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ABSTRACT

The Agricultural sector, especially wine farms within the Western Cape, plays an important role in the economy of South Africa. This industry has a rich history with regard to slavery and the historical practice of paying employees in part with alcohol. This practice was (and still is) commonly referred to as the 'dop' system. This, as well as the other social problems that prevail amongst farm workers, exacerbate those workers' susceptibility towards the misuse of alcohol. Relevant jurisprudence and legislation guides an employer when dealing with such cases within the workplace. It is also common knowledge that the farm worker and farmer relationship differs from other employment relationships within the economic sector. Farm workers within the Western Cape are ranked higher as users of alcohol compared to other occupational categories. Should this and other factors such as the 'dop' system have an impact on how the judges and arbitrators reconcile an employer's duty within this sector? Desktop research and the personal experiences of this writer revealed that employers within this sector have additional duties in dealing with alcoholism in their workforce and that legislation should address this issue.

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CHAPTER 1

INTRODUCTION

“Bacchus drowns within the bowl - Troubles that corrode the soul”

– Horace (Ancient Roman Poet)

1.1 Aim of dissertation

Alcohol is an intoxicating substance that has been used by mankind for a long time, as represented in Greek mythology as Dionysus the Greek god of wine, later adopted by the Romans as the Roman god of wine known as Bacchus. Alcohol was first used as a beverage to enjoy with hearty meals and at important events. Over time the image of alcohol developed and it developed into a consumer requirement for every occasion or even for no occasion at all. As the stress and pressure within the workplace increased, over the years, the need increased for individuals to relax and ‘get their minds off work’.

The consumption of alcohol increased drastically and its effects carried over into the work place. Since employees spend eight to ten hours a day at the workplace, the effects of alcohol consumption are bound to affect the employer. It has been found that absenteeism, sick leave and accidents are higher among employees who consume excessive amounts of alcohol.¹ The effects of alcohol abuse will impact the business in various ways including a decrease in productivity and an increase in the cost of doing business. Ultimately it will hinder employers’ ability to compete effectively in the increasingly competitive economic environment.² The direct annual costs of

¹Pick, W ‘Health 712 Final Report: Mine Health and Safety Council’ (2003) available at <http://www.mhsc.org.za> ,accessed on 13 May 2013.

² Frone Michael R ‘Work stress and alcohol use’ *Alcohol Research & Health* (1999) 23,4,284-291 available at <http://www.hawaii.edu/hivandaids/Work%20Stress%20and%20Alcohol%20Use.pdf> , accessed on 18 August 2013.

employee alcohol use and abuse in the workplace have been estimated to be about US\$170 billion in the United States.³

According to a Mine Health and Safety Council (MHSC) report,⁴ alcohol misuse is one of the most significant public health concerns facing South Africa today. The alcohol dependency of the average workforce was estimated to be between six per cent and sixteen per cent.⁵ Practices in the mining and Agricultural sectors historically included the migrant labour system and 'dop' system, the availability of cheap or free alcohol and the availability of alcohol on credit.⁶ All of these practices contributed towards the increased use of alcohol by the South African workforce.

The 'dop' system was used mostly on wine farms in the Western Cape. The farmworkers were paid only with cheap wine ('dop'), on a daily basis. This had two advantages for employers:

- they would have few expenses with regard to the payment for farmworkers and
- the addiction to alcohol that developed, kept the farmworkers 'incarcerated'.

As a result of the 'dop' system, the level of alcoholism in the mostly-coloured community was aggravated and increased. This practice was banned in the 1960's, but the ban was only enforced in the 1990's by Nelson Mandela.⁷ The availability of alcohol increased and in the late 1990's there were almost 23 000 licensed liquor outlets and between 150 000 and 200 000 unlicensed outlets.⁸ This figure means that for every 190 people there is one liquor outlet.

³Bamberger, Peter A 'Abusive supervision and subordinate problem drinking: Taking resistance, stress and subordinate personality into account' (2006) 59 *Human Relations* 6, 723-752.

⁴W Pick op cit note 1.

⁵ Ibid.

⁶ Ibid.

⁷ Schneider M, Norman R, Parry C D L, Bradshaw D & Plüddemann A. *Estimating the burden of alcohol abuse in South Africa in 2000 Methodological Note* (2007) Cape Town: South African Medical Research Council.

⁸McCann M, Harker Burnhams N, Albertyn C & Bhoola U *Alcohol, Drugs and Employment* 2 ed. (2011) Juta.

The Liquor Act of 2003 officially outlawed the 'dop' system.⁹ This Act states that 'an employer must not supply liquor or methylated spirits to any person as an inducement to employment; supply liquor or methylated spirits to an employee as or in lieu of wages or remuneration; or deduct from an employee's wages or remuneration any amount relating to the cost of liquor or methylated spirits'.¹⁰

The 'dop' system directly affected the health of the farmworkers. The acute and chronic effects of alcohol on the system are visible. The range of secondary effects includes Foetal Alcohol Syndrome (FAS), traumatic injuries, interpersonal violence and other social disruptions. The effects of alcohol, especially in the case of women, can be seen within this industry by specifically examining the high FAS rate in the Western Province.¹¹ A study indicated that some areas in the Western Cape have the highest incidence of FAS in the world.¹² Thirty per cent of those women who are either heavy or binge drinkers indicated that they never had someone to counsel them about the effects of drinking when pregnant.¹³ Ten per cent of those women had never even heard of FAS. The after-effects of the 'dop' system still remain to this day and can be seen in the fact that most farm workers still spend their wages on alcohol and visits to the 'shebeen'.

This paper will focus on the Agricultural sector and more specifically, will examine how judges and arbitrators should reconcile the sometimes-conflicting duties of employers in this sector. Farm workers are a marginalised group whose needs are consistently overlooked in policy documents enforced

⁹Merten, Marianne 'New Liquor Bill outlaws 'dop' system". *Mail & Guardian online* 5 September 2003 available at <http://mg.co.za/article/2003-09-05-new-liquor-bill-outlaws-dop-system>, accessed on 2 September 2013.

¹⁰ Liquor Act, 2003. Government Gazette. 26 April 2004.

¹¹ Schneider *et al* op cit note 7.

¹² Glasser, Jeff 'Cycle of Shame. South Africa has the highest rate of fetal alcohol syndrome in the world'. *US News* 12 May 2002, available at http://www.usnews.com/usnews/culture/articles/020520/archive_020802.html, accessed on 19 August 2013.

¹³ 'Comparison of Baseline drinking Practices, knowledge and attitudes of adults residing in communities taking part in the FAS Prevention Study in SA' (2012) *African Journal of Drug & Alcohol studies* 11(2).

by Government.¹⁴ The employees in this industry, specifically, are hard to discipline, because of the 'scars' that the 'dop' system left. The available labour within this sector, especially in certain areas, is limited and therefore employers cannot afford to have a high employee turnover. There are approximately 712 thousand people employed between the ages of fifteen and sixty five in the Agricultural sector. The Western Cape, followed by Limpopo and Mpumalanga, hosts most of the workforce within this sector.¹⁵ The hospitality, mining and agricultural industries have been shown to have the highest proportions of high- risk employees including those with high and risky levels of alcohol consumption.¹⁶

The practicality of enforcing disciplinary measures for misconduct within this sector is also not as easy as it might first seem. Implementing an 'incapacity' procedure is also challenging and the process is sometimes simply followed to adhere to the requirements of legislation. When the employee returns to his or her social environment, it is just a matter of time before a relapse occurs.

Employees in the wineries work with huge volumes of alcohol on a daily basis. Should the nature of their job not be seen as an extenuating factor when dealing with intoxication problems in the workplace? If so, should the same then apply for employees working in the banking or hospitality industries? The most employees in this industry are typically in rural areas and have very little exposure to social assistance from the Government. How realistic and practical is it for the employer to refer the employee to a social worker for assistance with dependency problems? The availability of rehabilitation programmes and Government services in these rural areas is very limited.

¹⁴ Schenker, Marc 'Farm workers in South Africa: The challenge of eradicating alcohol abuse and the legacy of the dop system' (1998) *SAMJ* 88 9.

¹⁵ Quarterly Labour Force Survey (Quarter 2, 2013) Statistics South Africa available at <http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&ved=0CCsQFjAA&url=http%3A%2F%2Fwww.statssa.gov.za%2FPublications%2FP0211%2FP02112ndQuarter2013.pdf&ei=zMEoUqzLMir0QXfk4EI&usq=AFQjCNFyv3Sd0rjttJRL9bVmeTZMDhAgNw&sig2=wg9dUtvKHb1snMTFlyegdA&bvm=bv.51773540,d.d2k> ,accessed on 1 September 2013.

¹⁶ Roche Anne & Kenn Pidd 'Workers' Patterns of Alcohol Consumption' (2006) NCETA available at nceta.flinders.edu.au/download_file/-/view/459 ,accessed on 25 August 2013.

Research into alcohol and alcoholism have evolved and led to alcoholism being recognised world-wide as a disease. It led to the development of jurisprudence on alcohol-related problems in the workplace. Alcohol-related problems in the workplace can now be considered as either a misconduct or incapacity issue.

The aim of this paper is to study the development of jurisprudence concerning alcohol-related problems in the workplace. Specifically, this paper aims to establish factors that should be kept in mind when dealing with an incident that is alcohol-related. An investigation will take place into the practical implementation of the case law within the Agricultural sector. In conclusion, the paper will consider possible recommendations, if any, to be made to the existing jurisprudence in order to align it with the needs and expectations of employees and employers in this sector. This is an issue that certainly needs addressing because Agriculture is a major contributor to the economy, especially for the Western Cape.

1.2 Research question

Given the prevalence of alcoholism amongst the South African workforce, what are the duties of employers generally on alcohol-related issues. Also, given the particular history of the Agricultural sector, should employers in that sector take on any extra responsibilities regarding alcohol-related issues. Moreover, can the captains of this industry or Government assist the employers and the employees in this sector, regarding those issues?

1.3 Methodology

The methodology used in this paper is based mainly on desktop research, with the focus on a review of judgments, awards and academic publications. While most of the jurisprudence on the subject matter do not address alcohol misconduct cases in the agricultural sector, they do provide important guidelines that cannot be ignored when dealing with such cases. As the writer

is a Human Resource Consultant practising in the Agricultural sector, some personal experience will also be used to contribute towards this paper.

1.4 Summary of chapters

Chapter one deals with the introduction to the minor dissertation. A short description about the aim of the dissertation will be presented, with a brief overview of the reasoning behind the dissertation; that overview takes a glimpse into the history of alcohol use in South Africa. The rich history of South Africa and the Agricultural sector with regard to the 'dop' system and alcohol abuse leads to the research question, which is based on the legal responsibility of the role players within the sector. The research methodology elaborates on the foundation on which this dissertation is based. Chapter two will give an overview of the theory of alcohol problems in the workplace. The different types of alcohol consumers will be defined as well as related terms. Health and Safety legislation regulates an employer's duties in terms of alcohol use and intoxication in the workplace and will be discussed in Chapter three.

Chapter four contains an extensive literature study based on jurisprudence and regulations relating to the following issues: classifying the problem; the extent of the employer's duty; the correct disciplinary procedures; the right that the employer has to set standards and to test; the zero-tolerance approach and the courts; and lastly, the proving of intoxication. Chapter five reflects on the employees' and trade unions' duties by looking at common-law relationships and the prevention and treatment of substance abuse. This chapter also deals with various relevant recommendations for the role players within the industry. The focus of this paper is on the Agricultural sector and therefore it is important to elaborate on, and to investigate the extent of the problem, within that sector, both nationally and internationally as described in Chapter six as well as examining the challenges facing this sector in implementing policies and procedures. Chapter seven summarises the conclusions reached in the study.

CHAPTER 2

THEORY FOR ALCOHOL PROBLEMS IN THE WORKPLACE

Drinking alcohol is not a problem in itself. However, the pattern of drinking can become problematic. The pattern includes where, when, how much and how often alcohol is consumed. The long-term and short-term consequences might differ.¹⁷ Whenever an employee's drinking or alcohol dependency interferes with his performance, ability to work or with his relationships at work, then that person is usually defined as a worker with an alcohol problem.¹⁸ Alcohol problems within the workplace can be divided into two categories: psychical incapacity or misconduct.

2.1 The triangle of alcohol dependence

It is important to understand the recent theory concerning alcohol use in the workplace, before such behaviour can be judged. The following model was introduced by Mc Cann, Harker-Burnhams, Albertyn *et al*¹⁹ for considering alcohol problems in the workplace.

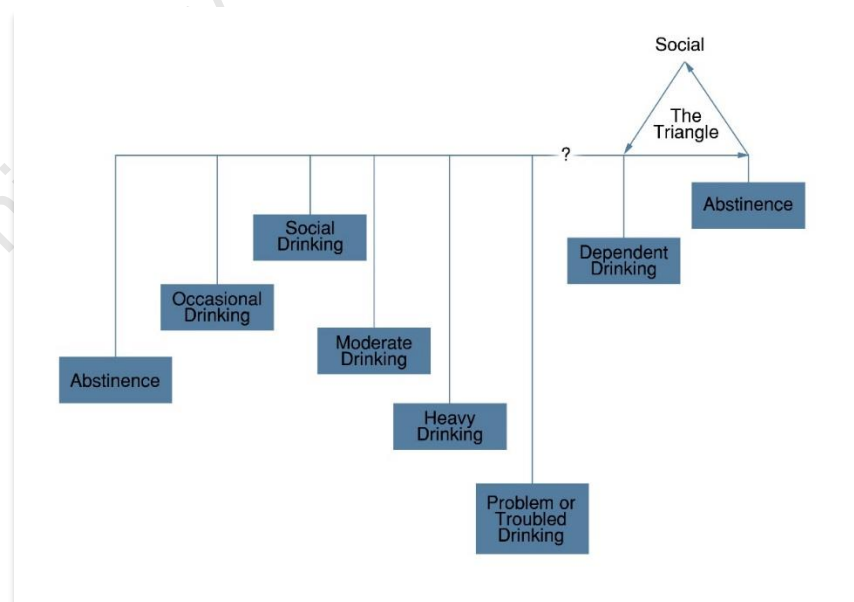


Figure 1: A theoretical model for alcohol problems in the workplace.

¹⁷ Ibid.

¹⁸ McCann *et al* op cit note 8.

¹⁹ Ibid.

The triangle of alcohol dependence is derived from a long-term follow-up study by McCann *et al* conducted over ten years.²⁰ The study found that most individuals' behaviour fluctuates between abstinence and dependent drinking. Heavy and troubled drinkers are not included in the dependent drinking definition. The study on which the model is based, found that heavy and troubled drinkers can be prevented from falling into the dependency triangle if they receive education, therapy and counselling. Preventative treatment before the person becomes alcohol dependant has a higher success rate. In the workplace it is believed that there are mainly heavy and troubled drinkers and that they should be assisted before they reach the dependent drinking stage. The triangle in the model is not static and that illustrates that individuals can move between dependant drinking patterns and abstinence due to the impact of various stressors in one's life.

The World Health Organization (WHO)'s Global Status Report on Alcohol indicated that South Africans have the highest consumption of absolute alcohol per drinker per year. South Africa is ranked as second-highest in the category of harmful patterns of drinking. South Africa has the highest level of heavy episodic drinking, for both male and female drinkers.²¹

2.2 Defining categories of consumption

In order to define the extent of an employee's alcohol problem, it is important to define the category of consumption applicable to that person. McCann *et al* define it categories as follows.²²

The social drinker is a person who does not become intoxicated and whose alcohol consumption is not more than three units²³ of alcohol a day. The chances are therefore small that alcohol is affecting the person's social life or work or causing health problems.

²⁰ Ibid.

²¹ Comparison of baseline drinking practices: op cit note 13.

²² McCann *et al* op cit note 8.

²³ A unit of alcohol, irrespective of its quantity or form is classified as 8gram. Refer McCann *et al* op cit note 8, p14.

The moderate drinker will on special occasions become intoxicated and consumes up to four units of alcohol a day.

The heavy drinker will be intoxicated periodically and consumes more than six units of alcohol a day and approximately 41 to 44 units of alcohol a week.

A problem or troubled drinker is intoxicated periodically and this person's social and work life may have suffered due to the high volumes of alcohol consumption. This person consumes between 50 and 60 units per week or seven to nine units per day. Edwards²⁴ found that binge drinking occurs due to the degree of the alcohol dependence syndrome. The causes were identified as external factors or pressures. Change in the shape of this drinking pattern occurs because it is not a unique type of dependence.

The dependent drinker consumes at least 70 units of alcohol a week, has a marked tolerance of alcohol and will not necessarily seem intoxicated. When the alcohol levels drop, this person will develop withdrawal symptoms. This type of drinker will continue to consume alcohol despite the psychological, social and physical problems which arise.

A community survey that took place in two wine growing regions in South Africa found that the Western Cape had the highest percentage of harmful alcohol use. The incidence of binge drinking amongst grade eight to eleven children was found to be 34 per cent in 2003, increasing to 41 per cent in 2008. These results were higher for non-urban than for urban settings.²⁵ The International Labour Organisation estimated that between 3 and 5 per cent of the average workforce globally are alcohol dependent and 25 per cent are at risk of dependence.²⁶

²⁴ Edwards, G. *The Treatment of Drinking Problems* (1982) Grant McIntyre, London.

²⁵ Comparison of baseline drinking practices: op cit note 13.

²⁶ Institute of Alcohol Studies Factsheet 'Alcohol and the Workplace' (2009) available at <http://www.ias.org.uk/uploads/pdf/Factsheets/Alcohol%20in%20the%20workplace%20factsheet%20August%202013.pdf>, accessed on 26 July 2013.

2.3 Defining Intoxication and Consumption

The legal driving limit in South Africa is 0.05 gram per 100 millilitre of blood. The level of intoxication and the influence of alcohol depend on various factors such as body mass, gender and level of alcohol in the blood. At a level of 100 milligram per 100 millilitre of blood there is a progressive loss of sensory perception, a staggering posture, emotional instability and reduced judgment.²⁷ These symptoms become worse as the blood-alcohol level rises.

Cooper, Schwir and Smith refer to five stages of intoxication.²⁸ The first stage is referred to as light intoxication and applies when a person's blood alcohol concentration is between 0.06 and 0.09. Visible signs of intoxication may be defects in speech, dilated pupils, flushed face and an elevated mood. If a person's blood alcohol concentration reaches 0.15, then that person has reached the moderately intoxicated stage. The person might be prone to thickness of speech and staggering. When a person is heavily intoxicated, movements become clumsy and a staggering gait is evident. The blood alcohol concentration at this stage would be between 0.16 and 0.20. The last two stages referred to by Cooper *et al* are: very heavily intoxicated and superpose to comatose. These last two stages are not commonly found within the workplace and will not be elaborated on for the purposes of this paper.

The Norwich Union Healthcare conducted a study in Norway and found that a third of employees went to work with a hangover. Fifteen per cent reported that they have been drunk at work and one in ten employees reported a hangover once a month at the workplace.²⁹ Alcohol dependency should not be taken lightly. It is important for employers to differentiate between the

²⁷ Mc Cann *et al* op cit note 18.

²⁸ Cooper Wilfrid E, T. Schwär G. & Smith Lionel S. *Alcohol Drugs and Road Traffic* (1979) Juta.

²⁹ Institute of Alcohol Studies Factsheet op cit note 26.

various stages of intoxication and consumption in order to apply applicable policies and procedures relating to the misuse of alcohol at the workplace.

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CHAPTER 3

THE EMPLOYER'S DUTIES IN TERMS OF HEALTH AND SAFETY LEGISLATION

3.1 Health and Safety Legislation

Every workplace has to adhere to Health and Safety standards and regulations as provided for in the Occupational Health and Safety Act 85 of 1993. The Act provides for the following regulations that are applicable to the consumption of alcohol and intoxication in the workplace.

Thus, in terms of s 8(1):

'Every employer shall provide and maintain, as far as is reasonably practicable, a working environment that is safe and without risk to the health of his employees'.³⁰

In terms of s 14:³¹

'Every employee shall at work-

- (a) take reasonable care for the health and safety of himself and of other persons who may be affected by his acts or omissions;
- (b) as regards any duty or requirement imposed on his employer or any other person by this Act, co-operate with such employer or person to enable that duty or requirement to be performed or complied with;
- (c) carry out any lawful order given to him, and obey the health and safety rules and procedures laid down by his employer or by anyone authorised thereto by his employer, in the interest of health or safety'

In terms of Clause 2A of the General Safety Regulations:³²

'(1) Subject to the provisions of sub regulation (3), an employer or a user, as the case may be, shall not permit any person who is or who appears to be under the influence of intoxicating liquor or drugs, to enter or remain at a workplace.

³⁰ Occupational Health and Safety Act 85 of 1993.

³¹ Ibid.

³² Ibid.

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

Therefore, the duty on employers is to ensure that, if an employee appears to be under the influence of intoxicating liquor, then that person is not allowed to work, enter or remain at the workplace. Employers are also responsible for ensuring that employees do not have intoxicating liquor or drugs in their possession and do not offer them to other employees at the workplace.

In terms of s 22(3) of the Compensation for Occupational Injuries and Diseases Act 130 of 1993:

'If an accident is attributable to the serious and wilful misconduct of the employee, no compensation shall be payable in terms of this Act...Serious and wilful misconduct' means being under the influence of intoxicating liquor or a drug having a narcotic effect'.³³

The focus of the wine industry with regard to its product has changed slightly over the past ten years. Thus, the earlier focus of selling bulk wine of lower quality has shifted towards exporting good quality wine to various international markets. With this change, other regulators and bodies such as WIETA (Agricultural Ethical Trade Initiative) came to play a role which focuses on social responsibility and HACCP (Hazard Analysis and Critical Control Points) with its focus on Health & Safety. This means that the role of safety systems is getting increased emphasis. The commercial farming sector is also transforming with regard to these regulations, to ensure that its products will be accepted by buyers for retail stores, where in the past not much emphasis was placed on social responsibility and Health and Safety standards.

³³ Compensation for Occupational Injuries and Diseases Act 130 of 1993.

CHAPTER 4

THE EMPLOYER'S RIGHTS AND DUTIES IN TERMS OF THE LABOUR RELATIONS ACT

The aim of this chapter is to give an overview of the employer's rights and duties in terms of alcohol related problems related to misconduct or incapacity. Relevant jurisprudence will be referred to and considered in this chapter in order to give substance to the various questions that arise when identifying an employer's rights and duties.

4.1 Classifying the problem: Misconduct, incapacity or disability

Section 23 of the Constitution³⁴ guarantees that everyone has the right to fair labour practices. This means that disciplinary actions within the workplace have to be carried out fairly in terms of equality, equal respect, dignity and privacy. An employer may take disciplinary action against an employee who is unable to perform his or her duties because of substance abuse or 'being under the influence' while at work. Although not all offences are identified and stipulated within a disciplinary code, some offences are so obvious that there is no need for spelling them out explicitly. Against this background it is recommended that an alcohol and substance abuse policy should be in place. Schedule 8 of the Labour Relations Act (LRA) refers the employer to the following Guidelines in cases of dismissal for misconduct:³⁵

'Any person who is determining whether a dismissal for misconduct is unfair should consider-

- (a) whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and
- (b) if a rule or standard was contravened, whether or not-
 - (i) the rule was a valid or reasonable rule or standard;

³⁴ Constitution of the Republic of SA 1996.

³⁵ Labour Relations Act 66 of 1995, Schedule 8. Item 7

- (ii) the employee was aware, or could reasonably be expected to have been aware, of the rule or standard;
- (iii) the rule or standard has been consistently applied by the employer; and
- (iv) dismissal was an appropriate sanction for the contravention of the rule or standard.'

According to Item 5.1.3 of the Code of Good Practice on Key Aspects of Disability in the Workplace, alcohol-related problems in the work place cannot be defined as a disability. An impairment³⁶ is only substantially limiting if the person is unable to do a job or is limited in doing a job. Not all impairments are limited and some can be easily controlled, corrected or lessened. For example a person who is substantially impaired in terms of vision can wear contact lenses or spectacles. Substantially limiting impairments can be assessed by considering medical treatments or devices. In many instances these impairments can be corrected to prevent or remove the adverse impacts that the impairment causes. According to public policy, certain conditions or impairments may not be considered as disabilities. These include but are not limited to:³⁷

- (i) sexual behaviour disorders that are against public policy;
- (ii) self-imposed body adornments such as tattoos and body piercing;
- (iii) compulsive gambling, tendency to steal or light fires;
- (iv) disorders that affect a person's mental or physical state if they are caused by current use of illegal drugs or alcohol, unless the affected person is participating in a recognised programme of treatment;
- (v) normal deviations in height, weight and strength; and

³⁶ Item 5.1.2 of the Code of Good Practice on Key Aspects of Disability in the Workplace defines an impairment as physical or mental. A 'physical' impairment means a partial or total loss of a bodily function or part of the body. It includes sensory impairments such as being deaf, hearing impaired, or visually impaired and any combination of physical or mental impairments. 'Mental' impairment means a clinically recognised condition or illness that affects a person's thought processes, judgment or emotions.

³⁷ Employment Equity Act 55 of 1998. *Code of Good Practice on Key aspects of Disability in the Workplace*. Item 5.1.3

- (vi) conventional physical and mental characteristics and common personality traits.

The division between misconduct and incapacity has not always been clear. The courts have held that dismissals for alcohol-related offences should only be justified where the offence is serious and the employee was not capable of rendering services in accordance with the minimum standards expected in the contract of employment.³⁸ In the *Mondi* judgment the legal position for alcohol offences has progressed. A computer operator was charged with 'drunkenness'. The court ruled that the employer failed to prove that the employee was actually drunk by exclusively relying on the result of a breathalyser test. It seems that this case turned due to the manner in which the charge was formulated.

Thus, in *Naik v Telkom SA*³⁹ the employee had seventeen years of service with Telkom and was dismissed in 1999 for being under the influence of alcohol whilst on duty. The employee had been a heavy drinker for years and had no alcohol-related problems until 1998. In 1997 the employee was appointed to an administrative position and in 1998 he admitted himself to a rehabilitation centre for his alcohol problem. He attended weekly counselling sessions and suffered relapses. On 27th January 1999 he was given a final written warning for being under the influence of alcohol while at work. He then threatened his manager with a panga. On 23rd June 1999 he missed an important management meeting and was found to be intoxicated in his car. He was dismissed shortly afterwards, after a disciplinary enquiry.

The CCMA commissioner only scrutinised the substance of the dismissal. In his decision the Commissioner considered the following three aspects relating to intoxication at the workplace. Firstly, the Code of Good Practice in the LRA states that alcoholism is viewed as an illness and should in fact be treated as

³⁸ *Mondi Paper Co v Dlamini* (1996) 9 BLLR 1109 (LAC).

³⁹ *Naik v Telkom SA* (2000) 21 ILJ 1266 (CCMA).

any other illness. Item 11 in the Code states that the following guidelines should be used when deciding whether dismissal is the appropriate sanction:⁴⁰

- ‘11. Any person determining whether a dismissal arising from ill health or injury is unfair should consider –
- (a) whether or not the employee is capable of performing the work; and
 - (b) if the employee is not capable-
 - (i) the extent to which the employee is able to perform the work;
 - (ii) the extent to which the employee’s work circumstances might be adapted to accommodate disability, or, where this is not possible, the extent to which the employee’s duties might be adapted; and
 - (iii) the availability of any suitable alternative work.’

The Code of Good Practice (LRA): Dismissal, Item 10(3), states the following:⁴¹

- ‘10(3) The degree of incapacity is relevant to the fairness of any dismissal. The cause of the incapacity may also be relevant. In the case of certain kinds of incapacity, for example alcoholism or drug abuse, counselling and rehabilitation may be appropriate steps for the employer to consider.’

Secondly, the CCMA Commissioner noted that some conduct in the workplace involving the use or abuse of alcohol may correctly be described as misconduct. This would be when the employee cannot be regarded as being incapacitated, and the following applies: he is repeatedly guilty of alcohol abuse; there is no physical damage because of this abuse and it seems that he will continue to abuse alcohol. This is usually the case if the employee is not dependant on alcohol.

⁴⁰ Labour Relations Act 66 of 1995, Schedule 11.

⁴¹ Ibid.

Thirdly, the CCMA Commissioner stated that, when considering how to deal with incapacity due to alcoholism, item 11 of the Code of Good Practice needs to be followed. Special consideration needs to be given to the extent of the incapacity suffered, as well as the availability of alternative work prior to dismissal. The relevance of this judgment to the Agricultural sector is that farm workers are unskilled labourers and usually in the lowest position at the farm. Little alternative work is available as employees are usually general farm workers who have the same duties as fellow employees.

The dismissal of Mr Naik was found to be unfair, because the employer could have assigned him to alternative work at a lower grade, where the consequences of a relapse would be less disruptive. The extenuating circumstances considered were:

- the fact that he had been a problem drinker for years,
- he only caused problems on two occasions at work and
- he was still in treatment.

The *Naik* judgment clearly indicates that when one is dealing with alcohol-related incidents in the workplace, the correct solution is not as straightforward as one might think. The onus is on employers to establish whether they are dealing with a case of misconduct or incapacity where alcohol is a factor. Failure to do so properly may result in the dismissal being ruled as unfair. It is important to determine where to draw the line between misconduct and incapacity. As far as incapacity is concerned, the employer cannot be expected to continue accommodating an employee. The employer in the abovementioned case, Telkom, gave Mr Naik several chances and it is expected that employees should also take responsibility for their own behaviour at some stage.

If the employer establishes employee misconduct after a fair procedure was followed, then this could lead to dismissal. In *SACCAWU v Bonus*⁴² the employee denied that he was an alcoholic and therefore claimed that

⁴² *SACCAWU obo Mfengwane v Bonus* (1998) 5 BALR 595.

counselling was unnecessary. The matter was treated as misconduct and the employer's disciplinary policy was taken into consideration. A disciplinary policy, according to Schedule 8 of the LRA, should make provision for progressive discipline.⁴³ Dismissal for a first offence is not generally appropriate, except for gross misconduct of such a nature that it makes the continued employment relationship intolerable. The employee's circumstances, such as length of service, personal circumstances, the nature of the job, the circumstances of the infringement and the disciplinary record should be considered in deciding whether to impose the penalty of dismissal or not. Lastly, the penalty of dismissal should be applied consistently by the employer.

When compiling an alcohol policy and the sanction for such alcohol-related transgressions, it is important to consider the nature of the employee's occupation. For example if the work has inherent safety implications, any intoxication at the workplace will constitute serious misconduct; one such example would be a truck driver.⁴⁴ Dismissal could possibly occur, even if it was a first offence. In contrast, if an administrative employee is intoxicated at the workplace, the sanction for the transgression can be less than for a truck driver. In *Le Roy v SA Express Airways*⁴⁵ in deciding an alcohol related incident in a different context, the court suggested that a farm labourer may still be able to work in the fields if intoxicated, although he might be too drunk to operate a tractor. This approach is not practically applicable in the Agricultural sector since farm workers use equipment that can be dangerous when the operator is intoxicated; the results can be seen in the statistics relating to injuries, discussed later.

An alcohol policy can discriminate fairly if it has different rules for different classes of employee; this is seen in *Le Roy v SA Express Airways*.⁴⁶ The employee was employed as a pilot for a domestic passenger airline and was

⁴³ Labour Relations Act 66 of 1995, Schedule 8.

⁴⁴ SA Labour Guide 'Alcoholism and the workplace' available at <http://www.labourguide.co.za>, accessed on 13 May 2013.

⁴⁵ *Le Roy v SA Express Airways* (1999) 20 ILJ 431 (CCMA).

⁴⁶ *Ibid.*

found guilty of having operated as a pilot in command while under the influence of intoxicating liquor and was also guilty of having contravened various rules and standards in the workplace. The employee was scheduled to make a return flight from Cape Town to East London the following day at 12h05 and had spent the previous evening in various pubs, consuming large quantities of beer until 05h00 that morning. The employee testified that he had consumed eight beers between 21h45 and 03h00 but he denied that he had drunk excessively or had been under the influence of alcohol when he reported for duty. Company policy stated that a flight crew member shall not consume alcoholic beverages within eight hours of a flight or standby duty, and shall avoid excessive alcohol intake for twenty-four hours before a flight. The employer made use of allegations by the crew and the opinion of an expert witness that the employee contravened these rules. The court held that the degree of intoxication should be judged more conservatively if the task entrusted to the person is critical from a safety viewpoint.

In 2011 the Labour Court in *Transnet Freight Rail v Transnet Bargaining Council & others*⁴⁷ gave a fresh perspective on whether alcohol abuse should be treated as misconduct rather than incapacity if the employee is not an alcoholic. The applicant was employed as a yard official from 27th May 2002 until she was dismissed on 29th May 2009. The position that she held was a critical from a safety viewpoint and therefore being under the influence of alcohol at work constituted serious misconduct in terms of the disciplinary code. On the date of the dismissal the applicant already had a valid serious written warning for being under the influence of alcohol at work. During the arbitration proceedings, the applicant claimed that she was not an alcoholic or suffered from alcoholism.

Grogan stated the following in *Workplace Law*⁴⁸:

‘...The dividing line between addiction and mere drunkenness is sometimes blurred. An employee who reports for duty under the

⁴⁷ *Transnet Freight Rail v Transnet Bargaining Council & others* (2011) 32 ILJ 1766 (LC).

⁴⁸ John, Grogan *Workplace law* 9 ed (2007) 226 and 266.

influence of alcohol or drugs may be charged with misconduct. Whether such an employee should be considered for counselling or rehabilitation depends on the facts of each case. These steps are generally considered unnecessary if employees deny that they are addicted to drugs or alcohol, or that they were under the influence at the time. Rehabilitative steps need not be undertaken at the employer's expense, unless provision is made for them in a medical aid scheme.'

Steenkamp⁴⁹ J stated that once a commissioner finds that the employee is not an alcoholic it is necessary to consider whether the sanction applied by the employer, was reasonable and justified in the circumstances. The law relating to misconduct should thus be applied and not that of incapacity.

The *Transnet* case also clearly stated that:

- Personal problems of an employee should not be confused or seen as an excuse for the abuse of alcohol. Alcohol abuse does not imply that the person is an alcoholic and that the misconduct should be treated as incapacity.
- Personal issues can cause the employee to abuse alcohol and can therefore aggravate any existing disease. But if an employee does not suffer from a disease such as alcoholism he or she cannot be treated as if they are merely because they have personal issues.⁵⁰

According to the Labour Court ruling the arbitrator placed an unfair burden on the employer; the reasoning used by the arbitrator made the distinction between incapacity and misconduct for alcohol-related matters meaningless. If this ruling would be applied, then all cases involving employees under the influence of alcohol should be treated as suffering from alcoholism, irrespective of whether they are truly ill or not and this should not be the case.⁵¹

⁴⁹ *Transnet Freight Rail* supra note 45.

⁵⁰ Ibid.

⁵¹ Ibid.

The facts in *Builders Trade Depot v Commission for Conciliation, Mediation & Arbitration & others*⁵² were substantially similar to those in *Transnet*. The second arbitrator in the *Builders case* found that the dismissal of the employee was unfair, although the employee had been drinking on duty and had a valid written warning for the same offence. The employee denied that he had a drinking problem. The arbitrator argued that the employee was intoxicated to such an extent that he could not perform his duties as a salesman properly. The dismissal was found to be substantively unfair. The arbitrator ruled that the employee was not under the influence of alcohol “to such an extent that he could not perform his duties properly” and thus his offence was not serious enough to warrant dismissal. The Labour Court found that the finding of the arbitrator was so unreasonable that no reasonable arbitrator could have come to the same conclusion.⁵³ The arbitrator did not apply the principles as set out in *Transnet*. Steenkamp J concluded that the first arbitration award stands and that the dismissal of the employee was in fact fair.

The following can be summarised from *Transnet* and *Builders* judgments:

- Employers are not obliged to investigate, in each alcohol-related case, whether the employee is an alcoholic or not.
- If the employee specifically denies being an alcoholic and having consumed alcohol then the onus is on the employee to seek the employer’s assistance.
- If the employee is an alcoholic then (but only then) the employer is obliged to treat that employee as incapacitated.
- If the employee did not seek the employer’s help or denied that he or she is an alcoholic, then all such alcohol-related incidents should be treated as cases of misconduct.⁵⁴

⁵² *Builders Trade Depot v Commission for Conciliation, Mediation & Arbitration & others* (2011) 33 ILJ 1154 (LC).

⁵³ *Sidomo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 12 BLLR 1097 (CC).

⁵⁴ SA Labour Guide ‘Alcohol abuse: misconduct or incapacity’ available at <http://www.labourguide.co.za>, accessed on 13 May 2013.

4.2 The treatment of alcoholism: the extent of the employer's duty

In *Jansen and Pressure Concepts*⁵⁵ the employer's duty to assist and accommodate the employee and his needs was defined. The employee had poor time-keeping skills that led to his dismissal. The reason for his poor time-keeping skills was an alcohol-related problem. The employer did not give proper consideration to this problem and therefore the arbitrator found that the employer had failed in his duty to accommodate the employee's problem.

The arbitrator found that:

- The employer failed to apply the principles of progressive discipline;
- failed to apply the rules in the workplace consistently; and,
- failed to make an attempt to assist the employee with his alcohol problem.

Jansen illustrates that the employer does have a duty to provide assistance, although item 10 (3) of The Code of Good Practice in the LRA refers to '...appropriate steps for an employer to consider'. It is clear that even though legislation does not force employers to provide assistance, arbitrators still frown upon cases where the employer decided against assisting the employee. The extent to which arbitrators expect the employer to provide support was an issue that arose in *Portnet (Cape Town) and SA Transport & Allied Workers Union on behalf of Lesch*.⁵⁶ The employee was dismissed for serious misconduct that related to being under the influence of alcohol while on duty and verbally abusing his supervisor. The union and the company were aware of the employee's alcoholism and moreover, the company offered him assistance numerous times. The employee however denied that he had an alcohol-related problem and refused assistance. The employee was also aware of the disciplinary code and knew that it was against policy to work under the influence of alcohol. He knew of the consequences that this could have for him and other employees. The dismissal was found fair.

⁵⁵ *Jansen and Pressure Concepts* (2005) 26 ILJ 2064 (BCA).

⁵⁶ *Portnet (Cape Town) and SA Transport & Allied Workers Union on behalf of Lesch* (2002) 23 ILJ 1675 (ARB).

In making this finding the arbitrator ruled that:

- the dismissal was justified;
- the employee had numerous warnings for the same conduct; and.
- incapacity procedures were irrelevant because of the disposition of the employee.

According to the arbitrator the company did all that it reasonably could to assist the employee and so the dismissal was justified for misconduct.

In the *Lesch* case it is clear that the employer cannot force the employee to undergo rehabilitation. The employer can demand that, if the employee states that he or she had no problem, then:⁵⁷

- that employee should stop the offending habit immediately,
- or undergo a rehabilitation programme,
- or face dismissal if the conduct occurs again.

As with any other dependency problem, the alcohol abuser is not always willing to accept that he or she has a problem. What is the duty of the employer if an employee insists that he or she has no problem? In *Spoornet v SARHWU*⁵⁸ the employee denied that he consumed liquor and refused counselling and rehabilitation. He stated that he did not have a drinking problem. He was found guilty of misconduct and dismissed. The dismissal was found to be fair even though it was his first offence and he did not have a previous disciplinary record.

In the *Transnet and Builders Depot* rulings, the judge emphasised that it is not an employer's duty to investigate every case of alcohol abuse to find whether the employee actually has an alcohol problem. However, in an earlier case, *SALSTAFF v Metrorail*,⁵⁹ the opposite was found. Here, the employee was dismissed on several charges of being under the influence of alcohol while on duty. The arbitrator found that the employee regularly worked shifts of

⁵⁷ SA Labour Guide op cit note 42.

⁵⁸ *Spoornet (Ermelo) v SARHWU obo Nkosi* (1998) 1 BALR 108.

⁵⁹ *SALSTAFF obo Venter v Metro Rail* (1999) 1 BALR 59.

eighteen hours without a break and such long hours were not normal. Those working hours did not allow the employee any recreational time and the employer should have addressed the root of the problem. Thus, the employer should have investigated the reasons for the alcohol abuse and then should have adjusted his working hours.

In conclusion, when an employer deals with an employee who admits to alcoholism, the employer may take into account:

- unsuccessful attempts at rehabilitation or employee assistance programmes,
- the relevant costs involved and
- the disruptions to operations due to absenteeism.

Employers may therefore decide that dismissal is the only route to follow as in *PPWAWU v Nampak Corrugated Containers*.⁶⁰

In an earlier judgment with specific reference to the Agricultural sector the court made a reference to the use of the 'dop' system in the agricultural community and noted that it is the employer's duty to ensure that employees are fit for their daily duties.⁶¹ In this case the court also noted that rehabilitation should be kept in mind when deciding on an appropriate sanction regarding alcohol in the workplace especially if the employee has a history of alcohol abuse. The Industrial Court in *Booyesen v Helderberg (Pty) Ltd* in 1994 noted that agriculture differs from other industries, because the employer provides accommodation and living areas at the workplace, and so a community structure is created. The court also emphasised that the 'dop system' encouraged worker dependency on alcohol and so consideration should be given to the working and domestic environment of the farm worker. The farm worker differs from industrial employees because.⁶²

⁶⁰*Nampak Products Ltd t/a Nampak Corrugated Containers (Western Province) and PPWAWU* (1992) 13 ILJ 1292 (ARB).

⁶¹ *Esau & another v Wynland Berdery Belange (Edms) Bpk h/a Zetler Bros* (1995) 4 LCD 89 (ALC).

⁶² *Booyesen v Helderberg (Pty) Ltd* (1994) 3 LCD 189 (IC).

- (i) a narrower relationship exists between the farm community and the employer;
- (ii) heads of families, as well as other family members, are frequently employed by the very person who is also the owner of the land and their homes;
- (iii) the employer has a greater say over the fundamental choices of the employees;
- (iv) there is a degree of dependency that forces employees to accept and enforce community values; and,
- (v) there is a narrower distinction between the on-duty and off-duty behaviour of employees.

The farmer and farm worker have an employment relationship which binds them. Nevertheless, because of the history of this industry and other factors, it is not easy and straightforward to deal with problems in the agricultural workplace, especially substance abuse problems. Any reference to the history of this industry and the former role of farm workers as slaves, might draw attention to a legacy of abusive managerial control. However abuse may not only be physical but also verbal. Abusive supervision has been associated with lower job and life satisfaction, lower normative and affective commitment, greater conflict between work and family, psychological stress and a dysfunctional resistance to managerial control. These outcomes are likely to lead to employees with drinking problems.⁶³ This places an additional duty on the employer to align managerial style in a way that prevents or decreases abusive supervision.

4.3 The correct disciplinary procedures/remedial action for misconduct and incapacity

In terms of s 188 of the LRA, if an employer is to dismiss an employee, the dismissal has to fit into one of three categories. Thus, the employer is required to show that the dismissal was fair taking into account the employee's conduct

⁶³ Bamberger op cit note 3.

or capacity or that the dismissal is based on the employer's operational requirements.⁶⁴

The procedures given in the Code of Good Practice are generally similar, but differ for dismissal for misconduct and incapacity. Misconduct according to the Code refers to the breach of a valid or reasonable standard that:

- was known or
- could have been expected to have been known;
- has been consistently applied; and,
- dismissal was an appropriate sanction.

In the case of incapacity (poor work performance), the Code refers to the failure to meet a required performance standard which the employee was aware of or could have been expected to be aware of.⁶⁵

Steenkamp J, in *Transnet Freight Rail v Transnet Bargaining Council*, agreed that a commissioner should use the following criteria, plus any other criteria considered relevant, in determining the fairness of dismissals that involve reporting for duty under the influence of alcohol:⁶⁶

1. Did the employee know of the rule and was the employee aware that breaching it could result in dismissal?
2. Did the employee wilfully commit the misconduct?
3. The nature and responsibilities of the employee's job function.
4. The basis for the employee's challenge to dismissal.
5. The importance of the rule breached.
6. The principles and necessary application of progressive discipline and the importance of consistency.
7. The employee's disciplinary record, including the presence or lack of any relevant valid warnings or final warnings that may be in effect.

⁶⁴Rycroft A J 'Blurring the lines between incapacity, misconduct and operational requirements: Zillo v Maletswai Municipality & others' (2009) *SA Mercantile L J* 1-7.

⁶⁵ Ibid.

⁶⁶ *Transnet Freight Rail* supra note 45 provide page number.

8. The harm (or potential to bring harm) as a result of the misconduct.

Almost all academic publications advise that employers should adopt an alcohol policy and that employees should be informed of it.⁶⁷ When applying discipline in an alcohol-related case, management has to follow a procedurally fair process as stipulated in Schedule 8 of the LRA.⁶⁸ Does this mean that management's prerogatives concerning discipline are restrained? In *Black Mountain v CCMA*⁶⁹ the employee operated a 50-ton vehicle and caused an accident. It was found that the alcohol in his system was far above the legal limit for driving and he displayed apparent symptoms of intoxication. After a disciplinary enquiry he was dismissed. At arbitration the dismissal was found to be substantively and procedurally unfair. The employer had a written Standard Procedure for Alcohol and Drug related behaviour and according to that procedure, the employee should have been assessed by a therapist before being charged with the misconduct. Justice requires employers to comply with the standards that they have adopted. The practice in the Agricultural sector should be that, even though there might be no policy in place, assistance should be offered because of the nature of the working relationship and the history of the sector.

Not all employers are labour law experts or lawyers and so the distinction between incapacity and misconduct can be blurred. Thus, the wording or description of the charges formally stated on the notice of the hearing may not reflect the true transgression. The court argued in *Zililo v Maletswai Municipality*⁷⁰ that the reason for dismissal should be based on the charges formally preferred against the employee. This is in order to establish a direct link between the charges, the evidence led and the finding on the charges. The Labour Court held:⁷¹

⁶⁷ Mcann *et al* op cit note 27.

⁶⁸ Labour Relations Act 66 of 1995, Schedule 8.

⁶⁹ *Black Mountain v CCMA & others* (2005) 1 BLLR 0001 (LC).

⁷⁰ *Zililo v Maletswai Municipality* op cit note 64.

⁷¹ *Ibid.*

'Failure to undertake this analysis amounts to failure to apply the relevant legal principle and thus amounting to a fundamental error of law. Consequently the employee party would be denied a fair hearing, thus making the reward reviewable.'

Rycroft argues, however, that an arbitrator should not decide a matter solely on whether the classification of the misconduct or incapacity was correct; one reason is the basic similarities of the requirements and processes. Instead the basis for the decision should be whether a fair procedure was applied and a fair reason for dismissal given, as called for in s 188 of the LRA.⁷² Rycroft's argument is based on moving away from the rigid 'criminal justice model of workplace procedure' as indicated in *Avril Elizabeth Home for the Mentally Handicapped v CCMA*. Here the Labour Court held:⁷³

'When the code refers to an opportunity that must be given by the employer to the employee to state a case in response to any allegations made against that employee, which need not be a formal enquiry, it means no more than that there should be dialogue and an opportunity for reflection before any decision is taken to dismiss. In the absence of exceptional circumstances, the substantive content of this process as defined by item 4 of the code requires the conducting of an investigation, notification to the employee of any allegations that may flow from that investigation, and an opportunity, within a reasonable time, to prepare a response to the employer's allegations with the assistance of a trade union representative or fellow employee. The employer should then communicate the decision taken, and preferably communicate this in writing. If the decision is to dismiss the employee, the employee should be given the reason for dismissal and reminded of his or her rights to refer any disputed dismissal to the CCMA, a bargaining council with jurisdiction, or any procedure established in terms of a collective agreement (see item 4(1) and (3)).'

⁷² Rycroft op cit note 64.

⁷³ *Avril Elizabeth Home for the Mentally Handicapped v CCMA and others* (2006) (LC).

4.4 The right to set standards and to test

An arbitrator can only interfere with the right of an employer to test for alcohol levels and to set standards within the workplace, if it is found during the arbitration that these employer rights were applied inconsistently or unfairly. The employer is entitled to set consistent and fair standards of conduct for employees.⁷⁴ In *Arangie and Aberdare Cables*⁷⁵ the employee refused to obey a valid instruction from a superior to leave the premises and was dismissed for insubordination. The policy of the company was to do random breathalyser tests on employees. Any employee suspected of being under the influence of alcohol was not allowed onto the premises because that person might be a danger to himself and other employees. The applicant refused to submit to the breathalyser test, because he stated that the readings were false, but he could not substantiate why he claimed this.

The commissioner found that the results of a blood test require longer than a day and so this test is not suitable for the workplace. The issue in this *Aberdare* case was whether the employee contravened a valid rule or practice of the company by refusing to blow into the alcohol scanner and by refusing to leave the company premises afterwards.

Item 7(b) of Schedule 8 of the LRA should be referred to when determining the fairness of a dismissal.⁷⁶ Thus:

‘if a rule or standard was contravened, whether or not –

- (i) the rule was a valid or reasonable rule or standard;
- (ii) the employee was aware, or could reasonably be expected to have been aware, of the rule or standard;
- (iii) the rule or standard has been consistently applied by the employer;
and
- (iv) the dismissal was an appropriate sanction for the contravention of the rule or standard’.

⁷⁴ *Escom v Mokoena* (1997) 2 LLD 214 (LAG).

⁷⁵ *Arangie and Aberdare Cables* (2007) 28 ILJ 249 (CCMA).

⁷⁶ Labour Relations Act 66 of 1995, S 8 item 7(b).

The dismissal of an employee was found to be procedurally and substantively fair in *National Union of Metalworkers of SA v Haggie Wire & Strand*.⁷⁷ The alcohol in the blood level of the employee was found to be '0.115 per cent and 0.116 per cent' setting him over the limit in the company policy of '0.03 per cent'. This was not the first offence of the employee and he was previously disciplined for contravening the same rule. The arbitrator emphasised that dismissal cannot be seen as a punishment, but merely as the employer exercising his contractual right to terminate the employment services because of the employee's breach of the contract of employment. The ultimate test for dismissal remains whether the continuation of the employment relationship would be intolerable, due to the trust that has been broken down by the employee's misconduct.⁷⁸ Dismissal can be seen as a form of risk management to prevent other employees from committing the same misconduct and this position was elaborated upon by Conradie JA:⁷⁹

'A dismissal is not an expression of moral outrage: much less is it an act of vengeance. It is, or should be, a sensible operational response to risk management in the particular enterprise. That is why supermarket shelf packers who steal small items are routinely dismissed. Their dismissal has little to do with society's moral opprobrium of a minor theft; it has everything to do with the operational requirements of the employer's enterprise.'

The *Haggie* judgment shows that although there is an employment relationship between the parties, the employer still remains responsible and liable for the economic wellbeing and survival of the company. Management's prerogative is therefore a vital role within the workplace.

In *National Union of Metalworkers of SA v Automotive SA (Pty) Ltd*⁸⁰ the applicant was employed as a storeman who occasionally drove vehicles.

⁷⁷ *National Union of Metalworkers of SA on behalf of Motsele and Haggie Wire & Strand* (2006) 27 ILJ 871 (BCA).

⁷⁸ *NUMSA obo Davids/Bosal Africa (Pty) Ltd* (1999) 11 BALR 1327.

⁷⁹ *De Beers Consolidated Mines Ltd v CCMA & others* (2000) 21 ILJ 1051 (LAC).

⁸⁰ *National Union of Metalworkers of SA on behalf of Mbali and Schrader Automotive SA (Pty) Ltd* (2006) 27 ILJ 865 (BCA).

Alcohol was detected on his breath and after submitting to a breathalyser test the alcohol in his bloodstream was found to be above the 0.05 per cent prescribed in the Road Traffic Act 1989. The arbitrator argued that according to common law, dismissal for an alcohol-related offence must take the following into account:

- the nature of the job; and
- the employee's state of intoxication.
- whether the employee was able to render services in accordance with the minimum standards as prescribed in the contract of employment.

The employee only smelled of alcohol and he did not behave in any manner out of the ordinary. There was no evidence that he was unable to perform his required duties as a store man. Driving was not listed as a responsibility in the job description of the employee and on the day in question he did not drive any vehicle. The charge against the employee was that of drunkenness/being under the influence of alcohol. That charge implies that the employee was unable to perform any duties and that he presented a danger to himself and to fellow employees.

The employer cannot just rely on the results of a breathalyser test to prove drunkenness, because the breathalyser only tests the presence of alcohol within the bloodstream.⁸¹ The employee should have been charged instead with 'presence of alcohol in his bloodstream' and by combining that with a zero-tolerance policy, the dismissal might have been upheld.

On the issue of testing and the right to test, can alcohol abuse be reduced if medical testing of applicants is allowed during the recruitment process? The Employment Equity Act (EEA) 55 of 1998 defines a medical test as 'any test, question, inquiry or other means to ascertain whether an employee had any medical condition'. Section 7 of the EEA allows employers to make use of medical testing for employees or applicants if it is justifiable in the light of the

⁸¹ *Mondi v Dlamini* supra note 36.

following: medical facts; employment conditions; social policy; the fair distribution of employee benefits or the inherent requirements of the job.⁸² Employers can make a compelling argument for random testing to ensure that employees are not intoxicated at the workplace, this is in order to adhere to the employer's duty to provide a safe working environment for employees, in terms of OHSWA regulations.

4.5 The Zero-tolerance approach and the courts

Misconduct involving dishonesty can include fraud, corruption, theft and misrepresentation. When comparing such misconduct to alcohol-related offences within the workplace, the courts generally consider the effect that the misconduct had on the continuation of the employment relationship.⁸³ In cases of theft it was found that the size of the theft was not material in considering whether the employment relationship was now intolerable as a result of that theft. The courts view dismissals for theft as a matter of risk management and not moral judgement. In *Miyambo v CCMA*⁸⁴ the latter was illustrated. The employee removed scrap metal without permission of the employer and was dismissed for theft. The Labour Appeal Court upheld the dismissal and conveyed that trust is of great importance in the employment relationship and that the employer had a policy of zero tolerance for theft.

The views of the courts evolved and it is no longer sufficient to prove that the conduct was dishonest. The Supreme Court of Appeal in *Edcon Ltd Pillemer NO*⁸⁵ upheld that the employer should give evidence to show that the conduct of the employee caused a breach in the trust relationship. Such evidence would include the following: the nature and scope of the duties; the position of the employee within the hierarchy; the importance of trust in the position; the

⁸² Abrahams E & Pepler S 'How alcohol and drug abuse can be eliminated from the workplace' available at <http://www.bowman.co.za/News-Blog/Blog/eliminating-alcohol-and-drug-abuse>, accessed on 26 July 2013.

⁸³ van der Walt A J, R le Roux & A Govindjee *Labour Law in Context* (2012) Pearson.

⁸⁴ *Miyambo v CCMA* (2010) 31 ILJ 2031 (LC).

⁸⁵ *Edcon Ltd v Pillemer NO* (2010) 1 BLLR 1 (SCA).

performance of the employee's work and the negative effect that the dismissal of the employee will have on the operations of the employer.⁸⁶

The writer's own experience is that misconduct cases involving alcohol mostly include theft of alcohol as well. This applies especially in cases containing cellar hands in wineries. Most if not all employers within the Agricultural sector feel very strong about a zero-tolerance policy with regard to intoxication and theft.

A zero-tolerance policy does not imply immediate dismissal if an employee has been charged and found guilty of being under the influence of alcohol or drugs at work. Any medical test or procedure conducted by the employer also needs to verify this. The employee in *Yende and Cobra Watertech*⁸⁷ was dependent on the drug cannabis. The employer had tested the employee on two occasions and found that he had cannabis in his system. Instead of dismissal he was sent to SANCA for rehabilitation. On the second occasion he was tested after rehabilitation and it was found that he still had a drug dependency that had not decreased since rehabilitation. He was charged for being 'under the influence of drugs whilst performing his duties' and was dismissed. The arbitrator found the dismissal to be unfair. The employer had no evidence that the employee was under the influence whilst performing his duties. The test the employer applied was not to ascertain whether the employee was performing his duties whilst under the influence, but rather showed that over a period of time his dependency had not diminished. There was no evidence to show that he was underperforming and there were no other tests done to show that he was under the influence; such tests could have included asking questions, smelling his breath and getting him to do exercises before filling in a check sheet. This case illustrates that it has become increasingly important to screen-test job applicants before employing them in order to detect substance abuse.

⁸⁶ Ibid.

⁸⁷ *Yende and Cobra Watertech* (2004) 25 ILJ 2412 (BCA).

The Labour Court in *Taxi-Trucks Parcel Express (Pty) Ltd v National Bargaining Council for the Road Freight Industry & others*⁸⁸ found the sanction of dismissal for the employee to be too harsh and ordered reinstatement; this finding was in terms of s 145 of the LRA. The employee, Mr Caluza went to work whilst he was still under the influence of alcohol that he had consumed the night before. The breathalyser test indicated that his blood alcohol level was 0.15g/100ml; three times over the legal driving limit. Colleagues and management observed that he was smelling of alcohol and his eyes were bloodshot but he was not slurring and could have a sensible conversation. He was employed as a general worker and his duties included loading and off-loading vehicles, sorting freights and occasionally accompanying vehicles on deliveries. On the day in question he was only loading tyres onto trucks. Mr Caluza had been employed by the employer for about seven years and had a clean disciplinary record. Taxi-Trucks Parcel Express had a zero-tolerance policy with regard to being under the influence of alcohol at the workplace.

The policy of Taxi-Trucks in misconduct cases was to follow the disciplinary code and this would lead to a hearing. The offence was classified by the disciplinary code as one that “may result in a final warning or dismissal”. The arbitrator found the zero- tolerance approach to be unfair in this instance, bearing in mind the job responsibilities of the particular employee; the arbitrator was of the opinion that the trust relationship had not been irretrievably broken down. Progressive discipline could have been applied and it was found that the employee did not act to the detriment of the employer and also showed remorse.

Steenkamp J made clear distinctions between the *Taxi-Trucks* case and the *Transnet* case by emphasising that the employee in the *Transnet* case had a safety critical position and was on a written warning for a similar offence. Mr Caluza was not performing ‘skilled, technically complex and highly responsible

⁸⁸ *Taxi-Trucks Parcel Express (Pty) Ltd v National Bargaining Council for the Road Freight Industry & others* (2012) 33 ILJ 2985 (LC).

tasks'.⁸⁹ The writer agrees with Steenkamp J that a zero-tolerance approach could not be applied to a clerk in the same way as to a driver or a pilot. Each case should be weighed on its own merits and dismissal as an appropriate sanction based on the breakdown of the trust relationship should be taken into consideration by the employer. A commissioner may not interfere with an employer's discretion to dismiss, but the employer should comply with the law on the standard of fairness as in item 7(b) (iv) of the Code of Good Practice: Dismissal.⁹⁰

The employee in *South African Breweries Ltd v CCMA & others*⁹¹ was employed as a process operator. The employee allegedly opened a bottle of beer and drank some of it whilst on duty. He was charged and later dismissed for drinking alcohol on duty, unauthorised removal and consumption of SAB products on site and operating machinery after having consumed alcohol in the workplace. The arbitrator found that the dismissal was substantively unfair and ordered reinstatement prospectively without back pay together with a final written warning valid for twelve months. Although South African Breweries takes a tough stance on alcohol-related misconduct, the arbitrator pointed out that the following factors, as stipulated by the Constitutional Court in *Sidumo*, should be taken into consideration to determine if a dismissal was *fair*.⁹²

- (i) The totality of circumstances;
- (ii) The importance of the rule that had been breached;
- (iii) The reason the employer imposed the sanction of dismissal;
- (iv) The harm caused by the employee's conduct;
- (v) Whether additional training and instruction may result in the employee not repeating the misconduct;
- (vi) The effect of the dismissal on the employee; and
- (vii) The employee's service record.

⁸⁹ *Taxi-trucks* supra at note 85.

⁹⁰ *Communication Workers Union on behalf of Van Wyk and SA Post Office (2007) 28 ILJ 966 (CCMA)*.

⁹¹ *South African Breweries Ltd v CCMA & others (C 665/2011) (2012) ZALCCT 17*.

⁹² *National Union of Mine Workers & Others v Samancor Ltd (2011) 32 ILJ 168 (SCA)*.

An employer therefore needs to be certain that all the above mentioned criteria have been taken into account in order to be sure that the dismissal was substantively fair. In English law the criteria are different for an employer who would like to avoid liability for unfair dismissal claims. Serious misconduct relating to drug and alcohol offences usually justifies fair dismissal as long as the employer ensures that the criteria of the *Burchell* test are met. Thus, medical advice should also be obtained in cases of misconduct due to alcohol or drug related offences.⁹³ The *British Home Stores v Burchell Ltd* case is frequently used as a precedent in determining whether the duties of the employer need to be clarified when conducting an investigation. According to the ruling in that case, the employer has to apply the following three criteria. First, the employer must establish a belief that the employee committed the act in question. Second, that belief must be based on reasonable grounds and third, the true facts should be established by as much investigation into the matter as was reasonable in the circumstances.⁹⁴ According to English law, the employer also has to establish whether an alcohol-related incident is misconduct or incapacity. If the employee should refuse treatment and the misconduct continues as part of the illness, then the employer is entitled to dismiss the employee. Misconduct includes excessive absences due to the alcohol dependency problem. Such dismissal will be ruled as fair if the following steps are followed:⁹⁵

- (i) The employer can testify that he was aware of the absence record and the reasons for such absence;
- (ii) A fair procedure by giving the employee the opportunity to explain his/her absences;
- (iii) Warnings was given relating to the problem as to the disciplinary action that will be taken if there are future absences; and
- (iv) Medical advice about the drug/alcohol situation was obtained with regard to the employee to satisfy themselves that nothing more can reasonably be done.

⁹³ Yew, Julian *Termination of Employment* (Bloomsbury Professional) United Kingdom, (2013) available at <http://uk.practicallaw.com/books/9781845928339/chapterc1#TTOE-c01-UID34>, accessed on 16 August 2013.

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

The employee in *South African Breweries Ltd v CCMA & others* generally had an unblemished disciplinary record in his twenty-two years of service to SAB. There was no evidence that the employment relationship was irretrievably broken. The breathalyser test registered 0.00% of alcohol, which implied that the employee had not placed SAB at risk. The breathalyser test was administered seven hours after the employee drank from the bottle. The evidence however showed that he only took a few sips of beer. The disciplinary guidelines of SAB specify that it is an offence to work while 'being intoxicated and/or under the influence of alcohol' and this is taken to mean that a breath alcohol content of more than 0.24 mg/1000ml is prohibited.

The writer does not agree that progressive discipline should have applied in this case. Dishonesty was part of the allegations as the employee deliberately took the beer that did not belong to him and drank whilst on duty. He knew that this was against policy. This breach should have been seen as an aggravating factor and so dismissal should be seen as fair. The fact that he had been working for some time at SAB also constitutes as an aggravating factor, because he knew the policies and procedures. The fact that he lied about what was in the bottle that he drank, adds to his dishonesty. This will certainly render an employment relationship intolerable.

The inconsistency in jurisprudence relating to zero-tolerance was again illustrated in *Goodyear SA (Pty) Ltd v CCMA & others*⁹⁶. The employee was called five hours before his shift and asked to come to work early because of a shortage of employees. The employee was at that moment sleeping off the effects of a party. The employee was subjected to a breathalyser test when he arrived at the workplace. He failed the breathalyser test. The employee was on final warning at the time. The dismissal was found unfair by the Labour Appeal Court. The court argued that the employee had done the company a favour by coming to work early, and had been exposed to 'subtle pressure' to do so.

⁹⁶ *Goodyear SA (Pty) Ltd v CCMA & others* (2004) 1 BLLR 7 (LAC).

In conclusion the courts seemed to take into account extenuating circumstances, such as years of service, previous offences and the trust relationship when determining if dismissal was a fair sanction. It is evident from jurisprudence that a zero tolerance policy cannot be applied the same across the board. The key duties and responsibilities of the employee will also determine and contribute to the seriousness of the intoxication offence.

4.6 Proving intoxication

When proving intoxication at the workplace, can employers say with confidence that, if the blood alcohol level is above a certain percentage then, the employee is intoxicated? Should the policy prescribe a certain alcohol level that should not be exceeded in the workspace or is it safe to judge each case against the 0.5 per cent currently indicated as the legal limit by the Road Traffic Act? In *Astore Africa (Pty) Ltd v CCMA & others*⁹⁷ the employee, a truck driver, was dismissed for being drunk on duty. The arbitration award at the CCMA ordered reinstatement of the employee, because the employer failed to prove that the driver was incapable of driving.

The *Astore* case indicates that more than one factor must be taken into consideration when intoxication needs to be proved. It is not merely enough to say that the employee smelled of alcohol or that the breathalyser reading was over 0.5 per cent. The degree of intoxication should be tested and that can be done by means of a breathalyser test or blood test, preferably, in the presence of a witness for either party.⁹⁸ The employer should also record in writing the general appearance and general attitude of the employee and this should be signed off by the observer and a witness who also observed it.⁹⁹ In *National Union of Metalworkers of SA v Automotive SA (Pty) Ltd* it was stated that the clinical proof of drunkenness involves factors such as the classical tell-tale signs; these include the smell of alcohol, slurred speech, aggression,

⁹⁷ *Astore Africa (Pty) Ltd v CCMA & others* (2008) 1 BLLR 14 (LC).

⁹⁸ SA Labour Guide op cit note 42.

⁹⁹ Ibid.

staggering, bloodshot eyes, passing out and disorientation.¹⁰⁰ A breathalyser test shows only the blood alcohol level and not whether the person was under the influence of alcohol.¹⁰¹

The question arises: what if the employee has a reading of 0.49 per cent on a breathalyser? Does this mean that the employee is intoxicated even though the reading is below the legal limit prescribed in the Road Traffic Act? Should this employee be permitted to continue working? As discussed earlier, Section 2 of the Occupational Health and Safety Act states that an employer may not permit an employee to continue working if the employee 'appears to have' consumed alcoholic liquor.¹⁰²

Another important aspect to take into consideration is the alcohol policy of the employer. If the alcohol policy states that the company has a zero-tolerance policy limit for alcohol, then everybody should adhere to that set standard. This was confirmed in *SACCAWU v A1 Fisheries*¹⁰³ where it was ruled that the employer only had to prove that alcohol had been consumed; the amount was not relevant. This however does not mean that it would justify a dismissal if the employee does not adhere to the policy. As confirmed in the previous section on zero-tolerance and with specific reference to the *SAB*¹⁰⁴ case several factors should be taken into consideration before a dismissal could be justified.

Earlier jurisprudence also considered the debate of the validity of a breathalyser test; here, *Castle Lead Works (Tvl) (Pty) Ltd and National Union of Metalworkers of SA* is relevant.¹⁰⁵ In *Castle Lead*, breathalysers were not considered as sufficient proof of evidence, because of certain inherent shortcomings. The focus slowly shifted to the administration procedure for the

¹⁰⁰ NUMSA obo Mbali supra note 77.

¹⁰¹ Tsoedi v Topturf Group (1999) 4 LLD 533 (CCMA).

¹⁰² Occupational Health and Safety Act 85 of 1993.

¹⁰³ SACCAWU obo Ntonga & another v A1 Fisheries (1999) 8 BALR 943.

¹⁰⁴ South African Breweries supra at note 91.

¹⁰⁵ Castle Lead Works (Tvl) (Pty) Ltd and National Union of Metalworkers of SA (1989) 10 ILJ 776 (ARB).

breathalyser tests as indicated by the arbitrator in *Price Club and CCAWUSA*:¹⁰⁶

‘When a breathalyser test is used it would seem essential that a witness be present for the employee. It would also seem desirable that there be a witness for the management. Here there was, what the assistant manager claimed to be an independent, neutral witness in the form of the head of the security. Security was supplied by an outside company, but it is likely that the employees would have seen security personnel as being part of management. If at the end of the test there would have been a paper signed by the person conducting the test, in this case the assistant manager, and by a witness for management, in this case the head of security, and if it had been signed by the employee and his witness there would have been no dispute about the validity of the test.’

The correctness of a breathalyser reading will often be challenged by employees who have been dismissed because the reading indicated alcohol within the bloodstream. In *Goba and Clubland* the employee challenged the fairness of his dismissal based on a reading of 0.38 per cent.

The commissioner ruled that employers should lead evidence on:

- the nature of the device,
- the qualifications of the tester,
- the significance of the reading and
- proof that the test was properly administered. Such proof should be presented by a person who is an expert in the field.¹⁰⁷

A medical doctor testified in *National Union of Mineworkers and Palaborwa Mining Co* to explain the readings of the toxication report and to explain the process of how alcohol is metabolised in the body.¹⁰⁸ Testimonies by an expert such as a doctor in the above mentioned case will strengthen the testimony when proving intoxication.

¹⁰⁶ *Price Club and CCAWUSA* (1988) ARB 8.11.5.

¹⁰⁷ *Goba and Clubland* (2002) 23 ILJ 1300 (CCMA).

¹⁰⁸ *National Union of Mineworkers on behalf of Thuke and Palaborwa Mining Co* (2010) 31 ILJ 1270 (CCMA).

*In Tanker Services (Pty) Ltd v Magudulela*¹⁰⁹ the LAC ruled that when dealing with intoxication, the degree of intoxication should be taken into consideration before labelling an employee as 'under the influence of alcohol'. The application used to test the degree of intoxication would depend on the nature of the job of the employee and a stricter test may apply if the job entails a higher health and safety risk. The LAC in *Palaborwa Mining Co Ltd v Cheetham & others* referred to the employer's strict policy regarding offences relating to alcohol and dismissal of first time offenders; the LAC held that this policy was justified in the light of the company's duty to ensure the safety of its employees.¹¹⁰ What is the situation if a company only disciplines employees who fail to do their jobs, but does not discipline employees who come to work intoxicated? Does that not create the impression that the company turns a blind eye to social and economic problems and therefore accepts alcoholism? In *NUMSA and John Thompson Africa (Pty) Ltd*¹¹¹ the commissioner found that the employer knew that the employee was drunk when he arrived at work. Nevertheless, the employer allowed the employee to continue with his work, although he was interfering with the machinery and other employees. The signal that the company sent was that it does not matter if employees come to work drunk, as long as they can do their work; employees who fail to do their work would be disciplined. It is difficult to change a pattern of behaviour which has become entrenched, but the employer has a duty to attend this.

Employees must be treated equally when found to be intoxicated. It is unfair to be harsher towards an employee who has been working for a few hours, than towards an employee who was prohibited from entering the premises or from starting work.¹¹² Dr Grogan held the following in *NUMSA obo Davids/Bosal Africa (Pty) Ltd*:

¹⁰⁹ *Tanker Services (Pty) Ltd v Magudulela* (1997) 12 BLLR 1552 (LAC).

¹¹⁰ *Palaborwa Mining Co Ltd v Cheetham & others* (2008) 29 ILJ 306 (LAC).

¹¹¹ *NUMSA and John Thompson Africa (Pty) Ltd* (1997) 2 LLD 155 (CCMA).

¹¹² *NUMSA obo Davids/Bosal Africa* supra at note 75.

'However the plea that the moral culpability of a person who is drunk in charge of a vehicle or machinery is diminished because he failed to have an accident before being apprehended is clearly preposterous. Were that defence to be upheld in traffic courts, the offence of driving under the influence of liquor would be rendered unenforceable, except when the accused had had an accident.'

Logically, the ruling of *Exactics-Pet (Pty) Ltd v Patelia NO & others* in the Labour Court should extend to instances where an intoxicated employee who reports for duty is prevented from doing his work because of the employer's diligence. The fact that the employee was not allowed to work should not diminish his liability for his state of intoxication.¹¹³

In the *Tosca Labs v CCMA* case, the commissioner relied on the principles laid down by the LAC which state that the real test is to investigate if the employee's competence to perform has been impaired, instead of solely focusing on the breathalyser reading. The reading on the breathalyser only indicates the presence of alcohol in the employee's breath and body.¹¹⁴ Commissioner van Tonder in *Moleveld and de la Rey 1001 Building Material (Pty) Ltd*¹¹⁵ pointed out that in drunken driving cases the onus to prove intoxication is much heavier than in civil cases that come before the CCMA. Trite law states that any witness, expert or not, is entitled to testify in court procedures on the intoxication of a person as long as the evidence is motivated by a description of the facts upon which the opinion is based. In this particular case the employee argued that a breathalyser or blood test was not used, therefore there is no evidence that he was indeed intoxicated. An employer is under no obligation to provide blood tests or breathalyser test evidence in order to prove intoxication as long as the employer has credible and reliable witnesses.

¹¹³ *Exactics-Pet (Pty) Ltd v Patelia NO & others* (2006) 27 ILJ 1126 (LC).

¹¹⁴ *Tosca Labs v Commission for Conciliation, Mediation & Arbitration & others* (2012) 33 ILJ 1738 (LC).

¹¹⁵ *Moleveld and de La Rey 1001 Building Material (Pty) Ltd* (2006) 27 ILJ 1237 (CCMA).

The most recent case at the Labour Court, addressing this issue, was *National Union of Metalworkers of SA on behalf of Johnson and Trident Steel*.¹¹⁶ The employer adopted a new 'zero-tolerance' approach to alcohol-related offences within the company. The question arose; due to the nature of the work, does a first offence merit dismissal? The employee argued that the previous standards were no longer applied and that he was not intoxicated on that day. The court found that after the new policy was introduced, all employees found guilty of the offence were treated in the same way and received the same sanction. The employee was aware of the new policy and knew what would happen if the rule was contravened. The focus of the judge was on reviewing how the test was administered and on whether the employer relied on other factors in addition to the fact that the employee smelled of alcohol. A breathalyser test can thus serve as evidence to conclude that an employee was intoxicated; this was also concluded in *Tosca Labs v CCMA*.¹¹⁷

Credible and reliable witnesses are not always easy to provide. They might testify against the employee at the internal disciplinary hearing, but may subsequently change their testimony in support of the employee at an arbitration hearing. This happens in all sectors including the Agricultural sector. An employee might promise a reward to somebody to testify in their favour. Also, a witness might feel threatened by the employer or might be rewarded by the employer in order to alter the testimony. The Supreme Court of Appeal in *Stellenbosch Farmers' Winery Group Ltd v Martell & Cie*¹¹⁸ summarised the technique generally employed by courts and tribunals in order to resolve factual disputes that involve two conflicting versions. The credibility of the witnesses can be evaluated against the following: their candour and demeanour; their bias, latent or blatant; internal contradictions in their evidence; external contradictions with what was pleaded or put on their behalf; the probability or improbability of particular aspects of their version and lastly the calibre and cogency of their performance compared to that of

¹¹⁶ *National Union of Metalworkers of SA on behalf of Johnson and Trident Steel (Pty) Ltd* (2013) 34 ILJ 455 (BCA).

¹¹⁷ *Tosca supra* at note 110.

¹¹⁸ *Stellenbosch Farmers' Winery Group Ltd v Martell & Cie* (2003) (1) SA 11 (SCA).

other witnesses. Additional factors used to determine the reliability of the witness will include the opportunities they had to experience or observe the event in question and the quality, integrity and independence of their recall.

The employee in *Carolissen and International Brokers & Credit Control (Pty) Ltd*¹¹⁹ was employed as a car salesman and was described by witnesses as being drunk on duty. The employee contested this, because the employer had no proof and the witnesses were not reliable. The arbitrator found that his behaviour during working hours was indicative of being under the influence of alcohol and the witnesses were regarded as credible and reliable because they knew him well and could tell whether he was under the influence or not. The dismissal was found to be substantively fair.

The jurisprudence in this chapter suggests that the alcohol offence should be classified as either incapacity or misconduct. It is of great importance that the correct disciplinary steps are applied once the conduct is classified. A fair process procedure and a fair reason for dismissal will always be the focus when a dismissal is assessed by an arbitrator. The results of a breathalyser test alone will not stand when proving intoxication unless the employee should not be able to fulfil their responsibilities in their current state. The nature of the job and the disciplinary record of the employee should always be taken into consideration in intoxication cases. The employer has no legal requirement to assist the employee in the case of incapacity problems. There is however an unspoken expectancy on employers in the Agricultural sector to extend their assistance and resources in this regard. The inconsistencies within the jurisprudence can be found in the *Goodyear* case and the *SALSTAFF* case. This suggests that if the work interferes with the recreational time of the employee it should be taken into account as an extenuating circumstance when deciding on a disciplinary measure. There is still room for development with regards to the existing findings of jurisprudence and especially cases relating to the Agricultural sector.

¹¹⁹ *Carolissen and International Brokers & Credit Control (Pty) Ltd* (2004) 25 ILJ 2076 (BCA).

CHAPTER 5

THE EMPLOYEES' AND TRADE UNIONS' DUTIES

5.1 The Common-law relationship

The common-law implies that the employee has a legal obligation to perform work as required under the contract of employment.¹²⁰ The duties and responsibilities of employees in the common-law relationship are:¹²¹

- (i) to enter and remain in service;
- (ii) to maintain reasonable efficiency;
- (iii) to further the employer's business interests;
- (iv) to be respectful and obedient; and
- (v) to refrain from misconduct

Employees are obliged to carry out the tasks they agreed upon performing in a reasonable efficiency. If the employee does not adhere to these standards then he or she is in breach of contract and the employer may claim damages and enforce specific performance of the terms of the contract.

The employer has the following remedies available under the common law if an employee has reached a state of physical or mental deterioration due to alcohol dependence. This dependence must leave the employee unable to perform the duties in accordance with the employer's specific standards as stated in the contract with the employee. The remedies are:¹²²

- a) the employee may be denied payment for the day and sent home,
- b) the employer can take disciplinary action against the employee because of their impairment;

¹²⁰ Mc Cann *et al* op cit note 8.

¹²¹ John, Grogran *Workplace Law* 10 ed (2009) ch 4.

¹²² Mc Cann *et al* op cit note 8.

- c) the contract can be terminated if the breach was serious or if it constituted a repudiation and
- d) damages may be claimed from the employee.

If the misconduct left the employment relationship intolerable it is regarded as a justifiable dismissal if it is regarded as serious enough. Serious misconduct under the common law includes dishonesty, drunkenness, gross negligence, insolence, fighting, revealing of trade secrets, persistent idleness and absenteeism. The ruling of the civil courts implied that every contract of employment contains an implied term that entitles the employee to a pre-dismissal hearing.¹²³

5.2 Statutes

The employee's duties and obligations under the common-law relationship of employment are or will be supplemented by the following statutes:¹²⁴

- the Prevention of and Treatment for Substance Abuse Act 70 of 2008;
- the Occupational Health & Safety Act 85 of 1993; and
- the Labour Relations Act 66 of 1995.

5.2.1 The Prevention of and Treatment for Substance Abuse Act 70 of 2008

This Act is not yet promulgated and is not directly applicable to the workplace, but the rationale for the Act is based on the fact that substance abuse in SA has become a universal problem and that some form of strategy is needed to address it. The objects of the Act are to:¹²⁵

- a) combat substance abuse in a coordinated manner;

¹²³ John Grogran op cit note 121.

¹²⁴ Mc Cann *et al* op cit note 8.

¹²⁵ Ibid.

- b) provide for the registration and establishment of all programmes and services, including community-based services and those provided in treatment centres and halfway houses;
- c) create conditions and procedures for the admission and release of persons to or from treatment centres;
- d) provide prevention, early intervention, treatment, reintegration, and after care services to deter the onset of and mitigate the impact of substance abuse;
- e) establish a Central Drug Authority to monitor and oversee the implementation of the National Drug Master Plan;
- f) promote a collaborative approach amongst government departments and other stakeholders involved in combating substance abuse; and
- g) provide for the registration, establishment, deregistration and disestablishment of halfway houses and treatment centres.

5.2.2 Occupational Health & Safety Act 85 of 1993

The health and safety regulations pre-1993 issued under the Machinery and Occupational Safety (MOS) Act 6 of 1983 and especially regulation 12 (2) stated the following:

‘At a workplace or on premises where machinery is used, no person shall have in his possession or partake of or offer any other person intoxicating liquor or drugs, except with the express permission of the employer...’

The MOS Act was replaced by the OHSA in 1993. The Regulation 12(2) of the MOS Act still remains applicable if it was in force prior to the endorsement of S 43(5) of the OHSA.¹²⁶ The employee has a statutory obligation under regulation 6(a) upon the employer if he or she is under the influence of alcohol:

‘carry out any lawful order given to him [e.g. to cease work and to leave the workplace] and [he] shall obey the health and safety rules and procedures laid down by his employer or by anyone authorised thereto by his employer...’

¹²⁶ Ibid.

Therefore, if the employer suspects that the employee is under the influence of alcohol, and then requires that employee to undergo a non-invasive alcohol test or to leave the workstation, then that employee is obliged by statutory regulation to comply.¹²⁷ The employer should ensure that there are reasonable grounds for issuing those instructions to the employee.

The employee also has a duty of care towards other employees, contractors, customers and members of the public not to cause harm to them, especially harm arising from serious and wilful misconduct. The employer will have no indemnity from such claims and will be liable to compensate the other party.¹²⁸

5.3 The employee and Trade Unions Duties

Employees and their representatives should respect all the laws and regulations that govern drug and alcohol use in the workplace.¹²⁹ The employee has a duty to adhere to the alcohol policy of the employer and to make use of the employee assistance programme if he or she has a substance abuse problem. The onus is on trade unions to ensure that the working conditions of their members are safe and comply with the health standards required by the Health and Safety Act. Trade unions should also ensure that the employer makes use of the correct disciplinary procedures as stipulated in the relevant policy when dealing with an alcohol-related case, in order to ensure that a fair procedure is followed. The employee can be assisted by the trade union when negotiating arrangements with the employer in terms of rehabilitation if the employee suffers from addiction.¹³⁰

¹²⁷ Ibid.

¹²⁸ Compensation for Occupational Injuries and Diseases Act 130 of 1993.

¹²⁹ *International Labour Organization code of practice 'Management of alcohol- and drug-related issues in the workplace'* (1996) Geneva: International Labour Office available at http://www.ilo.org/global/publications/ilo-bookstore/order-online/books/WCMS_PUBL_9221094553_EN/lang--en/index.htm , accessed on 2 September 2013.

¹³⁰ Mc Cann *et al* op cit note 8.

In order to address the alcohol problem within the Agricultural Sector is it important for the role-players within the sector to take responsibility for the problem. It is not just the responsibility of employers and Government to address the various issues; the employees should take responsibility for their behaviour. Trade Unions should play a major role in the empowerment of their members, not only in the area of labour law but especially on social and economic issues within South Africa and their immediate working environment.

5.4 Recommendations

The procedures applicable to incapacity within the workplace, need to be adjusted to take account of the specific needs of the Agricultural sector. The Department of Agriculture and non-profit organisations such as DOP-STOP are ideal bodies to review those procedures for that sector and to adjust them. It is recommended that employers encourage social workers to become involved within their farming communities. The Industry Association for Responsible Alcohol use (ARA) has more or less 4000 wine producers, 60 cellars and 180 distributors as members. ARA understands that in order to decrease alcohol misuse in the sector, it is crucial to address the social deprivation.¹³¹ The ARA Perdeberg Wine Project was launched in August 2011. The main focus of this project is to address social issues such as alcohol abuse, foetal alcohol syndrome and labour concerns amongst the farm workers in that area. This project is a huge success and will now be applied in the Robertson region with Robertson Winery as a major role-player.¹³² Independent social workers are also key-role-players within these projects.

The initiative of these ARA projects can also be used in other farming regions. A group of farmers can employ a social worker within their region to address social problems. This initiative would be helpful and could be proactive in

¹³¹ ARA 'The SA Liquor Industry: our Contribution' available at <http://www.ara.co.za>, accessed on 26 August 2013.

¹³² ARA Perdeberg Wine Project receives approval for funding (July 15,2013) available at <http://www.ara.co.za> ,accessed on 10 September 2013.

addressing alcohol abuse and preventing employees from reaching the heavy drinking and high-risk stage. Alcohol problems cannot be addressed in isolation and instead it is necessary to address all the other social issues if the aim is to see an improvement in the drinking patterns of farm workers in South Africa. National and local government is in need of funding in order to implement useful legislation and policy on the abuse of alcohol. The success in combating the alcohol problem does not only rely on new legislation but on the relevant resources available to balance the severity of the problem.¹³³

Revd Nosey Pieterse (Executive President) of The Black Association of the Agricultural Sector (BAWSI) pointed out that the Government included farm workers in various legislation such as the Labour Relations Act, Eviction and Security Tenure Act (ESTA), Sectoral Determination for Agricultural workers, the Employment Equity Act and the Skills Development Act. The reality is that these laws do not come close to touching the lives of the farm workers.¹³⁴ The writer agrees with this statement. The Agricultural sector have different dynamics than other sectors and it is recommended that the application of law within this sector should always be done with that in mind.

AgriSA, as a major role-player within this sector, could compile a policy manual with regards to alcohol abuse. This will give all employees and employers a starting point to work from and elaborate on the minimum standards that were set by this policy. The wise words of Ralph Emerson describes the intervention that the Agricultural sector needs for dealing with this substance abuse problem. 'Do not go where the path may lead, go instead where there is no path and leave a trail.'

¹³³ Gregory, Singer 'An Examination of South African Alcohol Policy Occasional Paper' (13 July 2003) available at http://www.noelimits.co.za/staging/CPLO/index.php?option=com_rokdownloads&view=file&task=download&id=341%3Aop-13-alcoholism-greg-singer&Itemid=19, accessed on 10 September 2013.

¹³⁴ Farmworker Voices Reflections of Worker Conditions on South African Farms Black Association for Agricultural Sector (5 June 2012) available at www.sawit.co.za/images/BAWSI_Farmworkers_3%20June.pdf, accessed on 10 September 2013.

CHAPTER 6

ASSESSMENT

Over the past two decades, views on the possible causes of substance abuse in the workplace have evolved. McCann *et al* put forward two views. The first is that alcohol and drug problems are external to the workplace and factors such as genetic susceptibility, environmental, cultural and other psychosocial issues all contribute to alcohol dependency.¹³⁵ The second view assumes that the conditions within the workplace contribute to substance abuse and these conditions include workplace culture and social climate.

6.1 Psychosocial perspective

Many people feel powerless in the workplace, especially if they feel they do not have ownership over their work. Alcohol can make a person feel powerful and assertive even though that person normally feels inadequate. It is used as an escape route from the reality, stress and pain in one's life. Stress within the workplace can lead to a negative emotional state which renders some people vulnerable to substance abuse. However, this is not true for everyone and much depends on one's ability to handle stress and pressure within the working environment.¹³⁶

Galanter identified job competition, unusual hours of work, time pressures, dirtiness and heaviness of work as factors that contribute to high-risk situations for alcohol problems. Tedious, repetitive tasks cause stress and people may want to unburden by indulging in pleasurable activities; this may lead to the desire to indulge in, or receive immediate gratification in, alcohol or drugs.¹³⁷

¹³⁵ Mc Cann *et al* op cit note 8.

¹³⁶ Ibid.

¹³⁷ Galanter, M *Recent Developments in Alcoholism* vol 6. (1998) Plenum.

6.2 An environmental perspective

People who abuse alcohol or drugs often choose an occupation where the environment favours a culture of drinking. The following three occupational circumstances were identified as being likely to lead to alcohol abuse:¹³⁸

- (i) the availability of alcohol during working hours;
- (ii) increased social pressure to drink; and
- (iii) separation from normal sexual or social relationships.

Unsatisfactory work and living conditions on mines as well as on farms encourage unhealthy drinking habits, exacerbated by poor social conditions such as poverty and ill health.¹³⁹ The Europeans had a strong influence on drinking patterns in South Africa. They introduced commercial alcoholic drinks that were stronger than those used in traditional culture.

The influence of legislation on alcohol use and abuse is illustrated by the Western Cape Liquor Act ¹⁴⁰that limits on-site and off-site consumption and sales of alcohol as well as trading of alcohol on Sundays. On-site sales of alcohol in outlets operating in residential areas are also prohibited.¹⁴¹ This, however, is not a long-term solution for our society. Farm workers are now protected by legislation such as this Act since it prohibits substituting payment with alcohol. There is however a lack of monitoring and enforcement of this labour legislation. There is a shortage of government agents to carry out monitoring and enforcing.¹⁴² The Western Cape employs about 140 labour inspectors, and this number is not enough to cover the widespread rural areas within the province. Many farmers are still reluctant to comply with labour legislation and some are even hostile towards it. Legislation has disrupted the

¹³⁸ Plant, M A 'Alcoholism and occupation: A review' *British Journal of Addiction* (1977) 72, 309-316.

¹³⁹ Mc Cann *et al* op cit note 18.

¹⁴⁰ No. 4 of 2008: Western Cape Liquor Act, 2008.

¹⁴¹ Mc Cann *et al* op cit note 18.

¹⁴² SANPERI 'The position of women workers in wine and deciduous fruit chains' (2003) available at www.wfp.org.za/publications/.../83-women-in-global-value-chain.html, accessed on 13 May 2013.

institutionalized order of paternalistic labour management, but it is still clear that it has not been transformed as a whole.¹⁴³

6.3 An organisational culture perspective

Bacharach describe workplace culture as ‘an organized set of understandings that participants within a work setting share regarding behavioural comporment’.¹⁴⁴ Individual behaviour and outlooks relevant to human well-being can be explained by explanatory variables found within the workplace and at the job itself; this especially applies to alcohol problems.¹⁴⁵ A person’s alcohol consumption pattern might be influenced by the workplace culture. High levels of risky drinking may be due to a workplace culture that disregards excessive alcohol use.¹⁴⁶ The wineries in the Agricultural sector are an example. The wineries are solely reliant on the sale and production of their product, wine, in order to be profitable.

Some breweries supply alcohol to employees by holding a social event after work, having a free pub or providing alcoholic beverages at the end of the month.¹⁴⁷ The history of apartheid and slavery in South Africa still has an impact on the nature of the working relationship between farmer and farm worker. Workers are afraid to object to certain practices: they lack knowledge and there is a high level of illiteracy within the workforce and these are factors which contribute to the vulnerability of these employees. A Human Rights watch reported discovered during a study that at least two wine farms is South

¹⁴³ Joachim, Ewert & Andries du Toit ‘A deepening divide in the countryside: Restructuring and rural livelihoods in the South African wine industry’ *Journal of Southern African Studies* (2005) 31, 2.

¹⁴⁴ Bacharach S B, Bamberger P A & Sonnenstuhl W J ‘Driven to drink: Managerial control work-related risk factors, and employee problem drinking’ (2002) *Academy of Management Journal* 45, 637–58.

¹⁴⁵ Greenberg E S, Grunberg L & Moore S ‘The changing workplace, alcohol problems and well-being: Findings from our research program and reflections on their meaning (2000) available at www.colorado.edu/ibs/PEC/workplacechange/papers/WP_007.pdf, accessed on 19 August 2013.

¹⁴⁶ Roche and Pidd op cit note 16.

¹⁴⁷ McCann et al. op cit note 18.

Africa are still using the 'dop' system.¹⁴⁸ Although the 'dop' system is mainly absent within the industry, the level of alcohol dependence amongst farmworkers continues to play a role in the cycle of poverty and dependence that is difficult to escape.¹⁴⁹ Some farm owners are selling wine on credit to the employees, thus promoting a cycle of debt.¹⁵⁰ These practices indirectly contribute to the alcohol abuse problems within the industry and shadow the 'dop' system.

The leadership style of managers within an organisation also contributes to the organisational culture. A manager or supervisor who uses power and authority tyrannically and vindictively can be described as a 'petty tyrant'.¹⁵¹ There is a distinct link between negative interpersonal experiences such as harassment or abuse at the workplace and an increase in drinking habits.¹⁵² Labour relations on farms can be described as paternalistic, which illustrates that farmers themselves feel responsible for their workers. A farmer described his burden as follows:¹⁵³

...you have the coloured workers living on the farms.

...So you are the first person to whom he complains.

You are the policemen, you are a magistrate, if he gets hurt you must nurse him yourself, or you drive him to the clinic. And sometimes you must play the role of a father punishing his children. If there are mischievous boys who transgress then you must punish them yourself. You don't run to the courts for every little complaint.

¹⁴⁸ Bearded Wiseman 'At least Two Wine Farms still use the Illegal Dop system' (23 Aug 2011) available at <http://www.2oceansvibe.com/2011/08/23/at-least-two-wine-farms-still-use-the-illegal-dop-payment-system/>, accessed on 13 September 2013.

¹⁴⁹ London, Leslie 'Addressing the legacy of the Dop system: Tackling alcohol abuse among South African farm workers (1999) available at <http://www.sahealthinfo.org/admodule/dopsystem.htm>, accessed on 2 September 2013.

¹⁵⁰ Prins, Crystal 'Conditions on farms' Unit for Social Research Directorate Research & Population development (2004) available at www.westerncape.gov.za/Text/2005/4/reviewed_farmworkers.pdf, accessed on 25 August 2013.

¹⁵¹ Ashforth, B 'Petty tyranny in organizations' (1994) *Human Relations* 47, 755–78.

¹⁵² Rospenda K M, Richman J A, Wislar J S & Flaherty J A 'Chronicity of sexual harassment and generalized work-place abuse: Effects on drinking outcomes'. *Addiction* (2000) 95(12), 1805–20.

¹⁵³ London, Leslie 'Human rights, environmental justice, and the health of farm workers in South Africa' *Int J Occup Environ Health* (2003) 9 59-68.

6.4 The extent of the Alcohol problem in the Industry

The evolution of alcohol consumption began with the Bantu and Khoikhoi consuming intoxicating drinks derived from fermenting plants, fruits and grains. Alcohol had a social role and was consumed mainly at rituals and social gatherings. In 1652, wine was introduced into the Cape by Jan van Riebeeck. Wine and malt beer were used by sailors to prevent scurvy. In 1657, malt was first brewed in the Cape and in 1659 the first wine was produced there. By the end of the nineteenth century the only alcohol policy that existed was rooted in draconian law. For example, the non-white population groups were prohibited from consuming alcohol in order to prevent social decay and disorder. In the 1890's, unskilled workers were encouraged to consume alcohol, because this gave an income to the providers of the alcohol. That situation changed in 1896 when the sale of liquor was restricted further, to establish a sober workforce. In 1909 the Native Beer Act stipulated that beer can only be consumed within the beer halls in Durban. During apartheid, legislation controlled where Africans and Coloureds could buy and consume liquor, how much they could buy, who they could drink with, who produced and procured it and the quality of the alcohol available to them. In response to these strict regulations, the brewing and drinking of alcohol in illegal shebeens became a form of resistance against the oppressive laws of apartheid. Alcohol was used to blot out the stress and feelings of alienation amongst the suppressed groups.¹⁵⁴

In the United States, 8 per cent of the workforce are classified as problem drinkers and three-quarters of this group cannot perform their daily work without alcohol in their bloodstream.¹⁵⁵ Most of these 'alcoholics' go undetected, despite their underperformance. Over the past twelve years the use of alcohol and prevalence of binge drinking have remained unchanged for adults of various race groups in South Africa.¹⁵⁶ In a study of twenty African

¹⁵⁴ Schneider et al. op cit note 7.

¹⁵⁵ McCann et al. op cit note 8.

¹⁵⁶ Ibid.

countries, South Africa ranked fourth highest in terms of the number of heavy drinkers as a percentage of current drinkers.¹⁵⁷ A study in 1993 amongst farm workers in the Western Cape reported that the usual Friday to Sunday night consumption was six 750 ml bottles of wine or one 750 ml bottle of spirits.¹⁵⁸

A recent study compared and assessed the effects that high-risk drinking and the associated factors, have on female farm workers on farms in the Western Cape and Gauteng. The study found the following:¹⁵⁹

- 27 per cent of the respondents in Gauteng are current drinkers.
- 46 per cent of respondents in the Western Cape are current drinkers.
- 20 per cent of the Gauteng drinkers are high-risk drinkers.
- 68 per cent of the Western Cape drinkers are high-risk drinkers.
- 81 per cent of the respondents in Gauteng were black and 42 per cent were permanently employed.
- 90 per cent of the respondents in the Western Cape were coloured and 80 per cent were employed.
- The preferred drinks in Gauteng are coolers and ciders while in the Western Cape beer and papsak¹⁶⁰ are commonly drunk.

Various studies have linked alcohol and drug abuse to a long list of problems within the workplace. These include:¹⁶¹

- tardiness, absenteeism and increased sick days;
- poor decision-making;
- errors in production or service delivery;
- unsafe work practices;

¹⁵⁷ Ibid.

¹⁵⁸ London, Leslie 'Alcohol consumption amongst South African farm workers: A challenge for post-apartheid health sector transformation' *Drug and Alcohol Dependence* (2000) 56 199-206.

¹⁵⁹Oluwayemisi A Ojo, Goedele Louwagie, Neo Morojele, Kirstie Rendall-Mkosi, Leslie London, Steve Olorunju & Adlai Davids 'Factors associated with female high-risk drinking in a rural and urban South African site' *SAMJ* (2010) 100 3.

¹⁶⁰ Afrikaans word meaning 'soft sack' referring to cheap wine sold in a foil-lined plastic bag. SAPA 'Papsak' runs dry (18 September 2007) available at <http://www.iol.co.za/news/south-africa/papsak-runs-dry-1.371260#.UisnBvcaJjo>, accessed on 7 September 2013.

¹⁶¹ 'Ontario Public Health Association. 'Let's take action on alcohol problems in the workplace' (2004) Alcohol Policy Network available at www.apolnet.ca/resources/pubs/LTA-Workplace.pdf, accessed on 3 September 2013.

- decreased productivity or increased need for overtime;
- conflicts among employees;
- low morale;
- high turnover;
- early retirements and loss of experience and knowledge;
- rise in incidence of grievances, arbitration and disciplinary actions;
- preventable injuries on and off the job involving both workers and the general public; and
- theft, fraud or embezzlement.

In the Western Cape, alcohol abuse is a factor in 60 per cent of violent incidents that result in trauma.¹⁶² The existence of alcohol problems amongst farm workers is not a phenomenon specific to South Africa, but is found internationally as well. Numerous studies have indicated farming as a hazardous occupation in terms of the occupational injuries that occur. Colorado farm workers who drank three or more alcoholic drinks per day had an injury rate of 3.62 per 10 000 person-days; the injury rate was 3.02 per 10 000 person-days for those consuming one to two drinks per day.¹⁶³ A study in New Zealand found that 39 per cent of farm workers abused alcohol.¹⁶⁴

6.5 Challenges and suggestions in implementing an alcohol policy

Conditions for farm workers remain poor throughout the industry. The writer's personal experience indicates that the minimum wage increased by 51% on 1st March 2013 had an adverse effect within the industry. Practices such as mechanisation, restructuring and decreasing of benefits is currently taking place. The experience of the writer indicates that the living conditions on farms are still not what it should be. If farmers wish to deduct 10 % from the farm

¹⁶² Prins op cit note 138.

¹⁶³ Stallones, Lorann 'Alcohol consumption patterns and work-related injuries among Colorado farm residents' *American Journal of Preventative Medicine* (2003) 25(1).

¹⁶⁴ Fragar Lyn, Jacqui Eather, Julie Depczynski & Tony Lower 'Alcohol and farm workplace – Final Research Report' (2010) *Australian Centre for Agricultural Health and Safety* available at http://www.health.nsw.gov.au/resources/publichealth/surveys/AER_Final_Report_100902.pdf, accessed on 18 August 2013.

workers' wages for housing, the housing should meet certain standards as described in the Sectoral Determination for Farm workers. Some farmers choose not to deduct money for housing and therefore no minimum standards have to be adhered to. All these social problems impact on the behaviour and psychological well-being of the employee. Before the issue of alcohol abuse is addressed, these other factors should be minimised. A shift in the focus from legislation and regulation to making resources available for implementing intervention strategies, should occur in order to change the pattern of drinking in South Africa.¹⁶⁵ Employers need to involve employees when drafting an alcohol policy; if employees feel that they are participants and will stand to benefit from it, acceptance will be easier.¹⁶⁶

Education levels within the Agricultural sector are still low and it was found that on average, a farm worker has five years' schooling.¹⁶⁷ This low level of education is a barrier to occupational mobility and leads to ignorance about social and economic issues. Many women are not aware of the dangers of FAS and its consequences on their children. The prevalence of FAS affects the future labour market of South Africa. Thus, people with FAS may suffer many disabilities; these include facial abnormalities, poor co-ordination, hyperactivity, learning disabilities, speech and language difficulties, mental retardation, a low IQ and poor judgment skills.¹⁶⁸ The culture of drinking and alcohol dependency has a high probability of carrying over from one generation to the next. Education alone, however, is not enough to address this problem, it needs to be tackled with an organisational culture that values and promotes healthy lifestyles.¹⁶⁹

The reasons put forward for alcohol misuse are complex. Jurisprudence tries to simplify the situation by defining two categories: misconduct or incapacity. The solutions for alcohol misuse should be multi-faceted and culturally

¹⁶⁵ Schneider et al. op cit note 7.

¹⁶⁶ McCann et al. op cit note 8.

¹⁶⁷ Schenker op cit note 14.

¹⁶⁸ Cohen, Lauren 'Dop' system leaves a massive hangover.' *Sunday Times* 19 August 2007, available at <http://rajpatel.org/2009/10/30/the-dop-system/>, accessed on 18 August 2013.

¹⁶⁹ Ontario Public Health Association op cit note 148.

sensitive if success is to be achieved. For example, the attitudes of employees towards alcohol need to change. Also, the acceptability of inappropriate drinking needs to be reduced, to prevent and reduce the harmful use of alcohol.¹⁷⁰ It is recommended that partnerships be formed with a broad range of stakeholders within the industry in order to build strategies for each region that will have an impact on the culture of that region.

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¹⁷⁰ World Health Organization 'Public hearing on harmful use of alcohol' Department of Mental Health and Substance Abuse World Health Organization: Geneva (2009) available at http://www.who.int/substance_abuse/activities/hearing/en/, accessed on 16 August 2013.

CHAPTER 7

CONCLUSION

7.1 Conclusion

By drawing from the relevant literature and jurisprudence consulted in this paper, it is evident that the Agricultural sector and the mining sector have certain disadvantages. This is even more true for the Agricultural sector than for the mining sector because the 'dop' system prevailed in the Agricultural sector and housing on the farm is usually part of the conditions of employment. The fact that most of the employees, especially in the remote farming areas, still live on the farms makes the social and economic issues more complex. It is easier for the farmer and farmworker to continue with a paternalistic relationship because the farmworker is more dependent than the farmer and more vulnerable. Legislation intended to protect the rights of farm workers is still not being enforced as it should be. The alcohol problem within the industry is not only caused by the 'dop' system as initially suggested, but was also found to be related to other factors: these included the nature of the job, managerial control and social circumstances such as a lack in education. All these factors contribute to the lack of well-being of the individual and impacts upon self-esteem.

As a starting point, employers and employees within the Agricultural sector need to change their beliefs about alcohol and furthermore, the self-esteem of the workers needs to be increased. Employers should be more active in educating the employees about alcohol and its effects, in order to create a perception at the organisation and within the community, that alcohol problems can be overcome. Incapacity related issues relating to alcohol need to be proactively addressed; ongoing leadership and mentorship are needed if these issues are to be faced within the sector.

Misconduct relating to alcohol and intoxication levels should be subject to less-stringent disciplinary action for a first offence. Nevertheless, intoxication

should not be tolerated at all in the workplace because of Health and Safety regulations and the high injury rate. This message needs to be communicated to the employees and a system needs to be put in place to deal with intoxicated employees in a constructive manner. The nature of the jobs within the industry does not allow an employee to be rotated to another position and it is not practical to alter the position to accommodate the employee. Further research is recommended on the recommendations made by the writer at the end of Chapter 5. This will contribute to the decrease of alcohol related problems within society and the workplace.

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