Trade* 52.

3.1.6 *The Medical, Dental and Pharmacy Act of 1928*

With the introduction of the *Medical, Dental and Pharmacy Act* in 1928, all drugs that were classified as "habit forming drugs" were outlawed.²⁰⁵ Not only was cannabis classified as such, but it was also explicitly outlawed in terms of section 69 of the relevant Act, which reads:

No person shall smoke, or use, or shall import, manufacture, sell or supply, or possess for purpose of sale or supply to any other person, any pipe, receptacle or appliance for smoking opium, Indian hemp or dagga or intsangu, or save except in the circumstances contemplated in sections, sixty-two to sixty-four...²⁰⁶

The above section thus meant that cannabis was banned.

3.1.7 *The Weeds Act 42 of 1937*

The *Weeds Act* of 1937 placed the onus to prevent cannabis cultivation on landowners and occupiers of land.²⁰⁷ According to this Act, the owner or occupier of land had to prevent any plant classified as "weed" from growing on their premises whereby failing to do so was regarded as an offence.²⁰⁸ Upon discovery of such an instance and conviction of offence, the State was authorised to remove such weed at the expense of the land owner or occupier of the land. In 1937 cannabis was classified as such a weed in terms of the act and was therefore prohibited from being cultivated.²⁰⁹

3.1.8 *The Abuse of Dependence-producing Substances and Rehabilitation Centres Act*

As a result of the rise in illicit cannabis trade and the continued abuse of cannabis at the time, the Department of Social Welfare and Pensions published a report entitled *Drug Dependence and Some of Its Concomitant Aspects in the Republic of South Africa*.²¹⁰ This report outlined the problematic effects of cannabis on the youth, linking the use of

²⁰⁵ Du Toit 1975 *Cannabis and Culture* 107.

²⁰⁶ Section 69 of *The Medical, Dental and Pharmacy Act* 13 of 1928.

²⁰⁷ Anonymous 2020 <https://www.medicalcannabisdispensary.co.za/articles/current-cannabis-laws-in-south-africa>.

²⁰⁸ Du Toit 1975 *Cannabis and Culture* 107; Paterson *Prohibition & Resistance: A Socio-Political Exploration of the Changing Dynamics of the Southern African Cannabis Trade* 54.

²⁰⁹ Paterson *Prohibition & Resistance: A Socio-Political Exploration of the Changing Dynamics of the Southern African Cannabis Trade* 54; Anonymous 2020 <https://www.medicalcannabisdispensary.co.za/articles/current-cannabis-laws-in-south-africa>.

²¹⁰ Paterson *Prohibition & Resistance: A Socio-Political Exploration of the Changing Dynamics of the Southern African Cannabis Trade* 59.

cannabis to mischief.²¹¹ This report influenced the legislature when writing the *Abuse of Dependence-producing Substances and Rehabilitation Centres Act*, where cannabis was listed as a prohibited dependence producing drug.²¹² The Act created a presumption that if a person is caught with cannabis or any prohibited dependence-producing substance exceeding 115 grams in mass, it could be assumed that the accused dealt in such substances till the contrary has been proven.²¹³ Persons convicted of dealing in cannabis in terms of this act could be held liable to a maximum fine of R30 000 and/or imprisonment for a period not exceeding 15 years.²¹⁴ Persons who were not suspected of dealing in drugs were naturally not prosecuted in terms of this Act.

3.1.9 Medicines and Related Substances Control Act 101 of 1965 and the Drugs and Drug Trafficking Act of 1992

The possession of cannabis was criminalised through the provisions of both the *Drugs and Drug Trafficking Act* as well as the *Medicines and Related Substances Control Act*.²¹⁵ Cannabis was listed as an undesirable dependence-producing substance in Part 3 of Schedule 2 of the *Drugs and Drug Trafficking Act* while section 4(b) of the act prohibited the possession of such substances for recreational use.²¹⁶ In the government gazette of 10 April 2003, cannabis was also listed as a schedule 7 substance in the *Medicines and Related Substances Control Act*.²¹⁷ Section 22A(9)(a)(i) of the *Medicines and Related Substances Control Act* prohibited acquisition, use, possession and manufacturing of cannabis without the authorisation of the Director-General of Health.²¹⁸

3.2 Case law – The Prince of cannabis & Co.

Before discussing the legal arguments in each of the Prince-cases, it is of value to first discuss the facts that led up to these cases. Mr Prince was a law graduate and an aspiring

²¹¹ Paterson *Prohibition & Resistance: A Socio-Political Exploration of the Changing Dynamics of the Southern African Cannabis Trade* 59.

²¹² Part 1 of the Schedule in *Abuse of Dependence-Producing Substances and Rehabilitation Centres Act* 41 of 1971.

²¹³ Section 10(1) of *Abuse of Dependence-Producing Substances and Rehabilitation Centres Act* 41 of 1971.

²¹⁴ Section 2(d)(i) of *Abuse of Dependence-Producing Substances and Rehabilitation Centres Act* 41 of 1971.

²¹⁵ Lubaale and Mavundla 2019 *African Human Rights Law Journal* 820.

²¹⁶ Section 4(b) read together with part 2 of schedule 2 of *Drugs and Drug Trafficking Act* 140 of 1992.

²¹⁷ GG 24727 of 10 April 2003; Footnote 2 of Section 2(b) of *Drugs and Drug Trafficking Act* 140 of 1992.

²¹⁸ Section 22A(9)(A)(1) of *Medicines and Related Substances Control Act* 101 of 1965.

candidate attorney that applied to the Law Society for the registration of his contract for his articles of clerkship as a candidate attorney.²¹⁹ He was also, however, a practicing Rastafarian who had twice been convicted in terms of section 4(b) of the *Drugs and Drug Trafficking Act* for the unlawful possession of cannabis.²²⁰ Section A4 of the old *Attorneys Act* required a person with aspirations of becoming a candidate attorney to submit their contract as well as an affidavit confirming that they are "a fit and proper person" to the Law Society.²²¹ Once these requirements are met to the satisfaction of the Law Society, the Law Society would register the candidates' contracts with their respective principals and they might commence with their articles of clerkship.²²² In the case of Mr Prince, the Law Society refused to register his contract for articles of clerkship because, according to the council, Mr Prince had failed to persuade them that he was a "fit and proper person".²²³ Their justification for this was that, apart from the fact that Mr Prince had previously been convicted of a criminal offence, he also stated in his affidavit that he would continue to use cannabis when practising his religion, whereby he stated that he would commit the offence again.²²⁴

3.2.1 Prince v The President of the Law Society of the Cape of Good Hope in the High Court (1998)

After the decision by the council of the Law Society, Mr Prince applied to the High Court of the Cape Provincial Division for an order setting aside the decision and also directing the secretary of the Law Society to register the articles of clerkship contract.²²⁵

The legal main argument made by Mr Prince and his legal team was that the prohibition of cannabis in terms of section 4(b) of the *Drugs and Drug Trafficking Act* infringed on his right to freedom of religion in section 15(1) and section 31(1)(a) of the Constitution. His alternative argument was that the prohibition of cannabis unfairly discriminated

²¹⁹ *Prince v President, Cape Law Society* 2000 3 SA 845 (SCA) para 2; *Prince v The President of the Law Society of the Cape of Good Hope* 1998 JDR 0368 1.

²²⁰ *Prince v President, Cape Law Society* 2000 3 SA 845 (SCA) para 2; i1998 JDR 0368 2.

²²¹ Section A4 of the *Attorneys Act* 53 of 1979.

²²² *Prince v President, Cape Law Society* 2000 3 SA 845 (SCA) para 1.

²²³ *Prince v President, Cape Law Society* 2000 3 SA 845 (SCA) para 5; *Prince v The President of the Law Society of the Cape of Good Hope* 1998 JDR 0368 2.

²²⁴ *Prince v President, Cape Law Society* 2000 3 SA 845 (SCA) para 5.

²²⁵ *Prince v The President of the Law Society of the Cape of Good Hope* 1998 JDR 0368 (C) 2.

against people of the Rastafarian religion and therefore infringed on their constitutional right against unfair discrimination in terms of section 9(3) of the Constitution.

The enquiry into whether the above-mentioned constituted an unfair breach of a constitutional right was twofold: Firstly, the Court had to determine whether there was limitation of a constitutional right; and secondly, if there was indeed a limitation, whether the limitation was justifiable in terms of section section 36 of the Constitution.²²⁶ Section 36 of the Constitution provides that rights in the *Bill of Rights* may be limited in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, also taking into account the factors listed in section 36(a) to (e).²²⁷ Subsections (a) to (e) focus on the following factors:²²⁸

- (a) the nature of the rights that are being limited;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) a less restrictive means to achieve the purpose.

The Applicant agreed that the prohibition of cannabis was fair as far as subsection (a) to (d), but that the restriction was not fair in terms of subsection (e).²²⁹ The Applicant was of the view that his right to religious freedom could be avoided by creating an exemption that would allow *bona fide* Rastafarians to use cannabis for their religious purposes.²³⁰ The Court had to weigh up the right to freedom of religion for Rastafarians to smoke cannabis against the evils that the legislature sought to combat with section 4 of the *Drugs and Drug Trafficking Act*.²³¹ The Court was of the view that if an exemption were to be created, an impractical burden of proof would be placed on the prosecution and the door would be left open for an accused to raise the easy defence of being a Rastafarian,

²²⁶ *Prince v The President of the Law Society of the Cape of Good Hope* 1998 JDR 0368 (C) 11.

²²⁷ *Prince v The President of the Law Society of the Cape of Good Hope* 1998 JDR 0368 (C) 11; Section 36 of *The Constitution of the Republic of South Africa*, 1996.

²²⁸ Section 36(a) to (3) of *The Constitution of the Republic of South Africa*, 1996.

²²⁹ *Prince v The President of the Law Society of the Cape of Good Hope* 1998 JDR 0368 (C) 21.

²³⁰ *Prince v The President of the Law Society of the Cape of Good Hope* 1998 JDR 0368 (C) 21 - 22.

²³¹ *Prince v The President of the Law Society of the Cape of Good Hope* 1998 JDR 0368 (C) 27.

even if it was truly not the case.²³² The Court found that the limitation placed on the freedom of religion in terms of section 4(b) of the *Drugs and Drug Trafficking Act* was justified by the limitation clause in the Constitution.²³³

With regard to the argument that section 4(b) of the *Drugs and Drug Trafficking Act* unfairly discriminated against people of the Rastafarian religion, the Court also found, for similar reasons as listed above that the limitation was justified in terms of section 36 of the Constitution.²³⁴

The application was dismissed by Judge President Friedman, but the application for leave to appeal was granted.²³⁵

3.2.2 Prince v President of the Law Society of the Cape of Good Hope in the Supreme Court of Appeal (2002)

With the same facts set out above Mr Prince approached the Supreme Court of Appeal.²³⁶ The application was to: Firstly, have the decision of the Council of the Law Society reviewed with the motivation being that the Council did not exercise its discretion properly; and secondly to have section 4(b) of the *Drugs Act* as well as section 22A(10) of the *Medicines Act* declared inconsistent with the Constitution; or to create an exception to these sections for the purposes of religious practice.²³⁷

With regard to the decision by the Council, the Court found that the Council was within its rights to reject the registration of the contract on the basis that the applicant, apart from having previous convictions, stated that he would intentionally continue acting in defiance of the law.²³⁸ This was something that was not acceptable for a person alleging to be a fit and proper person or someone that will have to take the oath of office to

²³² *Prince v The President of the Law Society of the Cape of Good Hope* 1998 JDR 0368 (C) 27.

²³³ *Prince v The President of the Law Society of the Cape of Good Hope* 1998 JDR 0368 (C) 30; Section 36 of *The Constitution of the Republic of South Africa*, 1996.

²³⁴ *Prince v The President of the Law Society of the Cape of Good Hope* 1998 JDR 0368 (C) 33-34.

²³⁵ *Prince v President, Cape Law Society* 2000 3 SA 845 (SCA) para 3.

²³⁶ *Prince v President, Cape Law Society* 2000 3 SA 845 (SCA) para 3.

²³⁷ *Prince v President, Cape Law Society* 2000 3 SA 845 (SCA) para 4 and para 11

²³⁸ *Prince v President, Cape Law Society* 2000 3 SA 845 (SCA) para 17.

uphold the laws of South Africa.²³⁹ The Court agreed with the opinion of the Council's decision that this would bring disrepute to the profession.²⁴⁰

With regard to having section 4(b) of the *Drugs and Drug Trafficking Act* and 22A(10) of the *Medicines and Related Substances Control Act* be declared unconstitutional, or creating an exception on these sections, the Court was of the view that the restrictions of the aforementioned sections created were for a legitimate governmental aim - the protection of society as a whole.²⁴¹ The limitation in terms of section 36(e) of the Constitution was thus justifiable.²⁴² The Court also stated that only the legislature can legislate, therefore creating an exception to the abovementioned sections was beyond the Courts' powers.²⁴³

3.2.3 Prince v South Africa before the African Commission on Human and Peoples' Rights

Mr Prince filed a complaint with the African Commission on Human and Peoples' Rights (hereafter African Commission) alleging that South Africa, who is a member of the African Union, violated articles 5, 8, 15 and 17(2) of the *African Charter on Human and Peoples' Rights* (hereafter *Banjul Charter*).²⁴⁴

Mr Prince alleged that the neglect of both the *Medicines and Related Substances Control Act* as well as the *Drugs and Drug Trafficking Act* to distinguish the use of cannabis by Rastafarians for *bona fide* purposes from drug abuse violates his right to dignity, freedom of religion, occupational choice as well as cultural life.²⁴⁵ Mr Price submitted that he did not ask for the decriminalisation of cannabis, but merely for reasonable accommodation to manifest his beliefs in accordance with the Rastafari religion.²⁴⁶

²³⁹ *Prince v President, Cape Law Society* 2000 3 SA 845 (SCA) para 6.

²⁴⁰ *Prince v President, Cape Law Society* 2000 3 SA 845 (SCA) para 5 and par 17.

²⁴¹ *Prince v President, Cape Law Society* 2000 3 SA 845 (SCA) para 12.

²⁴² *Prince v President, Cape Law Society* 2000 3 SA 845 (SCA) para 14.

²⁴³ *Prince v President, Cape Law Society* 2000 3 SA 845 (SCA) para 11.

²⁴⁴ Art 5: Right to respect of the dignity inherent in a human being;

Art 8: Right to freedom of conscience, profession and free practice of religion;

Art 15: Right to occupational choice to work under equitable and satisfactory conditions;

Art 17(2): The right of an individual to freely take part in the cultural life of his community.

Garreth Anver Prince v South Africa Comm 255/2002, 18th ACHPR AAR Annex III (2004-2005) para 5.

²⁴⁵ *Garreth Anver Prince v South Africa Comm* 255/2002, 18th ACHPR AAR Annex III (2004-2005) para 30.

²⁴⁶ *Garreth Anver Prince v South Africa Comm* 255/2002, 18th ACHPR AAR Annex III (2004-2005) para 31.

South Africa argued that all religious practices must be conducted within the framework of South African Law and that all persons within its borders are bound thereby.²⁴⁷ South Africa averred that reasonable limitations were placed on the practice of a religion in the interest of the broader society and that these limitations do not negate the essential right to freedom of religion.²⁴⁸ South Africa submitted that attorneys are obliged to uphold the law and that any wilful defiance of the law suggests that a person is not fit and proper to be admitted as an attorney.²⁴⁹ Finally, South Africa maintained that the legal restrictions that were placed on the use of cannabis, even for religious purposes, were both rational and legitimate, therefore same do not invade the right to freedom of religion any further than necessary.²⁵⁰

With regard to the alleged violation of article 8 of the Banjul Charter, the African Commission stated that even though the right to hold religious beliefs should be absolute, the right to act on those beliefs should not.²⁵¹ Therefore, in some circumstances, the interests of the broader society can indeed outweigh the right of a group when it comes to practising their religion.²⁵² The African Commission found that the limitations that were placed on the possession of cannabis served a general and legitimate purpose; and were necessary to obtain a desired result.²⁵³ The African Commission found no violation of article 8.²⁵⁴

Regarding article 15 of the *Banjul Charter*, relating to occupational choice, the African Commission found that although states must respect and protect the right of individuals to access the labour market without discrimination, leniency must not be granted for individuals to bypass restrictions that were legitimately laid down in the interests of society. The African Commission was of the view that Mr Prince had disqualified himself from the profession by violating legitimate restrictions. Section 8 was thus not violated by South Africa.²⁵⁵

²⁴⁷ *Garreth Anver Prince v South Africa Comm 255/2002*, 18th ACHPR AAR Annex III (2004-2005) para 33.

²⁴⁸ *Garreth Anver Prince v South Africa Comm 255/2002*, 18th ACHPR AAR Annex III (2004-2005) para 34.

²⁴⁹ *Garreth Anver Prince v South Africa Comm 255/2002*, 18th ACHPR AAR Annex III (2004-2005) para 32.

²⁵⁰ *Garreth Anver Prince v South Africa Comm 255/2002*, 18th ACHPR AAR Annex III (2004-2005) para 34.

²⁵¹ *Garreth Anver Prince v South Africa Comm 255/2002*, 18th ACHPR AAR Annex III (2004-2005) para 41.

²⁵² *Garreth Anver Prince v South Africa Comm 255/2002*, 18th ACHPR AAR Annex III (2004-2005) para 41.

²⁵³ *Garreth Anver Prince v South Africa Comm 255/2002*, 18th ACHPR AAR Annex III (2004-2005) para 43.

²⁵⁴ *Garreth Anver Prince v South Africa Comm 255/2002*, 18th ACHPR AAR Annex III (2004-2005) para 44.

²⁵⁵ *Garreth Anver Prince v South Africa Comm 255/2002*, 18th ACHPR AAR Annex III (2004-2005) para 46.

The final matter that the African Commission had to address was the alleged violation of articles 5 and 17(2) of the *Banjul Charter*, being the right to dignity and cultural life. The African Commission noted that although individuals may freely choose to exercise their culture, the right to do so may not be unlimited in so far that it violates the norms that keep the nation together.²⁵⁶ Once again the interests of the whole society outweigh the interests of single group.²⁵⁷ Once again the Commission found that there was no violation.²⁵⁸

3.2.4 *Prince v South Africa before the Human Rights Committee of the United Nations (2007)*

Mr Prince was not satisfied by the findings of the South African Constitutional Court nor the decision taken by the African Commission. As a result, he escalated the matter to the United Nations.²⁵⁹ Mr Prince alleged the following violations of the *International Covenant on Civil and Political Rights*: article 18, paragraph 1; article 26 and article 27.²⁶⁰

Mr Prince claimed a violation by South Africa in terms of article 18 paragraph 1, arguing that the State party had a positive obligation in terms of the covenant to take measures to ensure the *de facto* protection of his right to freedom of religion.²⁶¹ He also added that the limitation placed by South Africa on the possession of cannabis was excessive.²⁶² According to Mr Prince South Africa had also violated article 26 in that the State failed to differentiate the Rastafari religion from other religions, thereby discriminating against

²⁵⁶ *Garreth Anver Prince v South Africa Comm 255/2002*, 18th ACHPR AAR Annex III (2004-2005) para 48.

²⁵⁷ *Garreth Anver Prince v South Africa Comm 255/2002*, 18th ACHPR AAR Annex III (2004-2005) para 48.

²⁵⁸ *Garreth Anver Prince v South Africa Comm 255/2002*, 18th ACHPR AAR Annex III (2004-2005) para 49.

²⁵⁹ *Gareth Anver Prince v South Africa CCPR/C/91/D/1474/2006*.

²⁶⁰ *Gareth Anver Prince v South Africa CCPR/C/91/D/1474/2006* para 1;

Article 18, par 1: "Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching";

Article 26: "All persons are equal before the law and entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religions, political or other opinion, national or social origin, property, birth or other status";

Article 27: "In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of the group, to enjoy their own culture, to profess and practice their religion, or to use their own language".

²⁶¹ *Gareth Anver Prince v South Africa CCPR/C/91/D/1474/2006* para 3.1.

²⁶² *Gareth Anver Prince v South Africa CCPR/C/91/D/1474/2006* para 3.2.

him.²⁶³ Finally, Mr Prince alleged the failure of the State to explore and find an effective exemption for the Rastafari religion, constituted a violation under article 27.²⁶⁴

The State responded to the abovementioned and argued that article 18 paragraph 3 allowed for a limitation to be placed on the rights contained in article 18 paragraph 1.²⁶⁵ The state averred that the limitation placed on article 18 paragraph 1 was proportionate and necessary for the protection of public safety, order, health, morals or the fundamental rights and freedoms of others.²⁶⁶ With regard to the alleged violation of article 26, the State argued that the law should apply equally to all and that the Rastafari religion should not be differentiated from other religions because it could be interpreted as a form of discrimination against other groups in society.²⁶⁷ Finally, with regard to article 27, the state submitted that the Constitutional Court, while making its decision, did take into account that Rastafarians form part of a minority group who is small, vulnerable and marginalised.²⁶⁸

The Human Rights Committee found that there was no violation of article 18 paragraph 1 because the failure of that State to make an exception for Rastafarians to possess cannabis was justified in terms of article 18 paragraph 3.²⁶⁹ With regard to the alleged violation of article 26, the Committee found that there was no violation as the prohibition of cannabis does not disproportionately only affect people of the Rastafari religion, but also the general public.²⁷⁰ The Committee also added that the limitation of cannabis was based on objective and reasonable grounds.²⁷¹ Finally, the Committee agreed that there was an interference with the right of a member of a religious minority, but found that the interference was not within the meaning of article 27 and there was therefore no violation of the said article.²⁷²

²⁶³ *Gareth Anver Prince v South Africa* CCPR/C/91/D/1474/2006 para 3.3.

²⁶⁴ *Gareth Anver Prince v South Africa* CCPR/C/91/D/1474/2006 para 3.4.

²⁶⁵ *Gareth Anver Prince v South Africa* CCPR/C/91/D/1474/2006 para 4.5;

Article 18, par 3: Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

²⁶⁶ *Gareth Anver Prince v South Africa* CCPR/C/91/D/1474/2006 para 4.4.

²⁶⁷ *Gareth Anver Prince v South Africa* CCPR/C/91/D/1474/2006 para 4.9 and 4.10.

²⁶⁸ *Gareth Anver Prince v South Africa* CCPR/C/91/D/1474/2006 para 4.11.

²⁶⁹ *Gareth Anver Prince v South Africa* CCPR/C/91/D/1474/2006 para 7.3.

²⁷⁰ *Gareth Anver Prince v South Africa* CCPR/C/91/D/1474/2006 para 7.5.

²⁷¹ *Gareth Anver Prince v South Africa* CCPR/C/91/D/1474/2006 para 7.5.

²⁷² *Gareth Anver Prince v South Africa* CCPR/C/91/D/1474/2006 para 7.4.

3.2.5 *Prince v Minister of Justice and Constitutional Development and Others (2017)*

In 2017 different applicants brought essentially the same application before the Western Cape High Court to have the impugned provisions against the personal cultivation, possession and use of cannabis be declared unconstitutional and invalid.²⁷³ They contended *inter alia* that the impugned legislation infringed on their right to privacy.²⁷⁴ The right to privacy was central to this application and the Court mainly dealt with it.²⁷⁵ Because the applications were similar, the Court consolidated the applications and decided them together.²⁷⁶

Once again, the legislation in question was sections 4(b) and 5(b) of the *Drugs and Drug Trafficking Act*, sections 22A(9)(a)(i) and 22A(10) of the *Medicines and Related Substances Control Act* and section 40(1)(h) of the *Criminal Procedure Act*.²⁷⁷ Sections 4(b) and 5(b) of the *Drugs and Drug Trafficking Act* dealt with the prohibition of the possession, cultivation, transportation and distribution of cannabis for personal consumption while the *Medicines and Related Substances Control Act* only prohibited the consumption of cannabis.²⁷⁸ Finally, section 40(1)(h) of the *Criminal Procedure Act* dealt with the powers of a peace officer to arrest a person, without a warrant, who is reasonably suspected of committing an offence relating to the supply, possession or conveyance of cannabis.²⁷⁹

It was now for the first time before the Court to decide whether the abovementioned sections infringed on the applicants' right to privacy in section 14 of the Constitution.²⁸⁰ This time it was whether the limitation on the right to privacy could pass the constitutional muster of section 36 of the Constitution.²⁸¹ Section 14 of the Constitution reads as follows:

Everyone has the right to privacy which includes the right not to have-
(a) their person or home searched;

²⁷³ *Prince v Minister of Justice* 2017 4 SA 299 (WCC).

²⁷⁴ *Prince v Minister of Justice* 2017 4 SA 299 (WCC) para 11.

²⁷⁵ *Prince v Minister of Justice* 2017 4 SA 299 (WCC) para 20.

²⁷⁶ *Prince v Minister of Justice* 2017 4 SA 299 (WCC) para 3.

²⁷⁷ *Prince v Minister of Justice* 2017 4 SA 299 (WCC) para 132.

²⁷⁸ *Prince v Minister of Justice* 2017 4 SA 299 (WCC) para 4.

²⁷⁹ *Prince v Minister of Justice* 2017 4 SA 299 (WCC) para 4.

²⁸⁰ *Prince v Minister of Justice* 2017 4 SA 299 (WCC) para 18; Section 14 of *The Constitution of the Republic of South Africa, 1996*.

²⁸¹ *Prince v Minister of Justice* 2017 4 SA 299 (WCC) para 20; Section 36(1) of *The Constitution of the Republic of South Africa, 1996*.

- (b) their property searched;
- (c) their possessions seized; or
- (d) the privacy of their communications infringed.

The Court started off by stating that it was trite law that the right to privacy becomes more powerful, and deserving of greater protection, once one moves closer to the centre of the intimate sphere of a person.²⁸² Judge Davis averred that if the previous statement was true, then those who wish to partake in small quantities of cannabis in the intimacy of their homes exercise a right to autonomy which, without clear justification, does not merit the interference from the outside community or the state.²⁸³ The onus was on the state to prove that the limitation on the right to privacy could be justified in terms of section 36(1) of the Constitution.²⁸⁴ Again, these factors were: (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.²⁸⁵

In casu focus was placed on section 36(1)(b): the importance of the purpose of the limitation. The state had to prove that there was a substantial state interest which justified the limitation.²⁸⁶ The evidence that was led by the state had the effect of pointing out possible dangers that were associated with the use of cannabis.²⁸⁷ However, many shortcomings were pointed out by the applicants' expert witnesses in the evidence led by the state.²⁸⁸ Based on new studies that the light to moderate use of cannabis poses no greater risk than that of alcohol.²⁸⁹ The applicants submitted that the extent and manner to which cannabis was prohibited, could not be justified.²⁹⁰ The applicant also submitted that the criminalisation of cannabis in some cases, opens up the risk of further harm to the health and well-being of persons consuming it.²⁹¹

²⁸² *Prince v Minister of Justice* 2017 4 SA 299 (WCC) para 22.

²⁸³ *Prince v Minister of Justice* 2017 4 SA 299 (WCC) para 25.

²⁸⁴ *Prince v Minister of Justice* 2017 4 SA 299 (WCC) para 29.

²⁸⁵ Section 36(1) of *The Constitution of the Republic of South Africa, 1996*; *Prince v Minister of Justice* 2017 4 SA 299 (WCC) para 28.

²⁸⁶ *Prince v Minister of Justice* 2017 4 SA 299 (WCC) para 32.

²⁸⁷ *Prince v Minister of Justice* 2017 4 SA 299 (WCC) para 32.

²⁸⁸ *Prince v Minister of Justice* 2017 4 SA 299 (WCC) para 92.

²⁸⁹ *Prince v Minister of Justice* 2017 4 SA 299 (WCC) para 59.

²⁹⁰ *Prince v Minister of Justice* 2017 4 SA 299 (WCC) para 59; *Prince v Minister of Justice* 2017 4 SA 299 (WCC) para 63; *Prince v Minister of Justice* 2017 4 SA 299 (WCC) para 72.

²⁹¹ *Prince v Minister of Justice* 2017 4 SA 299 (WCC) para 61.

The Court made use of comparative law of countries with democracies also based on freedom, equality and dignity as a guide to determine whether the limitations on the right to freedom was indeed unjustified.²⁹² The Court considered cases, with similar facts, from foreign jurisdictions to determine whether the prohibition on the possession and consumption of cannabis for personal use unreasonably violated the right to privacy.

The first decision the Court considered was the dissenting judgement of Arbour J in the Canadian case of *R v Malmo-Levine*²⁹³, which was particularly applicable to the limitation of the right to privacy as enshrined in section 14 of the South African Constitution.²⁹⁴ Judge Arbour referred to the harm principle by John Stuart Mill that stated that: "the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others".²⁹⁵ Thus, the government could only constrain the liberties of a person if those liberties, left unconstrained, will cause reasonable risk to others.²⁹⁶ Judge Arbour noted the burden that cannabis places on society is very small compared to the burden society already tolerates as a result of the use of alcohol and tobacco.²⁹⁷ Furthermore, he found that the prohibition of the personal use of cannabis in Canada violated the right to liberty in a manner that is not in accordance with the harm principle, which is accepted as a principle of fundamental justice, because little to no harm is suffered by society as a result of the personal use of cannabis to justify the limitation of rights.²⁹⁸ The second judgment the Court considered was the *Arriola-case*²⁹⁹ by the Argentinian Supreme Court of Justice which found that the consumption of cannabis did not bring any concrete harm or danger to others in the general community and therefore declared that the criminalisation of the possession and consumption of cannabis for personal use unconstitutional because it unjustifiably violated an individual's right to privacy.³⁰⁰ Finally, fundamentally the same rationale was followed by the Alaskan Court in the case of *Ravin v State of Alaska*³⁰¹ where the Court

²⁹² *Prince v Minister of Justice* 2017 4 SA 299 (WCC) para 64.

²⁹³ *R v Malmo-Levine* 2003 SCR 571.

²⁹⁴ *Prince v Minister of Justice* 2017 4 SA 299 (WCC) para 73.

²⁹⁵ *Prince v Minister of Justice* 2017 4 SA 299 (WCC) para 69.

²⁹⁶ *Prince v Minister of Justice* 2017 4 SA 299 (WCC) paras 69 to 71.

²⁹⁷ *Prince v Minister of Justice* 2017 4 SA 299 (WCC) para 72.

²⁹⁸ *Prince v Minister of Justice* 2017 4 SA 299 (WCC) para 72.

²⁹⁹ *Fallo Arriola* (A. 891. XLIV).

³⁰⁰ *Prince v Minister of Justice* 2017 4 SA 299 (WCC) para 75.

³⁰¹ *Ravin v state* 537 P.2 494 (1975).

found that the right to privacy encompasses the possession and ingestion of cannabis in the privacy of one's home, unless the state can prove harm arising thereof to the public.³⁰²

In formulating judgement, the Court referred to the case of *AB v Minister of Social Development* that found that what other open and democratic societies consider appropriate can be of assistance in determining what is reasonable and justifiable in our own society for the purposes of section 36(1) of the Constitution.³⁰³ The Court noted that there was an international shift within democratic societies that recognised that the possession of cannabis for personal use does not cause societal harm and that limitations thereto are not justifiable.³⁰⁴ In the evaluation of evidence before the Court to determine whether the State has discharged its burden of proof to show that the limitation of privacy was justified, the Court stated that the evidence that was led by the state was 'singularly unimpressive'.³⁰⁵

The Court concluded that, based on the evidence led by the applicants and the lack of reliable evidence presented by the state, the legislative response to the personal consumption and use of cannabis was disproportionate to the minor social harms that may be caused as a result of the use thereof.³⁰⁶ The State failed to prove that there were no less restrictive means of dealing with their legitimate objective of curbing drug abuse, even though it was clear that a multitude of less restrictive means were available.³⁰⁷ The Court stated that the blunt instrument of the criminal law, as employed in the prohibition against the personal possession and use of cannabis, was disproportionate to the harms that the legislature had sought to curb.³⁰⁸ The Court found that the impugned provisions that limit the possession and use of cannabis for personal purposes, unjustifiably limited the right to privacy.³⁰⁹ Accordingly the Court declared sections 4(b) and 5(b) of the *Drugs and Drug Trafficking Act*; section 40(1)(h) of the *Criminal Procedure Act*; sections

³⁰² *Prince v Minister of Justice* 2017 4 SA 299 (WCC) paras 76 and 78.

³⁰³ *Prince v Minister of Justice* 2017 4 SA 299 (WCC) para 83; *AB v Minister of Social Development* 3 SA 570 (CC) para 321.

³⁰⁴ *Prince v Minister of Justice* 2017 4 SA 299 (WCC) para 90.

³⁰⁵ *Prince v Minister of Justice* 2017 4 SA 299 (WCC) para 92.

³⁰⁶ *Prince v Minister of Justice* 2017 4 SA 299 (WCC) para 102.

³⁰⁷ *Prince v Minister of Justice* 2017 4 SA 299 (WCC) para 107.

³⁰⁸ *Prince v Minister of Justice* 2017 4 SA 299 (WCC) para 108.

³⁰⁹ *Prince v Minister of Justice* 2017 4 SA 299 (WCC) para 102; *Prince v Minister of Justice* 2017 4 SA 299 (WCC) para 112.

22A(9)(a)(i) and 22A(10) of the *Medicines and Related Substances Control Act*; and schedule 7 of GN R509 of 2003 constitutionally invalid.

3.2.6 Minister of Justice and Constitutional Development and Others v Prince and Others (2018)

The State was dissatisfied with the judgement handed down by the High Court in the abovementioned ruling of *Prince v Minister of Justice and Constitutional Development* and, as a final effort, advanced the matter to the Constitutional Court.³¹⁰

Because the High Court declared the impugned provisions invalid on the basis that they unjustifiably limited the right to privacy, the Constitutional Court had to evaluate whether there was a limitation on the right to privacy, and if so, whether the limitation was justifiable based on the criteria listed in section 36 of the Constitution.

The Constitutional Court confirmed the decision by the High Court that the impugned provisions relating to the prohibition of the cultivation, possession and use of cannabis for personal use did indeed limit the right to privacy.³¹¹ The question that the Court now faced with was whether the limitation on the right to privacy was reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom in terms of section 36 of the Constitution.³¹²

Relating to the scope and content of the right to privacy, the Court referred to the well-known case of *Bernstein v Bester*³¹³ where Judge Ackermann stated that the right to privacy is the right to live one's life with minimum interference by the authorities and that it essentially entailed the right to be left alone.³¹⁴ The Court noted from this case that a very high level of protection was granted to the inner sphere of a person's private life, but as one acquired a social dimension thereto, the right to privacy becomes subject to some limitation if the said limitations could be justified.³¹⁵

³¹⁰ *Minister of Justice and Constitutional Development v Prince* 2018 1 SACR 14 (CC).

³¹¹ *Minister of Justice and Constitutional Development v Prince* 2018 1 SACR 14 (CC) para 58.

³¹² *Minister of Justice and Constitutional Development v Prince* 2018 1 SACR 14 (CC) para 60.

³¹³ *Bernstein v Bester* 1996 2 SA 751 (CC).

³¹⁴ *Minister of Justice and Constitutional Development v Prince* 2018 1 SACR 14 (CC) para 42 and 45.

³¹⁵ *Minister of Justice and Constitutional Development v Prince* 2018 1 SACR 14 (CC) para 46 to 48.

While considering the importance of the purpose of the limitation of the right to privacy, the counsel for the State argued that the purpose of the prohibition was for the protection of the health, safety and psychological well-being of persons that were affected by the trafficking and use of dependence-producing drugs.³¹⁶ The importance and legitimacy of this objective was never disputed.³¹⁷

With regard to the nature and extent of the limitation, the Court found that, based on the evidence that was brought, it was proven that low levels of consumption of cannabis was indeed safe.³¹⁸ What had not been proven was at which dosage does cannabis consumption become a concern to society.³¹⁹ The absence of the latter fact caused the Court to view the limitation as invasive.³²⁰

The Court turned its attention to the relationship between the limitation and the purpose of the restriction. Once again, the Court pointed out certain contradictions in the evidence brought by the State witnesses.³²¹ The Court referred to a report published by the World Health Organisation whereafter the Court came to the conclusion that the use of cannabis was no more harmful to society than that of alcohol.³²² This fact was also confirmed in the statements made by the South African Central Drug Authority.³²³ The Constitutional Court agreed with the conclusion made by the High Court: that many democratic societies based on freedom, equality and human dignity have either legalised or decriminalised the possession of cannabis for personal consumption.³²⁴

There were however issues in which the Constitutional Court differed from the High Court: the definition of 'deal in' that included the cultivation of cannabis; the cultivation and consumption of cannabis in private, rather than limiting it to a private dwelling; and the permissibility relating to the sale and purchase of cannabis.

³¹⁶ *Minister of Justice and Constitutional Development v Prince* 2018 1 SACR 14 (CC) para 63 and 64.

³¹⁷ *Minister of Justice and Constitutional Development v Prince* 2018 1 SACR 14 (CC) para 64.

³¹⁸ *Minister of Justice and Constitutional Development v Prince* 2018 1 SACR 14 (CC) para 66.

³¹⁹ *Minister of Justice and Constitutional Development v Prince* 2018 1 SACR 14 (CC) para 66.

³²⁰ *Minister of Justice and Constitutional Development v Prince* 2018 1 SACR 14 (CC) para 66.

³²¹ *Minister of Justice and Constitutional Development v Prince* 2018 1 SACR 14 (CC) para 69.

³²² *Minister of Justice and Constitutional Development v Prince* 2018 1 SACR 14 (CC) para 70.

³²³ *Minister of Justice and Constitutional Development v Prince* 2018 1 SACR 14 (CC) para 78.

³²⁴ *Minister of Justice and Constitutional Development v Prince* 2018 1 SACR 14 (CC) para 79.

The definition of 'deal in' in section 1 of the *Drugs and Drug Trafficking Act* was declared invalid by the Court because it prohibited the cultivation of cannabis for personal use. The definition of 'deal in' was:

performing any act in connection with the transshipment, importation, cultivation, collection, manufacture, supply, prescription, administration, sale, transmission or exportation of the drug.³²⁵

The Court ordered that the cultivation of cannabis for personal use be excluded from the definition of 'deal in'.³²⁶ This had the effect that persons who cultivated cannabis for personal use could not be regarded as dealing in cannabis, which is still regarded as an offence.³²⁷

The Constitutional Court stated that what was ordered in the High Court decision relating to the cultivation, possession and consumption of cannabis should not be interpreted to restrict cannabis possession and use to merely just a dwelling, but should be afforded the broader meaning of any place that is private.³²⁸ Thus, an adult person could cultivate, possess and consume cannabis at any place that could be considered private.³²⁹

The Constitutional Court did not confirm the decision of the High Court that declared section 22A(10) invalid.³³⁰ Section 22A(10) regulates the sale and administration of cannabis. The sale and purchase of cannabis, other than for medical purposes, could still not be allowed in terms of section 22A(10) because the prevention of dealing in drugs is regarded as a legitimate aim.

The Constitutional Court also did not confirm the order of the High Court to have section 40(1)(h) of the *Criminal Procedure Act* be declared constitutionally invalid.³³¹ Section 40(1)(h) enabled a peace officer to arrest any person without a warrant who was reasonably suspected of having committed an offence.³³² If it is no longer a crime to

³²⁵ The definition of 'deal in' in section 1 of the *Drugs and Drug Trafficking Act* 140 of 1992.

³²⁶ *Minister of Justice and Constitutional Development v Prince* 2018 1 SACR 14 (CC) par 24.

³²⁷ *Minister of Justice and Constitutional Development v Prince* 2018 1 SACR 14 (CC) par 24, 83 and 84.

³²⁸ *Minister of Justice and Constitutional Development v Prince* 2018 1 SACR 14 (CC) par 85 to 86.

³²⁹ *Minister of Justice and Constitutional Development v Prince* 2018 1 SACR 14 (CC) par 100.

³³⁰ *Minister of Justice and Constitutional Development v Prince* 2018 1 SACR 14 (CC) par 89.

³³¹ *Minister of Justice and Constitutional Development v Prince* 2018 1 SACR 14 (CC) para 93.

³³² Section 40(1)(h) of the *Criminal Procedure Act* 51 of 1977.

cultivate and possess cannabis for personal consumption, then there is no basis for a peace officer to act in terms of this section.³³³

The Constitutional Court handed down judgement to the effect that it will apply until Parliament has amended the constitutional defects relating to the cultivation, possession and consumption of cannabis for personal use.³³⁴

3.3 Conclusion

The history of South African legislation relating to cannabis serves an important purpose - placing certain *lacunae* that is the result of the *Prince- case* in proper historical legislative context. The historical context relating to cannabis legislation coupled by the Courts' rationale in the respective *Prince- cases*, enables for a better understanding of how and why cannabis was legalised.

³³³ *Minister of Justice and Constitutional Development v Prince* 2018 1 SACR 14 (CC) para 93.

³³⁴ *Minister of Justice and Constitutional Development v Prince* 2018 1 SACR 14 (CC) para 128.

Chapter 4 The influence of cannabis on the employment relationship

This chapter will examine the potential effects of the legalisation of cannabis on the employment relationship. Specific regard will be given to the rights and duties of the employer and employee, and the possible impact cannabis-induced impairment may have on said aspects.

4.1 The employment relationship: A brief overview

South African labour law is influenced by the principles of both the Roman-Dutch and English law.³³⁵ The employment relationship can commence when the common law contract of employment is concluded, or simply when it can be found that a particular relationship complies with the common law elements of an employment relationship.³³⁶ The employment contract finds its origins in Roman Law as the *locatio conductio operarum*, which relates to the contract for the letting and hiring of personal services in return for remuneration.³³⁷ The employment contract consists of two parties, being the employer and the employee.³³⁸ An employment relationship is initiated in the common law once two parties enter into an agreement that the one party, being the employee, would render his labour to and under the control of the other party, being the employer, in return for remuneration.³³⁹ Of note, a contract of employment is not a pre-requisite to the formation of an employment relationship – all that is required is that the relationship consists of the mentioned common law elements of an employment relationship.³⁴⁰

The employment relationship between the employer and employee is regulated by a number of statutes of which the *Labour Relations Act* 66 of 1995 (hereafter the LRA), the *Basic Conditions of Employment Act* 75 of 1997 (hereafter the BCEA), the *Employment Equity Act* 55 of 1998 (hereafter EEA), and the *Occupational Health and Safety Act* 58 of

³³⁵ Grogan *Workplace Law* 4.

³³⁶ Section 200A and 213 of the *Labour Relations Act* 66 of 1995; *Mtambo & Another v SA Clothing Industries Ltd* (1993) 14 ILJ 983 (LAC) 991; *Wyeth SA (Pty) Ltd v Manqele* 2005 6 BLLR 523 (LAC) para 43.

³³⁷ *Smit v Workmen's Compensation Commissioner* 1979 1 SA 51 (A) 56-57.

³³⁸ *Smit v Workmen's Compensation Commissioner* 1979 1 SA 51 (A) 56.

³³⁹ *Smit v Workmen's Compensation Commissioner* 1979 1 SA 51 (A) 56.

³⁴⁰ *Discovery Health Limited v CCMA* 2008 7 BLLR 633 (LC) para 41.

1995 (hereafter OHSA) are primary examples.³⁴¹ Specific attention will be paid to the LRA, which governs the employment relationship between the employer and the employee in both individual and collective contexts.³⁴² Employers and employees working in the mining sector are also regulated by the *Mine Health and Safety Act* 29 of 1996 (hereafter MHSA).³⁴³ The LRA aims *inter alia* to give effect to section 23 of the *Constitution*.³⁴⁴ Regard will also be given to the *OHSA*, that creates the statutory basis which ensures the health and safety of persons at work.³⁴⁵ Cannabis induced impairment will likely lead to a breach of statutory and common law duties of the employment relationship, as will be argued below.

4.2 Rights and duties of the employment relationship affected by cannabis induced impairment at the workplace

Because of the reciprocal nature of the employment relationship, both parties in the relationship have multiple rights and duties towards each other.³⁴⁶ These duties may either be explicit or implied terms that flow from the *naturalia contractus*.³⁴⁷ Should either party be in material breach of its duties towards the other party, in terms of law of contract, the disadvantaged party will have a right to cancel the agreement, claim for damages, or compel the other party to comply with the contract, known as specific performance.³⁴⁸ Apart from these law of contract remedies available, the disadvantaged party can also act in terms of the LRA, by claiming that labour law rights have been infringed.³⁴⁹ Any recourse taken that affects the labour relationship will *inter alia* be governed by the LRA.

³⁴¹ *Labour Relations Act* 66 of 1995; *Basic Conditions of Employment Act* 75 of 1997; *Employment Equity Act* 55 of 1998; *Occupational Health and Safety Act* 85 of 1993.

³⁴² Section 2 of the *Labour Relations Act* 66 of 1995.

³⁴³ *Mine Health and Safety Act* 29 of 1996.

³⁴⁴ Preamble to *Labour Relations Act* 66 of 1995.

³⁴⁵ *Preamble to the Occupational Health and Safety Act* 85 of 1993.

³⁴⁶ *Grogan Workplace Law* 45.

³⁴⁷ *Council for Scientific & Industrial Research v Fijen* (1996) 17 ILJ 18 (A) 26.

³⁴⁸ *Council for Scientific & Industrial Research v Fijen* (1996) 17 ILJ 18 (A) 26; *Grogan Workplace Law* 45.

³⁴⁹ Section 115 and 133 of the *Labour Relations Act* 66 of 1995.

4.2.1 Breach of duties by the employee as a result of impairment

Substance dependence may be regarded as a form of incapacity.³⁵⁰ Incapacity as a result of substance dependence may eventually lead to the faultless dismissal of an employee, based on his or her incapacity to continue to render their services on the standard required.³⁵¹ For the purposes of this study, only substance abuse by non-dependant users will be taken into account. Thus, incapacity as a result of substance dependence will not form part of this investigation.

4.2.1.1 To enter and remain in service

Unless otherwise agreed upon, the employee is obliged to tender his or her labour at the instruction and discretion of the employer.³⁵² Saving the leave prescribed in chapter three of the *BCEA*, an employee who does not tender labour may not claim remuneration from the employer.³⁵³ This is the result of the "no work, no pay"-principle.³⁵⁴ Employees who entered into an employment contract is obliged to avail their services to their employer.³⁵⁵

Employees under the influence of cannabis may not always be physically able to tender their labour as agreed or instructed due to their cannabis-induced impairment. It is foreseeable that the failure by an employee to perform his or her services, in this scenario, can lead to a possible deterioration of the employment relationship. Eventually, this could lead to the termination of the employment relationship as a result of misconduct.

4.2.1.2 To maintain reasonable efficiency

Employees have a duty towards their employers to maintain reasonable efficiency in the labour they provide.³⁵⁶ The Provincial Division of the Cape of Good Hope found in *Friedlander v Hodes Bros*³⁵⁷ that when employees agree to hold certain positions, such

³⁵⁰ Smook *et al* 2014 *Social Work* 64.

³⁵¹ Schedule 8 of the *Labour Relations Act* - The Code of Good Practice: Dismissal.

³⁵² *Smit v Workmen's Compensation Commissioner* 1979 (1) SA 51 (A) 61.

³⁵³ Chapter 3 of the *Basic Conditions of Employment Act* 75 of 1997.

³⁵⁴ *Ekurhuleni Metropolitan Municipality v South African Municipality Workers Union* 2014 ZALAC 61 para 13; *Queen v Plank & Others* (1900) 17 SC 45 46.

³⁵⁵ Grogan *Workplace Law* 47.

³⁵⁶ Grogan *Workplace Law* 49.

³⁵⁷ *Friedlander v Hodes Bros* CDP 176.

employees can be dismissed for not maintaining reasonable efficiency as a result of negligence or incompetence.

To determine whether an employee is breaching his or her duty to maintain reasonable efficiency, the employer can compare the efficiency of the employee with that of other employees holding similar positions.³⁵⁸ Because of the effects of cannabis on the human body, an employee who reports for work under the influence of cannabis may not be able to maintain reasonable efficiency, and be in breach of his or her duty towards the employer.³⁵⁹

Apart from other courses of action that could be taken to justify disciplinary action against an employee who reports for work under the influence of cannabis, an employer may decide to dismiss an employee for not maintaining reasonable efficiency in the execution of his or her duties. The employer should be mindful of item 9 of the Code of Good Practice relating to dismissals that guides employers as to when they may dismiss an employee for inefficiency in work performance.³⁶⁰ Item 9 reads as follows:

Any person determining whether a dismissal for poor work performance is unfair should consider—

- (a) whether or not the employee failed to meet a performance standard; and
- (b) if the employee did not meet a required performance standard whether or not—
 - (i) the employee was aware, or could reasonably be expected to have been aware, of the required performance standard;
 - (ii) the employee was given a fair opportunity to meet the required performance standard; and
 - (iii) dismissal was an appropriate sanction for not meeting the required performance standard.

Before an employer can terminate the employment contract on the basis of inefficient work performance, the employee must have been aware of the standard required.³⁶¹ An employee whose efficiency and quality of work is influenced by the fact that he or she is under the influence of cannabis-induced impairment and continues to work under the influence of cannabis, will in all likelihood make themselves guilty of misconduct.³⁶²

³⁵⁸ Grogan *Workplace Law* 49.

³⁵⁹ Ashton 2001 *British Journal of Psychiatry* 104. Effects such as: impaired body movement, altered senses and difficulty with thinking and problem solving.

³⁶⁰ Item 8(2) and 9 of Schedule 8 of the *Labour Relations Act* - The Code of Good Practice: Dismissal.

³⁶¹ Item 9(b)(i) of the Schedule 8 of the *Labour Relations Act* - The Code of Good Practice: Dismissal.

³⁶² *Mthembu v NCT Durban Wood Chips* 2019 4 BALR 369 (CCMA) para 71.

4.2.1.3 To further the employer's business interests

There is a duty on employees to further the interests of their employer.³⁶³ In all circumstances it is expected of employees to act in good faith towards their employers.³⁶⁴ In the case of *E. Ebert & Co v Geo H Edy*³⁶⁵, the Eastern Districts Court of South Africa, as it then was, found that the trust relationship between an employee and his employer is fundamental and disregarding an employer's interests is seen as a breach of the trust relationship. Employees are expected, in all relevant circumstances, to act *bona fide* and in a manner that will further the business interests of their employer.³⁶⁶ It cannot be said that employees who report for work impaired as a result of cannabis consumption are furthering their employers' interests. In fact, the opposite is true.

This is also true for employees under the influence of cannabis that are off-duty and who conduct themselves in a fashion that could bring the name of the employer into disrepute. For example, an employee who is wearing the identifiable uniform of his or her employer while being under the influence of cannabis, and conducting themselves in an unbecoming manner. Item 7(a) of the *Code of Good Practice for Dismissal* not only makes reference to misconduct in the workplace, but also refers to conduct of relevance to the workplace.³⁶⁷ For this to happen, the employer must either prove that a nexus exists between the offence committed by the employee and the profitability of the employer's business, or that the offence renders the continuation of the employment relationship intolerable as the trust relationship has deteriorated.³⁶⁸ Thus, should the conduct of an employee who is off-duty, and under the influence of cannabis, be unbecoming and it brings the employer's name into disrepute, the employer may discipline the employee for such conduct.³⁶⁹

4.2.1.4 To be respectful and obedient

³⁶³ Grogan *Workplace Law* 50.

³⁶⁴ *Nadasen v CG Smith Sugar Ltd* 1994 11 BLLR 56 (IC) 58; *Steyn v Crown National (Pty) Ltd* 2002 5 BALR 546 (CCMA) 550.

³⁶⁵ *E. Ebert & Co. v Geo. H. Edy* 8 EDC 32 38.

³⁶⁶ Grogan *Workplace Law* 50.

³⁶⁷ Item 7(a) of the Schedule 8 of the *Labour Relations Act* - The Code of Good Practice: Dismissal.

³⁶⁸ *Nyembezi v NEHAWU* 1997 1 BLLR 94 (IC) 102; *Easi Access Rental (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration* 2016 8 BLLR 783 (LC) para 41.

³⁶⁹ *Nyembezi v NEHAWU* 1997 1 BLLR 94 (IC) 102; *National Union of Public Service and Allied Workers obo Mani v National Lotteries Board* 2014 (6) BCLR 663 (CC) para 226 & 227.

For the healthy continuation of the employment relationship, respect and obedience are implied duties of the employment relationship.³⁷⁰ As a result of the inception of the employment relationship, the employee has an obligation to obey the lawful instructions of his or her employer.³⁷¹

It is paramount that employees respect and submit themselves to their employers.³⁷² This principle has become trite in the labour courts.³⁷³ When the disrespect by the employee is frequent or gross to the extent that it renders the employment relationship intolerable, the employer is justified to discipline or even dismiss the employee.³⁷⁴ Dependent on the circumstances and the severity of the breach of this duty, the employer should consider to first issue a warning, before considering dismissing the employee.³⁷⁵

Depending on the employee's state of mind and how his or her mind reacts to cannabis, an employee's conduct towards his or her employer could be negatively affected and result in conduct of the employee that can be regarded as disrespectful and disobedient.³⁷⁶ This, in turn, may cause the employment relationship to become intolerable, resulting in dismissal.

4.2.1.5 To refrain from misconduct generally

Employers can only dismiss an employee for misconduct if the misconduct irretrievably renders the continuation of the working relationship intolerable.³⁷⁷ Once again, emphasis is placed on the trust within the employment relationship.³⁷⁸ The different actions that may be regarded as misconduct are plentiful and will differ from circumstance to circumstance. The requirement however is that the conduct of the employee must be contrary to some rule of conduct valid to the employer's workplace, and it must have

³⁷⁰ *Smit v Workmen's Compensation Commissioner* 1979 1 SA 51 (A) 59-60; Grogan Workplace Law 52.

³⁷¹ *Smit v Workmen's Compensation Commissioner* 1979 1 SA 51 (A) 59-60.

³⁷² Grogan Workplace Law 52.

³⁷³ *Commercial Catering & Allied Workers Union of SA v Wooltru t/a Woolworths* 1989 10 ILJ 311 (IC) 315; *Maitin v Colgate Palmolive (Pty) Ltd* 2008 7 BALR 610 (NBCCI) 614.

³⁷⁴ Grogan Workplace Law 53.

³⁷⁵ *Commercial Catering & Allied Workers Union of SA v Wooltru t/a Woolworths* 1989 10 ILJ 311 (IC) 315; *Timothy v Nampak Corrugated Containers (Pty) Ltd* 2010 8 BLLR 830 (LAC) 835.

³⁷⁶ Ashton 2001 *British Journal of Psychiatry* 104.

³⁷⁷ Grogan Workplace Law 54.

³⁷⁸ Grogan Workplace Law 54.

been of such a nature that it damaged the trust relationship.³⁷⁹ The employer's code of conduct usually defines what actions the employer may view as misconduct; this may also vary from employer to employer.³⁸⁰ However, the requirement not to report for duty under the influence of any intoxicating substance is generally accepted to exist in any workplace, based on the common law duty of an employee to maintain efficiency and act in the interests of the employer.

The conduct of an impaired person is in most cases unpredictable.³⁸¹ In circumstances where the workplace has inherent dangers, the employer usually develops a zero-tolerance policy, requiring an employee not to have any traces of intoxicating substances in his or her body when reporting for work.³⁸² This is done as a precaution to ensure that a working environment, that already has plentiful risks, remains safe as far as reasonably possible.³⁸³ Reporting to work in contravention of such policy will be regarded as misconduct if the rule can be justified.³⁸⁴ Before dismissing an employee for misconduct, the guidelines in cases of dismissal for misconduct must be considered, regard must *inter alia* be given to the reasonable validity of the rule and whether dismissal is an appropriate sanction for the contravention of the rule.³⁸⁵

With regard to the validity of a rule, the CCMA found in *Mthembu & others v NCT Durban Wood Chips*³⁸⁶ that *in casu*, intoxication impairs an employee's ability to work to the standard, care and skill that is required by the employer. The Commissioner of the CCMA found that, because of the high degree of safety measures required by employers with dangerous working environments, an employer is entitled to discipline an employee, where intoxication impairs the employee's ability to work safely in an already dangerous working environment.³⁸⁷ A rule regarding intoxication at work will subsequently be valid. With regard to an appropriate sanction for the contravention of such a rule in a dangerous working environment, the Commissioner stated that there is a duty on employees to

³⁷⁹ Item 7(b) of the Schedule 8 of the *Labour Relations Act* - The Code of Good Practice: Dismissal; *Anglo American Farms t/a Boschendal Restaurant v Komjwayo* 1992 13 ILJ 573 (LAC) 592.

³⁸⁰ Item 7 of the Schedule 8 of the *Labour Relations Act* - The Code of Good Practice: Dismissal.

³⁸¹ Hartney 2020 <https://www.verywellmind.com/what-does-a-marijuana-high-feel-like-22303>.

³⁸² *Mthembu v NCT Durban Wood Chips* 2019 4 BALR 369 (CCMA) para 19.

³⁸³ *Mthembu v NCT Durban Wood Chips* 2019 4 BALR 369 (CCMA) para 72.

³⁸⁴ Item 7 of the Schedule 8 of the *Labour Relations Act* - The Code of Good Practice: Dismissal.

³⁸⁵ Item 7 of the Schedule 8 of the *Labour Relations Act* - The Code of Good Practice: Dismissal.

³⁸⁶ *Mthembu v NCT Durban Wood Chips* 2019 4 BALR 369 (CCMA) para 70.

³⁸⁷ *Mthembu v NCT Durban Wood Chips* 2019 4 BALR 369 (CCMA) para 70 and 71.

ensure that any impairment they might have as a result of smoking cannabis at home, must first subside before they report to work.³⁸⁸ The Commissioner found that dismissal was a substantively appropriate sanction for the contravention of such a rule; in light thereof that breaching the rule compromises the safety of the workplace.³⁸⁹ However, in circumstances where there is no inherent danger in the working environment, employers will have a hard time justifying a zero-tolerance policy towards impairment in the workplace.

4.2.2 Duties of the employer towards the employee

There are *inter alia* three main duties that employers have towards their employees: to receive the employee into service and provide the employee with work; to remunerate the employee for services rendered and to ensure that working conditions are safe.³⁹⁰

4.2.2.1 To receive the employee into service

There is a duty on employers to receive and keep their employees in their service.³⁹¹ Apart from certain exceptions, the "no work, no pay"-principle does not apply when the employer does not give his employee tasks to perform. An employer must continue to pay employees for the availability of their service, even when those services are not used.³⁹²

However, this rule is not absolute and in certain circumstances an employer does not have to receive an employee into service. Examples of this could be where an employee is suspended as a result of a disciplinary hearing or when an employer denies an employee access to the workplace as a result of a 'lock out' in terms of section 64 of the LRA as well as instances where employees are laid off or put on short time as a measure to avoid retrenchment.³⁹³

³⁸⁸ *Mthembu v NCT Durban Wood Chips* 2019 4 BALR 369 (CCMA) para 84.

³⁸⁹ *Mthembu v NCT Durban Wood Chips* 2019 4 BALR 369 (CCMA) para 89.

³⁹⁰ Grogan *Workplace Law* 54.

³⁹¹ Grogan *Workplace Law* 56.

³⁹² *Faberlan v McKay and Fraser* WLD 23 26-27.

³⁹³ Section 186(2)(b) of the *Labour Relations Act* 66 of 1995; Section 64 of the *Labour Relations Act* 66 of 1995.

Employers may justify not receiving employees who are impaired as a result of drug abuse into their service in terms of section 8(2)(h) of the *OHS Act*.³⁹⁴ Section 8(2)(h) enables employers to enforce such measures as may be necessary in the interests of health and safety.³⁹⁵ General Safety Regulation 2A of the *OHS Act* places an explicit duty on employers not to allow any person who appears to be under the influence of intoxicating substances to enter or remain in the workplace.³⁹⁶

Of importance, the *OHS Act* enables employers not to receive employees into their service when the impairment of such employees is likely to cause dangers in the working environment for themselves as well as for other persons.³⁹⁷ Thus, in such circumstances, the employer would not breach his or her duty to receive the employee into service.

4.2.2.2 To ensure safe working conditions

Section 8(1) of the *OHS Act* places a duty on an employer to provide and maintain, as far as reasonably practicable, a working environment that is safe and without risk to the health of its employees.³⁹⁸ Apart from the legislative duty, the common law also places a duty on employers to have regard to their employees' safety.³⁹⁹ Section 8(2)(h) makes provision for employers to enforce such measures as may be necessary in the interest of health and safety.⁴⁰⁰

Employers conducting business in the mining sector are, apart from the *OHS Act*, also bound by the provisions of the *MHS Act*. Section 5(1) places an onus on the employer to ensure, as far as reasonably practicable, to maintain a working environment that is safe and without risk for its employees.⁴⁰¹ Mining employers have the duty to draft a policy relating to the protection of employees' health and safety at work.⁴⁰² Employers are to assess

³⁹⁴ Section 8(2)(h) of the *Occupational Health and Safety Act* 85 of 1993.

³⁹⁵ Section 8(h) of the *Occupational Health and Safety Act* 85 of 1993.

³⁹⁶ General safety regulation 2A of the *Occupational Health and Safety Act* 85 of 1993.

³⁹⁷ Section 8(2)(h) of the *Occupational Health and Safety Act* 85 of 1993.

³⁹⁸ Section 8(2)(h) of the *Occupational Health and Safety Act* 85 of 1993.

³⁹⁹ *Wilson and Clyde Coal Co Ltd v English* 1937 3 All ER 628 638.

⁴⁰⁰ Section 8(2)(h) of the *Occupational Health and Safety Act* 85 of 1993.

⁴⁰¹ Section 5(1) of the *Mine Health and Safety Act* 29 of 1996.

⁴⁰² Section 8(1)(a) of the *Mine Health and Safety Act* 29 of 1996.

possible sources of risk, and put in place countermeasures to eliminate the risk as far reasonably possible.⁴⁰³

As also mentioned above, employers are able, due to safety requirements, not to receive employees into service when they are impaired as a result of substance abuse or otherwise as these employees pose a health risk to themselves as well as other persons in the working environment.

4.3 Conclusion

It is clear that the employment relationship is reciprocal in nature, and it creates a multitude of rights and duties for both employees and employers. There is an onus on both parties in the employment relationship to conduct themselves in such a manner that they do not jeopardise the rights of the other party, which could lead to the employment relationship becoming intolerable. It must be noted that there is no direct duty on employers or employees to prevent impairment in the workplace, but rather an indirect duty, as impairment cause certain rights and duties within the employment relationship to become jeopardised. As discussed above, it is clear that impairment intrudes on various rights and duties of the parties in the employment relationship. Employers must be able to identify and regulated cannabis induced impairment amongst employees to be able to protect their rights, as well as employees' rights.

⁴⁰³ Section 11(1), (2) and (3) of the *Mine Health and Safety Act* 29 of 1996.

Chapter 5 Identification of cannabis induced impairment

For employers to be able to implement policies relating to cannabis induced impairment, they must firstly be able to identify and prove instances of impairment. This chapter will investigate whether cannabis induced impairment can accurately be identified by using alternatives to drug test, and if so, what the best practices are in identifying such impairment. Furthermore, the probative value of such evidence will be considered. The recommendations of the International Labour Organisation will be reflected on, with the goal of determining what is expected from employers with regard to the regulation and prevention of substance impairment in the workplace. Ultimately, these recommendations could or even should be implemented in South Africa where applicable. Apart from the international law position, cognisance must also be taken of appropriate foreign law relevant to the topic. In this regard, best practices for the identification and prevention of cannabis induced impairment in The Netherlands and Canada will be discussed. Specific regard will be given to both the employment legislation and criminal legislations of the aforementioned jurisdictions. Criminal legislation will serve as an example of how the State deals with identifying and proving cannabis-induced impairment.

5.1 South Africa: The status quo for determining cannabis induced impairment in the workplace

The issue for employers is whether an employee can test positive for cannabis induced impairment. It is a fact that testing positive for the use of cannabis does not in itself prove impairment; determining impairment is the crux of maintaining workplace safety and employee efficiency, and must therefore be determined with relative certainty.⁴⁰⁴ Identifying impairment in the workplace is thus of great importance for employers.

In the matter of *Mthembu v NCT Durban Wood Chips*,⁴⁰⁵ the Commissioner found that the dismissal of an employee who tested positive for the use of cannabis was substantively fair, even though the impairment of the employee was not proven. The employer did not dispute that the employee who tested positive for the use of cannabis,

⁴⁰⁴ Wyllie 2019 <https://www.policemag.com/505866/testing-drivers-for-marijuana-impairment>.

⁴⁰⁵ *Mthembu v NCT Durban Wood Chips* 2019 4 BALR 369 (CCMA) para 89.

showed no signs of impairment.⁴⁰⁶ It is the opinion of the writer that the Commissioner however erred in accepting that testing positive for the use of cannabis equates to being under the influence of cannabis and thus being impaired.⁴⁰⁷ The Commissioner nevertheless did correctly find that, because of the inherent danger of the workplace, and the employer's zero-tolerance policy towards substance abuse, dismissal could be justified.⁴⁰⁸

In the case of *Rankeng v Signature Cosmetics and Fragrance (Pty) Ltd*,⁴⁰⁹ an employee admitted to smoking cannabis two hours before reporting to work. The employee's eyes were watery and red when the employee admitted to smoking cannabis.⁴¹⁰ The employee was sent to the pathologists, where he tested positive for the use of cannabis.⁴¹¹ After a disciplinary hearing was held, the employee was found guilty of reporting to work under the influence of cannabis and was subsequently dismissed.⁴¹² When the matter was referred to the CCMA, the only point in dispute was whether the employee was actually under the influence of cannabis when he reported to work.⁴¹³ The Commissioner found that, although the employee's eyes were watery and red, it could not be regarded as signs of physical or mental impairment.⁴¹⁴ The dismissal was found to be substantively unfair, as dismissal was found to be inappropriate and a too harsh sanction for the offence.⁴¹⁵ Also, there was no inherent danger to the workplace environment. The Commissioner however found the employee guilty of contravening the employer's policy on drug use, and ordered that the employee be reinstated while also receiving a final written warning.⁴¹⁶

From the aforementioned two cases the position taken by the CCMA relating to the identification of cannabis-induced impairment remains unclear. No legal certainty or accepted practice was established by the CCMA.

⁴⁰⁶ *Mthembu v NCT Durban Wood Chips* 2019 4 BALR 369 (CCMA) para 56.

⁴⁰⁷ *Mthembu v NCT Durban Wood Chips* 2019 4 BALR 369 (CCMA) para 82 and -84.

⁴⁰⁸ *Mthembu v NCT Durban Wood Chips* 2019 4 BALR 369 (CCMA) para 81.

⁴⁰⁹ *Rankeng v Signature Cosmetics and Fragrance (Pty) Ltd* 2020 10 BALR 1128 (CCMA) para 9.

⁴¹⁰ *Rankeng v Signature Cosmetics and Fragrance (Pty) Ltd* 2020 10 BALR 1128 (CCMA) para 8.

⁴¹¹ *Rankeng v Signature Cosmetics and Fragrance (Pty) Ltd* 2020 10 BALR 1128 (CCMA) para 6.

⁴¹² *Rankeng v Signature Cosmetics and Fragrance (Pty) Ltd* 2020 10 BALR 1128 (CCMA) para 4.

⁴¹³ *Rankeng v Signature Cosmetics and Fragrance (Pty) Ltd* 2020 10 BALR 1128 (CCMA) para 15.

⁴¹⁴ *Rankeng v Signature Cosmetics and Fragrance (Pty) Ltd* 2020 10 BALR 1128 (CCMA) para 18.

⁴¹⁵ *Rankeng v Signature Cosmetics and Fragrance (Pty) Ltd* 2020 10 BALR 1128 (CCMA) para 19.

⁴¹⁶ *Rankeng v Signature Cosmetics and Fragrance (Pty) Ltd* 2020 10 BALR 1128 (CCMA) paras 21 & 22.

5.2 Alternative methods to drug testing for determining cannabis-induced impairment

Unfortunately, as yet there is no clinically scientific, objective and viable test for determining whether an employee is impaired.⁴¹⁷ Although impairment may be obvious in certain cases of cannabis use, other instances of cannabis-induced impairment may not be as obvious.⁴¹⁸ Apart from clinical drug testing to prove the presence of cannabis in a person's bloodstream, other methods for determining impairment do exist. These methods, and their accuracy for determining when impairment is present, will now be investigated.

The horizontal gaze nystagmus tests whether there is any involuntary jerking of the eyeballs.⁴¹⁹ If a person is under the influence of an intoxicating substance, the jerking of the eyeballs become more pronounced when looking from side to side, following an object with their eyes while keeping their head still.⁴²⁰ If there is a lack of smooth pursuit, it is the first indication of impairment.⁴²¹ If the suspected person looks all the way to the side and their eyes begin jerking within four seconds, it serves as a second indication that the person may be impaired.⁴²² However, the problem with this test is that it is only 77% accurate in determining whether a person is impaired.⁴²³

The walk-and-turn test entails walking on a line, while taking nine heel-to-toe steps, turning around and doing the same.⁴²⁴ Failing to walk heel to toe, stepping off the line, using arms to balance, turning incorrectly or taking the incorrect number of steps could be an indication that the person might be under the influence of a substance.⁴²⁵ This test has an accuracy rate of 66%, and might even prove challenging for persons who are not impaired.⁴²⁶

⁴¹⁷ Johnson 2018 <https://www.thesafetymag.com/ca/topics/technology/how-to-test-employees-for-cannabis-impairment/186973>; Wyllie 2019 <https://www.policemag.com/505866/testing-drivers-for-marijuana-impairment>.

⁴¹⁸ Lautieri 2021 <https://americanaddictioncenters.org/marijuana-rehab/how-to-tell-if-someone-is-high>.

⁴¹⁹ FieldSobrietyTests.org date unknown <http://www.fieldsobrietytests.org/horizontalgazenystagmus.html>.

⁴²⁰ FieldSobrietyTests.org date unknown <http://www.fieldsobrietytests.org/horizontalgazenystagmus.html>.

⁴²¹ FieldSobrietyTests.org date unknown <http://www.fieldsobrietytests.org/horizontalgazenystagmus.html>.

⁴²² FieldSobrietyTests.org date unknown <http://www.fieldsobrietytests.org/horizontalgazenystagmus.html>.

⁴²³ FieldSobrietyTests.org date unknown <http://www.fieldsobrietytests.org/horizontalgazenystagmus.html>.

⁴²⁴ FieldSobrietyTests.org date unknown <http://www.fieldsobrietytests.org/walkandturntest.html>.

⁴²⁵ FieldSobrietyTests.org date unknown <http://www.fieldsobrietytests.org/walkandturntest.html>.

⁴²⁶ FieldSobrietyTests.org date unknown <http://www.fieldsobrietytests.org/walkandturntest.html>.

The one-leg stand test requires a person to stand on one leg, holding their other leg six inches off the ground till they are instructed to lower their leg.⁴²⁷ The person conducting the test will look for clues such as swaying, using arms for balance, hopping, or the lowering of the leg before instructed to do so.⁴²⁸ This test only has a 65% accuracy rate for determining intoxication as any person who has a natural coordination disposition will fail the test.⁴²⁹

The combination of the abovementioned tests makes out the Standard Field Sobriety Test.⁴³⁰ The lack of clinical tests for the identification of cannabis induced impairment may therefore force employers to rely on the Standard Field Sobriety Test to identify impairment of their employees. International and foreign jurisdictions may serve as guidance in the identification of cannabis induced impairment.

5.3 International and foreign perspectives relating to cannabis-induced impairment

To gain an understanding as to why international and foreign perspectives may have an influence on the interpretation of South African law, one must consider sections 39(1)(b) and 39(1)(c) of the Constitution. The Constitution is the supreme law of the land, and all other legislation are subject to it.⁴³¹ The Constitution instructs that, when interpreting the Bill of Rights, which includes the right to fair labour practices, a court, tribunal or forum must consider international law, and may consider foreign law.⁴³² There is thus a definite obligation to consider international law, and an indefinite discretion for considering foreign law when interpreting the right to fair labour practices. Section 233 of the Constitution underscores the importance of international law when interpreting legislation.⁴³³ Section 233 states that, when interpreting legislation, preference must be

⁴²⁷ FieldSobrietyTests.org date unknown <http://www.fieldsobrietytests.org/onelegstandtest.html>.

⁴²⁸ FieldSobrietyTests.org date unknown <http://www.fieldsobrietytests.org/onelegstandtest.html>.

⁴²⁹ FieldSobrietyTests.org date unknown <http://www.fieldsobrietytests.org/onelegstandtest.html>.

⁴³⁰ FieldSobrietyTests.org date unknown <http://www.fieldsobrietytests.org/onelegstandtest.html>.

⁴³¹ *Pharmaceutical Manufacturers Association of South Africa In re: The Ex Parte Application of the President of the Republic of South Africa* 2000 2 SA 764 (CC) para 19.

⁴³² Sections 39(1)(b), 39(1)(c) and 23(1) of *The Constitution of the Republic of South Africa, 1996*; Section 39(1)(b): When interpreting the Bill of Rights, a court tribunal or forum must consider international law. Section(1)(c): When interpreting the Bill of Rights, a court tribunal or forum may consider foreign law. Section 23(1): Everyone has the right to fair labour practices.

⁴³³ Section 223 of *The Constitution of the Republic of South Africa, 1996*: When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternate interpretation that is inconsistent with international law.

given to an interpretation that is consistent with international law. In *S v Makwanyane*⁴³⁴ the Court stated that international and foreign authorities are of value when dealing with vexed issues in our law, as they provide us with possible solutions to problems. Thus, international and foreign law can serve as guidance when South African employers interpret South African labour law and possibly also provide solutions to the identification of cannabis induced impairment.

5.3.1 International law

South Africa is a member of the International Labour Organisation, an agency of the United Nations, tasked with setting international labour standards.⁴³⁵ The ILO writes recommendations to its member states with the goal of creating international standards in the workplace.⁴³⁶ In 1996 the International Labour Organisation's Interregional Tripartite Experts Meeting on Drug and Alcohol Testing in the Workplace published a code of practice for the management of alcohol- and drug-related issues in the workplace.⁴³⁷ The purpose of the publication was to provide guidance to those who have a responsibility in addressing alcohol- and drug-related problems in the workplace.⁴³⁸ An onus was placed on employers and employees to take appropriate action against alcohol and drug-related problems in the working environment.⁴³⁹ It is stated that restrictions in the workplace with regard to the use of substances should be clear, unambiguous, and should apply to all employees.⁴⁴⁰ It is emphasised that preference should be given to remedial action, rather than disciplinary action, when implementing workplace policies.⁴⁴¹ Should an employee

⁴³⁴ *S v Makwanyane* 1995 ZACC 3 paras 34 and 35.

⁴³⁵ ILO <https://www.ilo.org/global/about-the-ilo/lang--en/index.htm> (1996).

⁴³⁶ International Labour Organization *Monitoring Compliance with International Labour Standards* 11.

⁴³⁷ Shahandeh and Caborn *Ethics, Professional Standards And Drug Addiction* 26; *ILO Code of Practice for the Management of Alcohol- and Drug-Related Issues in the Workplace*; Martinic *Tackling Harmful Alcohol Use* 135.

⁴³⁸ Preface to the *ILO Code of Practice for the Management of Alcohol- and Drug-Related Issues in the Workplace* (1996); Tobutt *Alcohol at Work* 2.

⁴³⁹ Preface to the *ILO Code of Practice for the Management of Alcohol- and Drug-Related Issues in the Workplace*; Martinic 2015 *Tackling Harmful Alcohol Use* 134; Tobutt *Alcohol at Work* 11.

⁴⁴⁰ Preface to the *ILO Code of Practice for the Management of Alcohol- and Drug-Related Issues in the Workplace* (1996).

⁴⁴¹ Preface to the *ILO Code of Practice for the Management of Alcohol- and Drug-Related Issues in the Workplace* (1996); Tobutt *Alcohol at Work* 11.

not cooperate when remedial action is taken, then an employer is entitled to take disciplinary action.⁴⁴²

An onus is placed on the relevant organ of state to supply employers and employees with the technical information and advice with the most effective means of complying with legislation applicable to drug related matters.⁴⁴³ With this information, employers are expected to take appropriate action to prevent drug induced impairment in the workplace.⁴⁴⁴ This usually includes a policy on substance use and impairment.⁴⁴⁵ It is then expected of employees to adhere to both the regulations of the employer and the legislature.⁴⁴⁶ Employers are to ensure that they use fair labour practices when implementing their policies, not creating undue stress, or physical and mental hardships for their employees.⁴⁴⁷ Employees, on the other hand, are expected to give their full cooperation to employers who implement policies for the prevention of substance induced impairment at work.⁴⁴⁸

Should it be necessary for an employer to intrude on the privacy of an employee for identifying drug use, such intrusion should be limited, reasonable and justifiable.⁴⁴⁹ To ensure that such an intrusion shall be reasonable, a policy on drug use and impairment in the workplace must be developed by employers, in consultation with their employees. If possible, medical experts in drug use and drug induced impairment should also contribute to such a policy, so as to ensure that the contents thereof can be justified.⁴⁵⁰ An important aspect of every alcohol and drug policy is the education of all persons in the workplace regarding the use of drugs, the identification of substance induced

⁴⁴² Preface to the *ILO Code of Practice for the Management of Alcohol- and Drug-Related Issues in the Workplace* (1996); Roman and Blum 2002 *Alcohol Research & Health* 53.

⁴⁴³ Article 2.1.6 of the *ILO Code of Practice for the Management of Alcohol- and Drug-Related Issues in the Workplace* (1996).

⁴⁴⁴ Shahandeh and Caborn *Ethics, Professional Standards And Drug Addiction* 29; Article 2.2.1 of the *ILO Code of Practice for the Management of Alcohol- and Drug-Related Issues in the Workplace* (1996).

⁴⁴⁵ Article 2.2.1 of the *ILO Code of Practice for the Management of Alcohol- and Drug-Related Issues in the Workplace* (1996).

⁴⁴⁶ Article 2.2.2 of the *ILO Code of Practice for the Management of Alcohol- and Drug-Related Issues in the Workplace* (1996).

⁴⁴⁷ Article 2.2.3 of the *ILO Code of Practice for the Management of Alcohol- and Drug-Related Issues in the Workplace* (1996).

⁴⁴⁸ Article 2.3.2 of the *ILO Code of Practice for the Management of Alcohol- and Drug-Related Issues in the Workplace* (1996).

⁴⁴⁹ Article 2.3.8 of the *ILO Code of Practice for the Management of Alcohol- and Drug-Related Issues in the Workplace* (1996).

⁴⁵⁰ Article 3.1.1 of the *ILO Code of Practice for the Management of Alcohol- and Drug-Related Issues in the Workplace* (1996).

impairment, and the prevention of substance induced impairment at or relevant to work.⁴⁵¹

It is furthermore important that employees understand the processes that will be followed, up to and including dismissal when employees contravene any of the provisions in the substance induced impairment policy.⁴⁵² The knowledge will encourage employees to prevent drug use and drug induced impairment in the workplace. In the application of a policy with regard to persons that are suspected of drug use, it is preferable, but not a requirement, that a qualified occupational health professional determines the fitness of an employee to work.⁴⁵³ Supervisors and senior personnel of the employer should receive adequate training to: identify unusual changes in an individual's workplace behaviour and workplace performance and to be able to educate employees on the employer's policy relating to drug use and drug induced impairment.⁴⁵⁴

For purposes of identification of substance induced impairment, the employer's policy should clearly define the method of identification, and specify what would be regarded as possible symptoms of impairment.⁴⁵⁵ It is of fundamental importance, when testing for drug use or impairment, that moral, ethical and legal issues be considered.⁴⁵⁶

The aforementioned elements will determine the fairness and appropriateness of a drug test.⁴⁵⁷ The *Guiding Principles on Drug and Alcohol Testing in the Workplace* (hereafter Guiding Principles) adopted by the *International Labour Organisation's Interregional Tripartite Experts Meeting* of May 1993 gives guidance on when drug testing of employees is fair and appropriate.⁴⁵⁸

⁴⁵¹ Article 3.2.1 of the *ILO Code of Practice for the Management of Alcohol- and Drug-Related Issues in the Workplace* (1996).

⁴⁵² Article 3.2.1 of the *ILO Code of Practice for the Management of Alcohol- and Drug-Related Issues in the Workplace* (1996).

⁴⁵³ Article 5.3.1 of the *ILO Code of Practice for the Management of Alcohol- and Drug-Related Issues in the Workplace* (1996).

⁴⁵⁴ Article 6.3 of the *ILO Code of Practice for the Management of Alcohol- and Drug-Related Issues in the Workplace* (1996); Roman and Blum 2002 *Alcohol Research & Health* 52.

⁴⁵⁵ Article 7.1 of the *ILO Code of Practice for the Management of Alcohol- and Drug-Related Issues in the Workplace* (1996).

⁴⁵⁶ Shahandeh and Caborn *Ethics, Professional Standards And Drug Addiction* 26.

⁴⁵⁷ Article 7.2.1 of the *ILO Code of Practice for the Management of Alcohol- and Drug-Related Issues in the Workplace* (1996).

⁴⁵⁸ Article 7.2.3 of the *ILO Code of Practice for the Management of Alcohol- and Drug-Related Issues in the Workplace* (1996).

The Guiding Principles state that a policy for the testing of substance use and impairment should be in writing, and be agreed upon by the employer and the employees.⁴⁵⁹ For the policy to have the desired effect, the tests used to implement the policy should be of the highest possible quality and reliability, while also taking into consideration the purpose of the test.⁴⁶⁰ It is important that any issues relating to the tests used to determine impairment be considered, before implementing the drug testing programme.⁴⁶¹ The document acknowledges that, although there are correlations between the behavioural effects and blood-alcohol concentrations, correlations have not been demonstrated for blood-cannabis concentrations and urine-cannabis concentrations.⁴⁶² This will obviously have an effect on reliability of the test for identifying impairment. According to the guidelines, the rights of employees must be respected in accordance with national legislation and international laws.⁴⁶³ Employees who refuse to be tested may not be presumed to be users of drugs.⁴⁶⁴

The Guiding Principles state that, when evaluating the need for the drug test to ensure the safety of the workplace, in relation to the privacy of the employee, the nature of the employee's work may, in circumstances where the safety of the employee is a concern, outweigh the employee's right to privacy.⁴⁶⁵ It is preferred that, when drug related problems exist in the workplace, preference should be given towards education and prevention strategies, rather than making use of disciplinary measures.⁴⁶⁶

When the need for drug testing arises, the workplace drug policy should clearly indicate the procedures when testing for drug use, the purpose of the test, and the use of the results.⁴⁶⁷ The policy should clearly identify the substance a person may be tested for, the method of testing that will be used, and the relevance thereof.⁴⁶⁸ Post- accident and

⁴⁵⁹ Overview to the *Guiding Principles on Drug and Alcohol Testing in the Workplace* (1993).

⁴⁶⁰ Shahandeh and Caborn *Ethics, Professional Standards And Drug Addiction* 32; Background to the *Guiding Principles on Drug and Alcohol Testing in the Workplace* (1993).

⁴⁶¹ Background to the *Guiding Principles on Drug and Alcohol Testing in the Workplace* (1993).

⁴⁶² *Guiding Principles on Drug and Alcohol Testing in the Workplace* (1993) 33.

⁴⁶³ Shahandeh and Caborn *Ethics, Professional Standards And Drug Addiction* 26; *Guiding Principles on Drug and Alcohol Testing in the Workplace* (1993) 34.

⁴⁶⁴ *Guiding Principles on Drug and Alcohol Testing in the Workplace* (1993) 34.

⁴⁶⁵ *Guiding Principles on Drug and Alcohol Testing in the Workplace* (1993) 32.

⁴⁶⁶ *Guiding Principles on Drug and Alcohol Testing in the Workplace* (1993) 34.

⁴⁶⁷ *Guiding Principles on Drug and Alcohol Testing in the Workplace* (1993) 35.

⁴⁶⁸ *Guiding Principles on Drug and Alcohol Testing in the Workplace* (1993) 35.

reasonable suspicion may be a valid reasons for testing for drug use and or impairment.⁴⁶⁹ The Guiding Principles prefers less invasive methods of drug testing, such as urine and breath testing, over more invasive testing methods, such as blood testing.⁴⁷⁰ Medical results should be reviewed, verified, and interpreted by medical experts to determine the likelihood of impairment.⁴⁷¹ When doing so, an employee must have the opportunity to discuss the results with a medical reviewer before further action is taken against the employee.⁴⁷²

Although merely guiding principles, it is recommended that the abovementioned principles should be incorporated into all employment policies relating to substance abuse and impairment in the workplace, ensuring that the policies are fair and justifiable.

5.3.2 Foreign law

In contrast to section 39(1)(b) of the Constitution, section 39(1)(c) states that the courts *may* consider foreign law when interpreting the Bill of Rights.⁴⁷³ Once again it is worth mentioning that the Constitution is the highest law of the land, and all other laws are subject to it.⁴⁷⁴ Thus, when dealing with vexed issues, the Constitution allows for the consideration of other jurisdictions which can serve as examples of how the problem can be resolved.⁴⁷⁵ As is clear from *S v Makwanyane*,⁴⁷⁶ the practices of foreign jurisdictions may serve as solutions to problems we face in South African law. Therefore, it may be of value to investigate how other countries where the recreational use of cannabis is permitted, such as The Netherlands and Canada, deal with cannabis induced impairment.

5.3.2.1 The Netherlands

When dealing with the matter of cannabis consumption, and the regulation of cannabis induced impairment, one cannot help but also consider the views and practices of The

⁴⁶⁹ *Guiding Principles on Drug and Alcohol Testing in the Workplace* (1993) 36.

⁴⁷⁰ *Guiding Principles on Drug and Alcohol Testing in the Workplace* (1993) 37.

⁴⁷¹ *Guiding Principles on Drug and Alcohol Testing in the Workplace* (1993) 38.

⁴⁷² *Guiding Principles on Drug and Alcohol Testing in the Workplace* (1993) 38.

⁴⁷³ Section 39(1)(c) of *The Constitution of the Republic of South Africa*, 1996.

⁴⁷⁴ *Pharmaceutical Manufacturers Association of South Africa In re: The Ex parte Application of the President of the Republic of South Africa* 2000 2 SA 764 (CC) para 19.

⁴⁷⁵ *S v Makwanyane* 1995 ZACC 3 para 34.

⁴⁷⁶ *S v Makwanyane* 1995 ZACC 3 paras 34 and 35.

Netherlands on the matter, a prominent country in cannabis culture.⁴⁷⁷ The quality of cannabis grown in The Netherlands is seen as the gold standard for cultivators and consumers of cannabis.⁴⁷⁸ The Netherlands, and specifically Amsterdam, is seen as a symbol of liberalism relating to the recreational use of cannabis.⁴⁷⁹ The Red-Light District in Amsterdam is renowned for its coffee shops that sell cannabis to consumers for recreational use.⁴⁸⁰ Interestingly, it is a classic misconception that the recreational use of cannabis in The Netherlands is legal.⁴⁸¹ In fact, the opposite is true. Although the sale and possession of cannabis remains a criminal offence in terms of article 2 of the *Dutch Opium Act*, The Netherlands exercises a policy of tolerance towards the possession and sale of cannabis.⁴⁸² This is also known as the "*Gedooogbeleid*".⁴⁸³ In terms of this policy, the State undertakes not to prosecute a person for the possession of small quantities of cannabis for personal recreational use.⁴⁸⁴ The policy describes possession of cannabis for personal use as possessing 5 grams or less of cannabis, or the possession of 5 cannabis plants or less.⁴⁸⁵ In The Netherlands, cannabis is regarded as a "*soft drug*", and the possession thereof is not seen as a serious offence.⁴⁸⁶ The same tolerance policy is applied to coffee shops, who will not be prosecuted by the State for the sale of cannabis, in small quantities to consumers, provided the coffee shops adheres to the toleration criteria prescribed by the municipality of the city where the coffee shop is located.⁴⁸⁷ This creates an ironic scenario where cannabis is illegally bought by coffee shops in large quantities, and "legally" sold to consumers in small quantities.⁴⁸⁸

As a result of the policy of tolerance towards cannabis in The Netherlands, the recreational use of cannabis has become *de facto* legal. Albeit *de facto* legal, and although

⁴⁷⁷ Sinclair 2010 <https://www.metrotimes.com/detroit/amsterdam-is-viper-central/Content?oid=2150854>.

⁴⁷⁸ Cluskey *The Irish Times*.

⁴⁷⁹ Weedler 2016 <https://vocal.media/potent/rise-and-fall-of-cannabis-culture-in-amsterdam>.

⁴⁸⁰ Weedler 2016 <https://vocal.media/potent/rise-and-fall-of-cannabis-culture-in-amsterdam>.

⁴⁸¹ Veen 2021 <https://dutchreview.com/culture/society/5-myths-surrounding-dutch-weed/>.

⁴⁸² Article 2 of the *Dutch Opium Act* of 2002; Veen 2021 <https://dutchreview.com/culture/society/5-myths-surrounding-dutch-weed/>.

⁴⁸³ Rijksoverheid 2021 <https://www.rijksoverheid.nl/onderwerpen/drugs/gedoogbeleid-softdrugs-en-coffeeshops>.

⁴⁸⁴ Rijksoverheid 2021 <https://www.rijksoverheid.nl/onderwerpen/drugs/gedoogbeleid-softdrugs-en-coffeeshops>.

⁴⁸⁵ Fiore 2016 <https://www.keglerbrown.com/publications/weed>.

⁴⁸⁶ Netherlands date unknown <https://www.government.nl/topics/drugs/difference-between-hard-and-soft-drugs>.

⁴⁸⁷ Netherlands date unknown <https://www.government.nl/topics/drugs/difference-between-hard-and-soft-drugs>.

⁴⁸⁸ Cluskey *The Irish Times*.

the actual act of consuming cannabis may be overlooked by authorities, the identification of cannabis induced impairment has become crucial for the implementation and regulation of cannabis induced impairment policies for both employers and the State.⁴⁸⁹ Without being able to identify impairment, employers will not be able to prevent employees who are under the influence of cannabis from entering the workplace and to ensure that employee productivity is maintained. What is more, the State will not be able to identify motorists who are under the influence of cannabis.

Similar to labour practices in South Africa, article 7:678 of the *Dutch Civil Code* provides employers with the right to terminate an employment relationship when: the employee, despite warning, takes to drunkenness or other dissipated behaviour; the employee deliberately, or despite warning, recklessly exposed themselves or others to serious danger, and when the employee deliberately, or because of reckless behaviour, becomes or remains unable to perform their work.⁴⁹⁰

An employee who is under the influence of cannabis may make themselves guilty of the aforementioned dismissible offences, which in South Africa, is regarded as misconduct.⁴⁹¹ In terms of article 7:658 section 1 of the *Dutch Civil Code*, a duty to care is placed on employers to ensure that reasonable and necessary safety measures are taken to prevent the employee from suffering injuries and/or damages during the performance of the employee's work.⁴⁹² This would and should obviously include the implementation of policies that prevent employees from entering the workplace while under the influence of cannabis, due to the safety risks that their impairment may pose. If the employer does not take reasonable measures to prevent the employee from harm, the employer may be held liable for the damages suffered by the employee.⁴⁹³ Also, similar to South African labour law, as discussed in chapter 4, the employer can dismiss an employee if reasonable grounds for dismissal exist.⁴⁹⁴ An example of a reasonable ground would be if the

⁴⁸⁹ Veldman 2020 <https://sensiseeds.com/en/blog/cannabis-driving-in-the-netherlands-laws-limitations/>.

⁴⁹⁰ *Mthembu v NCT Durban Wood Chips* 2019 4 BALR 369 (CCMA) para 89; Article 7:678 ss c, h and l of the Dutch Civil Code.

⁴⁹¹ *Mthembu v NCT Durban Wood Chips* 2019 4 BALR 369 (CCMA).

⁴⁹² Article 7:657 s 1 of the Dutch Civil Code.

⁴⁹³ Article 7:658 s 2 of the Dutch Civil Code.

⁴⁹⁴ Article 7:669 of the Dutch Civil Code.

employment relationship becomes "disturbed" and the continuation thereof cannot be reasonably expected from the employer.⁴⁹⁵

In an attempt to reasonably ensure the safety of employees, employers are expected to take reasonable steps to prevent persons who are impaired from entering the workplace.⁴⁹⁶ This would obviously also be applicable to employees who report to work under the influence of cannabis. This would be done by developing and implementing policies that prohibit substance induced impairment in the workplace. If the contravention of the employer's policy by the employee causes the trust relationship to become "disturbed", and the continuation of the relationship cannot be reasonably expected from the employer, the employer may then terminate the employment relationship. Dutch employers are left with a similar predicament to South African employers, as clinically testing for the identification of cannabis induced impairment remains problematic.⁴⁹⁷

In the Dutch case of *Rail Service Center Rotterdam v Verweerder*, the employer had a zero-tolerance policy relating to alcohol and other drugs.⁴⁹⁸ The employee's job entailed the operation of heavy machinery to load and unload containers.⁴⁹⁹ On numerous occasions the employee did not report to work.⁵⁰⁰ From circumstantial evidence the employer had the suspicion that the employee did not report to work because he was under the influence of alcohol and cannabis.⁵⁰¹ When the employer confronted the employee, the employee admitted that the reason for him not showing up to work was his abuse of alcohol, the employee denied that he ever used cannabis.⁵⁰² During the confrontation with the employee, the employee was again suspected to be under the influence of a substance.⁵⁰³ The employee was sent for a blood test and the results showed that his blood contained 2.46 millilitre of alcohol per 100 millilitres of blood, as well as 126 micrograms of THC per litre of blood.⁵⁰⁴ Interestingly enough, even in these

⁴⁹⁵ Article 7:669 par G of the *Dutch Civil Code*.

⁴⁹⁶ Article 7:658 of the *Dutch Civil Code*.

⁴⁹⁷ Fiore 2016 <https://www.keglerbrown.com/publications/weed>.

⁴⁹⁸ *Rail Service Center Rotterdam v Verweerder* Rechtbank Rotterdam, KTN-6598195_15062018 par 2.4.

⁴⁹⁹ *Rail Service Center Rotterdam v Verweerder* Rechtbank Rotterdam, KTN-6598195_15062018 par 2.3.

⁵⁰⁰ *Rail Service Center Rotterdam v Verweerder* Rechtbank Rotterdam, KTN-6598195_15062018 par 2.10 to 2.11.

⁵⁰¹ *Rail Service Center Rotterdam v Verweerder* Rechtbank Rotterdam, KTN-6598195_15062018 par 2.11.

⁵⁰² *Rail Service Center Rotterdam v Verweerder* Rechtbank Rotterdam, KTN-6598195_15062018 par 2.11.

⁵⁰³ *Rail Service Center Rotterdam v Verweerder* Rechtbank Rotterdam, KTN-6598195_15062018 par 4.9.

⁵⁰⁴ *Rail Service Center Rotterdam v Verweerder* Rechtbank Rotterdam, KTN-6598195_15062018 par 2.12

serious circumstances, the Court found that the employee's service may not be terminated.⁵⁰⁵

In the absence of accurate clinical tests to indicate impairment, one ought to consider other methods of testing for impairment as practices in other areas of the Dutch law. In terms of the Dutch "*Verkeerswet*", also known as the *Dutch Traffic Law*, motorists are prohibited from driving their motor vehicles while under the influence of an intoxicating substance.⁵⁰⁶ Dutch law is known to have a zero-tolerance policy towards motorists who drive their vehicles under the influence of cannabis.⁵⁰⁷ Should a motorist be suspected of drug use, the police are entitled to carry out an on-the spot saliva test.⁵⁰⁸ If a person's saliva tests positive for cannabis, then police is entitled to request a blood test for further investigation.⁵⁰⁹ Should the blood test find that the driver has more than 3 micrograms of THC per litre of blood in his or her blood stream, they will be found guilty of driving under the influence of cannabis.⁵¹⁰ Although this practice has come under criticism by Dutch citizens, for not being an accurate method for determining whether cannabis induced impairment is present, the government continues to relate blood-THC levels to impairment.⁵¹¹

Although it may seem as if The Netherlands has not been able to provide an ideal solution to the problem at hand, it is worth noting that their approach to dealing with suspected cases of cannabis induced impairment, although not perfect, gives citizens certainty of the law. Furthermore, it is worth noting that The Netherlands, despite being considered as liberal towards cannabis use, has drawn a clear line for its citizens, that will be to the benefit and safety of the community, even though it may be detrimental to the individual.

⁵⁰⁵ *Rail Service Center Rotterdam v Verweerder* Rechtbank Rotterdam, KTN-6598195_15062018 par 4.7.

⁵⁰⁶ Section 8 of Hoofdstuk II, *Wegenverkeerswet* (1994).

⁵⁰⁷ Veldman 2020 <https://sensiseeds.com/en/blog/cannabis-driving-in-the-netherlands-laws-limitations/>.

⁵⁰⁸ Veldman 2020 <https://sensiseeds.com/en/blog/cannabis-driving-in-the-netherlands-laws-limitations/>.

⁵⁰⁹ Veldman 2020 <https://sensiseeds.com/en/blog/cannabis-driving-in-the-netherlands-laws-limitations/>.

⁵¹⁰ Veldman 2020 <https://sensiseeds.com/en/blog/cannabis-driving-in-the-netherlands-laws-limitations/>.

⁵¹¹ Veldman 2020 <https://sensiseeds.com/en/blog/cannabis-driving-in-the-netherlands-laws-limitations/>.

5.3.2.2 Canada

The use of cannabis for recreational purposes was legalised in Canada on the 17th of October 2018.⁵¹² In terms of the *Cannabis Act*, individuals who are older than 18 years of age may possess up to 30 grams of dried cannabis and grow up to 4 cannabis plants per residence, for personal use.⁵¹³ When the recreational use of cannabis became legal in Canada, employers had to update their workplace policies relating to drugs, as well as health and safety.⁵¹⁴ Employers in Canada are now also facing challenges related to the regulation of cannabis induced impairment in the workplace.⁵¹⁵ According to one survey, 34% of Canadian companies still do not have a drug policy in place.⁵¹⁶

Similar to the position in South Africa, employers in Canada have a duty to protect the health and safety of their employees.⁵¹⁷ Employers have a duty to adopt and implement prescribed safety codes and safety standards to protect the safety of employees in the workplace.⁵¹⁸ Employers are expected to take all reasonable precautions and exercise due diligence to ensure the safety of their employees while performing their services.⁵¹⁹ While at work, employees are also expected to take all reasonable and necessary precautions to ensure that their actions will not negatively affect the health and safety of other employees.⁵²⁰ Employees are thus expected to perform their jobs as safely as they can, therefore they have to understand the impact that using intoxicating substances has on their own safety and on the safety of other employees.⁵²¹

Generally, employment policies in Canada place emphasis on the ability of employees to do their work without endangering their own safety, or the safety of others.⁵²² Employers

⁵¹² Anonymous 2020 *Vitality 1*; Anderson date unknown <https://www.go2hr.ca/legal/marijuana-at-work-six-things-employers-should-know>; Janisch 2019 <https://www.govdocs.com/what-employers-should-know-about-marijuana-in-canada/>.

⁵¹³ Section 8(1)(a) and (e) of *The Cannabis Act*.

⁵¹⁴ Verlint 2019 <https://www.littler.com/publication-press/publication/canada-how-can-employers-prepare-edible-cannabis-impending-arrival>.

⁵¹⁵ Anonymous 2020 *Vitality 2*; *International Brotherhood of Electrical Workers, Local 1620 v Lower Churchill Transmission Construction Employers' Association Inc.* 2020 NLCA 20.

⁵¹⁶ Anonymous 2020 *Vitality 2*.

⁵¹⁷ Section 125(1)(y) of *Canada Labour Code* (1985).

⁵¹⁸ Section 125(1)(v) of *Canada Labour Code* (1985).

⁵¹⁹ Anonymous 2018 <https://www.ccohs.ca/products/publications/cannabis>.

⁵²⁰ Section 126(1)(c) of *Canada Labour Code* (1985).

⁵²¹ *Workplace Strategies: Risk of Impairment from Cannabis* of 2018.

⁵²² Canadian Centre for Occupational Health and Safety 2021 https://www.ccohs.ca/oshanswers/psychosocial/medical_marijuana.html?=&wbdisable=true

are entitled to prohibit the use of cannabis at work, and also prohibit employees from entering the workplace while under the influence of cannabis.⁵²³ Should employees not comply with the employer's policy relating to cannabis use and cannabis induced impairment in the workplace, the employer has the right to take disciplinary action.⁵²⁴ Employers are thus able to develop and enforce organisational policies that prohibit the presence of cannabis and cannabis related products in the workplace.⁵²⁵

Employers considering the implementation of a zero-tolerance policy towards cannabis in an employee's blood stream while at work, in effect also forbidding the use of cannabis outside of the workplace shortly reporting to work, will have to justify their policies in light of the inherent dangers of their workplace environment.⁵²⁶ To determine whether a working environment is safety-sensitive enough to justify a zero-tolerance policy, the context of the industry, the employee's working environment, the employee's direct involvement in high risk operations and decision-making must be considered.⁵²⁷ If it is determined that the workplace environment is indeed safety sensitive, employers are expected to implement the necessary policies to protect the safety of their employees.⁵²⁸ Even though cannabis was not legal at the time of hearing the matter, it was found in the 2015 case of *French v. Selkin Logging* that a zero-tolerance policy relating to cannabis could be justified if: the adoption of the zero-tolerance policy was done for a purpose rationally connected to the performance of the job; the zero-tolerance policy was adopted in a good faith and belief that it is necessary for a legitimate work-related purpose; and that accommodating the individual would impose undue hardship upon the employer.⁵²⁹ This test is also known as the *bona fide* occupational requirement test ("BFOR-test").⁵³⁰

In working environments that does not pose any real danger, employees can still be punished for reporting to work under the influence of cannabis. In scenarios such as

⁵²³ Levy 2018 *HR Professional*; Anderson <https://www.go2hr.ca/legal/marijuana-at-work-six-things-employers-should-know>.

⁵²⁴ Anderson <https://www.go2hr.ca/legal/marijuana-at-work-six-things-employers-should-know>.

⁵²⁵ Workplace Strategies: Risk of Impairment from Cannabis of 2018.

⁵²⁶ Anonymous 2020 *Vitality* 3.

⁵²⁷ Workplace Strategies: Risk of Impairment from Cannabis of 2018.

⁵²⁸ Levy 2018 *HR Professional*.

⁵²⁹ *French v. Selkin Logging* 2015 BCHRT 101 para 92.

⁵³⁰ *French v. Selkin Logging* 2015 BCHRT 101 para 85; *British Columbia (Public Service Employee Relations Commission) v BCGSEU* 1999 3 SCR 3 para 54.

these, employers will not be able to justify a zero-tolerance policy.⁵³¹ A more progressive form of discipline will have to be applied when dealing with employees working in these types of working environments.⁵³²

It is recognised that the development and implementation of policies relating to cannabis use, and the identification of cannabis induced impairment, remains one of the most contentious issues in the Canadian workplace.⁵³³ This is because, as was stated earlier, that cannabis induced impairment cannot be measured scientifically.⁵³⁴ Some employers may use the employee's performance deficit to determine whether impairment is present, but this approach may be problematic as the result thereof is open for interpretation.⁵³⁵ Employees who are suspected of impairment may be sent to a medical practitioner for evaluation to determine whether they are fit for work or not.⁵³⁶ A medical professional may consider factors such as physical or mental abilities, sensory accuracy, level of skill, and functional limitations of the employee, to determine whether an employee is under the influence of cannabis and subsequently not fit for work.⁵³⁷

In the appeal case of *International Brotherhood of Electrical Workers Local 1620 v Lower Churchill Transmission Construction Employers' Association Inc* an employee was refused employment because he failed a drug test.⁵³⁸ The prospective employee (hereafter "grievor") smoked cannabis for medical purposes to manage chronic pain.⁵³⁹ The Arbitrator in the *court a quo* found that, although the employer had a duty to accommodate the grievor, as he had a disability, determining the impairment of the grievor every time before he entered the workplace would cause undue hardship for the

⁵³¹ *Workplace Strategies: Risk of Impairment from Cannabis* of 2018.

⁵³² Anderson date unknown <https://www.go2hr.ca/legal/marijuana-at-work-six-things-employers-should-know>.

⁵³³ Anderson date unknown <https://www.go2hr.ca/legal/marijuana-at-work-six-things-employers-should-know>.

⁵³⁴ Anonymous 2020 *Vitality* 3.

⁵³⁵ Anonymous 2020 *Vitality* 3.

⁵³⁶ Canadian Centre for Occupational Health and Safety 2021
https://www.ccohs.ca/oshanswers/psychosocial/medical_marijuana.html?=&wbdisable=true

⁵³⁷ Canadian Centre for Occupational Health and Safety 2021
https://www.ccohs.ca/oshanswers/psychosocial/medical_marijuana.html?=&wbdisable=true

⁵³⁸ *International Brotherhood of Electrical Workers, Local 1620 v Lower Churchill Transmission Construction Employers' Association Inc*. 2020 NLCA 20 para 1.

⁵³⁹ *International Brotherhood of Electrical Workers, Local 1620 v Lower Churchill Transmission Construction Employers' Association Inc*. 2020 NLCA 20 para 1.

employer, as cannabis-induced impairment could not be measured.⁵⁴⁰ In the Court of Appeal, it was for the Court to decide whether undue hardship in this scenario would indeed exist, or could alternative methods, such as a functional assessment, be used to determine impairment and not cause undue hardship for the employer.⁵⁴¹

The Court stated that, for the employer to discharge the onus of proving that an undue hardship would exist by accommodating the employee, the employer has to prove that alternative solutions were investigated, however none could be found.⁵⁴² This was not done by the employer, nor taken into account by the Arbitrator of the *court a quo*.⁵⁴³ The Court of Appeal suggested that an alternative, such as an individual assessment of the grievor's ability to perform the job safely, of which a standard field sobriety test is an example, could provide an option for identifying impairment without causing undue hardship for the employer.⁵⁴⁴

It is not just the employers of Canada that are expected to regulate cannabis induced impairment, but also the State of Canada. This is evident from section 230.14(1)(d) of the *Amendment Act of the Criminal Code of Canada*.⁵⁴⁵ In terms of this section, a peace officer who has a reasonable suspicion that a person has a drug in his or her system and has driven a vehicle, the peace officer may require the person suspected of impairment to conduct a physical coordination test and/or to provide a sample of their bodily fluid to conduct a drug test.⁵⁴⁶

The evaluating officer conducting the coordination test must be certified as a drug recognition expert and accredited by the International Association of Chiefs of Police.⁵⁴⁷ In terms of section 254(2)(a) of the *Criminal Code*, the coordination tests consist of those

⁵⁴⁰ *International Brotherhood of Electrical Workers, Local 1620 v Lower Churchill Transmission Construction Employers' Association Inc.* 2020 NLCA 20 paras 24 and 198.

⁵⁴¹ *International Brotherhood of Electrical Workers, Local 1620 v Lower Churchill Transmission Construction Employers' Association Inc.* 2020 NLCA 20 para 35.

⁵⁴² *International Brotherhood of Electrical Workers, Local 1620 v Lower Churchill Transmission Construction Employers' Association Inc.* 2020 NLCA 20 para 35.

⁵⁴³ *International Brotherhood of Electrical Workers, Local 1620 v Lower Churchill Transmission Construction Employers' Association Inc.* 2020 NLCA 20 para 36.

⁵⁴⁴ *International Brotherhood of Electrical Workers, Local 1620 v Lower Churchill Transmission Construction Employers' Association Inc.* 2020 NLCA 20 para 37.

⁵⁴⁵ Section 230.14(1)(d) of the *Amendment Act to the Criminal Code of Canada* (2008).

⁵⁴⁶ Section 230.27(1) of the *Amendment Act to the Criminal Code of Canada* (2008).

⁵⁴⁷ Regulation 1 of *Evaluation of Impaired Operation (Drugs and Alcohol) Regulations of Canada* (2008).

that have been described earlier in this chapter: the horizontal gaze nystagmus test, the walk-and-turn test, and the one-leg stand test.⁵⁴⁸

Apart from the physical coordination tests, a peace officer may also oblige a person suspected of drug impairment to subject him- or herself to a blood test, conducted by a medical practitioner or other qualified person.⁵⁴⁹ Should this blood test reflect that there are more than 2 nanograms of THC per 1 millilitre of blood present in the person's blood, then such person will be found guilty of driving under the influence of cannabis.⁵⁵⁰

Even though the abovementioned tests have their shortcomings, which is recognised by the Canadian Department of Justice, the combination of coordination tests as well as blood tests is the best approach to a problem that does not yet have the perfect solution.⁵⁵¹

5.4 Conclusion

It is important to distinguish instances where traces of cannabis are present in a person's body, from cases where a person is impaired as a result of previous cannabis use. Cannabis may remain in the human body for up to thirty days after use, long after impairment has subsided.⁵⁵² If only relied on a drug test, it is foreseeable that a person may test positive for cannabis while he or she is in actual fact not impaired. As could be seen from the *Mthembu*⁵⁵³ and *Rangkeng*⁵⁵⁴ cases, establishing whether an employee is under the influence of cannabis remains problematic, and no legal certainty on the subject exists. Alternative methods to drug testing, such as the Standard Field Sobriety Test, proved promising, but lacks reliability.⁵⁵⁵ The Guiding Principles require that tests for impairment should be of the highest possible reliability.⁵⁵⁶

⁵⁴⁸ Section 254(2)(a) of the *Criminal Code of Canada* (2008).

⁵⁴⁹ Section 320.27(1) of the *Amendment Act to the Criminal Code of Canada* (2008).

⁵⁵⁰ Section 320.14(1)(c) of the *Amendment Act to the Criminal Code of Canada* (2008); Regulation 2 of the *Blood Drug Concentration Regulations of Canada* (2018).

⁵⁵¹ *Workplace Strategies: Risk of Impairment from Cannabis* of 2018.

⁵⁵² Holland 2020 <https://www.healthline.com/health/what-is-cannabis>; Wyllie 2019 <https://www.policemag.com/505866/testing-drivers-for-marijuana-impairment>.

⁵⁵³ *Mthembu v NCT Durban Wood Chips* 2019 4 BALR 369 (CCMA) para 89.

⁵⁵⁴ *Rankeng v Signature Cosmetics and Fragrance (Pty) Ltd* 2020 10 BALR 1128 (CCMA) para 18.

⁵⁵⁵ Author unknown 2021 <http://www.fieldsobrietytests.org/walkandturntest.html>.

⁵⁵⁶ Shahandeh and Caborn *Ethics, Professional Standards And Drug Addiction* 32; Background to the *Guiding Principles on Drug and Alcohol Testing in the Workplace* (1993).

In The Netherlands it seems that the policy of tolerance has also made its way to the workplace, as could be seen in the matter of *Dutch case of Rail Service Center Rotterdam v Verweerder*.⁵⁵⁷ In this case the Court avoided the issue proving impairment altogether. The employee was not dismissed, in spite of contravening a zero-tolerance policy on substance abuse.⁵⁵⁸ When it comes to driving under the influence of cannabis, the State is stricter and wrongly suggests that a person having more than 3 micrograms of THC per litre of blood is under the influence of cannabis.⁵⁵⁹

The Canadian Court suggested in the matter of *Electrical Workers Local 1620 v Lower Churchill Transmission Construction Employers' Association Inc*⁵⁶⁰ that a coordination test be used to identify when impairment is present, whereafter failing such test the employee may be subjected to a drug test. The same stance is taken by the State of Canada when determining whether impairment is present.⁵⁶¹ This makes the evidence more reliable, and increases the probatory proof thereof. It can be concluded that the Canadian method of determining whether impairment is present be regarded as the best practice.

⁵⁵⁷ *Rail Service Center Rotterdam v Verweerder* Rechtbank Rotterdam, KTN-6598195_15062018 par 4.7.

⁵⁵⁸ *Rail Service Center Rotterdam v Verweerder* Rechtbank Rotterdam, KTN-6598195_15062018 par 4.7.

⁵⁵⁹ Veldman 2020 <https://sensiseeds.com/en/blog/cannabis-driving-in-the-netherlands-laws-limitations/>.

⁵⁶⁰ *International Brotherhood of Electrical Workers, Local 1620 v Lower Churchill Transmission Construction Employers' Association Inc*. 2020 NLCA 20 para 37.

⁵⁶¹ Section 230.27(1) of the *Amendment Act to the Criminal Code of Canada* of (2008).

CHAPTER 6 PROPOSALS

This chapter will investigate and propose possible solutions to the problem of identifying and prohibiting cannabis induced impairment in the workplace. Regard will be given to the proposed *Cannabis for Private Purposes Bill*, whereafter possible policy solutions will be introduced for employers to identify and prevent cannabis induced impairment in the workplace.

6.1 Considerations from Cannabis for Private Purposes Bill

The South African legislature has drafted and introduced a *Cannabis for Private Purposes Bill* in August 2020 (hereafter "Cannabis Bill").⁵⁶² This bill is still in its early developmental stages, and it will be some time before it will be promulgated into law. Although it is likely that amendments to this bill will be made, it serves as an early insight into the rationale and approach of the State in the regulation of cannabis and cannabis induced impairment.

The purpose of this bill is: to respect the right to privacy of an adult person to possess and cultivate cannabis; to enable adult persons to possess and/or consume cannabis; to protect non-consenting adults, and children, against the harms of cannabis, and to amend and/or delete provisions of laws relating to the use and possession of cannabis.⁵⁶³

In terms of section 2(1) of the Cannabis Bill,⁵⁶⁴ an adult person may for personal use:

- (a) possess the prescribed quantity of cannabis plant cultivation material;
- (b) cultivate the prescribed quantity of cannabis plants in a private place;
- (c) possess in private the prescribed quantity of cannabis in a public place;
- (d) possess the prescribed quantity in a private place;
- (e) possess in private, the prescribed quantity of cannabis in a public place.

The term "prescribed quantity" has different meanings, dependent on the context within which it is used.⁵⁶⁵ A person may possess an unlimited quantity of cannabis seeds and seedlings.⁵⁶⁶ One adult may possess up to four cannabis plants, and if there are two or

⁵⁶² GG 43595 of 7 August 2020.

⁵⁶³ GG 43595 of 7 August 2020.

⁵⁶⁴ Section 2(1)(a) to (e) in GG 43595 of 7 August 2020.

⁵⁶⁵ Schedule 3 in GG 43595 of 7 August 2020.

⁵⁶⁶ Section 2(1)(a) and Schedule 3 in GG 43595 of 7 August 2020.

more persons residing in a dwelling, the dwelling may possess a maximum of eight cannabis plants.⁵⁶⁷ A person may possess, in private, up to 100 grams of dried cannabis.⁵⁶⁸ If a person is in a private place, he or she may possess up to 600 grams of dried cannabis, or 1200 grams if there are two or more adult persons residing in the dwelling.⁵⁶⁹ A person may possess one flowering cannabis plant in a public place.⁵⁷⁰

Smoking cannabis in the presence of a non-consenting adult person is regarded as an offence for which a fine or a period of direct imprisonment not exceeding two years could be imposed, or both.⁵⁷¹ Also noteworthy is that the dealing in cannabis for remuneration or reward is an offence for which a person could be liable for a fine or a period of 15 years of imprisonment, or both.⁵⁷²

Section 10 read together with Schedule 5 of the Cannabis Bill proposes amendments to a number of laws, the most notable of which will be discussed hereunder.⁵⁷³ Part II and III of Schedule 2 of the *Drugs and Drug Trafficking Act* 140 of 1992 are amended so as to no longer include THC and cannabis in the list of Dangerous Dependence-Producing Substances, or in the list of Undesirable Dependence-Producing Substances.⁵⁷⁴ The most notable and insightful proposed changes to the *National Road Traffic Act* 93 of 1996 are to section 65(1), which deals with driving under the influence of liquor or drugs having a narcotic effect.⁵⁷⁵ In terms of these amendments, no person shall on a public road, drive a vehicle, or occupy the driver's seat of a vehicle, of which the engine is running while under the influence of intoxicating liquor, THC or any other drug having a narcotic effect.⁵⁷⁶ Section 65(2) will include that no person on a public road shall drive a vehicle, or occupy the driver's seat of a motor vehicle while the engine is running, if the concentration of THC in their blood is not less than 0,05 grams per 100 millilitres of

⁵⁶⁷ Section 2(1)(b) and Schedule 3 in GG 43595 of 7 August 2020.

⁵⁶⁸ Section 2(1)(c) and Schedule 3 in GG 43595 of 7 August 2020.

⁵⁶⁹ Section 2(1)(d) and Schedule 3 in GG 43595 of 7 August 2020.

⁵⁷⁰ Section 2(1)(3) and Schedule 3 in GG 43595 of 7 August 2020.

⁵⁷¹ Section 5(2) and 7(1)(d) in GG 43595 of 7 August 2020.

⁵⁷² Section 4(5) in GG 43595 of 7 August 2020.

⁵⁷³ Section 10 and Schedule 5 in GG 43595 of 7 August 2020.

⁵⁷⁴ Section 10 and Schedule 5 in GG 43595 of 7 August 2020; Part II and III of Schedule 2 of the *Drugs and Drug Trafficking Act* 140 of 1992.

⁵⁷⁵ Section 10 and Schedule 5 in GG 43595 of 7 August 2020; Section 65 of the *National Road Traffic Act* 93 of 1996.

⁵⁷⁶ Section 10 and Schedule 5 in GG 43595 of 7 August 2020; Section 65(1) of the *National Road Traffic Act* 93 of 1996.

blood.⁵⁷⁷ In terms of these amendments, the State sets the standard that any person who has more than 0,05 grams of THC per 100 millilitres of blood is regarded to be under the influence of THC, and thus also regarded to be impaired as a result thereof.

It is interesting to note that the position taken by the legislature in the identification of cannabis induced impairment is similar to that of The Netherlands, mentioned earlier in chapter 5. What can be hoped for is that future versions to the Cannabis Bill will follow an approach similar to that of Canada, where persons are first subjected to a physical coordination test, whereafter failing such test, a person is subjected to a blood test for confirmation of intoxication.

The relevance of the above is crucial for employers who are developing policies relating to cannabis induced impairment in the workplace. It is well known that for a person to be convicted of a criminal offence, the State must prove their case beyond reasonable doubt.⁵⁷⁸ Employers, however, only have to prove that an employee contravened a workplace rule on a balance of probabilities.⁵⁷⁹ The last-mentioned is a lower onus than that of the State in criminal proceedings.⁵⁸⁰

The Cannabis Bill will in all likelihood set the standard and give guidance, not just for the State, but also for employers, on how the issue of cannabis-induced impairment is to be dealt with.

6.2 Substance policy proposals

6.2.1 Considerations when drafting a substance policy

It is trite that employers are expected to take appropriate action to prevent drug induced impairment in the workplace.⁵⁸¹ As alluded to above, there may be various reasons for this, but mainly it will have regard to safety and efficiency in the workplace. The action referred to is usually done by way of workplace policies.

⁵⁷⁷ Section 10 and Schedule 5 in GG 43595 of 7 August 2020; Section 65(2) of the *National Road Traffic Act* 93 of 1996.

⁵⁷⁸ Du Toit Chapter 26 *Commentary on the Criminal Procedure Act* 1.

⁵⁷⁹ *Avril Elizabeth Home for the Mentally Handicapped v CCMA* 2006 9 BLLR 833 (LC) 837.

⁵⁸⁰ *Pather v Financial Services Board* 2017 ZASCA 125 para 29.

⁵⁸¹ Article 2.2.1 of the *ILO Code of Practice for the Management of Alcohol- and Drug-Related Issues in the Workplace* (1993).

When developing policies, employers must ensure that their policies are reasonable and justifiable, given the circumstances of their workplace.⁵⁸² It is ideal that the policy should be in writing, and be agreed upon by the employer and the employee.⁵⁸³ Employees are expected to give their full cooperation to employers who implement policies for the prevention of substance induced impairment at work.⁵⁸⁴ The policy should be clear and unambiguous.⁵⁸⁵ Preference should be given to corrective and progressive discipline before considering more serious forms of discipline such as dismissal.⁵⁸⁶ Should an employee not cooperate when remedial action is taken, then the employer is entitled to make use of more serious forms of disciplinary action.⁵⁸⁷ The policy, and its sanctions, should be applied equally and consistently to all employees in the workplace.⁵⁸⁸ When a policy is agreed upon by both the employer and the employee, it is more likely that the policy will be a reasonable policy.⁵⁸⁹

It is of importance, when testing for substance use or impairment, that moral, ethical and legal issues be considered. Section 7(1)(b) of the EEA states medical testing of an employee is prohibited, unless it is justifiable in the light of medical facts, employment conditions, social policy, the fair distribution of employee benefits or the inherent requirements of the job.⁵⁹⁰ Employers wanting to medically test employees for impairment will have to justify their rationale on at least one of the aforementioned prescribed justifications, dependant on the nature of the workplace. Not doing so could possibly infringe on the employee's right to bodily integrity.⁵⁹¹

⁵⁸² Article 2.3.8 of the *ILO Code of Practice for the Management of Alcohol- and Drug-Related Issues in the Workplace* (1993).

⁵⁸³ Overview to the *Guiding Principles on Drug and Alcohol Testing in the Workplace* (1993).

⁵⁸⁴ Article 2.3.2 of the *ILO Code of Practice for the Management of Alcohol- and Drug-Related Issues in the Workplace* (1993).

⁵⁸⁵ Preface to the *ILO Code of Practice for the Management of Alcohol- and Drug-Related Issues in the Workplace* (1993).

⁵⁸⁶ Preface to the *ILO Code of Practice for the Management of Alcohol- and Drug-Related Issues in the Workplace* (1993); Item 3(2) of the Schedule 8 of the *Labour Relations Act - The Code of Good Practice: Dismissal*.

⁵⁸⁷ Preface to the *ILO Code of Practice for the Management of Alcohol- and Drug-Related Issues in the Workplace* (1993).

⁵⁸⁸ Preface to the *ILO Code of Practice for the Management of Alcohol- and Drug-Related Issues in the Workplace* (1993); Item 3(6) of the Schedule 8 of the *Labour Relations Act - The Code of Good Practice: Dismissal*.

⁵⁸⁹ Overview to the *Guiding Principles on Drug and Alcohol Testing in the Workplace* (1993).

⁵⁹⁰ Section 7(1)(b) of the *Employment Equity Act* 55 of 1998.

⁵⁹¹ Section 12(2) of *The Constitution of the Republic of South Africa*, 1996.

The policy should explain to the employee the definition of the relevant substance, the effects of using the substance, how the use of the substance will be identified, and the possible disciplinary consequences for reporting to work with the substance in one's system and/or being under the influence of the substance.⁵⁹² For purposes of explaining to the employee the process that will be used for the identification of substance induced impairment, the employer's policy should clearly define the procedure that will be used to identify substance induced impairment.⁵⁹³ The purpose of the test and the results of the tests must be explained to the employee.⁵⁹⁴

Post-accident and reasonable suspicion are regarded as valid reasons for testing substance use and or impairment.⁵⁹⁵ Preference should be given to less invasive methods of drug testing, before continuing to more invasive testing methods, such as blood testing.⁵⁹⁶ Medical results should be reviewed, verified, and interpreted by medical experts to determine likelihood of impairment.⁵⁹⁷ When doing so, an employee must have the opportunity to discuss the results with a medical reviewer before further action is taken against the employee.⁵⁹⁸ The aforementioned principles should play a major role once the fairness and appropriateness of the policy is considered.⁵⁹⁹

Employees who, in contravention of the employer's policy, report to work in possession of cannabis and/or under the influence of cannabis would make themselves guilty of misconduct. Appropriate sanctions for such misconduct will be dependent on the circumstances of each particular working environment, which will be discussed in greater detail hereunder.

⁵⁹² Article 3.2.1 of the *ILO Code of Practice for the Management of Alcohol- and Drug-Related Issues in the Workplace*.

⁵⁹³ Article 7.1 of the *ILO Code of Practice for the Management of Alcohol- and Drug-Related Issues in the Workplace*.

⁵⁹⁴ *Guiding Principles on Drug and Alcohol Testing in the Workplace* (1993) 35.

⁵⁹⁵ *Guiding Principles on Drug and Alcohol Testing in the Workplace* (1993) 36.

⁵⁹⁶ *Guiding Principles on Drug and Alcohol Testing in the Workplace* (1993) 37.

⁵⁹⁷ *Guiding Principles on Drug and Alcohol Testing in the Workplace* (1993) 38.

⁵⁹⁸ *Guiding Principles on Drug and Alcohol Testing in the Workplace* (1993) 38.

⁵⁹⁹ Article 7.2.1 of the *ILO Code of Practice for the Management of Alcohol- and Drug-Related Issues in the Workplace* (1996); Item 7(b)(i) & (iv) Schedule 8 of the *Labour Relations Act – The Code of Good Practice: Dismissal*.

6.2.2 Policy proposals for the identification of cannabis induced impairment

The employer's substance policy must explain to the employee that intoxication, or even just a trace of the substance, could impair an employee's ability to work to the standard of care and skill that is required by the employer to ensure the safest possible working environment, in an environment that already has numerous dangers associated with it. This will serve as justification for the rule, as required by the ILO's code of practice for the management of alcohol- and drug-related issues in the workplace and LRA.⁶⁰⁰ The policy should list the substances that are considered to be dangerous to the safety of the working environment, so that employees can bear knowledge of which substances are prohibited by the employer. THC and cannabis will thus be listed.⁶⁰¹

As previously discussed, numerous tests already exist for the identification of cannabis induced impairment. The standard field sobriety test is comprised of a combination of coordination tests which include the horizontal gaze nystagmus tests, the walk-and-turn test and the one-leg stand test mentioned in chapter 5.⁶⁰² It would be wise for employers to have these coordination tests be conducted by a non-biased medical practitioner or other suitably qualified person when an employee is suspected of cannabis-induced impairment.

However, the problem with these tests is their unreliability for accurately determining cannabis induced impairment.⁶⁰³ A person testing positive for cannabis in his or her system is not necessarily impaired, and the same could also be said of a person who has a natural imbalance, or low natural levels of coordination. Therefore, it would be wise for employers to make use of a combination of tests, such as the State of Canada and the recommendation made by the court in the Canadian case of *International Brotherhood of Electrical Workers Local 1620 v Lower Churchill Transmission Construction Employers' Association Inc*, when determining whether cannabis-induced impairment is present.⁶⁰⁴

⁶⁰⁰ Article 2.3.8 of the *ILO Code of Practice for the Management of Alcohol- and Drug-Related Issues in the Workplace* (1996); Item 7(b)(i) of the Schedule 8 of the *Labour Relations Act - The Code of Good Practice: Dismissal*.

⁶⁰¹ Item 7 of the Schedule 8 of the *Labour Relations Act - The Code of Good Practice: Dismissal*.

⁶⁰² Author unknown 2021 <http://www.fieldsobrietytests.org/onelegstandtest.html>.

⁶⁰³ Visser *Finweek* 44-45.

⁶⁰⁴ Section 230.27(1) of the Amendment Act to the Criminal Code of Canada of 2008; *International Brotherhood of Electrical Workers, Local 1620 v Lower Churchill Transmission Construction Employers' Association Inc*. 2020 NLCA 20 para 37.

Should the employee fail the abovementioned tests, the employee should then be required to undergo a blood test, that must also be conducted by a medical practitioner or other suitably qualified person. From the proposed Cannabis Bill it can be seen that the standard set by the legislature for identifying impairments is 0,05 grams of THC per 100 millilitres of blood.⁶⁰⁵ Should an employee have failed the standard field sobriety test, and have more than 0,05 grams of THC per 100 millilitres of blood, employers may accept on a balance of probabilities that the employee is under the influence of cannabis, and will have grounds to dismiss, depending on the egregiousness of the transgression. A combination of these types of tests will most likely improve the accuracy of the outcome.

It is therefore proposed that employers who suspect an employee of cannabis-induced impairment should firstly subject the employee to a standard field sobriety test, and if an employee fails such test, the employee may be further subjected to a blood test, thereby also adhering to the *Guiding Principles on Drug and Alcohol Testing in the Workplace*.⁶⁰⁶ As blood tests are intrusive of a person's bodily integrity, it would be advisable for employers to include a clause in their employment contracts whereby employees expressly agree to be subjected to such tests.

Should an employer use these tests in conjunction to prove that an employee is impaired, it can be said that the employer has proven impairment beyond what even the State considers to be beyond reasonable doubt, which should suffice as adequate proof.

6.2.3 Proposed sanctions for the contravention of cannabis policy

The employer is entitled to discipline an employee for contravening the impairment policy.⁶⁰⁷ The policy must state that, what the possible sanctions may be, should employees make themselves guilty of contravening the policy. Employers should be mindful that the sanction imposed is fair in light of the offence and specific circumstances.

⁶⁰⁵ Section 10 and Schedule 5 in GG 43595 of 7 August 2020; Section 65(2) of the *National Road Traffic Act* 93 of 1996.

⁶⁰⁶ *Guiding Principles on Drug and Alcohol Testing in the Workplace* (1993) 34.

⁶⁰⁷ *Mthembu v NCT Durban Wood Chips* 2019 4 BALR 369 (CCMA) paras 70 and 71.

6.2.4 Proposed sanctions for a workplace without inherent dangers

Employers who have a workplace that does not have inherent dangers, should not focus their substance policy primarily on the safety of their employees, but rather on the influence of substance use on the employment relationship. As also clear from the *Mthembu v NCT Wood Chips* case, *Rankeng v Signature Cosmetics and Fragrance (Pty) Ltd*, as well as the Canadian case of *French v. Selkin Logging*, a zero-tolerance policy cannot be seen as reasonable in a workplace where no inherent dangers are present.⁶⁰⁸ Emphasis should be placed on the effect that a contravention of the policy may have on the employment relationship, as well as the rights and responsibilities of either party to the relationship, as mentioned in chapter 4. In this context, it would be inappropriate to dismiss an employee for a first offence; dismissal should be reserved for repeat offenders.⁶⁰⁹ It is proposed that an employee who contravenes the policy receives corrective sanctions, such as warnings and/or mandatory training on the effects of drugs on the human body, before considering dismissing the employee.

6.2.5 Proposed sanctions for a workplace with inherent dangers

In circumstances where the workplace has inherent dangers, the employer must develop a zero-tolerance policy, requiring an employee not to have any traces of intoxicating substances in his or her body when reporting to work.⁶¹⁰ As mentioned earlier, the safety of employees is a primary concern, and a zero-tolerance policy can and should be introduced in a workplace that has inherent dangers.⁶¹¹ Even if it is clear that the employee is not under the influence of such substance, the primary reason for this would be to ensure that the working environment remains as safe as reasonably possible for everyone that enters it, as required by the *Occupational Health and Safety Act*.⁶¹²

⁶⁰⁸ *Mthembu v NCT Durban Wood Chips* 2019 4 BALR 369 (CCMA); *French v. Selkin Logging* 2015 BCHRT 101; *Rankeng v Signature Cosmetics and Fragrance (Pty) Ltd* 2020 10 BALR 1128 (CCMA) paras 21 & 22.

⁶⁰⁹ Item 3(4) of the Schedule 8 of the *Labour Relations Act* - The Code of Good Practice: Dismissal; *Rankeng v Signature Cosmetics and Fragrance (Pty) Ltd* 2020 10 BALR 1128 (CCMA) paras 21 & 22.

⁶¹⁰ *Mthembu v NCT Durban Wood Chips* 2019 4 BALR 369 (CCMA) para 19.

⁶¹¹ *Mthembu v NCT Durban Wood Chips* 2019 4 BALR 369 (CCMA) para 81; Section 8(h) of the *Occupational Health and Safety Act* 85 of 1993.

⁶¹² *Mthembu v NCT Durban Wood Chips* 2019 4 BALR 369 (CCMA) para 72; Section 8(2)(h) of the *Occupational Health and Safety Act* 85 of 1993.

It is widely accepted that if a zero-tolerance policy can be justified as a result of the inherent dangers of the working environment, the dismissal of a first-time offender may be justified. It is also accepted that where the safety of the workplace is a concern, the individual employee's right to privacy is outweighed by the majority's right to a safe working environment.⁶¹³

Item 7 of the Code of Good Practice for Dismissal determines that when a policy is drafted in which dismissal is prescribed, the reasonableness of such sanction must be considered. Regard must thus be given to whether: the policy was valid or reasonable; the employee was aware or could have been reasonably expected to be aware of the policy; the policy is consistently applied to all employees; dismissal was the appropriate sanction for the contravention of the policy, taking into account circumstances from case to case.⁶¹⁴

6.3 Conclusion

When drafting a policy relating to the prevention of cannabis induced impairment in the workplace, the employer should ensure that the policy clearly defines the terms used in the policy. The policy must define what the employer regards as cannabis and cannabis related products. The policy must state under what circumstances will a test for impairment be warranted. The policy should explain to the employee how the test for identifying impairment will be conducted, as well as how the results thereof will be interpreted. Impairment should be defined. Employees should have the opportunity to have the results of their tests be interpreted by their own medical practitioners. The policy should clearly state which sanctions will be imposed for different offences. The employer should explain to employees and justify the motivation for such sanction in light of the working environment and/or working relationship. It is important that the policy is written in unambiguous and understandable language to ensure that the employee can understand the contents of the policy.

⁶¹³ *Guiding Principles on Drug and Alcohol Testing in the Workplace* (1993) 32.

⁶¹⁴ Item 7 of the Schedule 8 of the *Labour Relations Act* - The Code of Good Practice: Dismissal.

Chapter 7 Conclusion

7.1 Summary of main findings

From the onset of this study, the purpose was to investigate the legal position of employers with regard to identification and prevention of cannabis-induced impairment in the workplace. To understand and gain insight to the question at hand, a thorough investigation needed to be done, starting with the history of cannabis, its attributes, its cultivation, and the effects thereof on human beings.

The origin of cannabis, the variants thereof, as well as the effects of cannabis on the human body had to be investigated to understand what cannabis is, how easily it is cultivated, how it is consumed, and what effects the consumption of cannabis has on the human body. It was found that cannabis has various names, but that it refers to a type of flowering herb originating from the Himalayas, of which the main active ingredients are known as cannabinoids. Cannabis has a rich history, dating back to the Ice Age, more than 12 000 years ago. What is evident from the research in chapter two of this study is that cannabis has played an important part in human development, serving as a food, a drug and a fibrous material. Cannabis fibres, also known as hemp, were used for the manufacturing of clothes, food and paper. Denying society access to cannabis, for whatever reason, would essentially entail denying mankind from a part of its history.

It was discovered that various species of the cannabis plant exist, each with its own specific attributes and levels of cannabinoid content. Interestingly enough, scientists are now only beginning to understand the effects of CBD and THC on the human body. A major concern to employers is the identification and prevention of cannabis-induced impairment in the workplace. Examining bodily fluids for THC content cannot be regarded as a valid test for identifying when cannabis induced impairment is present, as there is no correlation between impairment and THC content in bodily fluids. More research in respect of the effects of cannabinoids, and specifically THC, on the human brain needs to be done so as to develop accurate tests for the identification of cannabis-induced impairment. Alternative methods to scientific testing for cannabis-induced impairment had to be investigated to determine the viability and reliability thereof. It can be concluded that these alternatives, and specifically the Standard Field Sobriety Test,

proved promising with regard to viability. It does however lack accuracy, only having an average accuracy rate of 69%.

The legal position pertaining to cannabis, both internationally and locally, needed to be discussed to give the reader the necessary broader legal context. Initially cannabis was not regulated. It was only during the colonial era that regulatory policies, with the hope of curbing the behaviour and cultures of enslaved people, started to emerge. The initial regulation of cannabis was used as a tool for oppressing certain classes of people and their culture. During the 19th century, the motivation for the regulation and the eventual prohibition of cannabis was the belief that cannabis consumption posed substantial health risks to society. This remained the view until fairly recently, after which a new view was gradually adopted based on more recent studies. The view adopted by countries, where cannabis use is legalised, is that cannabis does not pose any major risks to society as a whole. Furthermore, it is believed that proper regulation of cannabis poses less of a risk to society than outright banning cannabis, as standards may be set.

In the latest case of *Prince v Minister of Justice and Constitutional Development and Other*, the Court found that sections 4(b) and 5(b) of the *Drugs and Drug Trafficking Act*, sections 22A(9)(a)(i) and 22A(10) of the *Medicines and Related Substances Control Act* and section 40(1)(h) of the *Criminal Procedure Act* are unconstitutional, as they unreasonably limit a person's right to privacy. This had the effect of cannabis becoming legal in South Africa for personal use in private settings.

Since the handing down of the abovementioned Prince-judgement, employers had to regulate cannabis use and its resulting impairment in the workplace in an effort to guard the rights and duties arising out of the employment relationship. Of particular relevance to this study was the duty on the employer to maintain a safe working environment for its employees, and the employees' duty to maintain reasonable efficiency during working hours for their employer. It is highlighted that the use of cannabis before or during working hours results in impairment, which in turn adversely affects the aforementioned rights and duties arising from the working relationship.

When comparing the *Mthembu-case* to the *Rankeng-case*, it became clear that the testing of cannabis-induced impairment in the workplace is a difficult and problematic matter. In the *Mthembu-case* it was incorrectly accepted that an employee testing positive for

cannabis could be regarded as impaired. In the *Rankeng-case* it was found that an employee who admitted to smoking cannabis two hours before work, who also showed signs of impairment and tested positive for cannabis use, was not proven to be under the influence of cannabis.

When trying to solve difficult and problematic matters, the constitutional framework dictates that international law be considered. In doing so, it is determined that certain mandatory elements are prescribed to all policies relating to drug-induced impairment, as discussed in chapter 5. These elements should give guidance to employers when attempting to draft fair policies relating to cannabis-induced impairment in the workplace.

The foreign jurisdictions of The Netherlands and Canada were investigated in the hope of identifying possible best practices used by employers for the identification and regulation of cannabis-induced impairment in the workplace.

Contrary to popular belief, it was established that cannabis for private consumption is in fact illegal in The Netherlands, but tolerated by the State in terms of the "*Gedooogbeleid*". As in the case of South Africa, employers in The Netherlands also have a duty to ensure that reasonable and necessary safety measures are taken to prevent the employee from suffering injuries during the performance of their work. Employers in The Netherlands are permitted to dismiss employees under article 7:678 of the *Dutch Civil Code* when employees, despite reasonable warning, take to drunkenness or other dissipated behaviour. In the Dutch case of *Rail Service Center Rotterdam v Verweerder*, it was interesting to note that the Court found that the employee's service could not be terminated, even though he had reported to work with alcohol and THC in his system. What makes the matter even more peculiar is the fact that the employer had a zero-tolerance policy, as the workplace had inherent dangers. The Court stated that the employee had to be afforded an opportunity to redeem himself. Employers in The Netherlands wanting to prove impairment should, in theory, be able to follow the same rationale as the State when proving impairment. The State made it clear: a person having more than 3 micrograms of THC per litre of blood in his or her blood stream will be regarded as impaired. However, this position is not accurate as there is no correlation between impairment and blood-THC levels.

Canadian employers face similar challenges as South African and Dutch employers when wanting to prohibit cannabis-induced impairment in the workplace. Very much like in South Africa and The Netherlands, Canadian employers are also expected to take all reasonable and necessary steps to ensure the safety of their employees.

In Canada, the Court suggests that employers use a combination of coordination and clinical tests to prove impairment. This is the course of action taken by the State of Canada when having to prove impairment. A person suspected of impairment would first be subjected to a Standard Field Sobriety Test. Should he or she fail this coordination test, then he or she will further be subjected to clinical tests to determine what amount of THC per litre of blood is in his or her blood stream. Should it be more than 2 nanograms of THC per 1 millilitre of blood, such person would be considered as impaired.

In looking at a further Canadian judgement, the matter of *Electrical Workers Local 1620 v Lower Churchill Transmission Construction Employers' Association Inc* also stood out. In this case the Court suggested that employers wanting to determine whether impairment is present should use a combination of coordination tests, such as the Standard Field Sobriety Test in conjunction with conventional drug tests. It can be seen that the Court followed the approach taken by the State of Canada when wanting to prove impairment. If a person is suspected of impairment whilst driving a motor vehicle, such person would firstly be subjected to a coordination test. Should the said person fail such test, then he or she may be required to undergo blood tests. If the results show that such person has more than 2 nanograms of THC per 1 millilitre of blood, then he or she is regarded as being under the influence of THC.

In South Africa, the proposed *Cannabis for Private Purposes Bill* is of particular value, as it gives insight into the likely approach that will be taken by the legislature when having to identify cases of cannabis-induced impairment. Should this be promulgated into law, it is expected to cause certain amendments on the *National Road Traffic Act*. One being that persons who have more than 0,05 grams of THC per 100 millilitres of blood will be regarded as being under the influence of cannabis and thus impaired. This position is similar to that taken by The Netherlands.

For reasons previously mentioned, it is hoped that the South African legislature will rather follow the Canadian method of identifying cases of cannabis-induced impairment. The

Canadian approach is less intrusive, as it starts with a Standard Field Sobriety Test and only becomes more intrusive if the person fails the coordination tests.

7.2 Recommendations

Regardless of what the final version of the *Cannabis Bill* will be, it would be wise for South African employers to follow the Canadian approach. In doing so, employers will give greater probatory value to the evidence and suspicion of impairment, as tests used in conjunction should be more accurate than the mere use of one single test. This will result in employers proving their case over and above what even the State considers to be beyond reasonable doubt, whilst only a balance of probabilities is necessary by which employers must prove their case. The added benefit of this approach would be that employers need only incur the cost of a drug test once a person has actually failed the Standard Field Sobriety Test. The Standard Field Sobriety Test can be done on site by any person that has the necessary certification to do so. It is suggested that a designated person, who may already be in the employ of the employer, undergo the necessary training and obtain certification to be able to conduct the Standard Field Sobriety Test. This will save employers from incurring future costs when such tests need to be conducted. From an employees' perspective, the benefit of the Standard Field Sobriety Test is that it is less intrusive and employees will only be subjected to a drug test if it can be justified on the fact that they failed the Standard Field Sobriety Test.

When it is established that cannabis-induced impairment is present, the employer will have to ensure that he or she applies the appropriate sanction. This will depend on various factors, and will be guided by what is fair and reasonable in the individual circumstances of the working environment. Should the working environment have inherent dangers, an employer will be entitled to apply a zero-tolerance policy and subsequently dismiss the delinquent employee, even though he or she may be a first-time offender. Should the workplace pose no real danger, the employer will need to use progressive forms of discipline up until the point that the working relationship has become intolerable.

7.3 Closing remarks

Finally, it will be for the benefit of both employer and employee if the legislature, eventually, regulates the aspect of cannabis-induced impairment in labour legislation. This will provide much needed legal certainty in the workplace in this regard. In addition thereto, such legal provisions must evidently be enforceable. As per the words of Albert Einstein:

For nothing is more destructive of respect for the government and the law of the land than passing laws which cannot be enforced.

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