

19 SEPTEMBER 2016

EMPLOYMENT ALERT

Our programme on Conducting a Disciplinary Enquiry has been accredited by the Services SETA.

IN THIS ISSUE

OH NO! MORE EMPLOYMENT REGULATION

Various entities, academics and commentators have stated that the employment arena is over regulated. Whether this is true is a debate for another day.



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OH NO! MORE EMPLOYMENT REGULATION

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Recently, in the case of *AMCU and Others v Buffalo Coal Dundee (Pty) Ltd and Another* (JA42/2015) [2016], the Labour Appeal Court held that where a mining rights holder is not the employer it too must consult with the trade union insofar as the contractor intends to terminate employees' employment for operational requirements.

In the recent case of *Mnyandu v Padayachi* (AR162/2014) [2016], an employee (Padayachi) applied for a protection order in terms of the Protection from Harassment Act, No 17 of 2011 (Act) after receiving an email from a colleague (Mnyandu) which was circulated at their place of employment in which certain allegations were leveled against Padayachi and three colleagues. Padayachi alleged that his colleague had circulated an email which was 'defamatory, slanderous, libellous, dishonest, deceitful and malicious'. He contended that by circulating the email, Mnyandu 'impaired his dignity, defamed him, adversely affected his wellbeing and undermined his opportunity for promotion and financial benefit' at his place of employment by fabricating unfounded claims against him.

Padayachi could have utilised the common law to institute a claim for defamation or requested the employer to take disciplinary action against Mnyandu for her conduct. Instead, Padayachi used the Act to found his claim. Padayachi contended that that this email constituted harassment.

The Magistrates Court determined whether the conduct, ie the email sent by Mnyandu constituted harassment.

In s1 of the Act "harassment" is defined as:

'directly or indirectly engaging in conduct that the respondent knows or ought to know

- (a) causes harm or inspires the reasonable belief that harm may be caused to the complainant or a related person by unreasonably:
 - (ii) engaging in verbal, electronic or any other communication aimed at the complainant or a related person, by any means, whether or not conversation ensues; or
 - (iii) sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects to the complainant or a related person or leaving them where they will be found by, given to, or brought to the attention of, the complainant or a related person;

'harm' means any mental, psychological, physical or economic harm.'

The Magistrates Court found that the email sent by Mnyandu was sufficient to constitute harassment in the workplace. The Magistrates Court issued a final protection order against Mnyandu.

OH NO! MORE EMPLOYMENT REGULATION

CONTINUED

The High Court confirmed that the Act can apply to the workplace and may be useful in the work environment.



The Magistrates Court should have stated that the Act does not apply to the workplace and dismissed the claim. Rather, the Court stated that the Act applies in the workplace. As a result, employers and employees have to now contend with yet another piece of legislation applicable in the workplace.

Mnyandu appealed to the High Court. On appeal, the High Court overturned the decision of the Magistrates Court and ruled

in favour of Mnyandu. Although, the High Court found that the Act was applicable at the workplace, it found that Mnyandu did not harass Padayachi.

The High Court confirmed that the Act can apply to the workplace and may be useful in the work environment. Accordingly, the Act and the issuing of a protection order in terms of the Act extends to the workplace.

Aadil Patel and Boipelo Diale

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2014 1st by M&A Deal Flow
1st by M&A Deal Value
1st by General Corporate Finance
Deal Flow

2013 1st by M&A Deal Flow
1st by M&A Deal Value
1st by Unlisted Deals - Deal Flow

2012 1st by M&A Deal Flow
1st by General Corporate Finance
Deal Flow
1st by General Corporate Finance
Deal Value
1st by Unlisted Deals - Deal Flow

DealMakers

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1ST
South African law firm and
12th internationally for Africa
& Middle East by deal value

2ND
South African law firm and
2nd internationally for Africa
& Middle East by deal count

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Our Employment practice's new
EMPLOYMENT STRIKE GUIDELINE
answers our clients' FAQs.

Topics discussed include strikes, lock-outs and picketing.

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Michael Yeates named winner in the **2015 and 2016 ILO Client Choice International Awards** in the category 'Employment and Benefits, South Africa'.



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BBBEE STATUS: LEVEL THREE CONTRIBUTOR

Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 3 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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