

Smoking in the workplace in South Africa: Law and practice relating to the rights and obligations of employers and employees

Jamil Ddamulira Mujuzi, LLD

Post-Doctoral Fellow, Faculty of Law, University of the Western Cape

South Africans have a high prevalence of smoking. The preamble to the Tobacco Products Control Act, which regulates the production, marketing, advertising, selling and smoking of tobacco products in public places, acknowledges that tobacco use 'is extremely injurious to the health of smokers, non-smokers and other users of tobacco products'; 'has caused widespread addiction in society'; and 'warrants, in the public interest, a restrictive legislation'. One of the objectives of the Tobacco Products Control Act is to regulate the circumstances in which tobacco products can be used in public places, including workplaces. The Act makes smoking in a public place an offence and obliges employers who still allow smoking in the workplace to provide designated smoking areas. However, the Act also empowers employers to ban smoking totally at workplaces.

This paper highlights the provisions and regulations relating to smoking in workplaces and discusses the reported cases in which the various bargaining council arbitrators have dealt with the issue of employers' and employees' rights in cases relating to smoking at workplaces.

South Africans have a high prevalence of smoking. According to the Heart and Stroke Foundation of South Africa, there are 7 million smokers in South Africa, of whom 80% have tried to give up smoking at least once, 90% began to smoke before the age of 18, and 20% began to smoke before the age of 10.¹ The preamble to the Tobacco Products Control Act (as amended by the Tobacco Products Control Amendment Act, Act No. 63 of 2008),² which regulates the production, marketing, advertising, selling and smoking of tobacco products in public places, acknowledges that tobacco use 'is extremely injurious to the health of smokers, non-smokers and other users of tobacco products'; 'has caused widespread addiction in society'; and 'warrants, in the public interest, a restrictive legislation'. One of the objectives of the Tobacco Products Control Act (the Act) is to regulate the circumstances under which tobacco products can be used in public places, including workplaces. The Act makes smoking in a public place an offence and obliges employers who permit smoking in the workplace to provide designated smoking areas. However, the Act also empowers employers to ban smoking totally in the workplace. The purpose of this paper is to highlight the provisions and regulations relating to smoking in workplaces and to discuss the reported cases in which the bargaining council arbitrator has dealt with the issue of employers' and employees' rights and obligations in this situation.

Law relating to smoking in the workplace

As stated above, the Tobacco Products Control Act provides the legal framework that governs, *inter alia*, the circumstances under which smoking is permissible or otherwise in public places. The preamble to the Act provides, among other things, that one of the purposes of the Act is 'to prohibit or restrict smoking in public places'. Section 1 of the Act defines a public place as 'any indoor, enclosed or partially enclosed area which is open to the public, and includes a workplace and a public conveyance'. Section 1 also defines 'workplace' as meaning 'any indoor, enclosed or partially enclosed area in which employees perform duties of their employ-

ment', excluding areas specifically designated by the employer as smoking areas. Section 2(1)(a)(i) of the Act provides that 'no person may smoke any tobacco product in a public place; [or in] ... any area within a prescribed distance from a window of, ventilation inlet of, doorway to or entrance into a public place'. Under section 2(2) of the Act, the owner or the person in control of a public place or an employer in respect of the workplace 'shall ensure that no person smokes in that area'. Smoking in a public place is an offence under section 7 of the Act.

Pursuant to sections 2 and 6 of the Act, which empower the Minister of Health to make regulations giving effect to some provisions of the Act, in 2000 the Minister of Health published in the *Government Gazette* the Notice Relating to Smoking of Tobacco Products in Public Places. Section 3 of the Notice Relating to Smoking of Tobacco Products in Public Places provides as follows:

3. An employer, owner, licensee, lessee or person in control of a public place may designate a portion of a public place as a smoking area, provided that:
 - a. the designated smoking area does not exceed 25% of the total floor area of the public place;
 - b. the designated smoking area is separated from the rest of the public place by a solid partition and an entrance door on which the sign "SMOKING AREA" is displayed, written in black letters, at least 2 cm in height and 1,5 cm in breadth, on a white background;
 - c. the ventilation of the designated smoking area is such that air from the smoking area is directly exhausted to the outside and is not re-circulated to any other area within the public place;
 - d. the message: "SMOKING OF TOBACCO PRODUCTS IS HARMFUL TO YOUR HEALTH AND TO THE HEALTH OF

CHILDREN, PREGNANT OR BREASTFEEDING WOMEN AND NON-SMOKERS. FOR HELP TO QUIT PHONE (011) 720 3145" is displayed at the entrance to the designated smoking area, written in black letters, at least 2 cm in height and 1,5 cm in breadth, on a white background; and

- e. notices and signs indicating areas where smoking is permitted and where it is not permitted must be permanently displayed and signs indicating that smoking is not permitted must carry the warning: "ANY PERSON WHO FAILS TO COMPLY WITH THIS NOTICE SHALL BE PROSECUTED AND MAY BE LIABLE TO A FINE" [upper case in original].³

The Notice Relating to Smoking of Tobacco Products in Public Places provides further that '[a]n employer, owner, licensee, lessee or person in control of a public place must ensure that no person smokes anywhere other than in the designated smoking area in that public place' and that an employer must ensure that:

- a. employees who do not want to be exposed to tobacco smoke in the workplace are protected from tobacco smoke in that workplace; and
- b. employees may object to tobacco smoke in the workplace without retaliation of any kind.

The Notice Relating to Smoking of Tobacco Products in Public Places requires employers to 'have a written policy on smoking in the workplace, and the policy must be applied within three months from the date of coming into operation of the Tobacco Products Control Amendment Act, 1999'.⁴ In addition, section 9 of the Notice Relating to Smoking of Tobacco Products in Public Places provides that 'any employer, owner, licensee, lessee or person in control of any public place or part of a public place may totally prohibit smoking in that place'. The above provisions are self-explanatory and need no interpretation. Cases that have dealt with the rights and obligations of employees and employers in relation to smoking at workplaces will now be discussed.

Arbitrator's decisions on smoking at workplaces

Section 112 of the Labour Relations Act⁵ establishes the Commission for Conciliation, Mediation and Arbitration (CCMA) with the mandate to resolve disputes referred to in terms of the Labour Relations Act through conciliation or arbitration. These disputes include alleged unfair dismissal or suspension and other work-related grievances. Section 127 of the Labour Relations Act empowers the CCMA to accredit any council or private agency to resolve work-related disputes through conciliation or arbitration. What follows is a discussion of the decisions in which the arbitrator of the CCMA or its accredited agency has dealt with issues relating to the rights and obligations of employers and employees in matters relating to smoking in workplaces.

In the matter of *National Union of Metalworkers of SA on Behalf of Bhulwana and Boardman Brothers (Pty) Ltd*⁶ the factory owners banned smoking on the factory premises without consulting the workers or the workers' union. One of the employees was allegedly found smoking on the premises and as a result suspended from work for 17 days without pay as a disciplinary measure. On behalf of its member, the suspended employee, the workers' union took the matter for arbitration. The Union argued before the arbitrator

that 'the imposition of the rule without consultation amounted to a unilateral change to terms and conditions of employment'.⁷ The Union also added that the smoking policy was being imposed inconsistently because 'certain managers ... smoke[d] at will, whilst the majority of factory workers [we]re confined to smoking in their lunch-break only'.⁸ The applicants also argued that the sentence imposed on the employee was severe. The respondent argued that they did not 'view "smoking" as a condition of employment' and that 'the decision to disallow smoking in the workplace was a rule justified by law'.⁹ They added that the sanction imposed on the employee for smoking on the premises 'was in line with company policy and consistent with previous similar penalties imposed for the transgression of the same rule'.¹⁰ The respondent argued further that he had the right to prohibit the use of tobacco on the premises without consulting the employees or the Union, that 'he has an inherent right to make any other workplace rules as he or she may deem appropriate', and that rules prohibiting smoking on the premises were 'rules pertaining to the premises and not conditions of employment'.¹¹ He added that smoking had to be prohibited on the premises because the company 'had a responsibility towards the health of its workers' and that '[t]here were also operational considerations insofar as there had been fires on the company premises and the products they produced were highly flammable'.¹² The employer submitted that the applicant went ahead and smoked on the premises although '[t]here were notices in all areas warning employees to refrain from smoking on the premises'.¹³ The applicant denied having smoked on the premises because 'he was aware of the notice prohibiting him from doing so'.¹⁴ There were two issues for the arbitrator to decide: (i) 'whether the imposition of a no-smoking rule for the respondent's entire factory premises without prior consultation or agreement with the employees or the union constitutes a unilateral change to a term or condition of employment'; and (ii) 'whether the respondent acted fairly by suspending the applicant for allegedly smoking within the respondent's premises'.¹⁵ The arbitrator:

[Did] not agree that a total ban on smoking in the workplace constitutes a unilateral variation or change to working conditions. There is no contractual entitlement to smoke at the workplace. Section 3 of the Tobacco Products Control Act ... stipulates that an employer *may* designate a portion of a public place as a smoking area ... [T]he ... Act [provides further] that any employer in control of any public place or part of a public place *may* totally prohibit smoking in that place [emphasis added]. If an employer can exercise this right in a public place then it follows that they enjoy equal if not further rights to control smoking in a private establishment. In order for the right to smoke at the workplace to be considered a condition of employment, it would need to qualify as a *condition* under which the effected employees were employed. For this reason the applicant union cannot 'require' the employer to refrain from implementing a unilateral change to terms and conditions of employment or to restore the status quo ante for three days [emphasis in the original].¹⁶

The arbitrator held that there was no sufficient evidence to convince him that the applicant had been smoking on the premises and therefore held that his suspension had been unfair. On the issue of the inconsistent application of the smoking policy, the arbitrator held that 'any relief would have to be addressed in terms of its being rendered a mutual interest issue'.¹⁷ The above ruling raises three important issues relating to a smoking policy in the workplace: (i)

the policy must be known to all the employers; (ii) the employer has the right and in fact a duty to introduce a smoking policy on the premises without consulting his employees, even if the said policy will affect the employees negatively – this is because such a policy does not amount to a change of the terms of employment; and (iii) the arbitrator will be reluctant to order the employer to apply the smoking policy consistently. He would rather leave that issue to be addressed between the employer and the union.

In *Coetzee v Sinakho Staff Shop (Pty) Ltd*,¹⁸ in the matter alleging constructive dismissal, the applicant, who had been working as a consultant for the respondent for approximately 4 years, resigned and took the matter for arbitration on the grounds that the respondent had 'made continued employment intolerable for her thereby leaving her with no other reasonable alternative but to resign'.¹⁹ Among other things she claimed that:

Her health was ... deteriorating because of staff smoking in their offices with the no-smoking policy in place. At any given moment there were about 13 smokers smoking in their offices. She tried to close her office door to prevent smoke inhalation but was instructed not to. She contracted asthma as a result of the smoking in the offices. She previously did not have asthma. Within a few months of working for the respondent, she contracted flu which adversely affected her health over her entire period of working for the company. This is confirmed by a well-known medical doctor with 29 years' experience in the industry.²⁰

The respondent argued that the company had a no-smoking policy and that the applicant's argument to the contrary was unfounded.²¹ However, the applicant conceded that although the respondent had instituted a no-smoking policy later, that policy was not 'adhered to as staff members continued smoking at the front door with the wind blowing the smoke inside the office'.²² She added 'that after the smoking policy was introduced, she saw a decline in smoking in the office as smokers were no longer allowed to smoke in their offices'.²³

Asked whether she filed a grievance and, if so, to provide proof thereof, the applicant stated there was no proof as she did not lodge a grievance formally in writing. Asked precisely what she did about this unbearable situation, the applicant stated she closed her office door but was instructed to open it as the company has an open door policy. Asked why she did not resign and leave the company, the applicant stated that the respondent said he would take her to court.²⁴

The respondent argued that:

When the smoking law came about, the staff in the office resisted immediate implementation thereof. Every member of staff has a dedicated office and he thought they did not infringe the smoking law by smoking in their offices. Thereafter, he implemented a smoking policy and all staff complied therewith. He had to implement it as there was a more stringent smoking law in the pipeline from the Ministry of Health. He is not aware of the applicant's deteriorating health condition occasioned by smoking in the workplace as this was never reported to him and she did not even file a grievance. He did speak to the applicant about her sick leave as she had exhausted her sick leave privileges. The applicant tendered her resignation some 14 months after the implementation of the smoking policy in the workplace.²⁵

The respondent added that he was not aware 'that staff smoked at the front door and the wind blew the smoke inside', and although the applicant had submitted sick notes with reasons whenever she took sick leave, she never informed the respondent what her problem was.²⁶ The arbitrator found that:

The applicant did not bring it to the respondent's attention that smoke from staff members smoking in the office adversely affected her health to such an extent that she contracted asthma. Secondly, a smoking policy was implemented later precluding members of staff from smoking in their offices. The applicant continued working for the respondent nearly 14 months after the smoking policy was implemented. Except for a letter allegedly written by a well-known Pretoria specialist, no concrete evidence was placed before me during these arbitration proceedings. This evidence falls to be rejected as the doctor/specialist was not called to testify before me as the document cannot speak for itself.²⁷

The following principles could be distilled from the above facts and arbitrator's ruling: (i) for the applicant to be successful in an application alleging constructive dismissal as a result of other members of staff smoking at work, the applicant must show that he/she complained, in writing, about the manner in which the smoking was affecting her, that the employer did not act to stop or prevent other people from smoking in the workplace which continued to affect the applicant's health, and that the applicant had no alternative but to resign from the job as long as the continued smoking still affected her health. In other words, there has to be a direct nexus between the applicant's resignation and the smoking at the workplace, and the resignation must take place as soon as practicable; (ii) if the applicant alleges that he/she resigned as a result of smoking in the workplace and intends to rely on medical evidence to prove that smoking adversely affected her health, she must not only produce documentary medical evidence in the form of a physician's letter confirming that fact, but she is also under a duty to call the physician who authored that letter to testify before the arbitrator. It is argued that the arbitrator should also have taken the initiative to order the applicant to call the physician to come and testify. The applicant probably thought that the physician's letter was sufficient; (iii) for the employer to escape liability for the employee's resignation as a result of smoking in the workplace, it is not enough for the employer to show that he/she implemented a non-smoking policy. He/she must indicate that that policy was effective in the sense that it was adhered to by his employees;²⁸ and (iv) it is incumbent upon the employee to disclose fully to the employer the circumstances surrounding his/her continued absence from work as a result of falling sick due to other employees smoking in the workplace. Otherwise, the mere fact that the employee took sick leave without explaining to the employer that it was a result of her health being affected by smoking does not implicate the employer in the applicant's alleged constructive dismissal.

The 2004 arbitrator's decision in *Naudi v Stealth Marine*²⁹ is a classic example of the circumstances in which smoking in the workplace can amount to constructive dismissal. The applicant was employed as a receptionist by the respondent in March 2004. She 'had respiratory problems and previous serious health conditions which included asthma attacks as a result of smoking', which forced her to stop smoking.³⁰ According to the applicant, '[t]he respondent's premises had no designated smoking areas ... Staff smoked in the corridors, in the reception area and in their offices upstairs. Smoke often trickled down from the upstairs offices into

the reception area.³¹ After 2 weeks in her job, 'the applicant developed a reaction to the cigarette smoke and got sick'.³² Specifically, she 'had a tight chest and difficulty breathing' and 'also developed nausea, a headache and light-headedness'.³³ She complained to her bosses about smoking and told them that she was allergic to smoke and that if the employees continued smoking on the premises she would fall sick. However, although one of the senior managers advised staff to stop smoking on the premises, he himself and other employees continued to smoke on the premises and the applicant complained about that 'every day' to one of her bosses.³⁴ She subsequently sent a formal written complaint to her line manager outlining the negative effects smoke had on her health and requested her to prohibit people from smoking on the premises if the applicant were to remain healthy and productive. Despite the written complaint, no measures were put in place to designate a smoking area and/or to stop people from smoking on the premises. On 30 April when people were still smoking on the premises she 'advised her boss that she had to leave, as she was unable to continue to work under the circumstances'.³⁵ The issue for the arbitrator to determine was whether the employer's conduct amounted to constructive dismissal of the applicant. The arbitrator found in favour of the applicant in the following terms:

[T]he applicant did not intend to end the employment relationship. She had only been in the employ of the respondent for six weeks before resigning. The applicant would not have resigned but for the conduct of the respondent. In terms of the Tobacco Products Control Act ... smoking is not allowed in offices or in public areas in workplaces. Smoking is allowed in designated areas and it is the duty of an employer to ensure that the Act is complied with ... [T]he respondent failed to implement anti-smoking legislation in the workplace. The respondent's actions were therefore unlawful in allowing employees to smoke inside the administration building. It is important to note that the applicant in this case was not the average, healthy, non-smoking employee who was indignant at the fact that her employer was not complying with anti-smoking legislation. The applicant was previously a heavy smoker and had developed serious respiratory problems and an allergy to cigarette smoke as a result of her smoking habit. The applicant developed debilitating physical symptoms when exposed to cigarette smoke ... the respondent created an intolerable working environment for the applicant. The applicant was unable to be productive ... The applicant's evidence suggests that resignation was the only reasonable option open to her in the circumstances. The applicant complained to her boss ... When the situation did not change she took her complaint to the highest level at the workplace ... Despite this the situation did not improve ... [T]he applicant has proved that she was dismissed and that the respondent created an intolerable situation at the workplace that forced her to resign ... [T]he respondent actions were both unlawful and unfair.³⁶

The above decision clearly indicates what amounts to constructive dismissal pursuant to the employer's failure to put a smoking policy in place. The applicant must show that smoke makes it impossible for her to carry out the terms of her contract, i.e. to remain in the employer's employment. The applicant must report the matter in writing to the relevant authorities established by the employer's structures and specifically show how exposure to smoke makes it impossible for her to continue in the employer's employment. If the employer does not put measures to stop peo-

ple from smoking on the premises in place, the employee should resign as soon as practicable.

In *Gobey v Grinkaer-Lta Duraset*³⁷ the applicant, who alleged constructive dismissal for having been counselled, a step preceding a warning, several times in a short period of time by a new line manager, argued that he had been unfairly counselled by his line manager for smoking in a non-designated smoking area because his smoking 'had been reported to ... [his line manager] and not seen by him'.³⁸ The arbitrator found that:

It is irrelevant whether or not ... [the line manager] himself caught the applicant smoking in a non-designated area or not. The applicant on his own admission agreed that he had smoked in a non-designated area and that he was aware of the respondent's smoking policy. Such a policy must be adhered to by all employees and failure to do so must result in some form of corrective discipline. I am therefore not persuaded that the applicant was unfairly counselled on this issue.³⁹

The above finding raises the following important issues: (i) should the employer decide to designate smoking areas on the premises, those areas must be known to the employees;⁴⁰ and (ii) the smoking policy must be known to the employees – in other words, once the employer puts in place such a policy, he/she must make sure that all the employees are aware of it and the consequences that will flow from disobeying it; and (iii) for the policy to be effective and adhered to, its breach must attract sanctions, i.e. those who disobey the policy must expect disciplinary measures of some sort for their misconduct. This could be a written warning or counselling. It is within the discretion of the employer to determine the sanctions for failing to adhere to the smoking policy. It is irrelevant whether the employee was caught by the managers or any other employee while smoking in a non-designated area. What matters is that there is creditable evidence that the employee was indeed found smoking in a non-designated smoking area.

Conclusion

The article has dealt with the law and practice relating to smoking in workplaces in South Africa. It has been demonstrated that the law prohibits smoking in workplaces and obliges employers to put smoking policies in place on their premises. Several cases have appeared before different arbitrators on the rights of employers and employees in relation to smoking policies in workplaces. Some of the conclusions that could be drawn from the cases discussed above are: (i) the employer is not obliged to consult his/her employees before the introduction of a non-smoking policy at the workplace; (ii) the prohibition of smoking in workplaces does not amount to a change of the terms of employment; (iii) the employer has a duty to ensure that notices prohibiting smoking are displayed in conspicuous places in the workplace in a language understood by the employees; (iv) should the employee feel that smoking on the premises affects his/her health, she/he must complain to the employer in writing about that fact; and (v) an employee whose health has been affected by other employees smoking at work has to notify the employer how his/her health is being affected by such smoking and how that makes it impossible for him/her to continue in the employer's employment. If the employer fails to put measures in place to ensure that continued smoking on the premises does not affect the complainant, the latter should resign as soon as possible and claim damages on the basis of constructive dismissal.

References

1. See 'Smoking – let's clear the air'. http://www.heartfoundation.co.za/lifestyle/lifestyle_smoking.htm (accessed 22 April 2010).
2. Tobacco Products Control Act, Act No. 83 of 1993.
3. GG 21610 of 29 September 2000.
4. Act No. 12 of 1999.
5. Labour Relations Act 66 of 1995.
6. National Union of Metalworkers of SA on behalf of Bhulwana and Boardman Brothers (Pty) Ltd (2004) 25 ILJ 2258 (BCA).
7. National Union of Metalworkers of SA on behalf of Bhulwana and Boardman Brothers (Pty) Ltd, p. 2259.
8. National Union of Metalworkers of SA on behalf of Bhulwana and Boardman Brothers (Pty) Ltd, p. 2260.
9. National Union of Metalworkers of SA on behalf of Bhulwana and Boardman Brothers (Pty) Ltd, p. 2260.
10. National Union of Metalworkers of SA on behalf of Bhulwana and Boardman Brothers (Pty) Ltd, p. 2260.
11. National Union of Metalworkers of SA on behalf of Bhulwana and Boardman Brothers (Pty) Ltd, p. 2260.
12. National Union of Metalworkers of SA on behalf of Bhulwana and Boardman Brothers (Pty) Ltd, p. 2261.
13. National Union of Metalworkers of SA on behalf of Bhulwana and Boardman Brothers (Pty) Ltd, p. 2261.
14. National Union of Metalworkers of SA on behalf of Bhulwana and Boardman Brothers (Pty) Ltd, p. 2261.
15. National Union of Metalworkers of SA on behalf of Bhulwana and Boardman Brothers (Pty) Ltd, p. 2260.
16. National Union of Metalworkers of SA on behalf of Bhulwana and Boardman Brothers (Pty) Ltd, p. 2262.
17. National Union of Metalworkers of SA on behalf of Bhulwana and Boardman Brothers (Pty) Ltd, p. 2263.
18. Coetzee v Sinakho Saff Shop (Pty) Ltd (2009) JOL 24414 (CCMA).
19. Coetzee v Sinakho Saff Shop (Pty) Ltd, p. 2.
20. Coetzee v Sinakho Saff Shop (Pty) Ltd, p. 3.
21. Coetzee v Sinakho Saff Shop (Pty) Ltd, p. 4.
22. Coetzee v Sinakho Saff Shop (Pty) Ltd, p. 7.
23. Coetzee v Sinakho Saff Shop (Pty) Ltd, p. 4.
24. Coetzee v Sinakho Saff Shop (Pty) Ltd, pp. 4 - 5.
25. Coetzee v Sinakho Saff Shop (Pty) Ltd, p. 6.
26. Coetzee v Sinakho Saff Shop (Pty) Ltd, p. 7.
27. Coetzee v Sinakho Saff Shop (Pty) Ltd, p. 12.
28. It has to be recalled that the designated smoking place could be a room on the employer's premises. In *Mabalane v NSA Security* [2006] JOL 18652 (CCMA), the facts show that the employer had designated a room on the premises for his smoking employees.
29. *Naude v Stealth Marine* (2004) 25 ILJ 2402 (BCA).
30. *Naude v Stealth Marine*, p. 2403.
31. *Naude v Stealth Marine*, p. 2403.
32. *Naude v Stealth Marine*, p. 2403.
33. *Naude v Stealth Marine*, p. 2403.
34. *Naude v Stealth Marine*, p. 2403.
35. *Naude v Stealth Marine*, p. 2404.
36. *Naude v Stealth Marine*, pp. 2404 - 2405.
37. *Gobey v Grinker-Lta Duraset* [2007] JOL 19017 (MEIBC).
38. *Gobey v Grinker-Lta Duraset*, p. 2.
39. *Gobey v Grinker-Lta Duraset*, p. 4.
40. Although the facts in the matter of *Jacobs v SA Mint Company* [2007] JOL 19861 (MEIBC) are based on a claim of unlawful dismissal as a result of sexual harassment, the case discloses that there was a smoking policy in place and that the employers were aware of that policy and adhered to it. This is because it was adduced in evidence that the applicant and those he allegedly sexually assaulted and also his colleagues sometimes met in the company's designated smoking area.