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# EMPLOYMENT ALERT

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***"Flagged for life"* and section 6(3) of the EEA – A summary of the ruling in National Union of Mineworkers on behalf of Pandle and Harmony Gold Mining Co Ltd (2020) 41 ILJ 2001 (CCMA)**

In the recent Commission for Conciliation, Mediation and Arbitration (CCMA) Ruling in the matter between *NUM OBO Pandle and Harmony Gold Mining*, the central dispute concerned the employee's claim of unfair discrimination on an arbitrary ground in terms of section 6(3) of the Employment Equity Act 55 of 1998 (EEA).

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CLIFFE DEKKER HOFMEYR

## "Flagged for life" and section 6(3) of the EEA – A summary of the ruling in National Union of Mineworkers on behalf of Pandle and Harmony Gold Mining Co Ltd (2020) 41 ILJ 2001 (CCMA)

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Pandle was previously employed by Harmony Gold Mining Co Ltd (Harmony Gold) as a rock drill operator. He was dismissed for being absent from work without permission. Sometime later, the employee applied for the position of rock drill operator at another of Harmony Gold's operations. The employee's interview for this position was successful but, at the pre-employment screening, he was "flagged" on the system and advised that he had been blocked from future employment by any of Harmony Gold's operations because he had a pending fraud case. It was alleged that the sick note which the employee had provided as the reason for his absence from work was fraudulent.

The employee testified that it was unfair for Harmony Gold to block his future employment based on a mere allegation. He argued the "flagging" of his name had adverse effects on his future employability and his constitutional right to work.

Section 11(2) of the EEA provides that if the unfair discrimination is on an unlisted ground, the employee must prove on a balance of probabilities that the conduct complained of is not rational, that it amounts to discrimination and that the discrimination is unfair. In order to discharge that onus, there must be sufficient evidence to cast doubt on the reasons provided by the employer.

In this matter, it was undisputed that the employee would have been employed were it not for being "flagged".

The employee attacked the rationality of Harmony Gold's conduct on the basis that he had never been found guilty of fraud but was dismissed for absenteeism. Harmony Gold argued that the "flagging" protected its interests and ensured that it did not re-employ employees who had been dismissed for serious offences.

## RETRENCHMENT GUIDELINE



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## *"Flagged for life"* and section 6(3) of the EEA – A summary of the ruling in National Union of Mineworkers on behalf of Pandle and Harmony Gold Mining Co Ltd (2020) 41 ILJ 2001 (CCMA)...*continued*

Persons convicted of a criminal offence could apply to have their records expunged, whereas the "flagging" was in place for life.

It was clear from the evidence that the alleged differentiation had a negative effect as the employee was deprived of an opportunity to be employed and was worsened by the fact that the employee was "flagged" based on an untested allegation, and for an unlimited time.

Persons convicted of a criminal offence could apply to have their records expunged, whereas the "flagging" was in place for life. In the view of the CCMA, this did not accord with principles of fairness and social justice. The CCMA held the right to engage in productive work is an important component of human dignity and the mine's conduct was deemed to be

irrational and amounted to differentiation that had the impact of causing a fundamental impairment to human dignity.

The CCMA found that the employee was unfairly discriminated against and awarded compensation. Harmony Gold were directed to lift the "flagging" of the employee's name and to prevent future occurrences of the same unfair discrimination.

The ruling reaffirms the importance of employers aligning human resource policies with principles of fairness and social justice under South African law.

*Aadil Patel, Anli Bezuidenhout, Dylan Bouchier and Vaughn Rajah*

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EMPLOYMENT

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Michael Yeates ranked by CHAMBERS GLOBAL 2020 as an up and coming employment lawyer.



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### BBBEE STATUS: LEVEL TWO CONTRIBUTOR

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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