

# Employment Impact of the Cannabis Constitutional Court Ruling

19-09-2018

## Executive summary

1. The Constitutional Court has ruled that an adult may use Cannabis in private, may possess Cannabis for personal consumption in private and may cultivate Cannabis in a private place for personal consumption in private.
2. Whilst this authorizes an employee to use or possess Cannabis for personal consumption in private, this authorisation does not apply at the work place.
3. Employers may revise the applicable policy as it applies to Cannabis testing methodologies and prohibited concentrations.

## Introduction

### Western Cape High Court

1. On 24 March 2017, the Western Cape High Court ruled that the possession or cultivation of cannabis in a private dwelling for the personal consumption of an adult was a matter of privacy, and protected by the Constitution.
2. The judgement placed an obligation on parliament to correct defects in this regard in current law (primarily the Drugs and Drug Trafficking Act 140 of 1992 and the Medicines and Related Substances Control Act 101 of 1965) over the next 24 months.

#### **The order handed down on 24 March 2017 in the Western Cape High Court:**

"The following provisions are declared inconsistent with the Constitution of the Republic of South Africa and are invalid only to the extent that they prohibit the use of cannabis by an adult in a private dwellings [sic] where the possession, purchase or cultivation of cannabis is for personal consumption by an adult;

"1.1 Sections 4 (b) and 5 (b) of the Drugs and Drug Trafficking Act s 22A (10) thereof read with part III of the schedule 2, to the Drugs Act and

"1.2 Section 22 A (9)(a)(i) of the Medicines and Related Substances Control Act 101 of 1965 (the Medicines Act) read with Schedule 7 GN R509 published in terms of Section 22 A (2) of the Medicines Act.

"This declaration of invalidity is suspended for a period of 24 months from the date of this judgment in order to allow Parliament to correct the defects as set out in the judgment.

"It is declared that until Parliament has made the amendments contemplated in Paragraph 1 or the period of suspension has expired, it will be deemed to be a defence to a charge under a provision as set out in paragraph 1 of this order that the possession, or cultivation of cannabis in a private dwelling is for the personal consumption of the adult accused."

## Constitutional Court

1. On 18 September 2018, the Constitutional Court confirmed the order of the Western Cape Division of the High Court to the extent reflected in its order:
  - a. The reference in the order of the High Court to “in a private dwelling” or “in private dwellings” is replaced with “in private” or in the case of cultivation, “in a private place”.
  - b. To the extent that the order of the Western Cape Division of the High Court purported to declare as constitutionally invalid provisions of sections referred to in that order that prohibit the purchase of cannabis, that part of the order is not confirmed.
  - c. Sections 4(b) (use and possession of drugs) and 5(b) (dealing in drugs) of the Drugs and Drug Trafficking Act 140 of 1992 read with Part III of Schedule 2 of that Act (list of undesirable dependence-producing substances, in which cannabis is included) and section 22A(9)(a)(i) of the Medicines and Related Substances Control Act 101 of 1965 (control of medicines and scheduled substances) are declared inconsistent with section 14 of the Constitution to the extent that they criminalise the use or possession in private or cultivation in a private place of cannabis by an adult for his or her own personal consumption in private.
  
2. In essence, the Constitutional Court ruling allows
  - a. An adult to use cannabis in private.
  - b. An adult to possess cannabis for personal consumption in private.
  - c. An adult to cultivate cannabis in a private place for personal consumption in private.

**The order handed down on 18 September 2018 by the Constitutional Court on application for confirmation of an order of constitutional invalidity granted by the Western Cape Division of the High Court, Cape Town (Davis J), includes**

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6. The cross-appeal is upheld in part to the extent that the reference in the order of the High Court to “in a private dwelling” or “in private dwellings” is replaced with “in private” or in the case of cultivation, “in a private place”.

7. The order of the Western Cape Division of the High Court is confirmed only to the extent reflected in this order and is not confirmed in so far as it is not reflected in this order.

8. To the extent that the order of the Western Cape Division of the High Court purported to declare as constitutionally invalid provisions of sections referred to in that order that prohibit the purchase of cannabis, that part of the order is not confirmed.

9. To the extent that the order of the Western Cape Division of the High Court excluded from the ambit of its order of the declaration of invalidity provisions of the sections referred to in that order that prohibit the use or possession of cannabis in private in a place other than a private dwelling by an adult for his or her own personal consumption in private, that part of the order is not confirmed.

10. It is declared that, with effect from the date of the handing down of this judgment, the provisions of sections 4(b) of the Drugs and Drug Trafficking Act 140 of 1992 read with Part III of Schedule 2 of that Act and the provisions of section 22A(9)(a)(i) of the Medicines and Related Substances Control Act 101 of 1965 read with Schedule 7 of GN R509 of 2003 published in terms of section 22A(2) of that Act are inconsistent with right to privacy entrenched in section 14 of the

Constitution and, therefore, invalid to the extent that they make the use or possession of cannabis in private by an adult person for his or her own consumption in private a criminal offence.

11. It is declared that, with effect from the date of the handing down of this judgment, the provisions of section 5(b) of the Drugs and Drug Trafficking Act 140 of 1992 read with Part III of Schedule 2 of that Act and with the definition of the phrase “deal in” in section 1 of the Drugs and Drug Trafficking Act 140 of 1992 are inconsistent with the right to privacy entrenched in section 14 of the Constitution and, are, therefore, constitutionally invalid to the extent that they prohibit the cultivation of cannabis by an adult in a private place for his or her personal consumption in private.

12. The operation of the orders in 10 and 11 above is hereby suspended for a period of 24 months from the date of the handing down of this judgment to enable Parliament to rectify the constitutional defects.

13. During the period of the suspension of the operation of the order of invalidity:

(a) section 4(b) of the Drugs and Drug Trafficking Act 140 of 1992 shall be read as if it has subparagraph (vii) which reads as follows:

“(vii) , in the case of an adult, the substance is cannabis and he or she uses it or is in possession thereof in private for his or her personal consumption in private.”

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

(c) the following words and commas are to be read into the provisions of section 22A(9)(a)(i) of the Medicines and Related Substances Control Act 101 of 1965 after the word “unless”:

“, in the case of cannabis, he or she, being an adult, uses it or is in possession thereof in private for his or her personal consumption in private or, in any other case,”.

14. The above reading-in will fall away upon the coming into operation of the correction by Parliament of the constitutional defects in the statutory provisions identified in this judgment.

15. Should Parliament fail to cure the constitutional defects within 24 months from the date of the handing down of this judgment or within an extended period of suspension, the reading-in in this order will become final.

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## Occupational Health and Safety Act, Act 85 of 1993 & Mine Health and Safety Act, Act 29 of 1996

1. Current statutory requirements on Cannabis
  - a. Reg. 2A, inserted by GN R928/2003 in the General Safety Regulations, initially published under Government Notice R1031 in Government Gazette 10252 of 30 May 1986, and subsequently amended, is not affected by the Constitutional Court Ruling.
  - b. Mine Health and Safety Regulations (Minerals Act) published under GN R992 in GG 2741 of 26 June 1970, and subsequently amended, is not affected by the Constitutional Court Ruling.
  
2. The Constitutional Court Ruling does not affect these Regulations and it remains an Employer's duty to:
  - a. Not permit any person who is under influence to **enter** a workplace
  - b. Not permit any person who is under influence to **remain** at work
  - c. Not permit any person who **appears** under influence to **enter** a workplace
  - d. Not permit any person **who appears** under influence to **remain** at work
  - e. Not permit any person to be in **possession** at work
  - f. Not permit any person to **partake** at work
  - g. Not permit any person to **offer** any other person at work.

Occupational Health and Safety Act, Act 85 of 1993 General Safety Regulations  
2A. Intoxication

- (1) Subject to the provisions of subregulation (3), an employer or a user, as the case may be, shall not permit any person who is or who appears to be under the influence of intoxicating liquor or drugs, to enter or remain at a workplace.
- (2) Subject to the provisions of subregulation (3), no person at a workplace shall be under the influence of or have in his or her possession or partake of or offer any other person intoxicating liquor or drugs.
- (3) An employer or a user, as the case may be, shall, in the case where a person is taking medicines, only allow such person to perform duties at the workplace if the side effects of such medicine do not constitute a threat to the health or safety of the person concerned or other persons at such workplace.

Mine Health and Safety Regulations (Minerals Act)

4.7.1 No person in a state of intoxication or in any other condition which may render or be likely to render him incapable of taking care of himself or of persons under his charge, shall be allowed to enter the workings of a mine or be in the proximity of any working place or near any machinery on the surface of a mine or at a works, and any person who may have entered the workings of a mine or who is found in the proximity of any workings or near any machinery on the surface of a mine or at any works in a state of intoxication may be arrested immediately by the manager or some person duly *appointed* by him and immediately handed over to the police, and shall be deemed to be guilty of an offence under these regulations.

## Impact on employer's policy

### Employer and employee's statutory rights

1. The ruling of the Constitutional Court does not have an immediate impact on the employer's duties and rights for dealing with Cannabis use at the workplace.
2. The prohibitions as defined in the OHSA and MHSA Regulations are not directly affected by the Constitutional Court ruling.
3. The fact whether the use of a substance is permissible at all, does not affect the occupational health and safety impact thereof.
4. Cannabis has simply left the ranks of Cocaine, Tik, Heroin etc. and joined the likes of alcohol.
5. Whilst an employee may be permitted to use cannabis in private and to possess cannabis for personal consumption in private, this does not apply to the work place.

### Permissible levels

1. The criminalization of the use of Cannabis has, until now, relieved authorities from defining a permissible level of Cannabis as a measure of intoxication.
2. As with alcohol, traffic authorities may have to define allowable levels.
3. With respect to Cannabis, and considering the consideration of foreign law as permitted in Section 39 of the Constitution of South Africa, employers may want to use the 'Impairing Drug Levels' which became law in Canada on June 21, 2018.

### Testing methodologies & application on employment

1. The ruling of the Constitutional Court may have an effect on the testing methodologies for Cannabis at work.
2. Urine Cannabis tests
  - a. Urine Cannabis tests correlate poorly with intoxication, with the degree thereof and with time of use: tests can be positive for 3-5 days after exposure for infrequent users; for heavy users this may be up to 15 days; and for chronic users with high body fat, up to 30 days after last use.
  - b. This means that, in the absence of signs of impairment, a positive urine Cannabis test has no direct bearing on fitness for duty; one

could only conclude that the employee who tests urine-positive, had ‘engaged in the illegal consumption of Cannabis’ (that is when discarding other false positive triggers such as the use of NSAID, ARV, PPI etc.).

- c. Evidently most urine tests are multi-tests and other (legal and illegal drugs) may not have the same testing limitations. For these drugs any detectable level in the urine may, subject to confirmatory testing, indicate an offence.

### 3. Oral fluid drug screeners

- a. Oral fluid drug screeners can be used to detect the presence of the parent compound THC (the main impairing component in Cannabis) in saliva.
- b. These devices are available in South Africa and are fast, non-invasive, and accurate.
- c. If an employee tests positive on an oral fluid screening test, the positive result would confirm the likely presence of the drug; combined with other signs of impairment and subject to confirmatory testing, this could provide grounds for further action.

On April 13, 2017, the Government of Canada introduced Bill C-46, the most comprehensive reform to the *Criminal Code* transportation regime in more than 40 years. The Bill passed Parliament on June 20, 2018 and received Royal Assent on June 21, 2018. The new law is a modern, simplified, and more coherent system of reforms to better deter and detect drug and alcohol-impaired driving.

#### **Drug-impaired driving**

The legislation authorizes police to use additional tools, such as roadside oral fluid drug screeners, enacts new driving offences of being over a prohibited blood drug concentration, and allows for blood samples to be collected without first requiring a driver to undergo a drug recognition evaluation. It also gives authority for the Governor in Council to make regulations setting the levels for various impairing drugs and these regulations came into force on June 26, 2018.

#### **Penalties for drug-impaired driving**

New summary conviction offence:

- 2 nanograms (ng) but less than 5 ng of THC per millilitre (ml) of blood: maximum \$1,000 fine

New hybrid offences:

- 5 ng or more of THC per ml of blood:
  - First offence: mandatory minimum \$1,000 fine
  - Second offence: mandatory minimum 30 days imprisonment
  - Third and subsequent offences: mandatory minimum 120 days imprisonment
- Any detectable level of LSD, psilocybin, psilocin, ketamine, PCP, cocaine, methamphetamine, and/or 6-mam:
  - First offence: mandatory minimum \$1,000 fine
  - Second offence: mandatory minimum 30 days imprisonment
  - Third and subsequent offences: mandatory minimum 120 days imprisonment
- 5mg/L of GHB:
  - First offence: mandatory minimum \$1,000 fine

- Second offence: mandatory minimum 30 days imprisonment
- Third and subsequent offences: mandatory minimum 120 days imprisonment
- 50 milligrams (mg) of alcohol per 100 ml blood + 2.5 ng or more of THC per ml of blood:
  - First offence: mandatory minimum \$1,000 fine
  - Second offence: mandatory minimum 30 days imprisonment
  - Third and subsequent offences: mandatory minimum 120 days imprisonment
- Drug-impaired driving that does not cause bodily harm or death - Maximum penalties:
  - Summary conviction: 18 months imprisonment
  - Indictment: 5 years imprisonment
- Drug-impaired driving causing bodily harm - Maximum penalty:
  - Indictment: 10 years imprisonment
- Drug-impaired driving causing death - Maximum penalty:
  - Life imprisonment

Testing

- Police can demand that a driver comply with either a standardized field sobriety test or provide an oral fluid sample if they reasonably suspect a drug is in the driver's body. If they have reasonable grounds to believe an offence has been committed, they can demand a blood sample or a drug recognition evaluation

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