IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 433/06**

In the matter between:

ARCHIE SAYED **APPLICANT**

and

USUTU PULP COMPANY LTD
T/A SAPPI **RESPONDENT**

CORAM:

P. R. DUNSEITH	**:**	**PRESIDENT**
JOSIAH YENDE	**:**	**MEMBER**
NICHOLAS MANANA	**:**	**MEMBER**
FOR APPLICANT	**:**	**J. MAVUSO**
FOR RESPONDENT	**:**	**ADV. FYLNN**

J U D G E M E N T – 07/08/06

[1] The Swaziland Agriculture & Plantations Workers Union has applied to the Industrial Court in case no. 423/2006 for a final order interdicting the Respondent from implementing Random Alcohol Testing (RAT) at the workplace and directing the Respondent to negotiate the implementation of such testing. On the 13 July 2006 this court issued a rule nisi, calling upon the Respondent to show cause why the disciplinary enquiry against the Applicant in respect of certain charges of disobedience and unauthorized absence arising from the Applicant's

refusal to submit to RAT should not be stayed pending finalization of the application in the Case No. 423/06. Pending final determination of the rule nisi, the court interdicted the Respondent from proceeding with the disciplinary enquiry.

[2] Since the Respondent had not yet filed any opposing papers, the rule nisi and interim interdict were issued on the basis of the facts set out in the Applicant's Founding Affidavit (including allegations contained in the affidavits filed of record by the union in Case No. 423/06). The reasons for the issue of the rule nisi and the interim interdict appear in the judgement dated 13 July 2006, and it is not necessary to repeat the analysis of the law and facts set out in that judgement.

[3] Suffice it to say that the court found that the Applicant had prima facie established a clear right to refuse to submit to random alcohol testing (RAT) and that the disciplinary action taken against him in respect of his refusal is prima facie illegal and unfair.

[4] On the return date when the matter was fully argued on the merits, answering and replying affidavits had been filed and a full set of papers was then before court. The proper approach at this stage of the application is for the court to take the facts as set out by the Applicant, together with any facts set out by the Respondent which the Applicant cannot dispute, and to consider whether, having regard to the inherent probabilities the Applicant's right has been at least prima facie established, though open to some doubt.

See **Prest: The Law & Practice of Interdicts page 225.**

[5] At this stage, the court does not have to determine whether the union has a clear right to the relief it seeks in Case 423/2006. This will be determined when that application comes before the court.

For present purposes, if the Applicant can show that the probabilities of success to some extent favour the union in the main application under Case No. 423/2006, this will be sufficient for the granting of an interlocutory interdict (provided the other requirements for the grant of an interim interdict are present).

[6] The principal complaint of the union in case no. 423/2006 is that RAT was unilaterally introduced and implemented by the Respondent without any prior consultation or negotiation and without the consent of the union.

[7] The union refers in particular to Clause 11.04 of the disciplinary code, which deals with proof of drunkenness and states as follow:

> "*In the case of suspected drunkenness:*
>
> (a) *a positive reading of above 0.08% alcometer/breathalyzer reading duly confirmed by a security office shall be regarded as evidence leading to proof of drunkenness;*
>
> (b) *the actual results of the test shall be recorded in writing and be duly endorsed by the employee concerned in the presence of at least two witnesses;*
>
> (c) *where the alleged offender has refused to take a breath test, management shall decide as they deem fit any appropriate disciplinary action, taking into account the employee's reasons for the refusal as well as the circumstances of the case;*
>
> (d) *Statements from witnesses should be taken down to corroborate any other evidence of drunkenness*."

[8] It is argued by the union that Clause 11.04 is part of the disciplinary code and procedure and that the introduction of random alcohol testing materially varies the provisions of the clause. According to the union, such variation should have been agreed between the parties.

[9] In response to this complaint, the Respondent replies that:

9.1 the applicant is bound to comply with the company rules and procedures, in terms of his letter of appointment;

9.2 the respondent has an Alcohol Testing Policy & Procedure which forms part of the company's rules and procedures;

9.3 the objective of the policy is to ensure a safe working environment and compliance with Health & Safety Legislation.

9.4 RAT was formally introduced into the Alcohol Testing Policy & Procedure on 30th April 2006, after consultation with the union.

9.5 The capacity of the computerized access control system to perform random selection for RAT was first discussed with the union in September 2004. Subsequently, at a management/union consultation meeting held on the 21st March 2006, there was a discussion about RAT. The union did not object at that meeting to random selection and testing. On the contrary the union was more concerned about possible discrimination due to non- random selection by the security guards.

9.6 Consultations about RAT took place at the meeting on the 21st March 2006, and again at a briefing meeting on 5th May 2006 after the new policy had been introduced.

9.7 The union objected to the implementation of RAT for the first time at a meeting held on 24th May 2006, demanding that the new system be suspended until the parties have negotiated and agreed on the new policy.

9.8 The Respondent's position is that it was not obliged to obtain the consent of the union and/or the workers to the introduction of RAT, since this is a policy and procedure falling under the exclusive prerogative of management. All the Respondent was required to do was consult with the union. It was not required to negotiate and conclude an agreement to govern the implementation of RAT.

9.9 As evidence that no more than consultation was required, the Respondent referred to various clauses of the Collective agreement, the Disciplinary Code and Procedure, and the Recognition Agreement. In particular the Respondent referred to:

- Article 52 of the Collective Agreement dealing with Safety & Health;

Article 54 of the Collective Agreement dealing with consultation.
Article 7.01 of the Collective Agreement which preserves the authority of management.
Articles 1.4.2 and 3.2 of the Recognition Agreement which preserve the prerogative of management in respect of the operations of the company and the right of the Respondent to manage, direct or control the affairs of the company

and its employees.
Article 9.2 of the Recognition Agreement, which defines negotiable issues.
Article 12.01 of the Disciplinary Code & procedures, which provides as follows:

> "12.01 *AMENDMENTS*
>
> *This procedure is valid notwithstanding any collective agreement which may be in force between the Union and the Employer. Management endeavours not to make any amendment to paragraphs 1 through to 11 inclusive of this procedure except that the employer will consult with the Union in anticipation of any proposed amendment, deletion or addition to this procedure, its schedules and annexures or to make any arrangement for the giving effect generally to the purposes and provisions of this procedure."*

9.10 The Respondent also denies that RAT is inhumane and degrading, or that it infringes on the constitutional rights of employees. In this regard, Respondent's counsel described the manner in which RAT is administered, and emphasized the non-invasive nature of the process; the preservation of confidentiality and dignity; the distinction between random alcohol testing and random drug testing; and the deterrent effect of the procedure. He proceeded to argue that RAT does not infringe an employee's right to bodily privacy and constitutional protection against arbitrary search because RAT was introduced under the authority of the Occupational Health and Safety Act No. 9 of 2001, and is reasonably required for the purpose of promoting the rights or freedoms of other persons.

[10] The court has to decide effectively two central legal issues:

10.1 were the consultations at the meeting of 21st March 2006 sufficient to entitle the Respondent to unilaterally implement the new random alcohol testing policy and procedure;

10.2 does the new policy and procedure infringe on the constitutional rights of employees, either because it is inhumane and degrading or because it constitutes an arbitrary bodily search.

[11] It is unfortunate that the adjudication of these issues will inevitably anticipate the decision to be given in Case No. 423/2006 between the union and the respondent, notwithstanding that a final interdict is sought in that case whilst the present applicant has a less onerous burden of proof since he is only seeking interlocutory relief.

[12] Before addressing the central issues for determination, the court shall briefly express its views on random alcohol testing. The prima facie views previously expressed in the judgement dated 13 July 2006 are now informed by additional facts and explanations provided by the Respondent.

[13] It is not necessary to describe the random alcohol testing procedure, since this is clearly set out in DK2, the Alcohol Testing Policy & Procedure. The following aspects may however be highlighted:

13.1 the computerized access control system is programmed to randomly select a number of persons to be tested daily.

13.2 a person selected for testing undergoes a screen test, which merely requires blowing onto an instrument. If this test is failed,

then a breathalyzer test is conducted in the presence of the person's representative and supervisor.

13.3 if the breathalyser shows a reading of between 0,021-0,080mg/100ml, the person is refused entry into the Mill and an incident report is circulated to the line manager to ensure that the person is counseled.

13.4 if the breathalyzer shows a reading of 0,080 mg /100ml or higher, the person is refused entry, and an incident report is circulated to line managers to ensure that appropriate disciplinary action will be taken.

13.5 should any person refuse to submit to an alcohol test he/she will be refused entry on the basis that his/her sobriety could not be confirmed. An incident report is also circulated to ensure appropriate disciplinary action in respect of the refusal.

[14] This Policy & Procedure does not apply only to employees working in safety- sensitive positions or areas. It applies to all employees entering the Mill, regardless of their occupation or work station.

[15] The Policy and Procedure refers to counseling for persons whose test readings indicate the presence of alcohol less that 0,080mg/100ml, but otherwise does not contain any provisions which indicate that the testing is part of a broader programme of medico-social assessment, monitoring and support.

[16] The revised Alcohol Testing Policy & Procedure introduces a number of significant changes to the Policy & Procedure which applied prior to 30th April 2006. Apart from the selection of persons to be tested on a random basis, as a supplement to the previous selection based on suspicion, the new Policy now provides that:

> 16.1 a person whose test reading is less than 0,080mg/100ml may be refused entry to the mill;
>
> 16.2 a randomly selected person who refuses to submit to testing will be refused entry and disciplined notwithstanding that there is no other evidence of insobriety.

[17] The Respondent's counsel made available to the court an Executive Summary of the Canadian Human Rights Commission Policy on Alcohol & Drug Testing. This Policy makes the following observations with regard to random alcohol testing;

> 17.1 Alcohol testing may be included in a workplace drug-and-alcohol-testing programme, but only if the employer can demonstrate that it is a bona fide occupational requirement.
>
> 17.2 Random alcohol testing can be regarded as a reasonable requirement (of a health and safety programme) because alcohol testing can indicate actual impairment of ability to perform or fulfill the essential duties or requirements of the job. (This is in contrast to random drug testing, which can only detect the presence of drugs and not if or when an

employee may have been impaired by drug use)

17.3 Random alcohol testing must be confined to employees in safety- sensitive positions. Random testing of employees in non-safety sensitive positions is not acceptable.

(According to the Canadian National Policy, a safety- sensitive job is one in which incapacity due to drug or alcohol impairment could result in direct and significant risk of injury to the employee, other employees, or the environment. Whether a job can be categorized as safety-sensitive must be considered within the context of the industry, the particular workplace, and an employee's direct involvement in a high risk operation. Any definition must take into account the role of properly trained supervisors and the checks and balances present in the workplace.)

17.4 The Canadian Policy emphasizes that testing policies must provide for medico-social support by way of counseling and treatment for employees who test positive, and policies that result in summary loss of employment for a failed test cannot be regarded as reasonable.

17.5 Finally it should be noted that the Canadian Human Rights Commission does not advocate drug and alcohol testing for dealing with employee impairment. The Commission lists awareness, education, rehabilitation and effective interventions such as enhanced supervision and peer monitoring as the most effective ways of ensuring

that performance issues associated with alcohol and drug use are detected and resolved.

[18] The court is mindful of the difficulties that arise when comparing workplace policies and standards from other countries, particularly developed countries whose economies, legal framework and social milieu may be far removed from that of Swaziland.

To seek a more universal approach to alcohol testing, the court also perused the International Labour Organization's 1996 Code of Practice on the Management of Alcohol-and drug-related problems in the workplace.

[19] This code of practice places great emphasis on the need for workers and their representatives to cooperate with employers in development of an alcohol and drug policy. The code prescribes that workers and their representatives should actively participate in the development of the policy through consultation and negotiation where required by law or collective agreement.

[20] Article 3.2 of the ILO Code of Practice recommends the contents of an alcohol and drug policy as follows:

"A policy for the management of alcohol drugs in the workplace should include information and procedures on:

(*a*) *measures to reduce alcohol- and drug-related problems in the workplace through proper personnel management, good employment practices, improved working conditions, proper arrangement of work, and consultation between management and workers and their representatives;*

(b) measures to prohibit or restrict the availability of alcohol and drugs in the workplace;

(c) prevention of alcohol-and drug-related problems in the workplace through information, education, training and any other relevant programmes;

(d) identification, assessment and referral of those who have alcohol- or drug-related problems;

(e) measures relating to intervention and treatment and rehabilitation of individuals with alcohol- or drug-related problems;

(f) *rules governing conduct in the workplace relating to alcohol and drugs, the violation of which could result in the invoking of disciplinary procedures up to and including dismissal;*

(g) equal opportunities for persons who have, or who have previously had, alcohol- and drug-related problems, in accordance with national laws and regulations."

[21] On the issue of testing, the ILO Code of Practice states that this involves moral, ethical and legal issues and should be undertaken in accordance with national laws and practice, which may vary considerably between member states. The ILO does however have "Guiding Principles on drug and alcohol testing in the workplace," adopted by the ILO Interregional Tripartite Experts Meeting on Drugs & Alcohol Testing in the Workplace in May 1993, to which member states are referred for guidance.

[22] The Guiding Principles emphasize that drug and alcohol testing must

be placed within the larger context of the moral and ethical issues of collective rights of society and enterprises, and of individual human rights. in other words, drug and alcohol testing goes beyond the employer/employee relationship and requires a much broader consideration of fundamental rights to privacy and confidentiality, autonomy, fairness and the integrity of the body, as seen in the framework of national and international laws and jurisprudence, norms and values.

[23] The ILO Guiding Principles on Drug & Alcohol testing also mention that;

23.1 the need for testing should be evaluated according to the nature of the jobs involved (e.g safety- sensitive jobs);

23.2 testing should be part of a systematic programme which includes provision for education, counseling, treatment and rehabilitation, with disciplinary action taken as a last resort;

23.3 drug and alcohol testing programmes should fit within existing arrangements for ensuring the quality of work life, workers rights, the safety and security of the workplace, and employer's rights and responsibilities;

23.4 any changes to the testing policy, because of new conditions or because other substances are being tested for, should only take place with the agreement of all the social partners.

23.5 Workers should have the right to make informed decisions about whether or not to comply with requests for testing. Workers who refuse to be tested should not be presumed to be drug or alcohol users.

23.6 Alcohol testing by means of the breath is non-invasive and can determine actual impairment to the ability to perform work.

23.7 random alcohol testing has a valid deterrent function within the context of a comprehensive testing policy.

[24] The respondent has made provision in its Alcohol Testing Policy for :

24.1 the protection of the employee's right to representation;

24.2 the maintenance of confidentiality with regard to the test results;

24.3 the protection from discrimination or victimization;

24.4 the protection of the dignity of the employee.

[25] The court is satisfied that RAT does not expose the Respondent's employees to inhumane or degrading treatment, nor is the breath testing procedure unduly invasive, compromising or unhygienic.

[26] Nevertheless, the Respondent's revised Policy does fall short of the Canadian Human Rights Commission standards and the ILO guidelines in certain material respects:

26.1 the Policy does not exclude employees in non- safety sensitive positions from random testing;

26.2 the Policy does not apparently include any comprehensive programme for education and training on the deleterious effects of alcohol use, both within and without the workplace, and for counseling, treatment and rehabilitation of alcohol- impaired employees.

26.3 the Policy, as read with Article 11.03 of the Disciplinary Code, discriminates against drivers, who are liable to be summarily dismissed for a first offence of drunkenness, whereas other employees in safety-sensitive jobs receive a final warning for a first offence.

26.4 the variation of the Policy by the introduction of RAT was not the product of any meaningful exchange between the Respondent and the Union. The only consultation that took place related to the concept of random selection at the point of access, and did not involve any discussion of the important policy and procedural matters outlined in Article 3.2 of the ILO Code of Practice (see paragraph 20 above).

[27] Mr. Flynn for the Respondent argued that the Respondent is obliged in terms of Section 9 (3) of the Occupational Safety & Health Act, 2001

to “ensure that there exists a systematic way of identifying, evaluating and controlling hazards at the workplace and such systematic ways are functional at all times.” The Alcohol Testing Policy & Procedure is the Respondent’s systematic way of identifying and controlling the hazard of alcohol-impaired performance at the workplace.

[28] The Respondent’s reliance on Section 9 (3) of the said Act is a two-edged sword. The same Act requires the Respondent to establish a Safety & Health Committee, to serve as a forum for the discussion of matters affecting the health and safety of persons at the workplace. This committee has an equal number of management and employee representatives, and has the power to make appropriate decisions binding on the employer in respect of safety and health issues at the workplace.

[29] There is nothing on the papers before court to indicate that such a committee has been constituted at the Respondent’s workplace, or that such committee was ever involved in the formulation of the alcohol testing policy which the respondent characterizes as a “health and safety” policy. This tends to detract from the Respondents argument that the RAT was introduced under the authority of the Occupational Safety & Health Act, 2001, since the structures established by that Act for the formulation of policy appear to have been ignored.

[30] An Alcohol Testing Policy & Procedure may certainly be regarded as primarily a health and safety issue, but it is also a discipline issue, and an issue involving the human rights of workers which transcends the workplace.

[31] It is facile to argue that the respondent was not required to negotiate the implementation of RAT because it is a company health and safety policy and procedure. There are policies and procedures which have a significant impact on the employment relationship, the conditions of work, and/or the fundamental rights of workers. Such policies cannot be introduced unilaterally without a meaningful process of collective bargaining having taken place.

[32] To assert that collective negotiation only applies to issues involving wages and conditions of work, and not to the management of the business, assumes that there is a clear boundary between employment issues and management issues. All decisions that affect the business also affect the workforce.

Decisions about technology, means of production, health and safety and personnel structures may affect the workforce more than any other decisions the employer makes. In fact, the decisions that employers reserve to themselves under the label "management prerogative" may often be the ones in which it is most important for the workers representatives to make their contribution.

[33] It may be apposite at this stage for the court to distinguish between "negotiation" and "consultation" in the context of industrial relations.

> Negotiation is used synonymously with collective bargaining, and refers to the voluntary process whereby management and labour endeavour to reconcile their conflicting interests and aspirations through the joint regulation of terms and conditions of employment.
>
> **See R. Lewis: Labour Law in Britain (1986) 110**.

Consultation, on the other hand, involves seeking information, or advice on, or reaction to, a proposed cause of action. It envisages giving the consulted party an opportunity to express its opinion and make representations, with a view to taking such opinion or representations into account. It certainly does not mean merely affording an opportunity to comment about a decision already made and which is in the process of being implemented.

> See **Hadebe & Others v Ramtex Industrials Ltd (1986) 7 ILJ 726 (IC) 735.**

[34] The duty to negotiate is more onerous than the duty to consult. Negotiation involves an attempt to reach consensus. Although consensus is the aim of negotiation, it is not essential that an agreement is reached. Recognition and collective agreements often provide dispute resolution procedures which kick-in when negotiations have failed. In the absence of agreed resolution procedures, the law also allows an employer who has bargained in good faith to an impasse to unilaterally implement its proposals.

> (see **NUM v East Rand Gold & Uranium Company Ltd (1991) 12 ILJ**

1221 (A)

[35] The Recognition Agreement between the Respondent and the Union lists Negotiable Issues as follows:

- Those conditions of employment including wages which the parties agree are subject to negotiation.

- The procedures for monitoring the administration of this agreement and any other agreements concluded by the NC (Negotiating Committee).

[36] Clause 12 of the Recognition Agreement states that "The Grievance Procedure & Disciplinary Code & Procedure annexed hereto marked "C" and "D" respectively shall be observed by the parties."

The Disciplinary Code & Procedure is duly annexed. This is the code which includes Clause 11.04 dealing with Proof of Drunkenness.

[37} Clause 14 of the Recognition Agreement states that "no amendment of this agreement shall be effective unless it is reduced to writing and signed by the company and the union."

[38] It is the view of the court that this Clause 14 requires any variation of both the Recognition Agreement and the Grievance & Disciplinary Codes to be negotiated and agreed in writing.

[39] In so far as Clause 12.01 of the Disciplinary Code provides that "the Employer will consult with the union in anticipation of any proposed amendment, deletion or addition to this procedure," this must be read as subordinate to Clause 14 of the main recognition agreement and any amendment, deletion or addition will nevertheless have to be "reduced to writing and signed by the

company and the union."

[40] Although the amendment of the Alcohol Testing Policy and Procedure by the introduction of random testing has an application beyond the ambit of Clause 11.04 of the Disciplinary Code (proof of drunkenness), it undoubtedly operates to vary and add to that clause.

[41] For example, disciplinary action under the revised Policy may now be taken against a randomly-selected person who refuses to take a breath test, even though there is no other cause to suspect him/her of drunkenness. Such a person is presumed to be alcohol-impaired because his/her sobriety could not be confirmed.

[42] There is also a new punitive element involved in denying an employee access to the workplace where the test reading is lower than the 0.08mg/100ml standard previously established by agreement as "evidence leading to proof of drunkenness".

[43] The court finds that in so far as the introduction of RAT affects disciplinary offences, evidence and procedures governed by the Disciplinary Code & Procedure, the variation of the Alcohol Testing Policy & Procedure should have been negotiated with the union.

[44] Having regard also to the ethical and human rights implications of RAT; the necessity that random testing be part of a systematic programme which includes provision for education, and monitoring and support of alcohol-impaired employees; and the valid requirement that RAT should apply only to employees in safety-sensitive jobs or areas, it is surprising that the Respondent did not engage the union in meaningful dialogue in order to formulate a comprehensive and credible policy.

[45] The full implications of random testing do not appear to have been communicated to the union or the workers until the new Policy was published and implemented. This prompted confusion and protest, as appears from the minutes of the meetings held on 5th and 24th May 2006.

[46] The brief discussion which occurred at the consultation meeting of 21st March 2006 cannot be regarded as reasonable consultation. No proposal or draft policy was presented by management for

consideration and comment. It is not even clear from the minutes whether the union representative understood that random selection for testing by the access computer would no longer be based on good cause (i.e. suspicion).

[47] Furthermore, the minutes of the meeting indicate that the Respondent had already taken a decision to implement the new system, prior to any consultation with the union.

[48] In workplace parlance, there is a need for management to "sell" a new policy to the workers so that they "own: it, in the sense of understanding and accepting the policy and abiding by its rules. This did not happen with regard to RAT, to the extent that the Applicant, the Secretary of the union, has refused to cooperate with the policy and placed his employment in jeopardy on a matter of principle.

[49] In an unreported case decided by the SA Labour Court, Revelas J. ruled that the unilateral introduction of a substance abuse policy, without the agreement of the union, constituted a unilateral change in employment conditions. See **METRORAIL v SATAWU (unreported Labour Court Case No. J4561/01).**

This judgement fortifies the view of this Court that the Alcohol Testing Policy & Procedure does not fall within the exclusive managerial prerogative of the Respondent, and it should have been negotiated between the parties.

[50] With regard to the first legal issue then, the court finds that the so-called consultation at the meeting of 21st March 2006 was not sufficient to entitle the Respondent to unilaterally implement the new random Alcohol Testing Policy & Procedure.

[51] It follows that the probabilities of success in the main application under Case No. 423/2006 favour the union, and the Applicant has established a clear

right to refuse to submit to random alcohol testing. In that event, the Applicant is entitled to the interim relief he is seeking.

[52] In view of this finding, it is not necessary for the court to make any finding on the constitutional issue, namely whether RAT infringes upon the Applicant's fundamental right to be protected against arbitrary search without his free consent having been first obtained. The court shall nevertheless make certain observations with regard to this important issue.

[53] Section 14 (1) (e) of the Constitution of Swaziland declares and guarantees the fundamental right of an individual to be protected from arbitrary search.

[54] Section 22 (a) provides that a person shall not be subjected to the search of his person, except with the free consent of that person first obtained.
.
[55] Section 22 contains a clause limiting the fundamental protection against arbitrary search of the person as follows:

> " *22 (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision that:*
>
> (a) *is reasonably required in the interests of defence, public safety, public order, public morality, public health, town and country planning, the development and utilization of mineral resources, or the development or utilization of any other property in such a manner as to promote the public benefit;*
>
> (b) *is reasonably required for the purpose of promoting the rights or freedom of other persons."*

[56] The constitutional right contained in section 22 thus protects a person from an intrusion on his personal privacy and bodily integrity without his consent, unless reasonable justification can be shown for such intrusion.

[57] Privacy is a basic human right and the reasonable expectation of every person. It underpins human dignity and other fundamental rights such as freedom of association and freedom of expression. A free and democratic society requires respect for the autonomy of the individual and limits the power of the state and private organizations to intrude on that autonomy.

[58] The courts in the United States of America have held consistently that drug and alcohol testing, including preliminary breath test and breathalyser tests, constitutes a "search."

-See **Skinner v Railway Labour Executives Association 489 U. S. 602 at 616 -7**

Schmerber v State of California 384 U.S. 757 (1996)

State of Alaska v Blank 04/30/3004 sp-5802

[59] In South Africa, such tests have been dealt with in the context of the right to privacy

(See for instance **Seethal v Pravitha 1983 (3) SA 827 (D)**

S v Orrie & Another 2004 (3) SA 584 (c))

and are regarded as an infringement of bodily privacy if not carried out with the subject's informed consent.

[60] In the **SATAWU/ Metrorail** case referred to above, the Labour Court held that compulsory alcohol drug testing imposed without the consent of the union invaded workers' common law and constitutional rights to privacy and to bodily and psychological integrity.

[61] This court considers that the alcohol test provided for in the Respondent's

Policy constitutes a chemical search to determine whether the body and mind of the person tested is under the influence of alcohol, and as such the test intrudes on the Applicant's common law right to privacy and his constitutional right to be protected from bodily search without his consent.

[62] Not all invasions of privacy involving compulsory bodily search are necessarily unlawful. As set out above, the constitution expressly permits a compulsory search which is reasonably required in the interests of the public or for the purpose of promoting the rights or freedom of other persons.

[63] In its judgement dated 13 July 2006, the court referred to the power of the Police to administer breath and blood tests to confirm the presence of alcohol in a person who is suspected of driving under the influence of alcohol, and noted that this power does not extend to allow the police to administer random tests without reasonable cause.

[64] The union has consented to suspicion-based alcohol testing at the workplace. This consent is reflected in Clause 11.04 of the Disciplinary Code and is binding on the union's bargaining unit.

The constitutional question which arises, is whether the Respondent can impose compulsory random alcohol testing on the union without infringing the fundamental rights of the workers to be protected against arbitrary search. In other words, does RAT contravene Section 14 of the constitution.

[65] It is common cause that the union and the workers have not consented to the implementation of RAT. Mr. Flynn for the Respondent has argued that such consent is not required, for the reason that RAT has been imposed on the workers as a health and safety policy formulated under the authority of the Occupational Health & Safety Act No. 9 of 2001, and it is reasonably required for the purpose of promoting the rights or freedoms of other persons, in particular the Respondent and its employees.

[66] Clause 9 (2) of the Occupational Health & Safety Act provides that an employer shall as far as reasonably practicable ensure <u>by effective supervision</u> (my underlining) that work is performed in a safe manner and without risk to health or exposure to danger.

[67] Clause 3 (2) of the Act states that "the provisions of this Act shall be in addition to The Factories, Machinery and Construction Works Act, 1972 and any other related legislation."

[68] Clause 42 provides that "any act or regulations which relates to any matter

falling under this Act and which is not inconsistent with this Act shall continue to be in force as if it was made under this Act".

[69] Regulation 152 (1) of the Factory, Machinery & Construction Works Act, 1972 provides that no manager shall allow a person who is, or appears to be, under the influence of alcohol or narcotic drugs, to enter a factory or place where machinery is used.

> Regulation 152 (3) gives the manager or any person deputed by him the power to arrest any person whom he, on reasonable grounds, suspects of being under the influence of alcohol or drugs, if it is necessary to do so in the interests of the safety of other persons.

[70] Reading Section 9 of the Occupational Health & Safety Act together with the Regulations made under the Factory, Machinery & Construction Works Act, 1972, it appear to the court that the legislation neither expressly nor impliedly authorizes random testing for the purpose of excluding persons under the influence of alcohol from the workplace. On the contrary, the legislation expressly provides that *effective supervision* is the means whereby persons, who are suspected on reasonable grounds to be under the influence of alcohol, should be refused entry, or apprehended and removed.

[71] The court is left in serious doubt whether it can be said that RAT has been implemented under the authority of the legislation referred to, or any other law.

[72] Assuming however that Section 9 (3) of the Occupational Health & Safety Act can be said to authorize the Respondent to implement RAT as part of "a systematic way of identifying, evaluating and controlling hazards at the workplace", can it be said that RAT is reasonably required for the purpose of promoting the rights and freedoms of the Respondent and the other employees at the workplace?

[73] To answer this question, the Respondent bears the onus of satisfying the court that RAT is a reasonably necessary component of a system introduced to "identify, evaluate and control" the hazard of alcohol impairment at the workplace.

[74] The Respondent must demonstrate that it is not reasonably possible to establish an effective alcohol testing policy without the inclusion of RAT. To phrase this aspect in another way, it must be demonstrated that the competing right of the Respondent and other employees to be protected from alcohol-induced hazards at the workplace cannot be safeguarded without the inclusion of RAT in the Respondent's Alcohol Testing Policy & Procedure.

[75] The court is also required to have regard to the extent to which the fundamental right (to be protected against arbitrary search) is infringed by the adoption of RAT, and to weigh the potential prejudice that might be suffered as a result of the infringement, against the potential prejudice to the Respondent and its employees should RAT not form part of the Respondent's Alcohol Testing Policy & Procedure.

[76] It is immediately apparent that the Respondent's adoption of RAT as part of its policy cannot be justified with respect to employees who do not work in safety- sensitive jobs and areas. To that extent, and in respect of such employees, the Policy is clearly unconstitutional.

[77] With regard to safety- sensitive employees, RAT does not significantly contribute to the *detection* of employees under the influence of alcohol. Its sole merit appears to lie in its *deterrent* effect. Whether this deterrent effect cannot equally be achieved by better awareness programmes, and more efficient monitoring and supervision, has not been dealt with on the papers, and it is unnecessary for this court to venture any opinion in this regard for the purpose of the present application.

[78] What can be stated however is that the constitutionality of random alcohol testing without the consent of the employees is by no means established by the Respondent in this application, and the probabilities of success in the main application under Case No. 423/2006 to some extent also favour the union with regard to the constitutional question.

[79] For the reasons stated above the court confirms the prima facie view expressed in its previous judgement, to wit that a grave injustice would result if the disciplinary charges against the Applicant are permitted to be prosecuted without the application of the union under Case No. 423/06 having been

determined. The prospects of success in that case do favour the union, and the outcome of the case is likely to declare the disciplinary charges against the Respondent entirely misconceived.

[80] The rule nisi issued on the 13th July 2006 is confirmed.

The members agree.

The court expresses its appreciation for the helpful contributions of counsel for the parties.

P. R. DUNSEITH

PRESIDENT OF THE INDUSTRIAL COURT