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EMPLOYMENT ALERT

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WORKPLACE EQUITY POLICIES MUST COMPLY WITH EMPLOYMENT EQUITY LEGISLATION

The employee in *Solidarity obo Pretorius v City of Tshwane Metropolitan Municipality* (JS523/2014) [2016] ZALCJHB 155 (Solidarity) was a white male who had been shortlisted for a particular position by his employer. The Acting Executive Director: Human Resource Management (HR Director), approved the shortlist but made his approval subject to the following condition: 'only candidates from a designated group should be shortlisted and interviewed.' The position was re-advertised and the employee was not shortlisted a second time.

THE RIGHT TO PRIVACY WILL NOT ALWAYS BE AN ADEQUATE DEFENCE

Over the recent few years there has been a drastic advancement of information technology and social media. As such, the manner in which conduct on the internet and social media platforms is monitored and regulated must progress to keep abreast of the constant changes.

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The court held that the staffing policy did not comply with the EEA because it does not provide for numerical goals set in accordance with the economically active population.

The employee claimed that the employer had unfairly discriminated against him on the grounds of his race and gender. The employer justified the HR Director's conduct with reference to its staffing policy. The employer could not rely on an Employment Equity Plan (EE Plan) to justify its conduct because its EE Plan had expired and a new EE Plan had not yet been implemented.

The employer conceded in its evidence that it had discriminated against the employee. The consequence of this was that the onus was on the employer to prove that the discrimination was fair.

Discrimination is permitted if it is done in accordance with an affirmative action measure, as defined in s15 of the Employment Equity Act, No 55 of 1998 (EEA). Therefore, the Labour Court had to decide whether or not the employer's staffing policy qualified as an affirmative action measure. If so, the employer's discrimination against the employee would be fair and the court would have to decide whether or not the staffing policy was applied fairly.

The court noted that the HR Director made the condition based on workplace profile statistics reflected in a table on the form submitted to him for approval. The numbers on the form gave the HR Director the impression that 'too many' white males were shortlisted. The HR Director conceded in his evidence that he did not consider any numerical targets with which he could have compared the white male representation, nor did he consider 'whether the broader representativity was relevant to the shortlisting of candidates for [the [particular] position in [the] specific department'.

The Labour Court held that an affirmative action measure must be capable of measurement and being monitored. Equality, according to the court, 'presupposes a measurable result'. The court held that the staffing policy did not comply with the EEA because it does not provide for numerical goals set in accordance with the economically active population. Furthermore, the court held that the staffing policy is inflexible in that it does not allow for exceptions or deviations in certain circumstances. In light of this, the staffing policy did not comply with the EEA.

The Labour Court found that the employer had unfairly discriminated against the employee.

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Employers should ensure that they act in accordance with workplace equity policies and plans which comply with employment equity legislation.

The court noted that the employer did not lead evidence to show that the appointment of the employee in the position he was initially shortlisted for would not adversely affect the goals, targets and objectives of the employer's new EE Plan, (which had been implemented subsequent to the recruitment process wherein the employee took part). Thus, the court ordered the employer to appoint the employee in the position he was shortlisted for.

Employers should ensure that they act in accordance with workplace equity policies and plans which comply with employment equity legislation.

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THE RIGHT TO PRIVACY WILL NOT ALWAYS BE AN ADEQUATE DEFENCE

There have been several cases which deal with the fairness of disciplinary action taken against employees for engaging in misconduct on social media platforms. More often than not, the popular defence raised in such cases, is the right to privacy.

Over the recent few years there has been a drastic advancement of information technology and social media. As such, the manner in which conduct on the internet and social media platforms is monitored and regulated must progress to keep abreast of the constant changes.

In the employment context, there have been several cases which deal with the fairness of disciplinary action taken against employees for engaging in misconduct on social media platforms. More often than not, the popular defence raised in such cases, is the right to privacy provided by the Constitution of the Republic of South Africa. This is a relevant factor as generally, allegations of misconduct on social media arise from information obtained from an individual's personal social media accounts such as Facebook or Twitter.

The Constitutional Court, in the case of *Gaertner & Others v Minister of Finance & Others* 2014 (1) BCLR 38 (CC), found this to be a clear and simple issue, when it stated that 'Privacy, like other rights is not absolute. As a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks'.

This principle was followed by the High Court in the case *Harvey v Niland and Others* (ECG) 5021/2015 (unreported). The High Court was required to deal with the issue of whether Facebook communication, obtained by hacking the former employee's Facebook account without his knowledge, was admissible as evidence against him. The former employee remained a member of the Close Corporation of the employer and therefore continued to owe a fiduciary duty to the Close Corporation , despite his resignation from employment.

The High Court was required to deal with the issue of whether Facebook communication, obtained by hacking the former employee's Facebook account without his knowledge, was admissible as evidence against him.

In this regard, Niland tendered his resignation as an employee of Huntershill but remained in his capacity as a member of the Close Corporation when he took up employment with Thaba Thala, a competing safari tour company. Niland then shared posts on his Facebook account to the effect of advising several clients of Huntershill that he had moved onto 'bigger thinking' and would be operating close by.

The remaining member of Huntershill, Harvey, obtained the password for Niland's Facebook account and accessed the posts which Niland made in reference to his new employment. These posts were printed and submitted as part of the application to the High Court to interdict Niland from continuing his activities which caused financial harm and reputational damage to Huntershill. Furthermore, the High Court was requested to order that Niland was still obliged to act in the best interests of Huntershill and to comply with his fiduciary duties as he remained a member of the Close Corporation.

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The High Court held that there were no other practical and lawful means available for obtaining access to the Facebook communication and that without such information, Huntershill would have no platform to enforce its rights against Niland.

Niland objected to the use of his Facebook posts and argued that such evidence was inadmissible as it was unlawfully obtained and violated his fundamental right to privacy as enshrined in s14 of the Constitution.

Plasket J found that s86(1) of the Electronic Communications Act was silent on admissibility of evidence obtained in contravention of the provision, and that in the circumstances, the High Court would have the discretion to decide whether to allow the evidence. In exercising its discretion, the High Court considered various factors, such as the reasons why the evidence was unlawfully obtained, the nature of the evidence and availability of lawful means, as well as the extent to which the right to privacy has been violated.

The High Court noted that while the information was obtained unlawfully in violation of the right to privacy, the right to privacy is not absolute. This does not mean that people lose their right to privacy but the right is weakened depending on the manner in which an individual has carried themselves out in the circumstances.

The High Court held that there were no other practical and lawful means available for obtaining access to the Facebook communication and that without such information, Huntershill would have no platform to enforce its rights against Niland. In addition, Niland had denied his conduct on several occasions and therefore he could not be allowed to hide behind the expectation of a right to privacy.

These cases are important as it illustrates that the right to privacy is not absolute and employers may be entitled to use information, which cannot be obtained in any other manner, in order to protect its interests and reputation. Employers must however be careful in the manner of obtaining information as the admissibility of unlawfully obtained information is subject to the discretion of the court and in certain circumstances can amount to a violation of the right to privacy.

Samiksha Singh and Zola Mcaciso

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