



# INDUSTRIAL LAW JOURNAL

VOLUME 44    APRIL

2023

## *Dismissals for Cannabis Use: Determining Substantive Fairness*

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### ABSTRACT

Since the Constitutional Court's legalisation of the use of cannabis in private, dismissals for workplace infractions arising from testing positive for cannabis are on the rise. Such dismissals have been justified by employers on the basis of zero-tolerance policies. The standpoint being endorsed by the courts is that as long as the employer can justify the need for a zero-tolerance approach, dismissal is the automatic default position for the breach of the workplace rule. While the law on the workplace implications for cannabis use is still in its infancy, there is a substantive body of law, applicable to cannabis use, on dismissals for alcohol use in which zero-tolerance policies are also applied. Surprisingly, these established principles in respect of alcohol use have not been engaged with by the courts in dealing with cannabis related infractions. This article seeks to evaluate the recent court decisions and to determine whether the legal principles that are developing accord with the legislative framework and judicial requirements in determining the substantive fairness of a dismissal.

*Keywords:* cannabis, alcohol, zero-tolerance, dismissal, review test, substantive fairness, mitigating factors.

### 1 INTRODUCTION

Cannabis is a drug used by some for medicinal purposes, while others use it in a recreational manner. Whatever the reason for its consumption,

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the use of cannabis by an adult in private was decriminalised in 2018 following the Constitutional Court judgment in *Minister of Justice and Constitutional Development & others v Prince*.<sup>1</sup> Now that its use in private is permissible, workplace implications have escalated. In the main, employees have been dismissed for being under the influence of cannabis and/or testing positive for cannabis based on zero-tolerance policies. While the implementation of zero-tolerance policies is permissible and required in certain instances,<sup>2</sup> an important question that emerges is whether the breach of a zero-tolerance policy emanating from the use of cannabis in one's private time is substantively fair and should automatically attract a sanction of dismissal.

It is noteworthy that the zero-tolerance policies providing for the dismissal of employees for cannabis use, equally apply to alcohol use. However, it is now trite that there are key differences between the detection and effects of alcohol, as compared with cannabis. Firstly, cannabis remains detectable in one's body for several days, as compared with alcohol which only remains detectable for a few hours.<sup>3</sup> Secondly, a test for alcohol can conclusively indicate the level of alcohol in the blood, which to some extent assists in determining the employee's degree of impairment. The same does not apply to cannabis.<sup>4</sup>

These differences are important, as the purpose of zero-tolerance policies for drug and alcohol use is to maintain a safe environment. Being under the influence of drugs and alcohol in dangerous or hazardous work environments may impair employees' ability to execute their tasks properly, which can be a danger to themselves and others. However, the fact that cannabis remains in one's system for a lengthy period of time detracts from a conclusion that testing positive for the drug implies that the employee is under the influence of the drug to the extent that his or her ability to perform is impaired.

<sup>1</sup> 2018 (6) SA 393 (CC) (*Prince*), [2018] (10) BCLR 1220 (CC).

<sup>2</sup> Section 8(1) of the Occupational Health and Safety Act 85 of 1993 places a duty on employers to provide and maintain as is reasonably practicable, a working environment that is safe and without risk to the health of its employees. Section 2A of the General Safety Regulations published under GN R1031 GG 10252 of 30 May 1986, as amended by GN R928 GG 25128 of 25 June 2003 issued in terms of the Occupational Health and Safety Act prohibits an employer from permitting a person who is or who appears to be under the influence of intoxicating liquor or drugs, to enter or remain at a workplace.

<sup>3</sup> D Wagener *How Long Does Marijuana (Weed) Stay in Your System?* <https://americanaddictioncenters.org/marijuana-rehab/how-long-system-body>, accessed 16 January 2023 explains that THC, the psychoactive component of marijuana, is detectable for up to 90 days in hair and anywhere between one day to a month or longer in urine. The Orlando Recovery Center *How Long Does Alcohol Stay in Your Urine?* <https://www.orlandorecovery.com/drug-addiction-resources/alcohol/how-long-does-alcohol-stay-in-urine/>, accessed 16 January 2023 indicates that the ethanol in alcohol can be detected in a person's urine within an hour of drinking, and it typically remains detectable for up to 12 hours after the alcohol is consumed. See more generally M McCann et al *Alcohol, Drugs & Employment* 2 ed (Juta 2011).

<sup>4</sup> J Grogan *Dismissal* (Juta 2019) 277 explains that according to a study on the subject there is no scientific test to prove definitively when drug use results in impairment of performance.

The fairness of the decision to dismiss also becomes controversial when the employee does not occupy a position that is regarded as dangerous or hazardous. It is noteworthy that in determining the fairness of a dismissal for alcohol use the nature of an employee's work is a factor that must be considered, despite the existence of zero-tolerance policies.<sup>5</sup> This appears not to be the case in respect of the use of cannabis, as is evident from the recent Labour Court decision in *National Union of Metalworkers of SA obo Nhlabathi & another v PFG Building Glass (Pty) Ltd & others*.<sup>6</sup>

Against this background, this article seeks to evaluate the decisions on cannabis use that have emanated from the Labour Court and Labour Appeal Court (LAC). The purpose is to establish whether the legal principles that are developing accord with the legislative framework and judicial requirements in determining the substantive fairness of a dismissal. Furthermore, it seeks to ascertain whether there is a synergy with existing jurisprudence on the fairness of dismissals for alcohol use and the breach of zero-tolerance policies in general. This is done by first briefly discussing the requirements that must be complied with in adjudicating an unfair dismissal dispute for misconduct. Secondly, the key legal principles that have been developed by the judiciary in dismissals for alcohol use and the breach of zero-tolerance policies are considered. Thirdly, the Labour Court and LAC decisions on dismissals for cannabis use are evaluated. Thereafter, the conclusion seeks in the main to establish whether the approach being followed is in step with existing jurisprudence.

## 2 SUBSTANTIVE FAIRNESS: DISMISSALS FOR MISCONDUCT

### 2.1 *The legislative framework*

The constitutional right to fair labour practices provided for in s 23(1) of the Constitution<sup>7</sup> was held to be the starting point to determining the fairness of a dismissal in *Sidumo & another v Rustenburg Platinum Mines Ltd & others*.<sup>8</sup> *Sidumo* emphasised that it affords employees security of employment.<sup>9</sup> Therefore, in determining the fairness of a dismissal, decision makers must be mindful that job preservation is a core value of the Constitution.<sup>10</sup>

The Labour Relations Act (LRA)<sup>11</sup> in giving effect to s 23(1) of the Constitution protects employees against being unfairly dismissed.<sup>12</sup>

<sup>5</sup> Grogan *Workplace Law* (Juta 2020) 224 clarifies that an employee's inability to perform her or his work depends to some extent on its nature.

<sup>6</sup> (2023) 44 ILJ 231 (LC) (*Nhlabathi*).

<sup>7</sup> Constitution of the Republic of South Africa, 1996.

<sup>8</sup> (2007) 28 ILJ 2405 (CC), 2008 (2) SA 24 (CC), [2007] 12 BLLR 1097 (CC) (*Sidumo*).

<sup>9</sup> *Sidumo* n 8 above para 55.

<sup>10</sup> *ibid* para 72.

<sup>11</sup> Act 66 of 1995.

<sup>12</sup> *ibid* s 185(a).

Misconduct is one of the recognised grounds on which a dismissal can be premised but it must be effected for a fair reason and in accordance with a fair procedure.<sup>13</sup> In determining whether a dismissal for misconduct is fair an arbitrator must take into account the Code of Good Practice: Dismissal.<sup>14</sup> The salient aspects dealing with substantive fairness are that it is not appropriate to dismiss an employee for a first transgression, unless the conduct is serious and of such gravity that it makes a continued employment relationship intolerable. The code promotes the use of progressive discipline to correct behaviour. It further sanctions the consideration of mitigating factors as follows:

‘When deciding whether or not to impose the penalty of dismissal, the employer should in addition to the gravity of the misconduct consider factors such as the employee’s circumstances (including length of service, previous disciplinary record and personal circumstances), the nature of the job and the circumstances of the infringement itself.’<sup>15</sup>

An important point to be made is that the test for substantive fairness consists of two legs. The first relates to determining whether the employee is guilty of the misconduct of which he or she is accused. This is regarded as ‘a conventional process of factual adjudication’, which is regulated by the ordinary rules of evidence and procedure, void of the application of a value judgment.<sup>16</sup> Should the commissioner find that misconduct has been committed, the enquiry moves to the second leg, which involves determining the fairness of the sanction or the penalty.<sup>17</sup> In line with the code, this comprises three inquiries. The first is an enquiry into the gravity of the contravention of the disciplinary rule. The second is an enquiry into the consistency of the application of the disciplinary rule and the sanction. The third is an inquiry into mitigating and aggravating factors that may justify a different sanction.<sup>18</sup> Significantly, mitigating factors play an important role.<sup>19</sup> As explained by Grogan it is not always justifiable to dismiss employees for serious misconduct, such as the incidents listed in the code.<sup>20</sup> Employers must consider mitigating factors and the possibility of a lesser sanction.<sup>21</sup> The

<sup>13</sup> *ibid* s 188(1)(a) and (b).

<sup>14</sup> *ibid* s 188(2).

<sup>15</sup> item 3 of the code.

<sup>16</sup> *Sidumo* n 8 above para 59. See further A Myburgh & C Bosch *Reviews in the Labour Courts* (Lexis Nexis 2016) 271.

<sup>17</sup> See, for instance, A van Niekerk, N Smit, & M Christianson et al *Law@Work* (Lexis Nexis 2019) 295.

<sup>18</sup> Myburgh & Bosch n 16 above 284.

<sup>19</sup> Grogan n 4 above 251 and 252 states that ‘mitigating factors should be considered after the employee has been found guilty of the offence; whether there are mitigating (or aggravating) factors constitutes a separate enquiry’.

<sup>20</sup> Item 3(4) of the code lists gross dishonesty, wilful damage to the employer’s property, wilful endangering of the safety of others, the commission of physical assault, and gross insubordination as serious acts of misconduct.

<sup>21</sup> Grogan n 4 above 246.

failure to consider mitigating factors properly can result in a sanction of dismissal being overturned.<sup>22</sup>

## 2.2 *The reasonable commissioner test*

The findings of commissioners on the substantive fairness of dismissals are often taken on review by the employee or employer party. The Labour Court in considering review applications must apply the review test set out in *Sidumo*, which is the reasonable commissioner test.

This requires judges to assess whether the decision arrived at by the commissioner is one that a reasonable decision maker could not reach.<sup>23</sup> This overruled the Supreme Court of Appeal (SCA) decision which required commissioners to approach a dismissal with 'a measure of deference' towards the decision of the employer.<sup>24</sup> The Constitutional Court confirmed that while the decision to dismiss belongs to the employer, the determination of its fairness does not.<sup>25</sup>

The Constitutional Court proceeded to explain the factors that must be taken into account in approaching a dismissal dispute impartially. This included the reason the employer imposed the sanction of dismissal, the harm caused by the employee's conduct, whether additional training and instruction could prevent a repeat of the misconduct, the effect of dismissal on the employee, and his or her long-service record. Importantly, in deciding whether the dismissal was fair the commissioner must consider all relevant circumstances and not defer to the decision of the employer.<sup>26</sup>

The review test set out in *Sidumo*, similarly to the code, calls for a consideration of mitigating factors in determining whether dismissal is an appropriate sanction. Apart from this being evident from the legal principles set out above, it is apparent from the outcome of the *Sidumo* case. What is clear from the case is that despite an employee being guilty of a serious transgression, the employee can be saved from dismissal based on mitigating factors.<sup>27</sup>

The principles set out above are important and have become the standard by which penalty reviews are assessed.<sup>28</sup> Significantly, Myburgh & Bosch explain that there are a number of factors post *Sidumo* that have

<sup>22</sup> See for example *Stander v Education Labour Relations Council & others* (2011) 32 ILJ 978 (LC).

<sup>23</sup> *Sidumo* n 8 above para 110. See further Grogan n 4 above 239.

<sup>24</sup> *ibid* para 74.

<sup>25</sup> *ibid* para 75.

<sup>26</sup> *ibid* para 79.

<sup>27</sup> *Sidumo* n 8 above paras 6, 7, 117 and 119 explains that the employee was found guilty of negligently failing to apply established and detailed individual search procedures to minimise losses suffered from infractions such as theft. However, the dismissal imposed by the employer was overturned. Applying the reasonable decision maker test, the Constitutional Court found that the commissioner's decision of reducing the penalty of dismissal to a final written warning was reasonable. This was based on factors such as the employee's clean and lengthy service and the appropriateness of progressive discipline.

<sup>28</sup> Myburgh & Bosch n 16 above 287.

led to courts overturning the penalty decisions of commissioners. One such factor is the failure to consider material factors in mitigation.<sup>29</sup> It is further highlighted that in line with *Sidumo* consideration of the effect of the misconduct on the employment relationship is needed. So too is reflection on whether progressive discipline could assist in addressing problematic conduct.<sup>30</sup>

In *Fidelity Cash Management Service v CCMA & others*<sup>31</sup> the LAC clarified that while the task of determining the fairness of a dismissal lies with the commissioner, this does not mean that the decisions of commissioners 'are shielded from the legitimate scrutiny of the Labour Court on review'. In the court's view *Sidumo* attempted to strike a balance between two extremes, 'namely, on the one hand, interfering too much or too easily with decisions or arbitration awards of the CCMA and, on the other, refraining too much from interfering with CCMA's awards or decisions'.<sup>32</sup>

Ultimately, while it is the commissioner's sense of fairness that prevails,<sup>33</sup> the Labour Court has a duty to establish whether the commissioner considered all relevant factors in coming to its decision.

### 3 ESTABLISHED LEGAL PRINCIPLES: SUBSTANTIVE FAIRNESS IN DISMISSALS FOR ALCOHOL USE

An important principle that has emerged from the LAC is that dismissals for being under the influence of alcohol require evidence that the employee's competence to perform his or her duties was impaired. The court in *Tanker Services (Pty) Ltd v Magudulela*<sup>34</sup> stated that 'intoxication is a matter of degree'. Therefore, an employee could only be said to be under the influence of alcohol 'if he was no longer able to perform the tasks entrusted to him, and particularly the driving of a heavy vehicle, with the skill expected of a sober person'.<sup>35</sup> The court highlighted that the ability of an employee who has consumed alcohol to perform a task entrusted to him depends on the nature of the task.<sup>36</sup> Here, the employee refused to take a breathalyser test. However, the LAC found that the evidence led, which included the employee smelling of alcohol,

<sup>29</sup> *ibid* 305.

<sup>30</sup> Grogan n 4 above 240.

<sup>31</sup> (2008) 29 ILJ 964 (LAC) (*Fidelity*).

<sup>32</sup> *ibid* paras 98 and 99.

<sup>33</sup> In *National Union of Metalworkers of South Africa obo Cloete v Trentyre (Pty) Ltd and Others* [2008] ZALAC 18 (27 March 2008), [2016] JOL 35706 (LAC) (*Trentyre*) Zondo JP (para 2) stated that 'whether or not the sanction of dismissal is fair in a particular case is a value judgment that the CCMA commissioner or some other arbitrator must make on the basis of his or her own sense of fairness which, subject to other grounds of review set out in sec 145 of the Labour Relations Act, 1995 (Act 66 of 1995) ("the Act"), the Labour Court and this Court cannot overturn if it is a decision that could be reached by a reasonable decision maker'.

<sup>34</sup> [1997] 12 BLLR 1552 (LAC) (*Tanker*).

<sup>35</sup> *ibid* 1553(H).

<sup>36</sup> *ibid* 1553 (I).

speaking with a slur, being unsteady on his feet, and other conduct that alerted the security staff to suspect that he was under the influence of alcohol, was sufficient to establish on a balance of probabilities that he was in an unfit state to perform his duties properly.<sup>37</sup> It went on to find that the transgression was grave enough to warrant dismissal.<sup>38</sup> This was seemingly based on the fact that he was a driver of a 32-ton truck, an extremely heavy vehicle, and had been driving the truck at the time when he was suspected of being under the influence of the alcohol.<sup>39</sup>

The above principles have been followed by the Labour Court in subsequent decisions. In *Scrader Automotive (Pty) Ltd v MIBC and Others*<sup>40</sup> the Labour Court, referencing the decision in *Tanker*, endorsed the commissioner's finding that the dismissal was substantively unfair.<sup>41</sup> This was despite the employee having undertaken a breathalyser test, which revealed that he was above the alcohol limit of 0.05%.<sup>42</sup> The reasoning was that the employee held the position of store man, and the evidence did not suggest that he was so intoxicated that he could not perform his duties.<sup>43</sup> In *Tosca Labs v CCMA & others*<sup>44</sup> the commissioner similarly relying on the decision in *Tanker* found that while the breathalyser test established the presence of alcohol in the employee's breath and body, there was no indication that the employee's competence was impaired.<sup>45</sup> In both these cases the employer had a zero-tolerance policy in place.<sup>46</sup>

The decision in *Tanker* has therefore been applied where the charge was one of being under the influence, being drunk or being intoxicated.<sup>47</sup> The legal principles set out in *Tanker* have been used during the first leg of the enquiry in determining the substantive fairness of a dismissal, ie in determining whether the employee is guilty of the misconduct with which he or she was charged. Consequently, an employer who charges an employee with being under the influence of alcohol must prove that the employee's consumption of alcohol impaired the employee in carrying out his or her duties.

What follows is a discussion of the legal principles that apply to the second leg of the substantive fairness enquiry, ie whether dismissal is an

<sup>37</sup> *ibid* 1553F and 1555E.

<sup>38</sup> *ibid* 1555F.

<sup>39</sup> Grogan n 5 above 209.

<sup>40</sup> (2008) LC case no P488/05, [2008] JOL 22584 (LC) (*Scrader*).

<sup>41</sup> *ibid* paras 14, 15, 17 and 20.

<sup>42</sup> *ibid* para 3.

<sup>43</sup> *ibid* para 8.

<sup>44</sup> (2012) 33 *ILJ* 1738 (LC) (*Tosca*).

<sup>45</sup> *ibid* para 6.

<sup>46</sup> *ibid* para 3; *Scrader* n 40 above para 3.

<sup>47</sup> *Scrader* n 40 above para 10 explained that the definition of being drunk is being affected by alcohol in the body to such an extent that one is without full or proper control of one's faculties. The Labour Court clarified that synonyms for being drunk are being intoxicated or being under the influence.

appropriate sanction where the employee is guilty of being under the influence of alcohol or a related charge.

In *Palaborwa Mining Co Ltd v Cheetham & others*<sup>48</sup> the LAC agreed with the findings of the commissioner and found that the dismissal of an employee who occupied the position of company secretary for having more than 0.05 grams of alcohol in his blood was fair.<sup>49</sup> Here, the employer operated a mine and had a zero-tolerance policy in place to ensure the safety of its employees. The employee was subjected to a random alcohol test and tested positive. He admitted to having consumed alcohol the previous night.<sup>50</sup> Despite the employee performing a job that could not cause harm to others due to his alcohol consumption, and being employed for a period of eight years, 58 years' old, and a first offender, the sanction of dismissal was considered appropriate by the commissioner.<sup>51</sup> The Labour Court disagreed finding that an 'inflexible approach' was followed. Importantly, it was emphasised that the commissioner failed to consider mitigating factors.<sup>52</sup> However, the LAC found that on an application of the *Sidumo* test the court a quo erred in interfering with the commissioner's decision.

In the case of *Trentyre* that was decided shortly after *Palaborwa*, the issue was similarly whether the sanction of dismissal was appropriate. The employer had a zero-tolerance policy in place and dismissed the employee for being drunk on duty.<sup>53</sup> At the time of his dismissal he had been employed for three years and was a first offender. He worked as a wheel balancer, a job which required sobriety because of the potential risks in not properly balancing the wheels of the clients' vehicles.<sup>54</sup> While the commissioner found the applicant to have been under the influence of alcohol, she held the view that the sanction of dismissal was too harsh as the mitigating factors outweighed the aggravating ones. Acknowledging that the purpose of discipline was to correct behaviour and not to punish wrongdoing, she found that the sanction of dismissal was unfair and replaced it with a final written warning.<sup>55</sup>

It must be mentioned that the commissioner did not have regard to the principles set out in *Tanker*. Had she followed *Tanker* she could reasonably have reached the decision that he was not guilty of the transgression. Though he was under the influence of alcohol this was not regarded as severe enough to impair his ability to perform his tasks.<sup>56</sup> The Labour Court overturned the commissioner's ruling. On appeal the

<sup>48</sup> (2008) 29 ILJ 306 (LAC) (*Palaborwa*).

<sup>49</sup> *ibid* paras 3 and 8.

<sup>50</sup> *ibid* para 3.

<sup>51</sup> *ibid* paras 2 and 3.

<sup>52</sup> *ibid* para 2.

<sup>53</sup> *Trentyre* n 33 above paras 2 and 3 (per Patel JA).

<sup>54</sup> *ibid*.

<sup>55</sup> *ibid* paras 11 and 12.

<sup>56</sup> *ibid* para 11.

LAC focused on whether the commissioner had reasonably found the dismissal to be unfair in line with *Sidumo*.

The LAC per Patel JA and Zondo JP (as they then were) dismissed the decision of the Labour Court.<sup>57</sup> The following important pronouncements were made by Zondo JP. Firstly, he explained that

'it is not our law that the mere fact that an employee is found to be under the influence of liquor in the workplace on a particular day means that the only appropriate sanction in every case is dismissal. Each case must be decided on its own merits but, generally speaking, progressive discipline must be applied.'<sup>58</sup>

He stated further that a number of factors should be taken into account to establish whether dismissal is a fair sanction. This included the nature of the employee's job, the employee's length of service and disciplinary record, the extent to which the employee was under the influence of alcohol and other relevant factors.<sup>59</sup> Relying on the *Sidumo* test the LAC found that the court a quo was wrong in interfering with the commissioner's award.<sup>60</sup> *Trentyre* reflects the principle in *Sidumo* which requires the commissioner's sense of fairness to prevail, and reiterates various accepted factors which should be considered in determining whether dismissal is a reasonable sanction. This gives effect to the principles set out in the code.<sup>61</sup> It is notable that the nature of an employee's duties is an important factor. It can firstly be used to militate against a finding of guilt where impairment to perform one's duties is not proven as found in *Tanker*. However, it is also a factor that plays a role in determining the appropriateness of dismissal as a sanction as reflected in *Trentyre*.

Based on the principles set out in *Trentyre*, the LAC decision in *Palaborwa* is questionable. In that case, despite the employee having tested positive for alcohol, the nature of the job performed, as well as other mitigating factors, should have been considered by the commissioner. However, the commissioner in finding that the employee breached a rule that was based on a zero-tolerance policy seemingly regarded dismissal to be the default position. The legal principles set out in *Sidumo* and reaffirmed in *Trentyre* illustrate that a decision can only be considered to be a reasonable decision if all factors, including those in favour of the employee, are considered. Regard was not had to these factors in *Palaborwa*.

Subsequent Labour Court cases have endorsed the view set out in *Trentyre*. In *Tosca* the Labour Court highlighted that even if the employee was proven to have been under the influence of alcohol, the fairness of

<sup>57</sup> *ibid* paras 23 and 24 (per Patel JA) and paras 13 to 15 (per Zondo JP).

<sup>58</sup> *ibid* para 2 (per Zondo JP).

<sup>59</sup> *ibid*.

<sup>60</sup> *Palaborwa* n 48 above para 8.

<sup>61</sup> item 5 of the code.

a sanction of dismissal depends on the circumstances of the case.<sup>62</sup> The court was satisfied that the commissioner had applied his mind to the totality of evidence and had reached a reasonable decision in line with the *Sidumo* test.<sup>63</sup>

In *Taxi-Trucks Parcel Express (Pty) Ltd v National Bargaining Council for the Road Freight Industry & others*,<sup>64</sup> the employee worked for a delivery company as a general worker.<sup>65</sup> He had been with the company for six to seven years and had a clean record.<sup>66</sup> Although the commissioner found that the employee was guilty of being under the influence of alcohol,<sup>67</sup> it held that dismissal was too harsh a penalty. It was emphasised that the fairness of the sanction of dismissal depended on the nature of the job, irrespective of the existence of a zero-tolerance policy.<sup>68</sup> The commissioner further had regard to the fact that the relationship had not irretrievably broken down and that the administration of progressive discipline would have been sufficient to change the behaviour.<sup>69</sup>

The Labour Court agreed with the emphasis placed on the job performed by the employee stating that ‘despite the applicant’s legitimate concerns about safety, the functions of a general worker loading goods simply cannot be equated to that of the applicant’s drivers in applying its “zero-tolerance” policy’.<sup>70</sup> The Labour Court was satisfied that the arbitrator had sufficiently taken account of the factors outlined in *Sidumo*, which included the appropriateness of progressive discipline, the specific circumstances of the case, the applicability of the zero-tolerance rule, and the employee’s own circumstances.<sup>71</sup>

In *South African Breweries Ltd v CCMA and Others*<sup>72</sup> the Labour Court upheld the commissioner’s decision that the dismissal was unfair.<sup>73</sup> Here, the commissioner acknowledged that the employee’s misconduct had not placed the business at any risk.<sup>74</sup> The commissioner was also influenced by the length of the employee’s service and his clean disciplinary record, coupled with the fact that the trust relationship had not broken down.<sup>75</sup> Therefore, a sanction short of dismissal, notably a suspension and final written warning, was imposed.<sup>76</sup>

<sup>62</sup> *Tosca* n 44 above para 1.

<sup>63</sup> *ibid* para 13.

<sup>64</sup> (2012) 33 *ILJ* 2985 (LC) (*Taxi-Trucks Parcel Express*).

<sup>65</sup> *ibid* paras 1 and 2.

<sup>66</sup> *ibid* para 5.

<sup>67</sup> *ibid* para 3.

<sup>68</sup> *ibid* para 11.

<sup>69</sup> *ibid* paras 12 and 13.

<sup>70</sup> *ibid* para 18.

<sup>71</sup> *ibid* paras 35 and 36.

<sup>72</sup> 24 May 2012 C 665/2011(LC) (*South African Breweries*).

<sup>73</sup> *ibid* para 37.

<sup>74</sup> *ibid* para 10.

<sup>75</sup> *ibid* paras 12 and 13.

<sup>76</sup> *ibid* para 13.

*Trentyre* and the subsequent decisions of the Labour Court illustrate that a zero-tolerance policy relating to the consumption of alcohol does not by default attract a sanction of dismissal. A similar approach was endorsed by the LAC in *Shoprite Checkers (Pty) Ltd v CCMA & others*<sup>77</sup> albeit in a misconduct case involving the possession of an item that the employee had not declared to security when she commenced work (regarded as uncanceled goods). Here, the employee was dismissed based on the employer's zero-tolerance policy after being found with an uncanceled deodorant in her possession.<sup>78</sup> Her dismissal was upheld by the CCMA but overturned by the Labour Court.<sup>79</sup> The LAC engaged with the zero-tolerance policy and found that an employer was not allowed to adopt such an approach for all infractions. Regard must be had to its appropriateness or proportionality to the transgression.

The LAC explained that 'a zero-tolerance policy would be appropriate where, for example, the stock is gold but it would not necessarily be appropriate where an employee of the same employer removes a crust of bread otherwise assigned for the refuse bin'.<sup>80</sup> Significantly it highlighted that 'commissioners should be vigilant and examine the circumstances of each case to ensure that the constitutional right to fair labour practices, more particularly to a dismissal that is fair, is afforded to employees'.<sup>81</sup> This required commissioners to consider whether the circumstances of the case warranted dismissal. If they did not 'then irrespective of the company's policy, the commissioner is at large to set the dismissal aside and replace it with an appropriate sanction'.<sup>82</sup> It found that the commissioner had not done this and therefore agreed with the decision of the court a quo.<sup>83</sup> The legal principles set out by the LAC address the criticisms raised by Van Niekerk about the blind application of zero-tolerance policies.<sup>84</sup>

Having regard to the principles set out by the LAC in the cases discussed above, the recent Labour Court decision in *Air Products South Africa (Pty) Ltd v Matee and Others*<sup>85</sup> is considered. Here, the employer had a zero-tolerance policy concerning alcohol and drug abuse.<sup>86</sup> This was in line with the hazardous nature of the employer's business and its need for a safe working environment.<sup>87</sup> An employee after testing positive for alcohol was subjected to a disciplinary hearing and dismissed

<sup>77</sup> (2015) 36 ILJ 2273 (LAC) (*Shoprite Checkers*).

<sup>78</sup> *ibid* paras 2 and 9.

<sup>79</sup> *ibid* paras 1 and 10.

<sup>80</sup> *ibid* para 18.

<sup>81</sup> *ibid*.

<sup>82</sup> *ibid* para 22.

<sup>83</sup> *ibid* paras 23 and 24.

<sup>84</sup> A van Niekerk 'Dismissal for misconduct — Ghosts of justice past, present and future' (2012) *Acta Juridica* 116–119.

<sup>85</sup> [2021] ZALCJHB 332 (30 September 2021), [2021] JOL 53666 (LC) (*Air Products*).

<sup>86</sup> *ibid* para 29.

<sup>87</sup> *ibid* paras 5, 29 and 31.

for being under the influence of alcohol.<sup>88</sup> The employee was responsible for briefing, debriefing and dispatching drivers who controlled trucks. While the employer conceded that the employee did not work with dangerous equipment, it emphasised that he worked on a dangerous site and performed a critical role.<sup>89</sup> Despite this, the commissioner found that the dismissal was substantively unfair.<sup>90</sup> This was due to the employer's failure to prove that the employee's ability to do his job was impaired, in line with the decision in *Tanker*.<sup>91</sup> It should be noted that 0.03 grams of alcohol was detected in his blood, which was regarded to be a low level of alcohol.<sup>92</sup>

The Labour Court overturned the decision.<sup>93</sup> It took cognisance of the legal principles set out in *Shoprite Checkers* on zero-tolerance policies and recognised that in pursuing such a policy the employer had to show that dismissal was appropriate and proportional to the misconduct.<sup>94</sup> The employer was found to have done this based on the dangerous nature of the workplace that necessitated precautions to prevent the occurrence of disastrous workplace accidents.<sup>95</sup> Therefore, the Labour Court found that the commissioner had misconceived the enquiry. Instead of focusing on whether the circumstances of the case warranted the adoption of a zero-tolerance policy and whether the dismissal was appropriate and proportional to the misconduct, it focused on whether the employee was impaired in his ability to perform his tasks.<sup>96</sup> According to the Labour Court the matter in *Tanker* was distinguishable as it was concerned with whether the employee's faculties were impaired to an extent that he could no longer perform his duties. In this case it was whether the employee transgressed the employer's zero-tolerance policy.<sup>97</sup>

The point missed by the Labour Court was that in both this case as well as in *Tanker* the employee was charged with the same misconduct, ie being under the influence of alcohol. The legal principles set out in *Tanker* are required to be followed to determine whether the employee is guilty of being under the influence of alcohol. It is now trite that an employee cannot be said to be automatically guilty by virtue of having tested positive. Instead, the determinant factor is whether he was impaired in his ability to do his job. Whether it was fair to impose a

<sup>88</sup> *Noe Archibald Matee v Air Products* 20 March 2018 NBC case no CHEM40-17/18 unreported (*Neo Archibald*) para 5.

<sup>89</sup> *Air Products* n 85 above para 37.

<sup>90</sup> *ibid* paras 15 and 16.

<sup>91</sup> *ibid* paras 22 and 39.

<sup>92</sup> *Neo Archibald* n 88 above para 32 and *ibid* para 6.

<sup>93</sup> *Air Products* n 85 above para 42.

<sup>94</sup> *ibid* paras 26 and 27.

<sup>95</sup> *ibid* paras 30 and 31.

<sup>96</sup> *ibid* paras 38, 39 and 41.

<sup>97</sup> *ibid* paras 40 and 41.

sanction of dismissal in line with the employer's zero-tolerance stance would only have become relevant if he was found guilty.

If the employee had been charged with testing positive for alcohol the situation would have been different. By virtue of the results of the breathalyser test he would have been guilty of the transgression. At this stage, the fairness of dismissal in line with the zero-tolerance approach would have become relevant. If this stage of the enquiry became applicable, mitigating factors would have to be considered in deciding whether the sanction of dismissal was appropriate. Even though the case should not have proceeded to this stage, it is evident that the Labour Court had no regard to mitigating factors. The emphasis was placed solely on the reasonableness of the zero-tolerance policy to the organisation and to the position of the employee. Therefore, no regard was had to the legal principles set out in *Trentyre* in determining the fairness of the sanction and thus the decision should not serve as authority for the substantive fairness of dismissals for misconduct relating to alcohol consumption.

#### 4 DEVELOPING JURISPRUDENCE: SUBSTANTIVE FAIRNESS IN DISMISSALS FOR CANNABIS USE

Commissioners have been divided on what constitutes a fair sanction for being under the influence or testing positive for cannabis in the workplace. In some cases dismissal was the preferred sanction, while in others dismissal was replaced with a less severe penalty.<sup>98</sup> These cases were similar in nature. All of the employers adopted a zero-tolerance approach based on their hazardous operating environments, which required strict safety rules to be enforced.<sup>99</sup> The charges against the employees related to being under the influence of intoxicating substances/cannabis or contravening company policy for testing positive for cannabis.<sup>100</sup>

<sup>98</sup> In *Mthembu and Others/NCT Durban Wood Chips* [2019] 4 BALR 369 (CCMA) the commissioner found that the dismissal was substantively fair. A similar outcome was reached in *Ramalope/Bravo Group Sleep Product* [2022] 12 BALR 1203 (FBC) (*Ramalope*) and in *National Union of Metalworkers of SA obo Nhlabathi v PG Building Glass* 15 October 2020 NBC case no CHEM351-19/20 unreported (*Nhlabathi*). Contrarily, the commissioner in *Rankeng/Signature Cosmetics and Fragrance (Pty) Ltd* [2020] 10 BALR 1128 (CCMA) (*Rankeng*) found that dismissal was too harsh and replaced the dismissal with a final written warning. A similar stance was taken by the commissioner in *SGB Cape Octorex (Pty) Ltd v Metal & Engineering Industries Bargaining Council & others* (2023) 44 ILJ 179 (LAC) (*SGB Cape Octorex*).

<sup>99</sup> *Mthembu* n 98 above para 72; *Rankeng* n 98 above para 10; *Ramalope* n 98 above para 8; *Nhlabathi* n 98 above paras 11 and 32.

<sup>100</sup> In *Mthembu* n 98 above para 62 the employee was charged with being under the influence of intoxicating substances while on duty. In *Ramalope* n 98 above para 6 the charge was breaching the Occupational Health and Safety Act as a result of testing positive for an intoxicating substance (marijuana) whilst on duty. In *Nhlabathi* n 98 above para 8 the employees were charged with testing positive for cannabis while within the workplace. In *Rankeng* n 98 above para 5 the charge was being under the influence of cannabis while at work. In *SGB Cape Octorex* n 98 above para 4 the charge was testing positive for THC.

Two of the arbitration awards referred to above were taken on review. The one progressed to the appeal stage. In *Enever v Barloworld Equipment, a division of Barloworld SA (Pty) Ltd*<sup>101</sup> the dispute was referred to the Labour Court as one of unfair discrimination. The court correctly dismissed the claim of unfair discrimination initiated by the employee who had been dismissed for contravening the employer's alcohol and substance abuse policy, due to testing positive for cannabis in the workplace.<sup>102</sup> The court found that the dispute related to a dismissal for misconduct and was void of any elements of discrimination.<sup>103</sup> However, there were a number of important statements made by the court, which are relevant to the discussion. The court recognised that cannabis, unlike alcohol, can remain present in an individual's system for days after consumption. This for the Labour Court brought into question the constitutionality of a zero-tolerance policy, which prevents employees from using cannabis at home in their private time.<sup>104</sup> However, the court explained that despite the decriminalisation of the use of cannabis in private, no protection is offered by the *Prince* judgment to employees against disciplinary action should they violate company policy. Therefore, it is permissible for an employer to have in place a zero-tolerance approach to the consumption of cannabis where it operates in a dangerous environment. Under these circumstances an employer is entitled to discipline and dismiss any employee who acts in contravention of the policy.<sup>105</sup>

While the author supports the above pronouncements, there were two controversial points made by the Labour Court. The first was that it mattered not that the employee who tested positive for cannabis did not him- or herself engage in dangerous services, as long as the workplace operated by the employer was 'fraught with danger'.<sup>106</sup> The second was that 'unlike alcohol, one cannot determine a level of impairment based on test results. Proof of impairment is therefore not required as with alcohol, it is automatically assumed that one is under the influence of cannabis due its intoxicating nature'.<sup>107</sup>

The first point fails to take account of the established jurisprudence in respect of dismissals for alcohol use. It has specifically been found that the fairness of a dismissal will depend on a number of factors, one being the nature of the employee's work, irrespective of the implementation of a zero-tolerance policy based on the nature of the environment. The second point was also made with no regard to the established principles. It is trite that the level of impairment in respect of alcohol use is not conclusively determined based on test results. In *Tanker* the

<sup>101</sup> (2022) 43 ILJ 2025 (LC) (*Enever*).

<sup>102</sup> *ibid* para 47.

<sup>103</sup> *ibid* para 43.

<sup>104</sup> *ibid* para 26.

<sup>105</sup> *ibid* paras 22 and 23.

<sup>106</sup> *ibid* para 23.

<sup>107</sup> *ibid* para 26.

employee's ability to do his job was found to be impaired despite his refusal to undergo a breathalyser test. Other circumstances pointed towards his impairment, which could equally be applicable in the case of the consumption of cannabis. In *Tosca*, even though the employee underwent a breathalyser test, this was found to be insufficient to prove impairment. Therefore, there was no basis for the Labour Court's supposition that because impairment cannot be established from test results, it should automatically be assumed. If impairment for alcohol consumption cannot be conclusively determined based on test results, it can certainly not be used to demonstrate impairment for cannabis use. This is because cannabis can remain in the system for a lengthy period after consumption, a fact acknowledged by the Labour Court.

However, in this specific case impairment would not have been an issue, even if it had been referred as an unfair dismissal dispute instead of as an unfair discrimination dispute. This is because the employee was not charged with being under the influence of cannabis but rather for testing positive for cannabis in contravention of the employer's policy. Her guilt would have been undeniable as she tested positive. The issue for determination in an unfair dismissal dispute would have been whether dismissal was a fair sanction. The Labour Court, while not dealing with an unfair dismissal dispute, seemed to accept that in general the application of progressive discipline may be appropriate. Here, despite the employer's zero-tolerance policy, a sanction of a final written warning for the employee's contravention was recommended by the employer representative. However, this was rejected by the chairperson who instead opted to dismiss the employee on the basis that a final written warning would serve no purpose as the employee 'unequivocally refused to give up the consumption of cannabis'.<sup>108</sup>

The Labour Court recognised that it was not the contravention of the employer's policy by testing positive for cannabis that led to her dismissal. Instead, it was her negative attitude and unwillingness to stop consuming cannabis.<sup>109</sup> The court agreed that the final written warning, which sought to give effect to the principle of progressive discipline as endorsed in the code, would have served no purpose in this case.<sup>110</sup> However, the important point is that the existence of a zero-tolerance policy does not mean that dismissal must follow as a consequence of being found guilty. There is leeway for progressive discipline depending on the circumstances of the case.

Shortly after this decision, the LAC considered a similar matter in *SGB Cape Octorex*. Here, the commissioner found that the dismissal of an employee for testing positive for cannabis was substantively unfair and

<sup>108</sup> *ibid* para 11.

<sup>109</sup> *ibid* para 37.

<sup>110</sup> *ibid* para 40.

ordered that the employee be reinstated. The Labour Court dismissed the review application, which led the appellant to the LAC.<sup>111</sup>

The commissioner's finding was based on a number of mitigating factors, including the employee's length of service and clean disciplinary record, as well as the fact that the employee had pleaded guilty, that it was a first offence, and that the relationship between the parties could still be restored. However, the employer contended that the commissioner had failed to take account of the zero-tolerance approach adopted by the employer to the use of drugs.<sup>112</sup> The Labour Court dismissed the review application holding that there was no basis for concluding that the commissioner had ignored the zero-tolerance policy and that there was no evidence that the employee had compromised the safety and integrity of other workers.<sup>113</sup>

The LAC disagreed with the commissioner's findings. Importantly, it found that irrespective of mitigating factors such as the employee having a clean record and it being a first offence, commission of such misconduct attracted dismissal in line with the employer's zero-tolerance policy.<sup>114</sup> The LAC referred to the SCA decision in *Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA and Others*.<sup>115</sup> Notably, it made reference to the finding that 'commissioners must bear in mind that fairness is a relative concept, and that employers should be permitted leeway in determining a fair sanction'. Therefore, the commissioner was criticised for failing to acknowledge that 'the employer is entitled to set its own standards to enforce discipline in its workplace'.<sup>116</sup> The LAC concluded that the decision to dismiss was fair considering the nature of the employer's business and similar sanctions imposed on other offending employees.<sup>117</sup>

These pronouncements are arguably incorrect. Firstly, the LAC's reference to the SCA decision in *Sidumo* was misplaced. This decision was overturned by the Constitutional Court many years ago. It is therefore difficult to understand the reference to this decision. Secondly, the LAC's stance seemed to be that dismissal follows automatically upon the commission of misconduct for which there is a zero-tolerance policy. This approach fails to take account of the legal principles laid down by the LAC in both *Trentyre* and *Shoprite Checkers*.

The most recent case is that of *Nhlabathi*. Here, employees working as manufacturing operators were charged with testing positive for cannabis in their system while within the workplace. They were subsequently

<sup>111</sup> *SGB Cape Octorex* n 98 above paras 1, 3 and 4.

<sup>112</sup> *ibid* paras 5 and 6.

<sup>113</sup> *ibid* para 7.

<sup>114</sup> *ibid* para 11.

<sup>115</sup> [2006] 11 BLLR 1021 (SCA).

<sup>116</sup> *SGB Cape Octorex* n 98 above para 20.

<sup>117</sup> *ibid* para 21.

dismissed.<sup>118</sup> Like many of the cases already discussed, the employer had a zero-tolerance policy in place in relation to an employee being under the influence of alcohol or drugs within the workplace.<sup>119</sup> The rationale for the policy was to ensure safety as the workplace was dangerous and hazardous.<sup>120</sup> The applicants challenged their dismissals on the basis that the employer's policy did not apply to the use of cannabis, as this was not a drug. Furthermore, it was consumed in private, days before reporting to work, which was lawful in line with the *Prince* judgment.<sup>121</sup> The commissioner acknowledged the legalisation of the private use of cannabis by the Constitutional Court but found that 'it did not overrule the provisions of the Occupational Health and Safety Act, and the respondent was by law required to provide a safe working place, which is in any event not the applicant's private space'.<sup>122</sup> Dismissal was found to be an appropriate sanction as the employer had a zero-tolerance policy concerning the breach of this workplace rule due to the hazardous nature of the business.<sup>123</sup> However, despite the commissioner making reference to the factors to be considered in line with the code in deciding whether dismissal was an appropriate sanction, no consideration was given to mitigating factors or the use of progressive discipline. The effect of the commissioner's findings was that by virtue of it being reasonable for the employer to have a zero-tolerance policy in place, dismissal followed by default.<sup>124</sup>

On review, the Labour Court correctly found that the decriminalisation of the use of cannabis in private did not translate into a conclusion that an employer had no right to take disciplinary action against an employee who contravened a disciplinary code.<sup>125</sup> Furthermore, the court rightly rejected the argument that *Prince* had found that cannabis was not a drug.<sup>126</sup> However, where the court went wrong was in its determination of whether dismissal was an appropriate sanction. It was evident from the facts that the employer had a zero-tolerance policy in place, which was based on the hazardous nature of the workplace, and that the employees had breached the policy by testing positive for cannabis. The applicants contended that dismissal was an inappropriate sanction based on the following factors: they were not stationed at any machines on the day that they tested positive but were attending training, they were not in danger nor did they pose a danger to other employees, the trust relationship had not broken down, their period of employment

<sup>118</sup> *Nhlabathi* n 6 above paras 3 and 4.

<sup>119</sup> *ibid* paras 9 and 40.

<sup>120</sup> *ibid* paras 9, 16 and 40.

<sup>121</sup> *ibid* paras 24, 25, 41 and 47.

<sup>122</sup> *ibid* para 42.

<sup>123</sup> *ibid* para 45.

<sup>124</sup> *NUMSA obo Nhlabathi* n 98 above paras 31, 53 and 54.

<sup>125</sup> *Nhlabathi* n 6 above para 53.

<sup>126</sup> *ibid* para 74.

and clean disciplinary record should have been considered, and they had caused no harm to the employer. Therefore, progressive discipline would have been appropriate.<sup>127</sup>

The Labour Court did not agree. The nub of the decision supporting dismissal was the zero-tolerance policy. The court explained that 'zero-tolerance means that a particular type of behaviour or activity will not be tolerated at all and a zero-tolerance policy is one that does not allow any violations of a rule'.<sup>128</sup> It went on to explain that mitigating factors could not save an employee from dismissal where there had been breach of a zero-tolerance rule. 'How many dependants an individual has or how many years of unblemished service he or she has rendered, or any other mitigating factor for that matter plays no role where a zero-tolerance policy is followed and consistently applied.'<sup>129</sup> The court's stance was that the only factors that were relevant were whether the employee was aware of the zero-tolerance policy, whether it was consistently applied and whether it was justified in the workplace. It found that all of these factors were satisfied.<sup>130</sup>

The court made reference to the findings and pronouncements of the earlier decisions of *SGB Cape Octorex* and *Enever*, seemingly to support its decision.<sup>131</sup> It also considered the review test set out by the Constitutional Court in *Sidumo* and how it should be applied.<sup>132</sup> This led the court to the conclusion that the commissioner's findings fell within a band of reasonableness based on the evidence that was placed before her.<sup>133</sup> However, the Labour Court's reliance on the earlier cases of *SGB Cape Octorex* and *Enever* was misplaced based on the shortcomings already identified in these cases. Furthermore, it cannot be ignored that the Labour Court in *Enever* did not rule out the use of progressive discipline; in fact it endorsed it but found it to be inappropriate having regard to the facts of the case.

It is unfortunate that the Labour Court failed to engage with the established principles on the fairness of a dismissal for the violation of a zero-tolerance policy laid down by the LAC. The clear principle that emanates from these cases is that dismissal does not follow by default for a breach of a zero-tolerance policy. The sentiments expressed by Zondo JP in *Trentyre* are instructive. He made it clear that dismissal would not be an appropriate sanction for every case and that each case must be decided on its merits. He also endorsed the use of progressive discipline. Also of import is the principle set out in *Shoprite Checkers* that an employer is not allowed to adopt a zero-tolerance approach for

<sup>127</sup> *ibid* para 76.

<sup>128</sup> *ibid* para 85.

<sup>129</sup> *ibid* para 85.

<sup>130</sup> *ibid*.

<sup>131</sup> *ibid* paras 78–82.

<sup>132</sup> *ibid* paras 33–38 and 88.

<sup>133</sup> *ibid* para 90.

all acts of misconduct. Instead, the appropriateness of dismissal or its proportionality to the misconduct is what requires determination. There is no reason why these principles are not equally applicable to testing positive for or being under the influence of cannabis.

Furthermore, it is unquestionable that establishing the guilt of the employee is separate from determining whether dismissal is an appropriate sanction for being guilty of the misconduct. *Sidumo* also makes it clear that in determining whether dismissal is an appropriate sanction, a number of factors must be considered, including mitigating factors. Therefore, the Labour Court's finding that mitigating factors had no role to play in the case was erroneous. Despite *Sidumo* providing a commissioner with a good degree of latitude in determining whether the decision to dismiss is fair, on review the Labour Court is required to assess whether the commissioner considered the totality of circumstances. In *Nhlabathi* the commissioner did not. As explained in *Fidelity*, while it is the commissioner who has the task of determining whether a dismissal is fair, the Labour Court is required to interrogate the commissioner's decision. One of the aspects to be considered is whether the factors that weigh in favour of the employee are given the credence required by decisions of the LAC and Constitutional Court.

## 5 CONCLUSION

The jurisprudence that is developing in respect of workplace infringements stemming from cannabis consumption is out of kilter with the established jurisprudence in relation to dismissals for alcohol consumption and the application of zero-tolerance policies. These established legal principles are relevant to the infractions that have arisen in respect of cannabis use and there is no basis for the Labour Court and the LAC not to have considered them.

It is trite that the test for review set forth by the Constitutional Court in *Sidumo* constrains the Labour Court's powers. A commissioner's sense of fairness must be allowed to prevail and interference by the Labour Court is only permitted if an unreasonable decision is reached. However, *Sidumo* is instructive about the factors that must be considered by commissioners in reaching their decisions. Regard must be had to the totality of factors, which expressly include mitigating circumstances. Furthermore, sight must not be lost of the important conviction espoused in *Sidumo* that in determining the fairness of a dismissal, decision makers must be mindful that security of employment is a core value of the Constitution.

While the Labour Court should not unnecessarily interfere with a commissioner's decision, where the decision fails to consider appropriate factors and does not give effect to established legal principles, the Labour Court should intervene. Unfortunately, this was not done in *Nhlabathi*, despite there being room for intervention.