

Mthembu and others / NCT Durban Wood Chips

(2019) 28 CCMA 8.37.3

Reported in (Butterworths)	[2019] 4 BALR 369 (CCMA)
Case No.	KNDB4091-18
Award Date	24/09/2018
Jurisdiction	Commission for Conciliation, Mediation and Arbitration
Commissioner	C Oakes
Subject	Substantive fairness in dismissal Misconduct

Keywords

Dismissal – Substantive fairness – Misconduct – Consumption of drugs – Employees testing positive for cannabis while at work – Dismissal fair even though use of cannabis for private purposes not unlawful.

Mini Summary:

The three applicants were among several employees who were dismissed after testing positive for cannabis during a test conducted during working hours. The applicants claimed that they had not smoked the drug during working hours. The respondent claimed that due to the highly dangerous operations in its factory, it had a zero tolerance approach to working under the influence of alcohol or drugs, of which the applicants were aware.

The Commissioner noted that the Constitutional Court had just declared private use of cannabis legal. However, employers are still entitled to discipline employees who use cannabis or are under its influence during working hours. The respondent's operations indicated that such a prohibition was reasonable and the applicants knew that they were not allowed to report for work while under the influence of cannabis. The applicant's dismissal was therefore fair.

The application was dismissed.

Award

Issue to be decided

[1] I must decide whether the dismissal of the applicants was substantively unfair.

Background to dispute

- [2] The respondent conducts business in the wood and chip industry. Their work involves working with large machinery and extremely dangerous vehicles coming in and out of the premises throughout the day. The work floor is also fraught with danger. This is all common cause.
- [3] The product they work with are large logs weighing between 30 and 100 kilograms which can cause fatalities.
- [4] Based on this there are in place safety rules to protect employees and the respondent.
- [5] Out of this arises the present dispute. The applicants were charged with being under the influence of intoxicating substances whilst on duty. The applicants were tested through a urine test and found to be under the influence of cannabis which was admitted by the applicants. They, however, challenged their dismissals.

Survey of evidence

- [6] The first witness to testify was Lenny Naidoo who testified under oath as follows.
- [7] There is a substance abuse policy in place at the workplace which was introduced in 2016. Employees were informed of the substance abuse policy in 2016 and signed the policy. Proof thereof is on page 9 of the employer's bundle.
- [8] Besides the policy they have tool box talks where employees are in-formed of the employers' position on substance abuse.
- [9] In April 2017 employees were all tested. A urine sample was taken from all employees and all employees tested negative for drugs.
- [10] In the middle of 2017, an employee Mr Ngape was suspected of substance abuse. A urine sample was done, and he tested positive for cannabis. The urine sample was then sent to a laboratory for further testing which con-firmed that he was using cannabis.
- [11] He was called to a hearing and resigned during the hearing. A second test was done on all employees. Eight employees tested positive for Cannabis. Their urine samples were sent for further testing at a laboratory. The Laboratory test confirmed that four employees were positive. The applicants were part of the four employees

who tested positive. There was one other employee who was a casual. He was dismissed. The applicants were found guilty at a disciplinary hearing and dismissed.

- [12] Regarding the allegation that two other employees had tested positive and were not dismissed, he testified that the employees in question, that is Ayanda and Thulani had testified positive at the first stage however when sent for further testing at the laboratory they tested negative. This is the reason why they were not dismissed.
- [13] The workplace is dangerous with heavy machinery. There is a clipper that spins at 5000 rerves [sic] which takes 10–15 minutes to stop in case of an emergency. Apart from this they have machinery moving around in the plant. They receive an average of 60–85 truck deliveries into the mill daily. They also have locomotives which bring timber into the mill on rail which poses a further danger.
- [14] Sifiso Mthembu is employed as a weigh bridge clerk where he receives trucks. He walks around the truck and inspects the vehicle and tests the timber. He weighs the truck in and authorises the truck to move to the next authorising point. He then walks to the other end of the plant to the exit of the weighbridge and weighs the truck before it leaves and walks back to the weighbridge. When he does this, he walks through traffic which exposes him to danger.
- [15] Mr Peterson sharpens knives which are a metre long. He sharpens three knives at a time. After sharpening the knives, he polishes them. His work is very dangerous. There was an incident where a boiler maker walked past Mr Peterson's workstation and slit his finger to the bone as he walked past.
- [16] Sanele Mthethwa is a log Deck Assistant. His job is at the point where the logs fall onto the deck. He must assist the logs when they get stuck. He sometimes must climb onto the log to pull it out if it gets stuck.
- [17] The logs can weigh between 30 and 100 kilograms. In addition, the logs bounce around on the deck. He must be alert.
- [18] He was questioned by the representative of the second respondent and testified as follows.
- [19] He is employed as a Mill Manager. The substance abuse policy is a zero-tolerance policy. Page 3 of the policy reinforces this. It states that no one under the influence of drugs will be allowed on the premises. The policy further states that the respondent has a zero-tolerance approach to sub-stance abuse. Paragraph 4 states that the possession, sale or use of illegal drugs is prohibited. It is immaterial that they use the Cannabis outside of the premises. Their policy is zero tolerance. He is responsible in terms of the OSH Act to prevent accidents on site. An accident would lead to an investigation that would bring the plant to a standstill.
- [20] The testing of urine is done by trained nursing staff. The urine sample is then taken to the laboratory for further testing. Prior to undergoing tests employees must consent to the test.
- [21] Ayanda Ntombela was tested and his test results were negative. Employ-ees were also informed of the policy at tool box meetings.
- [22] Under cross-examination from Mr Sifiso Mthembu he testified that the applicants were not involved in accidents previously.
- [23] Under cross-examination from Mr Peterson he testified that he cannot show any favour to any employee. The policy of the company is zero tolerance.
- [24] Under cross-examination from Mr Sanele Mthethwa, he testified that the respondent cannot give them one more chance. The employees were given the substance abuse policy and signed for it and were told of the companies zero-tolerance stance of coming under the influence of drugs to the workplace.
- [25] The next witness to testify was the first applicant, Mr Sifiso Melokuhle Mthembu who testified under oath as follows.
- [26] He was employed in April 2011. He was employed as a Weighbridge Clerk at the time of his dismissal. He earned a salary of R8 000 per month at the date of his dismissal.
- [27] He agrees that they were told that drugs are prohibited. The place where he works and the work he does is not dangerous. When he walks from the exit to the weighbridge, he walks through a safe corridor. When working with locomotives, he walks alongside the locomotive where there is no danger.
- [28] They pleaded guilty at the disciplinary hearing as they were told by their senior Mervin to do so and he promised that if they pleaded guilty he would put in a good word for them.
- [29] When they were tested they were not given an opportunity to let the drugs clear from their system. He has two children and three sisters. All depend on him. He told the respondent at the hearing that he was sorry and asked for a last chance.
- [30] Under cross-examination by the representative of the first respondent he testified that he is aware that drugs are prohibited. He was told of this at the tool box talks. When he was tested it was when he was coming from his day off.
- [31] He agrees that part of his duties is to direct drivers and check that it is clear when directing drivers.
- [32] When cross-examined by Mr Cele for the second respondent he testified that they were told that smoking at work is prohibited. He does not smoke at work.

- [33] The next witness to testify was Sanele Mthethwa who testified under oath as follows.
- [34] He started working for the respondent in 2011. He was employed as a Log Deck Assistant earning R6 000 per month.
- [35] When told of the rule, they were not told that they are prohibited from smoking. They were told that they cannot smoke at work. When they were tested they were not given a chance to allow the drugs to clear from their system.
- [36] His job does not have much danger. He stands in the middle of the deck with bars protecting him on either side. The logs pass by him safely. When a log gets stuck the Controller would stop the machine and he would safe-ly undo the log.
- [37] He has two daughters and in addition takes care of his mother and the children of his brother.
- [38] Under cross-examination by the first respondent he testified as follows.
- [39] He was given a chance to explain himself at the disciplinary hearing. He agrees that he would be injured if he fell over the bars, but it is impossible as the bars are high. He agrees that there are gaps between the protective bars through which one could fall. He, however, does not believe that one could die if one fell over the safety bars.
- [40] When cross-examined by Mr Cele for the second respondent he testified that he had told his senior when asked to undergo a test that they are going to have a problem because they have drugs in their system.
- [41] He testified that he does not work close to the logs and therefore cannot be hit by a log as suggested by Mr Lenny Naidoo.
- [42] He pushes logs from conveyor belts. There is no danger.
- [43] The next witness to testify was James David Peterson who testified under oath as follows.
- [44] He started working for the respondent in 2010. He was employed as a knife grinder. He earned a salary of R7 000 per month.
- [45] He has never injured himself at work and he did not smoke Cannabis at work. He smokes Cannabis in his spare time at home. They were told in toolbox talks that no drugs were allowed at work.
- [46] In 2017, he started detoxing. He stopped smoking on 8 December 2018.
- [47] He has worked for seven and a half years and has never been injured. They have over the years installed a metal plate. The knives are placed up against the metal plate preventing any possible danger. He has three children.
- [48] Under cross-examination by the first respondent he testified as follows.
- [49] He agrees that when he stopped smoking on 8 December 2018 that he had already started detoxing. By then he had already tested positive.
- [50] He agrees that he is the one who removes the knife from the sharpening machine.
- [51] The next witness to testify was Nigel Peterson who testified under oath as follows.
- [52] He has never seen any of the applicants under the influence and has never witnessed any accidents involving the applicants at the workplace.
- [53] He is aware that Mr Peterson was taking detox medicine and did not smoke Cannabis during this time.
- [54] Under cross-examination he testified as follows.
- [55] He is aware that the respondent has in place a substance abuse policy. He understands that substance abuse leads to dismissal.
- [56] The applicants looked normal on the day they were tested. They could have, however, smoked before they came to work.
- [57] The next witness to testify was Xolani Bhekisisa Innocent Mthembu who testified under oath as follows.
- [58] He has never suspected any of the applicants to be under the influence of drugs. He was not at work when the applicants were tested. The applicants have not caused accidents at the workplace.
- [59] Under cross-examination he testified that he was employed as a Shift Supervisor. He is aware of the substance abuse policy. The policy states that employees are not to be under the influence at work.
- [60] He has facilitated tool box talks. He has told employees that if they are under the influence they would be tested.
- [61] It is easy to spot someone who is under the influence of alcohol. It is not easy to spot someone who is under the influence of drugs.

Analysis of evidence

- [62] The applicants were charged as follows at the workplace:
 "Under the influence of intoxicating substances whilst on duty".
- [63] They were found guilty at a disciplinary hearing and were dismissed. They challenged the fairness of their dismissal at the arbitration.
- [64] In determining whether a dismissal was fair I must consider:
- (a) whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and
 - (b) if a rule or standard was contravened, whether or not –
 - (i) the rule was a valid or reasonable rule or standard;
 - (ii) the employee was aware, or could reasonably be expected to have been aware, of the rule or standard;
 - (iii) the rule or standard has been consistently applied by the employer; and
 - (iv) dismissal was an appropriate sanction for the contravention of the rule or standard. (Schedule 8, item 7).
- [65] It is common cause that the respondent has in place a substance abuse policy which states that the respondent adopts a "zero tolerance" approach towards substance abuse.
- [66] The substance abuse policy also states that the possession, sale or use of illegal drugs is not consistent with the company's needs to operate in a safe and efficient fashion, therefore, no employee of the company may use or possess unlawful drugs at any time.
- [67] It is common cause that the applicants signed acknowledging the substance abuse policy and that it was explained to them. All the applicants testified that they are aware that the substance abuse policy states that they may not use drugs at the workplace. They are also told this at the tool box talks.
- [68] They all provided a common explanation and that is that they smoke Cannabis in their private time.
- [69] Is it reasonable to have a rule in place at the workplace in this regard? The Constitutional Court in the case of *Prince v Minister of Justice and Constitutional Development and others; Rubin v National Director of Public Prosecutions and others; Acton and others v National Director of Public Prosecutions and others* (4153/2012) [2017] ZAWCHC 30; [2017] 2 All SA 864 (WCC); [2017 \(4\) SA 299](#) (WCC) (31 March 2017) [reported as *Prince v Minister of Justice and Constitutional Development and others and related matters* – Ed] has just this week pronounced that legislation criminalising the private use of Cannabis is inconsistent with the Constitution. The court found that the provisions are only unconstitutional to the extent that they trench upon the private use and consumption of a quantity of cannabis for personal purposes, which the legislature considers does not constitute undue harm.
- [70] This is consistent with the legality around other intoxicating substances such as alcohol. It is the danger around the intoxication which now becomes an element for consideration. The court wisely recognising this, limited its finding to use of Cannabis for private use.
- [71] Like alcohol where there is an inkling that such intoxication could impair one's ability to work to the standard, care and skill required by the employer, the employer is entitled to discipline where the intoxication translates into an offence.
- [72] Because of the high degree of safety required of companies with heavy machinery and generally dangerous equipment, it is reasonable for employers to have in place rules prohibiting the consumption of such substances at the workplace or reporting to work under the influence of such substances. It is not disputed that it is an intoxicating substance and the court seems to accept this among other considerations and therefore limits its use to private use.
- [73] The rationale behind the rule of the company is consistent with the high degree of danger posed at the workplace. Mr Lenny Naidoo testified that they receive 60–85 truck deliveries daily. These carry logs which he testified can weigh between 30–100 kilograms. He further testified that the respondent has machinery moving around and a clipper which he described that spins and would be difficult to stop in the case of an emergency because it takes between 10–15 minutes to stop.
- [74] In turn he testified that each applicant's work posed specific dangers for each applicant.
- [75] Although each applicant tried to downplay the dangers inherent in each of their jobs, the evidence bears [sic] this out.
- [76] Mr Sifiso Mthembu was employed as a wage clerk where he receives trucks. He walks around the truck and inspects the vehicle and tests the timber. He weighs the truck in and authorises the truck to move to the next authorising point. He then walks to the other end of the plant to the exit of the weighbridge and weighs the truck before it leaves and walks back to the weighbridge. When he does this, he walks through traffic which provides danger to him. All around him are dangers and it is not as he states. He could easily be run over by a truck or have an incident when walking through the workplace. If not alert he could get injured when directing a truck or through a collision with moving machinery when walking through the plant. He (Mthembu) testified that he walks alongside locomotives in his duty. This poses another danger. The danger surrounding him requires an alert mind.

- [77] Mr Peterson sharpens knives which are a metre long. He sharpens three knives at a time. After sharpening the knives, he polishes them. His work without a doubt is very dangerous. It is common cause that there was an incident where a boiler maker walked past Mr Peterson's workstation and slit his finger to the bone as he walked past. His work is probably the most dangerous, yet he presented himself under the influence of an intoxicating substance.
- [78] Sanele Mthethwa is a log Deck Assistant. His job is at the point where the logs fall onto the deck. He must assist the logs when they get stuck. He sometimes must climb onto the log to pull it out if it gets stuck. It is self-evident that he must be alert. The inherent danger in climbing among logs to assist a jammed log is very real. He also assists moving logs off the conveyor belt.
- [79] Like Mr Peterson he could suffer serious injuries if not alert.
- [80] The test for a breach of safety standards is the wilful disregard for such rules. In the present matter the applicants were over time schooled in the substance abuse policy. In addition, they were told of the company's policy at tool box talks. I must pause to state that given this knowledge it was incumbent upon the applicants to inform the employer of any de-pendency issues they had. They did not.
- [81] The company's decision to dismiss in the present matter is closely aligned to safety considerations associated with someone working in a dangerous environment whilst under the influence of intoxicating substances. For this reason, it must be examined insofar as it impacts as a breach of safety regulations. It has not been approached primarily on the basis that it was a criminal offence.
- [82] The test for wilful disregard of safety rules is an objective reasonable man test. In other words what would a person possessing the skills and experience of the applicants be expected to do in the face of all the knowledge they possessed in respect of the company's stance on substance abuse. Given the factual matrix of the present matter it would be reasonable to expect the applicants not to present themselves to work under the influence of Cannabis because of the inherent dangers present at the work-place.
- [83] The applicants complained that the respondent has been inconsistent in disciplining two employees, that is, Ayanda and Thulani for similar offences. The respondent explained that although these two employees tested positive at the initial stage of testing, their laboratory results re-turned negative. Proof thereof was shown in the form of the test results of the two employees. Consistency in itself is not a rule. If an employer can distinguish between discipline handed down to different employees, the challenge to consistency falls away. This is the case in the present matter. They (Ayanda and Thulani) tested negative when laboratory tests were done whilst in the case of the applicants they tested positive for Cannabis at the same stage.
- [84] Regarding an appropriate sanction, the applicants were all aware that the respondent has a zero-tolerance view towards substance abuse and were aware of the possibility of dismissal if they tested positive. The company gave the applicants ample opportunity to adjust their private use of Cannabis in accordance with their work requirements. It was for them to make sure that when they smoke for private use it must not result in them reporting for work under the influence thereof. This is no different to consuming alcohol to such a degree the night before that the employee re-ports for duty under the influence the next day placing himself and other employees and the company at risk and exposes the company to unnecessary financial claims and fines.
- [85] It is not unusual for the Department of Labour to close a company for the occupational and safety risks it deems existent at company's premises. This has happened in recent times where mines were closed until such time that they put in place mechanisms averting the risk.
- [86] The applicants showed no real remorse. Their request for leniency was based on the actual offence but not on an undertaking that they would in the future make sure that they do not report for work under the influence of Cannabis. It was a hollow apology with no commitment to not repeating the offence. Remorse is a sincere acknowledgement of wrong and that the offence will not be repeated. There was no undertaking on the part of the applicants in this regard. Whilst the respondent is unable to limit what they do privately, employees are expected to abide by safety standards of the respondent which are designed to protect life and limb of not only the employee concerned but those who have come to carry out their duties understanding that their workplace is safe from any dangers.
- [87] Given their extensive exposure to the company's policy prohibiting the use of intoxicating substances at the workplace and their reluctance to stop smoking Cannabis at the door of the workplace, I see no chance how any counselling or training would assist them.
- [88] I, accordingly, find the dismissals of the applicants to be fair.
- (1) I, accordingly, find as follows.

Award

- [89] The dismissals of the applicants are found to be substantively fair.