REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Not Reportable

C219/2020

In the matter between:

MFUNDO LEE MARASI Applicant

and

THE PETROLEUM OIL AND GAS CORPORATION OF SOUTH AFRICA (SOC) LTD Respondent

Dates heard: 15 -17 August 2022; 23 and 24 January 2023; three sets of Heads of argument filed by 13 March 2023

Delivered: By means of email on the 26 June 2023; Deemed received at 10.00hr on the 27 June 2023

JUDGMENT

RABKIN-NAICKER J

[1] In this action, the applicant alleges that he was unfairly discriminated against on the basis of his culture. He seeks an order that the Respondent unfairly discriminated against him; three month's compensation for the period he was allegedly suspended without pay; damages in the amount of R250.000.00 for the impairment of his dignity, past medical expenses and emotional distress, and an order that that the Respondent's Alcohol and Substance Abuse policy be reviewed

by the respondent. The parties set out certain common cause facts[1] in their joint pre-trial minute dated 3 March 2022 as follows:

1.1 PetroSA's core business is the exploration and production of oil and gas and the participation in local and international petroleum ventures. Its Mossel Bay facility operated one of the largest gas-to-liquid refineries in the world.

1.2 Given the nature and the scale of the operation, strict adherence to the processes for entry to and operation in the refinery is required to ensure the safety of all employees on site.

1.3 All employees at the refinery are subjected to an annual medical assessment and ad hoc inspections to ensure their fitness for duty and that no intoxicating substances are brought into the refinery, as well as random individual and group drug testing. All employees are breathalyzed daily prior to being permitted entry to the refinery These procedures contribute to protecting the safety of all of PetroSA's employees.

1.4 Testing is conducted in accordance with PetroSA's Management of Alcohol and Drug Abuse at PetroSA Workplace Policy. The 2016 version was revised in 2019 and the current title is the Management Substance Abuse at PetroSA Workplace Policy (the Policy).

1.5 The purpose and scope of the Policy is, inter alia, to ensure the maintenance of a safe working environment, the health of its employees and compliance with the Mine Health and Safety Act 1996 (MHSA). The Policy further seeks to manage the risks of alcohol and substance abuse that may lead to an unsafe work environment. To this end the Policy provides for cut-off levels relating to the use of intoxicating substances, including alcohol and 16 other substances, and different types of medically approved testing. In the case of alcohol, the limit for urine testing is commensurate with a blood alcohol concentration of above 0.02% (20 micrograms/100ml blood). In the case of other substances, it ranges from 1ng/ml in

[1] There were also many facts in dispute in the pre-trial minute. There was no stated case therefore and applicant's wish for the case to be heard without oral evidence could not be acceded to.

the case of LSD to 500 ng/ml in the case of Amphetamine. The maximum permissible cut-off level in relation to cannabis is 50ng/ml (nanograms per ml).

1.6 The term “testing positive” or “intoxication” in this context refers to the presence of alcohol or other substances, including cannabis, above the relevant cut-off limits. Mr Marasi disputes whether urine testing in relation to cannabis can determine whether a person is inhibited from performing their functions. He also contends that the Policy is outdated as it precedes the Judgement by the Constitutional Court in *Minister of Justice and Constitutional Development and others v Prince and others 2018 (6) SA 393 (CC) (Prince III)*

1.7 The cut-off levels are in line with Western and European safety standards, such as the European Workplace Drug Testing Society (EWDTS) Guidelines (2015-05-29 Version 02), as well as section 11 of the MHSA. Mr Marasi contends that these limits precede the Prince 111 judgment and do not take into account African or cultural usage of Dagga.

1.8 Drug addiction (but not necessarily all drug use) usually impairs work ability and can lead to endangering the work environment. Employers can therefore legitimately seek to pre-empt these conditions by requiring testing for substance use and abuse.

1.9 If an employee tests above the cut off limit for any substance in an initial test [referred to as a panel test] a further confirmatory laboratory test is conducted to ascertain more precisely the level of the substance in their system. Should the laboratory test reveal that the employee is above the cut off limit, the employee will be deemed to be unfit for duty until such time as they test either negative or under the cut-off level.

1.10 Mr Marasi is employed by PetroSA as a Telelcommunications Technician. He has a clean disciplinary record and has been employed by the respondent for 14 years.

1.11 In or around April to May 2019 Mr Marasi informed PetrroSA of his decision to embark on a traditional healer training programme for 18 months. Mr Marasi contends that he informed PetroSA of his traditonal journey earlier which PetroSA disputes.

1.12 Mr Marasi did not wish to resign from his position in order to undergo his training. PetroSA allowed him to transfer from the Cape Town branch to the Mossel Bay refinery (the school he has to attend is situated in Mossel Bay).

1.13 It was agreed between the parties that Mr Marasi would bear the costs of his relocation. It was further agreed that he had to attend a medical surveillance assessment to determine his fitness to work at the refinery.

1.14 Mr Marasi attended the medical surveillance assessment (in Cape Town) conducted by Occupational Care South Africa, during which he disclosed his use of cannabis This was followed by a drug screening (a panel test) in which he tested positive for cannabis.

1.15 PetroSA requested a medical certificate prescribing cannabis use from Mr Marasi.

1.16 Following Mr Marasi's initial positive test, PetroSA decided to refuse him access to the refinery pending a further test by the Occupational Health Nurse at PetroSA's onsite clinic in Mossel Bay. Mr Marasi tested positive for cannabis with a result of 100ng/ml.

1.17 This test was followed by a confirmatory laboratory test at PetroSA's cost which indicated that Mr Marasi's blood content of cannabis was 52ng/ml which despite the time that had passed between the two tests, was still in excess of the permissible cut-off level.

1.18 PetroSA informed Mr Marasi that he had tested above the cut off level and that he would therefore not be permitted access to the refinery as he was deemed unfit for duty. Mr Marasi was also informed that he would be permitted to return to

work when he tested either negative or under the cut off limit which, in accordance with the policy, would mean he would be considered fit for duty.

1.19 Mr Marasi raised an internal grievance on 8 July 2019. A grievance hearing was held on 16 July 2019 followed by an in house conciliation on 6 August 2019. Mr Marasi claimed that the Policy was outdated in light of the Prince 111 judgment. The grievance remained unresolved as of 12 September 2019 after an external intervention had taken place.

1.20 Mr Marasi was on paid annual and sick leave when he was not at work. He contends that he was forced/obliged to take annual and sick leave to avoid losing his job.

1.21 On 20 August 2019, Mr Marasi took a further test at PetroSA's cost and tested below the cut off limit (26ng/ml) for cannabis. The pathcare report is dated 22 August 2019. He accordingly returned to work the following day on 23 August 2019 and continues to work for PetroSA to date in compliance with the Policy.

1.22 Mr Marasi referred a dispute to the NBCCI (the bargaining council). After the bargaining council ruled that it did not have jurisdiction, the dispute was referred to the CCMA for conciliation where it was determined on 27 February 2020 that the CCMA also lacked jurisdiction to hear the dispute on the basis that Mr Marasi's salary was above the prescribed threshold. The matter was then referred to this Court on 2 July 2020. PetroSA's exception to Mr Marasi's referral was upheld on 23 July 2021 which led to a Revised Statement of Case being served on Petro SA dated 16 August 2021.

<u>Evidence at Trial</u>

[2] Mr Marasi represented himself at the trial in which he testified as to his calling to become a traditional healer. Paragraph 5.1 of his amended statement of case reads as follows:

"I informed my employer about my calling as a traditional healer in 2015 after an annual drug test. I felt confident to answer the calling before and after the

Constitutional Court held in Minister of Justice and Constitutional Development& Others v Prince and Others 2018 ZACC 30 (Prince 3) that use of cannabis is now permitted for adult South Africans and soon thereafter requested that I be transferred to Petro SA in Mosselbay for a period of 18 months on order to complete my cultural training at the traditional school. I informed my employers that my training involves the usage of cannabis, and that such calling can only be refused, at great peril to the incumbent. My transfer was approved and I moved from Parow to MosselBay. Before my transfer I went for my annual test but the results came only after my transfer was approved and after I already moved to Mossel Bay. On arrival at Mossel Bay I was requested to submit to a drug test.

I was suspended from work, without pay, from 01 June – (I've worked from home) then on the 29th June 2019 until 23 August 2019, on the grounds that the concentration of THC cannabinoids in my system exceeded the prescribed company limit which is 50ng/ml. I was deemed to be in violation of the company Drug and Alcohol Policy after the results of my initial drug test showed 100ng/ml, THC. The subsequent test result, was 52ng/ml. I was then summarily suspended and at my own cost had to submit proof of the fact that I was subsequently within company requirements. This caused me great financial, emotional and psychological distress especially in light of the fact that the Company in no way whatsoever try to understand where I was coming from. I felt victimized because even after explaining the context, the company made no attempt to accommodate me.

I am particularly distressed about the manner in which the company went about to suspend me and argue that it unduly impaired my dignity, by belittling my culture and calling. There was no procedural or substantive fairness in suspending me. I was barred from entering my workplace after my credentials was revoked without informing me beforehand. The decision to suspend failed to follow clear company procedure and also failed to reasonably accommodate my usage of cannabis in violation of a clear duty to do so. The decision to do so without pay; was cruel and unusual, and in violation of fair administrative and labour procedure The callous manner in which the employer acted shows impetuous disregard for my rights and culture. I have been an exemplary employee with a clean disciplinary record. The policy of the Company cannot reign supreme over the Constitution of South Africa

and our labour laws. The company policy required a purposive and contextual interpretation, in order to be read in compliance with our new constitutional order. The company chose a literal interpretation, unsuited for this context. It is my case that my suspension amounted to an unfair labour practice and unfair discrimination under both the Labour Relations Act 66/1995 as well as the Employment Equity Act 55/1998."

[3] Mr Marasi testified in line with the above statement and presented as a confident witness with a firm belief in his convictions. He informed the Court that he was not a trade union member and described himself as a human rights activist. The trial of the factual issues pertinently turned on the following:

3.1 Whether Mr Marasi was suspended;

3.2 Whether the company reasonably accommodated him in his journey;

3.3 Whether the job that he did was of a nature that it required that he be prevented from entering the workplace when he was found to be over the applicable limit for cannabis in terms of the policy.

[4] It was the respondent's case that Mr Marasi was not suspended. No disciplinary proceedings were launched against him. Mr Soko, his line manager gave evidence at the trial. He denied that Mr Marasi was in fact suspended. Reference was made to a letter he had written on the 28 June 2019, which reads as follows:

"Dear Mfundo,

As per our last communication regarding your access to the Refinery being revoked, I have consulted with HSEQ in particular the OMP (Dr Van Staden), Security, Human Capital and Legal on the matter You have also confirmed to having met with Dr Van Staden regarding the outcome of your test results on the 20 June 2019 and Dr Van Staden discussed your test results and advised you that you are unfit for work. I further record that Dr Van Staden explained appropriate measures that PetroSA is obliged to enforce due to the inherent nature of its business exposures and legal

requirements that governs the safety of employees whilst in PetroSA premises. As a line manager, I requested clarity on what grounds access is denied, which policy or procedure is applicable in this scenario and in this regard, I was referred to the attached work standard document and HSE Policy.

According to the lab test results conducted as part of the medical surveillance and access control processes for PetroSA GTL R and other sites governed by the Mine Health and Safety Act as well as the Occupational Health and Safety Act, your urine samples exceed the permissible limit for our work environment. This includes all PetroSA sites governed by the documents referred to above and as per the attached standard. According to the company standard, you are declared unfit for duty as your lab test results for cannabis metabolites far exceeded allowable threshold for access to any of the PetroSA sites. The substance detected through the lab test is above allowable threshold for fit for duty purposes. The standard and applicable legislative regime is primarily for the protection of both your safety and those of other employees and consequently the outcomes of the tests necessitates PetroSA to refuse entry into any of its premises until your next confirmatory test is negative. You are thus not fit for duty until you have tested negative in a follow up test.

In this instance, you have a medical certificate of a Traditional Healer which is valid and acceptable unless it is proven otherwise. In this regard, guided by section 8.8 of the standard I, as the line manager representing the employer I can only facilitate appropriate assistance. My recommendation to you as advised by what is in front of me, would be for you to utilize your available leave (sick, annual etc.) whilst undergoing your treatment, which is supported by Dr CM Nhlapho, the Traditional Healer's medical certificate until you produce negative result on a follow up test.

Kindly take this email as a formal communication Your acknowledgment of receipt will be appreciated……"

[5] Mr Marasi testified that he did then use his leave entitlement until he tested negative. He however continued to refer to the prevention of him entering the workplace as a 'suspension' and hence an unfair labour practice. Mr Marasi's

testimony was in line with his statement of claim in which Marasi stated inter alia the following about his ‘suspension’:

“Failure to afford me an opportunity to challenge or influence this weighty decision, was unfair. I had to suffer the ignominy and embarrassment of having been denied entry to my workplace because my work badge had been blocked.

The decision to suspend me came orally from the Security Department on instruction of the Occupational Medical Practitioner (OMP). This cannot be appropriate as it does not afford an employee the dignity that should get. The decision to suspend can only come from senior management, and this should only happen after I was given a fair chance to advance reasons why such severe sanction should not ensue. The OMP can recommend blocking access but the final decision must be made by senior management, after hearing my side of the story. Audi alterem partem demands that. The company failed to abide by its own procedures, in its desire to block me from entering the work premises. In so far as the company policy purports to justify the decision to designate the OMP as the sole arbiter of whether work certificate is issued or blocked, it violate fair labour and administrative law requirements.

Company policy dictates that in the event that disciplinary action is to follow it is incumbent on the OMP to make the findings available to the concerned parties but this was not done The decision to suspend without pay, was thus prematurely taken and certainly affected me negatively I should have been given an opportunity to explain myself especially in light of the fact that I had previously disclosed the fact that my calling required the use of cannabis. In light of the fact that my transfer was allowed, the company could not simply bar me from work. That was a cruel, unusual and inhumane punishment in the context of this case.”

[6] Turning to the factual evidence relating to the respondent’s accommodation of Mr Marasi’s journey to become a traditional healer, it was his testimony that when he was blocked at the Mossel Bay refinery, his line manager told him that meetings were being held about the situation. It was after this that he received the above letter from Mr Soko. He was at home in June he stated, and then he sat down with his mentor and told him that he would unfortunately have to stop the dagga as the

company was now 'suspending him' and he would have to use his sick leave and annual leave. His mentor agreed and explained the situation to the other initiates. So, Mr Marasi testified that he had to detox and Mr Soko talked to the mentor and explained that Mr Marasi would have to do this. Mr Soko said that he would talk to the medical station and arranged for him to go in 30 days for the test in August. He had to stay out of the plant for three months and was allowed back on the 23rd August. He emphasized that the three months were very difficult for him and he sacrificed his health in the process.

[7] After the three months, Mr Marasi testified that he told his line manager that he had considered the alcohol and drug policy and that he would like to discuss it with the custodians of the Policy. He had sacrificed his journey he said and he was of the view that the policy did not accommodate his culture and was still based on the situation when cannabis was illegal. His boss said that he could start a grievance process which he did, and which later escalated as reflected in the joint pre-trial minute. He further confirmed that he asked Mr Soko how he could get valid sick and annual leave and he did put in a leave application and was paid for the three months. He could not take any sick leave for 4 months after this.

[8] Under cross-examination, Mr Marasi conceded that he did not tell his line manager before asking for a transfer to Mossel Bay that he would be using cannabis. He said he wouldn't have been in a position to know what would happen. He was asked why, when he knew he was moving to a more dangerous environment he did not tell his manager. He said it did not come up and he was he also worried about victimization. He didn't see it as a problem and he complied with testing. He was asked about the content of the medical certificate from his mentor and he explained that it was not possible to be specific in it and the company had accepted the letter. He further agreed that the lack of mention of a specific amount of cannabis that he would need to take would make it difficult for the company to determine if it was safe. In as far as the agreement to transfer him to Mossel Bay was concerned so that he may train under the mentor in question, he conceded that this was 'formal' accommodation of his calling,

[9] Mr Marasi stated that he was expecting the company to discuss issues with him after he came back from his 'illegal suspension'. He confirmed the three levels of his grievance process that were followed from July to September involved senior people. He agreed that his line manager was still trying to help at the grievance stage and that the minutes of same reflect that Mr Marasi described his Line Manager as very supportive.

[10] It was put to him that he wanted to be exempted from the Policy. He said that he did not necessarily want to be exempted but wanted the company to consider his cultural diversity in the process and the fact the 'medicine' was now legal in the country. He said that he wanted the company to consider him as a pilot programme with a view to changing the Policy. He accepted there had to be a cut off limit to safeguard safety.

[11] Mr Marasi agreed that he met with or had telephone conversations with the respondent's top executives and they considered his request to work from home. He still challenged their position contained in a report before court entitled "Report on the examination of Mr Mfundo Lee Marasi's case to continue the use of marijuana as part of his traditional journey while working". The report was prepared to provide feedback to the CEO. The team who met to discuss the issue were top managers. Mr Marasi had proposed the company considered the following according to the report:

"3.6 As a way forward, Mr Marasi, proposed that the company considers the following:

- Allow him space to finish his ancestral calling with ALL the related rituals (which includes the use of marijuana, impepho, igwada, etc.)

- Because the initial 18 months granted by the company expires in December 2020, he requested an extension of time in Mossel Bay, where his school is located, to finish his journey and related rituals. He indicated an additional 4 months (until February 2020).

• During this time, to continue working and receiving a salary, albeit working "in an isolated" environment (At home) and not be called on site. He stated that 80% of his work can be effectively done from home. The balance of the onsite work, he indicated, can be allocated to his Team members.

• The Company Drug and Alcohol policy to be updated to include the use of Marijuana for private use."

[12] It was put to Mr Marasi that the company agreed to extend his stay in Mossel Bay for 18 months. Mr Marasi said at the time the whole country was in lockdown. He conceded that another reason for the permission being granted was because of the following letter from his mentor to the company dated 7 December 2020:

"This is to inform PetroSA/Cranefild College of the prohibition of Initiation schools and Graduation ceremony Indefinately. Due to Covid-19 Level-1 restrictions, government has suspended all Initiation schools/Cultural graduation until further notice or been advised by GOCTA/Presidential pronunciation.

This means, Mfundo Lee Marasi will continue being at the school for an indefinite period, thus extending his stay longer than the 18 months that was prescribed.

Cultural graduations normally take place in the spring or vernal equinox – March 21st or the Autumnal equinox – September 22nd. As soon as we hear changes from the COGTA department, I'll definitely advise accordingly.

Should you have more clarity seeking questions, please do not hesitate to call me."

[13] It is evident from the Report prepared by the CEO quoted above, that consideration was given to Mr Marasi's request to work from home. It reads:

"4.4 The current Working from home arrangements, implemented during the COVID 19 Lockdown expects the same conditions of employment and employee behaviour, that is expected when employees are working from the office to be upheld which employees are working from home. The MANAGEMENT OF SUBSTANCE ABUSE

AT PETROSA WORKPLACE (HLT/SD/OOO/OO1) standard with specific reference to “not allowing employees under the influence of any intoxicating substance to work” is therefore enforceable for employees working at the office as well as those working from home. Allowing Mr Marasi to work from home, with the knowledge that he will be using an intoxicating substance; the company will be in violation of the Working from home Guidelines.

4.5 It was established that from an occupational risk management perspective, the working from home alternative presents a lower occupational risk to the employee when compared to the employee being on site, i.e. no rotating and/or moving machinery, however, the risk to the company is not mitigated/reduced

The nature of the work performed by Mr Marasi exposes him to highly confidential company information, which places the company should there be any disclosure or in the event of an incident occurring, while Mr Marasi is working from home, the company may be exposed and will be held liable.

4.6 Allowing Mr Marasi to work from home, with the knowledge that he will be using an intoxicating substance; the company will be indirectly consenting to a violation of the Occupational Health and Safety laws as well as its own company policies and standards.”

[14] Mr Sipho Soko testified that he is the line manager to Mr Marasi, holding the position of Information Infrastructure Manager of the respondent. He stated that the data centre in Mossel Bay is where the respondent’s systems are controlled from and contain a lot of power cables and computers. One of the two data centres in Mossel Bay is the central control room which is right in the centre of the refinery. He testified that PetroSA cannot function without a data centre as it conducts most of its business through the SAP system. If the data centre is not functional a lot of automated work will not happen – especially the transactional aspect. When the system was down in the past it resulted in a ship not being able to offload product.

[15] In as far as Mr Marasi’s work is concerned, Mr Soko testified that he looks after telecommunication including the telephone service and the PABX. All calls go

through the PABX. He also looks after all the virtual systems, attending to video conferencing systems. Mr Soko testified that if Mr Marasi was not alert or if he was under the influence, it would impact on the operations of the refinery. He referred to the risks involved if Mr Marasi miss-programmed the PABX. He said the PABX rooms are inside the data centre which contains very important equipment. Mr Marasi also may have to trouble shoot when there are problems with telephones on the site and go into different buildings to do so. If a call gets logged, Mr Marasi has to determine if there is a fault on a cable and then alert the contractors. He stated that contractors do assist Mr Marasi but he is the primary responsible person to support the telecommunication of the Company. He could also be required to climb up to heights to trouble shoot a connection fault. He also mentioned that there are other sites at Mossel Bay that Mr Marasi could be expected to go to as they have telephones such as the harbor, the storage facilities, the tank room, the heliport, to the ships/ rigs. He stated that Mr Marasi has had to go to a ship in the past as well as the dam where he had to be in the lift with a telephone and the damn wall is about 140 meters high.

[16] Mr Soko said that Mr Marasi's work is 50 per cent client facing and 50 per cent troubleshooting. In relation to the telephones, the client would be everybody who had an issue with a telephone. The audio visual is also client facing as the clients include the senior management of the Company when they use the boardrooms and everyone who sets up meetings in the meeting rooms. He said that Mr Marasi might not interact properly if he is not alert or if he is under the influence.

[17] Under cross-examination, Mr Soko agreed that over the years that Mr Marasi worked with him, he did not show signs that he was not alert or was intoxicated. It was put to him that he had access to the pabx and Mossel Bay data centre after Mr Soko had approved it. Mr Soko said he did not have any worry about giving him authorization until Mr Marasi tested above the limit. He agreed that PetroSA IT services were partly outsourced and that sub-contractors perform some of Mr Marasi's tasks in his job description, and that he had never received negative reports from them about his conduct with contractors. As to working in towers, Mr Soko conceded that Mr Marasi's task was to arrange access to them for the contractors. Mr Marasi put it to Mr Soko that he was forfeiting his benefits by using leave. Mr

Soko replied that the leave is your benefit and you were using it. Mr Marasi insisted he was forced to accept the benefit. Mr Soko denied this. Under re-examination Mr Soko clarified that access to the PABX and control room was given to Mr Marasi only when he was not blocked from access to the plant. He also stated that when Mr Marasi was based at Mossel Bay there was no instance when he had to go up the towers but he could be called.

[18] In as far as the testing and applicable policy is concerned, three witnesses gave evidence and their testimony and cross-examination is summarized in material part as follows:

18.1 Ms Nekele Monyatsi an occupational health practitioner conducted the medical tests on Mr Marasi in Mossel Bay. She was aware a test had been done in Cape Town. Mr Marasi completed a medical consent form and she conducted a comprehensive medical assessment including a drug test.

18.2 She testified that they test for the presence of a substance and not for intoxication. It is a rapid/immediate urine test that tests for 5 types of drugs including cannabis. She sent the same urine sample to Pathcare for confirmation. She sent copies of results to Mr Marasi on request by him in an email

18.3 Ms Gcobisa Vena, the Acting Corporate HSSEQ Manager testified that she provides guidance on health and safety issues in so far as policies, legislation and putting sytems in place are concerned. She is responsible for identifying risks in the organization and protecting employees and third parties. She confirmed that the refinery is designated by the Department of Labour as a major hazard installation. It is designated as a mine in terms of the Mine Health and Safety Act. The MHSA obliges the respondent to ensure that the risks are identified and managed. PetroSA is also governed by the OHSA.

18.4 She stated that it is an inherent requirement that those who work at the refinery must be fit for duty Substance use impacts the ability of an individual to perform their work as is required, which means that their effectiveness and efficiency are impacted. She confirmed that the 2019 Policy is the one that is currently in place.

The same cut off limits for cannabis as that set out in the 2016 Policy are still in place. She stated that the fact that cannabis use is now legal does not change the effect that cannabis has on the body.

18.5 Ms Vena testified that Mr Marasi was not suspended. His access was blocked. Suspension follows disciplinary action, she said. She testified that she spoke to him after he tested positive. He had come to tell her. She was involved and leading the investigation as to which approach to take in relation to Mr Marasi. The outcome of the investigation was due to the fact that as an organization they needed to comply with legal prescripts and standards. She read from the report that was prepared for the CEO's office. Vena stated that the respondent had accommodated Mr Marasi which the report shows. He was given a transfer to Mossel Bay and granted an extension to stay in Mossel Bay to complete his training.

18.6 It was put to Ms Vena under cross examination that the deletion of the word 'illegal' from the Policy in 2019 was done because of his case. She agreed. She said that risks of exposure did not change after legal changes to use of cannabis. It was put to her that the Policy says saliva tests give accurate results. She agreed and stated that in the event that it is thought that there is a need for a saliva test, it is done. However, she said that they need a rapid test when in a dangerous place which is achieved with the urine test. After the presence of a substance is confirmed further tests are done to find the level of the substance. It was put to her that the Policy is outdated and needs to take into account latest South African standards and be constitutionally compliant. She disagreed that there should be a change to the risk exposure standard although the Policy is reviewed every 6 years at a minimum and the review takes about 6 months. Under re-examination she stated that cannabis whether legal or illegal has the same effect on the body.

18.7 Ms Nompilo Cele the Lead Occupational Heath Practitioner for the respondent also gave evidence. She is based at the refinery in Mossel Bay in the medical section. She was the original drafter of the 2016 and 2019 Policies. She explained that testing is done for pre-placement, after an incident when someone is injured, at random, during annual medical surveillance or when someone is suspected or reported to be intoxicated. She explained that a panel test (urine test) is a rapid test

which tests for 5 types of drugs such as codeine, THC and cocaine. It shows a negative or a positive result within 5 to 10 minutes

18.8 A person signs a consent form. Once they test non-negative, the same specimen is sent to Pathcare for confirmation. The history of the employee is taken and the employee is handed over to security and the certificate to work is revoked and access is blocked until they receive the confirmatory test The results take up to 48 hours. Based on the history, they decide when to retake the test. The results give PetroSA the concentration/ level as a number.

18.8 She explained that a substance of misuse as defined in the Policy includes both legal and illegal drugs. The policy confirms that the European Workplace Drug Testing Society Guidelines were relied upon. The reason that they send the specimen to the lab is because is not easy to determine whether a person is intoxicated. In relation to Mr Marasi they relied on the confirmatory test of above 100ng/ml and the information he provided to them (as part of his medical history) that he was using cannabis. The maximum that the machine at Pathcare can detect is 100ng/ml.

18.10 She stated that no medical certificate was received to explain the dosage that Mr Marasi would be taking and why it would be safe for him to access the site. The letter she received only informed them that he uses marijuana but there was no dosage. She explained that GC/GM techniques are tests that are done on a culture such as for TB. It is a test that takes about 6 weeks and is also expensive. It has been used by the respondent in relation to an employee that was using a substance containing cannabinoids for therapeutic reasons but he denied using marijuana (which has THC with psychoactive effect) The respondent took into consideration that Mr Marasi was using cannabis (the raw material that triggers the psychoactive effect). The GC/MS test therefore would not have led to a different conclusion. It would just have prolonged the process event further as it tests for the same thing. The 100ng/ml result reflected that he was a chronic user and maybe used it in higher concentrations.

<u>Legal Principles</u>

[19] In the pre-trial minute agreed to by both parties in terms of the Judge President's Directive in Discrimination cases, it is recorded that Mr Marasi alleges the following:

"48 The Applicant alleges that he was directly and indirectly discriminated against based on his religion and/or cannabis culture:

48.1 The Applicant is alleging that the Policy itself is discriminatory and that if it had not been for his culture which requires cannabis use, he would not have been suspended.

48.2 The reason for his alleged suspension was the Policy which unfairly discriminates against him. Whilst the Policy appears neutral on the face of it, its impact is disproportionate on members of the cannabis community and therefore unfairly discriminatory.

48.3 The Applicant further contends that the Policy is skewed slanted towards mainstream drugs i.e. alcohol and tobacco, and unlawfully burdens or criminalises cannabis users for conducting the same normative activity.

48.4 The Applicant alleges that testing above the limited (sic) in the Policy does not affect his ability to perform his work as there was no problem with his work when he used cannabis before. He claims that urine testing indicated use in line with the Constitutional Court judgment as opposed to the inability to perform the functions of a position.

48.5 The Applicant alleges that he should have been reasonably accommodated in a way that allowed him to continue using cannabis in terms of his culture. He further alleges that he was only 2ng over the arbitrarily determined standard.

[20] Clause 49 of the Pre-trial Minute reads:

49. The respondent denied that it committed an act of direct or indirect discrimination:

49.1 The Policy sets out rational requirements that are reasonably calculated to maintain necessary standards of health and safety in the workplace. Those requirements apply universally to all employees and cannot be reasonably be construed as being discriminatory on any of the grounds or in relation to any group of persons referred to in section 6(1) of the EEA.

49.2 The Policy does not have a disproportionate impact on the "cannabis community" or any other "community". Its impact is calculated to be on any employee or employees, regardless of background, whose level of intoxication exceeds that which is permitted by the Policy. This does not convert those affected into a "community" in any meaningful sense. For the same reason, it would be nonsensical to describe employees excluded from the workplace due to excessive levels of alcohol consumption as a protect "alcohol community".

49.3 The Policy applies to 17 different forms of intoxicating substances and lays down the same limitation in respect of each subject to their respective intoxicating qualities. It does not single out cannabis users (let alone those who use cannabis for religious or cultural reasons). It is solely concerned with the effects of intoxicating substances (of which cannabis is but one) and prescribing limits on their consumption in the interests of workplace safety.

49.4 Intoxication resulting from the lawful use of cannabis, or any other substance (such as alcohol), constitutes as great a risk to health and safety as intoxication resulting from any other use.

49.5 The Applicant has never been told that he may not use cannabis. He is free to do so provided he maintains the concentration of cannabis in his system under the cut off level which corresponds to a reasonable level of safety, as stated in the Policy, it places no unreasonable burden on him to refrain from using cannabis in quantities likely to result in concentrations of cannabis in excess of this level. It is uncontentious that employees must refrain from the use of alcohol in excess of the permitted level. It should equally go without saying that the same applies to other

intoxicating substances without calling into question the Applicant's constitutional rights.

49.6 The Applicant's right to practice his religion or cultural traditions cannot trump the right of other employees to a safe working environment or PetroSA's legal duty to maintain such an environment, nor can it establish the unfairness of a policy for achieving those purposes.

49.7 The tests carried out by PetroSA fall within the permitted grounds in section 7(1) of the EEA. The tests are justified by the inherent requirements of the Applicant's job as well as his employment conditions. The Applicant complied with an instruction to be tested that was patently lawful but is aggrieved with the result."

[21] Section 6 of the EEA provides as follows: "6 Prohibition of unfair discrimination

(1) No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or on any other arbitrary ground.

(2) It is not unfair discrimination to-

(a) take affirmative action measures consistent with the purpose of this Act; or

(b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.

(3) Harassment of an employee is a form of unfair discrimination and is prohibited on any one, or a combination of grounds of unfair discrimination listed in subsection (1).

(4) A difference in terms and conditions of employment between employees of the same employer performing the same or substantially the same work or work of equal value that is directly or indirectly based on any one or more of the grounds listed in subsection (1), is unfair discrimination.

(5) The Minister, after consultation with the Commission, may prescribe the criteria and prescribe the methodology for assessing work of equal value contemplated in subsection (4)".

[22] An employment policy or practice is defined in Section 1 of the EEA as:

"'employment policy or practice' includes, but is not limited to-

(a) recruitment procedures, advertising and selection criteria;

(b) appointments and the appointment process;

(c) job classification and grading;

(d) remuneration, employment benefits and terms and conditions of employment;

(e) job assignments;

(f) the working environment and facilities;

(g) training and development;

(h) performance evaluation systems;

(i) promotion;

(j) transfer;

(k) demotion;

(l) disciplinary measures other than dismissal; and

(m) dismissal.

[23] Section 7 (1) of the EEA provides that:

"7 Medical testing

(1) Medical testing of an employee is prohibited, unless-

(a) legislation permits or requires the testing; or

(b) it is justifiable in the light of medical facts, employment conditions, social policy, the fair distribution of employee benefits or the inherent requirements of a job…."

[24] Determining whether there has been unfair discrimination involves, as the LAC has stated:

"[14] The test for unfair discrimination set out in Harksen v Lane NO & others applies equally to discrimination claims in labour law. The first step is to establish whether the appellant's policy or practice differentiates between people. The second step entails establishing whether that differentiation amounts to discrimination. The third step involves determining whether the discrimination is unfair. If the discrimination is based on any of the listed grounds in s 9 of the Constitution, it is presumed to be unfair.

[15] Since the claim of unfair discrimination had been raised by the respondents, the burden of proof in terms of s 11(1) of the EEA was placed on the appellant, as employer, to show that the discrimination alleged did not take place or that it is justified. This is distinguishable from a claim of discrimination on an arbitrary ground, in which case, in terms of s 11(2), the burden is on the complainants to prove that

the conduct complained of is not rational, that it amounts to discrimination and that the discrimination is unfair."[2]

Evaluation

[25] The purpose and scope of the Policy in question in casu reads as follows:

"The purpose of this standard is to manage the risk (as required by section 11 of MHSA No 29 of 1996) of alcohol and substance abuse that may lead to unsafe working environment in order to comply with section 5 of MHSA of 1996 that requires the employer to maintain health and safety at the mine.

The standard applies to all business units of PetroSA and will be enforced on all employees entering the premises of PetroSA with exception of visitors who are not allowed to do work at the plant."

[26] We must accept that on its face, (as Mr Marasi appears to do in his pre-trial minute), the Policy does not differentiate between employees. However, he submits that the impact of the policy on him and those practicing his culture/ religion amounts to discrimination. A provision is indirectly discriminatory against a group where it has a disproportionate impact on that group.[3] I accept that that the Policy may arguably be understood to impact the constitutionally protected rights of users of dagga who imbibe the substance for cultural and religious purposes disproportionally. However, the issue of whether this impact amounts to unfair discrimination is key.

[27] In the Court's view the critical issue in this case must be to decide whether testing below the limits contained in the Policy is an inherent requirement of the job. In my view, it cannot be gainsaid that the requirement of testing in the Policy is reasonable given the working environment of PetroSA. It is also in line with health and safety legislation applicable to the sector. Mr Marasi has not sought to argue that any employment law is unconstitutional and testified that he supported health and safety legislation. This is a case that stands to be distinguished from that of

[2] Tshwane University of Technology v Maraba & others (2021) 42 ILJ 1707 (LAC)
[3] Sithole and Another v Sithole and Another 2021 (5) SA 34 (CC) at para 25

Department of Correctional Services v POPCRU[4] in which prison warders of the Rastafarian faith and others who were answering the calling, were found to have been discriminated against because the policy in question in that matter did not permit men to wear dread locks. The SCA stated as follows:

"[25] ……. no evidence was adduced to prove that the respondents' hair worn over many years before they were ordered to shave it, detracted in any way from the performance of their duties or rendered them vulnerable to manipulation and corruption. Therefore, it was not established that short hair, not worn in dreadlocks, was an inherent requirement of their jobs. *A policy is not justified if it restricts a practice of religious belief — and, by necessary extension, a cultural belief — that does not affect an employee's ability to perform his duties, nor jeopardise the safety of the public or other employees, nor cause undue hardship to the employer in a practical sense.* No rational connection was established between the purported purpose of the discrimination and the measure taken. Neither was it shown that the department would suffer an unreasonable burden if it had exempted the respondents. The appeal must, therefore, fail." (emphasis mine)

[28] In **Damons v City of Cape Town**[5] the Constitutional Court considered an appeal on the question of whether a firefighter who had been injured on duty had been unfairly discriminated against, when he was not permitted to apply for promotion due to his disability. The Court referent to the section 6 EEA principle of the 'inherent requirements of the job" as follows:

"[67] The genesis of s 6(2)(b) is article 1(2) of Convention 111, which lays the basis for the defence of an inherent requirement not amounting to discrimination. ….. An inherent requirement of the job is usually impervious — a complete defence — to a claim for unfair discrimination. Of course, the requirement must be genuine. Once a requirement is determined to be inherent, then as a matter of law, it is not unfair discrimination for an employer to insist on employees meeting the requirement. An employer who proves that a requirement is inherent is protected against a claim of

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[4] 2013 (4) SA 176 (SCA)
[5] (2022) 43 ILJ 1549 (CC)

discrimination and therefore cannot be compelled to waive or excuse an inherent requirement to accommodate a person with disability."

[29] The EEA does not define the phrase "inherent requirement of the job". As noted in **Damons** above, the wording 'inherent requirement of a job' has been adopted from the ILO Discrimination (Employment and Occupation) Convention 111 of 1958, which has been ratified by South Africa. In '*The Impact of the Fourth Industrial Revolution on Workplace Law and Employment in South Africa*[6] the writers state that:

"In this context, art 1(2) of the convention states that 'any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination'".

[30] Once it is accepted, as I do, that testing negative in terms of the Policy is an inherent requirement of the job of all PetroSA employees given the nature of their work environment and the requirements of health and safety legislation, an unfair discrimination claim (whether alleged to be direct or indirect) must fail. The Court however appreciates that Mr Marasi felt deeply that his dignity was detrimentally affected. However, it is important to make the point, as the Constitutional Court has, that whether discrimination exists does not depend on the subjective feelings of various members of the affected group.[7]

[31] Mr Marasi did not refuse a test and he has not disputed that medical testing is justified in terms of section 7 of the EEA in this case. This is a case in which employment conditions justify testing of employees. From the evidence before me, and Mr Marasi's testimony, he wished the employer to use his case as 'a pilot study'. However, an employer is responsible to all its employees in the workplace. A further submission by Mr Marasi was that the 'legalisation' of cannabis after Prince III[8]

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[6] Lindani Nxumalo & Carol Nxumalo 'The Impact of the Fourth Industrial Revolution on Workplace Law and Employment in South Africa' (2021) 42 ILJ 16

[7] Women's Legal Centre Trust v President of the Republic of South Africa and Others 2022 (5) SA 323 (CC) at paragraph 52

[8] *Minister of Justice and Constitutional Development and others v Prince and others 2018 (6) SA 393 (CC)* in which the Constitutional Court by means of a "reading in" to applicable legislation established

requires the respondent to review and adjust its policy. As the witnesses from the respondent's occupational health team emphasized there are substances (including alcohol) on its list for testing that are legal. It is the limit of such substance that the Policy determines to be acceptable to health, safety and risk concerns.

[32] Mr Marasi's submissions contain extensive and interesting data and commentary relating to the issue of what medical tests are best for the determination of intoxication by cannabis. However, he did not bring any expert witnesses to the trial to assist the Court in this respect. The Court is unable to make findings in this respect. What the Court has to consider is the evidence of the occupational health personnel who testified for the respondent on the need for a rapid test (the urine test) to ensure that no employee enters a petro- chemical plant above the limits set by a Policy in line with international standards. There is no basis for the Court to find the Policy unfairly discriminatory.

[33] Much time was spent at trial on the issue of whether Mr Marasi was suspended or not. This issue appears to go to Mr Marasi establishing that an unfair labour practice was committed, an issue that should have been considered by the bargaining council. Unfair conduct of the employer could also have been considered by this Court if the discrimination claim succeeded and damages were considered. Given the applicant has conceded that the nature of the respondent's workplace requires strict adherence to the processes for entry to the refinery to ensure the safety of all employees on site, the above averments appear to the Court to be removed from reality. The concept that an employee should not be immediately barred from entry into a petro chemical plant when an impermissible amount of an intoxicating substance is found in their system, is absurd in the Court's view. The notion that the test result and its implication should be escalated to senior management and a hearing be held before this occurs, is also at odds with the requirements of health and safety that must be accorded to all employees in terms of the requisite statutes. The barring of Mr Marasi from the plant at Mossel Bay did not constitute a 'suspension' in terms of the LRA or an unfair labour practice. No procedural unfairness as pleaded by him is discernible on the facts before me.

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that the use or possession of cannabis in private or cultivation of cannabis in a private place for personal consumption in private is no longer a criminal offence. (see paragraph 109)

[34] In any event, in the Court's view the evidence as a whole established that Mr Marasi was not suspended and did not face any disciplinary action. He applied for sick and annual leave for the period he was unable to enter the workplace. This he was permitted to do by his line-manager who from his conduct and testimony treated Mr Marasi with respect and sensitivity. The respondent took a number of steps to assist him in his journey including relocation and extension of his stay at Mossel Bay.

[35] Evidence before Court on the issue of whether Mr Marasi should have been allowed to work from home rather than take leave, appeared to be given by him on the basis that this would have been a 'reasonable accommodation' of the 'cannabis community'. The principle of reasonable accommodation applies to persons with disabilities (to prevent unfair discrimination) and in the broader sense to promoting diversity in the workplace. In the broad sense, the Court is of the view that the respondent did reasonably accommodate Mr Marasi and that the evidence as to why it would not permit him to work from home during Covid while intoxicated, must be accepted as reasonable. Other employees working from home during this period were bound by normal workplace rules. In any event, given my finding that Mr Marasi was not discriminated against on grounds of his cultural practices and identity, and acceptance of the 'complete defence' of the inherent requirements of the job, the principle of reasonable accommodation is not directly relevant to this case.

[36] In view of all of the above, Mr Marasi's claims before this Court cannot succeed. I am not inclined to make a costs order in this matter. Mr Marasi came to Court with a genuine and deeply held belief that he had been unfairly discriminated against. It appears that his journey contributed to a greater awareness of his culture on the part of his employer. I fully expect he will continue to educate those he interacts with on his calling and the use of cannabis in relation thereto.

[37] I therefore make the following order:

Order

1. The applicant's claims are dismissed.

2. There is no order as to costs

H.Rabkin-Naicker

Judge of the Labour Court

<u>Appearances</u>

Applicant: In Person

Respondents: BCHC Attorneys