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Mining Alert

Up in smoke or going to pot?

The judgment of the Constitutional Court in the matter between *Minister of Justice and Constitutional Development et al case CCT 108/17* ("the Cannabis Judgment"), which decriminalised the cultivation, possession and use of cannabis for personal private purposes, understandably, evoked a wide range of responses, from jubilation, to predictions of dire consequences.

In this article, we touch on two important aspects, namely how health and safety could be affected, and what it means for employers in relation to their policies and procedures on substances, and the disciplinary code and procedure which applies at a particular workplace.

All stakeholders in the mining and natural resources sector have acknowledged that the fatal accidents in 2018 are unacceptable and have recommitted themselves to the target of zero harm. It is not the purpose of this article to elaborate on the various reasons that have been suggested for the various incidents and accidents that have occurred at South Africa's mines, but rather to make some observations regarding the responsibilities for health and safety placed on the "employer" for the purposes of the Mine Health and Safety Act 29 of 1996 (MHSA), i.e. the entity which holds the right to prospect or mine, and employees (this term is extremely widely defined under the MHSA to mean any person who is employed at or working at a mine. For the purpose of the MHSA, employees therefore include contractors, their employees, service providers, etc), within the context of the Cannabis Judgment.

The MHSA places the primary responsibility for the health and safety of employees on the "employer", which, for the purposes of this article, we refer to as the mining company. The health and safety responsibilities contained in sections 2 and 5 of the MHSA are broad-ranging, and the consequences of a failure to comply, can be dire. The consequences potentially include not only injuries and death, but also potential prosecution of the mining company, its directors, officers, managers, supervisors, and the imposition of an administrative fine on the mining company.

Section 22 of the MHSA also places responsibilities for health and safety on the employees themselves. Employees must take reasonable steps to ensure their own health and safety and

that of fellow employees.

Within the context of the health and safety responsibilities placed on the employer and employees, substance use or being under the influence of an intoxicating substance is taken extremely seriously. This is understandable, given the inherently dangerous nature of the mining environment, and, for example, the sheer scale and magnitude of machinery and equipment often used on mines.

Mining companies typically therefore implement comprehensive substance use policies, and disciplinary codes and procedures, which may be regarded as draconian, by the non-mining sector, but which is perfectly justifiable, within the mining context.

It seems that cannabis can remain in a person's system for variable amounts of time, depending on how often the person uses cannabis. "Casual use" can result in positive tests for short periods (three to five days), but persons who make more frequent use, can produce a positive test for up to a month. It is not only the amount that is used, that can impact on this. The way that cannabis is used apparently changes the way that it is metabolised (for example smoking versus ingesting), and there are a number of views on how long a person is "under the influence" of cannabis, after the person has used or ingested the cannabis.

The workplace would certainly not be regarded as "private", and there seems to be a common understanding that persons cannot cultivate, be in possession of, or use cannabis in the workplace (although employers will need to review their policies and procedures and make this absolutely clear). However, there is likely to be extensive debate regarding whether a person is "under the influence", if the person has used cannabis, outside of the workplace, and then comes to work, and cannabis is detected during random and other testing.

Persons who chair disciplinary inquiries, and, commissioners at the Commission for Conciliation, Mediation and Arbitration and judges at the Labour Court will have to grapple with this, in the coming months. Employees who are dismissed after testing positive for cannabis, without displaying symptoms of being "under the influence" will no doubt challenge their dismissal. However, they are unlikely to successfully challenge a dismissal if they are caught cultivating cannabis or being in possession or using cannabis in the workplace (unless the employer's codes and procedures are extremely poorly drafted).

Persons employed by contractors are, for the purposes of the MHSa, regarded as employees of the client (the mining company), and the responsibilities that are placed on the mining company extend to the employees of contractors. These persons are also required to comply with, among others, section 22 of the MHSa. A distinction must, however, be made between the employment status of persons who are employed by contracting companies, and who are deployed at the mine and health and safety responsibilities in terms of the MHSa. For employment purposes, these persons remain the employee of the contracting company, and the

contracting company will be the entity that needs to take appropriate disciplinary action against those persons in accordance with the disciplinary codes and procedures that have been implemented by the contracting companies in respect of their own employees. Mining companies will of course insist on that person being removed from the site, but the mining company has no authority, itself, to take disciplinary action against such a person. Mining companies are likely to tighten up the contractual provisions with contracting companies to address, amongst others cultivation, possessions and use of cannabis by the contracting company's employees.

A further distinction must be made in relation to persons who are engaged through the services of a temporary employment service (more commonly referred to as a "labour broker"). Again, persons provided to a mining company through the services of a labour broker, are regarded as employees of the mining company, for the purposes of the MHSa. However, for employment law purposes, these persons are deemed to be the employee of the labour broker and the labour broker will be responsible for taking appropriate disciplinary action.

While cultivation, possession and use of cannabis for personal private purposes has been decriminalised, there is going to be extensive debate, from all quarters, and stakeholders such as the mining companies, contracting companies and the employees themselves, will need to grapple with the practical interpretation and application of the decriminalisation, including in respect of health and safety in the workplace, substance policies and procedures, and disciplinary codes and procedures.

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