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EMPLOYMENT ALERT

IN THIS ISSUE

Reason over ransom: *National Union of Metal Workers of South Africa and Others v Aveng Trident Steel (a division of Aveng Africa (Pty) Ltd) and Another* 2020 ZACC 23

The Constitutional Court (CC) has handed down judgment in the long awaited case of *National Union of Metal Workers of South Africa and Others v Aveng Trident Steel (a division of Aveng Africa (Pty) Ltd) and Another* 2020 ZACC 23 (in which CDH successfully represented the Second Respondent). The CC dismissed an appeal by the National Union of Metalworkers of South Africa (NUMSA) (acting on behalf of the second to further applicants) against the judgment of the Labour Appeal Court (LAC), where the LAC held that the dismissal of the second to further applicants (the employees) was not automatically unfair in terms of section 187 (1)(c) of the Labour Relations Act 66 of 1995 (LRA).

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NUMSA approached the Labour Court (LC) claiming that the dismissal constituted an automatically unfair dismissal in terms of section 187(1)(c) of the LRA, because of the employees' refusal to accept a demand in respect of a matter of mutual interest.

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Briefly, the facts in the above matter were that Aveng, a large steel manufacturer, experienced economic difficulty in 2014 due to a decrease in sales and profits. In order to remain commercially viable, Aveng needed to restructure its workforce by:

- firstly, reducing its staff under a voluntary retrenchment process; and
- secondly, redesigning job descriptions to enable the combining of certain functions.

Aveng accordingly entered into a lengthy consultation process, in terms of section 189 of the LRA. In October 2014, and during the consultation process, the employer and NUMSA came to an interim agreement in terms of which the employees agreed to work in accordance with Aveng's redesigned job descriptions, pending the finalisation of the consultation process. NUMSA then reneged on the interim agreement by communicating that the employees would stop performing duties in accordance with the redesigned job descriptions, and further proceeded to demand a wage increase of R5 per hour for the employees who had up until that point worked in terms of the redesigned job descriptions for an extra 60c per hour, as agreed.

After exhausting the consultation process, Aveng offered the affected employees contracts of employment with redesigned job descriptions to avoid the contemplated retrenchments. However, the employees ultimately refused this offer and were dismissed as a result.

NUMSA approached the Labour Court (LC) claiming that the dismissal constituted an automatically unfair dismissal in terms of section 187(1)(c) of the LRA, because of the employees' refusal to accept a demand in respect of a matter of mutual interest. The LC found that although a dismissal where the reason is a refusal to accept a demand is prohibited, on the facts of the matter the proximate reason for the dismissals was Aveng's operational requirements and not the refusal to accept a demand. The LC accordingly concluded that the dismissals were substantively fair.

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The CC delivered three separate judgments which all agreed that the employees had not been unfairly dismissed for failing to accept a demand by the employer, but instead as a result of the employer's operational requirements.

NUMSA took the matter on appeal to the LAC. The LAC dismissed the appeal by upholding the judgment of the LC. After applying a causation test in relation to the dismissals, the LAC found that although a refusal to accept an employer's proposal was present, the more dominant and proximate cause of the dismissals was Aveng's operational requirements. The dismissals were accordingly held to be for a fair reason.

NUMSA then appealed to the CC. The CC delivered three separate judgments which all agreed that the employees had not been unfairly dismissed for failing to accept a demand by Aveng, but instead as a result of Aveng's operational requirements. The judgments differed in respect of the appropriate test to be applied in order to determine the true reason for the dismissals The first judgment penned by Mathopo AJ (with Mogoeng CJ, Khampepe J, Madlanga J and Theron J concurring) found that the language of section 187(1)(c) made it apposite for courts in these circumstances to apply a causal analysis to establish what the true reason for the dismissal was. The second judgment penned by Majiedt J (Jafta J, Mhlantla J, Tshiqi J and Victor AJ concurring) found that the courts should determine the true reason for the dismissal through an evaluation of the evidence led to it instead of embarking on a causation analysis. It found that:

- firstly, the importing of a causation analysis into the wording of section 187 (1)(c) unduly strained the language of the section;
- secondly, the causation test is more traditionally applied in context of criminal law and the law of delict; and
- thirdly, that it is unsuitable in the circumstances as it has the potential to yield an unpredictable outcome.

The third judgment penned by Jafta J (Majiedt J, Mhlantla J, Tshiqi J and Victor AJ concurring) agreed with the second judgment by finding that on a proper interpretation of section 187(1)(c), a causation analysis is not appropriate

Apart from differing in their views as to the appropriate approach to determining the true reason for a dismissal where a refusal to accept a demand by an employer has been proven; the CC unanimously confirmed that where an employer has dismissed employees as a result of their refusal to accept a proposed change to their terms and

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Notably, the Court stated that it is imperative that employers be allowed to restructure their business by *inter alia* redesigning employees' job descriptions, in order to adapt to the ever-changing economic climate and remain competitive in the market.

conditions of employment, as an alternative to retrenchment and as part of a business restructuring to meet its operational needs, then such a dismissal will be for a fair reason and not constitute a contravention of section 187 (1)(c) of the LRA.

Notably, the Court stated that it is imperative that employers be allowed to restructure their business by *inter alia* redesigning employees' job descriptions, in order to adapt to the ever-changing economic climate and remain competitive in the market. It found that the operational requirements contemplated by section 189 of the LRA do not only relate to the reduction of a workforce, but also the redesign of one's business structure and current workforce in order to survive and prosper. Employers that are not able to do this, or who choose not to, will suffer.

The CC accordingly found that Aveng approached the employees with the proposed redesigned job structure after having realised this economic imperative, and that NUMSA made it impossible for the employer to save jobs.

Trade Unions and their members should accordingly be sensitive in distinguishing when employers are approaching them in good faith with a proposal to change terms and conditions of employment for some operational reasons and to preserve their employment, from situations of collective bargaining where it is appropriate to exert economic pressure to further advance their interests.

Employers may now also take comfort in the fact that when they propose amendments to terms and conditions of their employees' employment in order to genuinely meet their operational requirements, they cannot be held to ransom by a threat of unfair dismissal in terms of section 187(1)(c) of the LRA, if the employees reject the proposal and are retrenched.

Mohsina Chenia, Jaden Cramer and Joshua Geldenhuys

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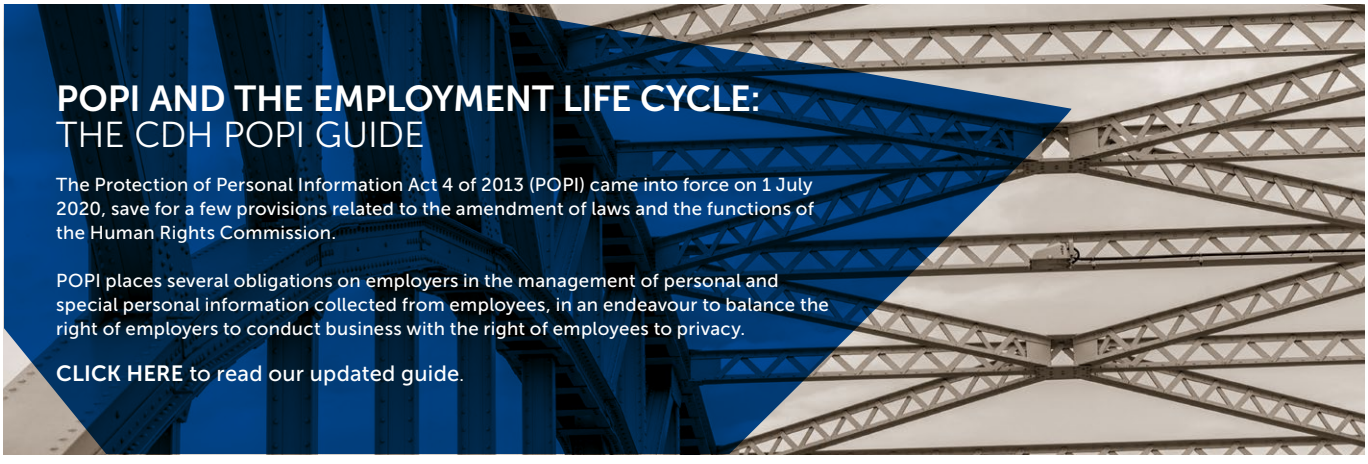

POPI AND THE EMPLOYMENT LIFE CYCLE: THE CDH POPI GUIDE

The Protection of Personal Information Act 4 of 2013 (POPI) came into force on 1 July 2020, save for a few provisions related to the amendment of laws and the functions of the Human Rights Commission.

POPI places several obligations on employers in the management of personal and special personal information collected from employees, in an endeavour to balance the right of employers to conduct business with the right of employees to privacy.

CLICK HERE to read our updated guide.

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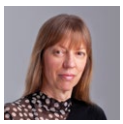

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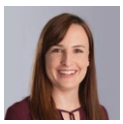

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BBBEE STATUS: LEVEL TWO CONTRIBUTOR
Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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