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DISPUTE RESOLUTION ALERT

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South Africa zooming forward with the AFSA virtual hearing protocol

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Protection of Personal Information Act 4 of 2013: Regulations 5 and Guidelines for the development of codes of conduct

On 26 February 2021, the Information Regulator (Regulator) published the Regulations Relating to the Protection of Personal Information, 2018, GN R1383/2018 (Regulations) dealing with Regulation 5 which came into force with effect from 1 March 2021.

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CLIFFE DEKKER HOFMEYR

South Africa zooming forward with the AFSA virtual hearing protocol

The Arbitration Foundation of Southern Africa (AFSA) published the AFSA Remote Hearing Protocol (RHP), which has provided parties with the necessary guidance as to how to conduct virtual hearings, which are administered by AFSA.

With COVID-19 reaching South African shores in February 2020, the commercial world, especially us practicing in the alternative dispute resolution space, did not think it would be necessary to find a solution to conduct hearings. It was envisaged by all of us that the Covid-19 pandemic would be over shortly after it began and that all our current hearings would merely be postponed to a future date. Well, we were wrong.

During lockdown, many of us still managed to conduct hearings virtually, through the various online audio video platforms, such as MS Teams, Zoom, and Web Ex and left it in the discretion of the tribunal to dictate the manner in which the hearing would take place. However, the Arbitration Foundation of Southern Africa (AFSA) published the AFSA Remote Hearing Protocol (RHP), which has provided parties with the necessary guidance as to how to conduct virtual hearings, which are administered by AFSA.

So how does the AFSA RHP fair against its counterparts? Whilst many arbitral institutions around the world have recently published guidelines on the organisation of online hearings, the rules

of many arbitral institutions do not contain express provisions for virtual hearings, but rather leave it in the hands of the tribunal to conduct the hearing in the most appropriate and practical manner.

Of significance and concern for all ADR practitioners is the giving of expert and factual witness testimony during a virtual hearing. The AFSA RHP addresses this in detail, from the where to the how. Both witnesses and experts are required to give evidence from a remote hearing witness room, seated with the necessary technical equipment, including two or more large computer monitors, with the witness being clearly visible from a camera in front of the witness as well as an overhead wide-angle camera with views of the witness, the desk, the room and the entrance into the remote hearing witness room. Should this technology not be available, the only persons permitted in the remote hearing room is the witness (and the interpreter if necessary), technical assistants, and party representatives on a watching brief. The tribunal may request the witness to angle his camera to provide a 360° view of the room to ensure that no unauthorised persons are present.

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South Africa zooming forward with the AFSA virtual hearing protocol

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CDH is proud to have been instrumental in developing the AFSA RHP.

Whilst not as detailed as the AFSA RHP, the Africa Arbitration Academy Protocol (AAAP) contains similar provisions to ensure that witness testimony is not given with the assistance of any unauthorised person and requires the witness to disclose the people present in the room with him or her. Technology for purposes of virtual hearings is not always readily accessible in Africa, particularly for witnesses, and it is encouraging to see the various arbitration centres throughout Africa making their facilities available to those who require the necessary equipment for virtual hearings.

When compared to the guidelines published by arbitration centres such as the London Court of International Arbitration (LCIA), the International Chamber of Commerce (ICC), the Singapore International Arbitration Centre (SIAC) and so on, the AFSA RHP is ahead in

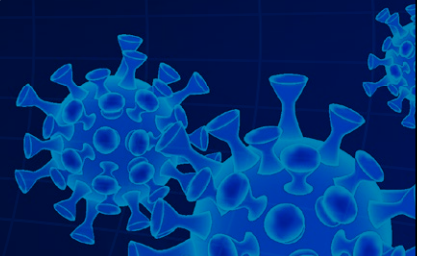
the industry, particularly when it comes to witness testimony during virtual hearings. The Seoul Protocol on Video Conferencing is by far the most detailed protocol when it comes to the technical specifications required for virtual hearings, however, insofar as witness testimony is concerned, it is relatively standard, leaving the manner in which the testimony is given under the direction of the Tribunal.

It is encouraging to see that arbitration centres in Africa are keeping up and, in the case of AFSA, ahead of other arbitration centres around the world when it comes to setting out the relevant rules and guidelines for witness testimony during virtual hearings. CDH is proud to have been instrumental in developing the AFSA RHP.

Danika Balusik

CDH'S COVID-19 RESOURCE HUB

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Protection of Personal Information Act 4 of 2013: Regulations 5 and Guidelines for the development of codes of conduct

Regulation 5 deals with the application for issuing codes of conduct.

On 26 February 2021, the Information Regulator (Regulator) published the Regulations Relating to the Protection of Personal Information, 2018, GN R1383/2018 (Regulations) dealing with Regulation 5 which came into force with effect from 1 March 2021. The Regulations also set out Regulation 4, which comes into effect on 1 May 2021, as well as the residual Regulations that will be commencing on 1 July 2021. In consideration of the recently published Regulations, with specific reference to Regulation 5, the Regulator also published the Guidelines to Develop Codes of Conduct in terms of section 65 of the Protection of Personal Information Act, 2013 - GN 75/2021 (Guidelines), to assist businesses with the preparation of codes of conduct that complies with Regulation 5. This Alert focuses on the impact and consequences of Regulation 5.

Regulation 5

Regulation 5 deals with the application for issuing codes of conduct. This Regulation was published in relation to codes of conduct that are issued in terms of section 60 and 61 of the Protection of Personal Information Act (No. 4 of 2013) (POPI). In terms of section 60(2)(a) and (b) of POPI, a code of conduct must:

- incorporate all the conditions for the lawful processing of personal information or set out obligations that provide a functional equivalent of all the obligations set out in those conditions; and

- prescribe how the conditions for the lawful processing of personal information are to be applied, or are to be complied with, given the particular features of the sector or sectors of society in which the relevant responsible parties are operating.

In the event any private or public body wishes to apply for the issuing of a code of conduct in terms of section 61(1)(b) of POPI, Regulation 5 states that such public or private body must submit an application to the Regulator on Form 3.

The Guidelines

The Guidelines serve as an explanatory aid to Chapter 7 of POPI, providing guidance on the development of codes of conduct to assist relevant bodies in setting an applicable minimum criteria and evaluation standards so that there is transparency relating to the requirements for the approval of a code of conduct.

Who may make a code and why?

The Regulator at its own initiative, or a relevant body, may make a code of conduct (code). A relevant body is defined in the Guidelines as any specific body or class of bodies, either private or public, from a specified industry, profession, vocation; or class, industries, professions or vocations that in the opinion of the Regulator has sufficient representation. A relevant body intending on developing a code should provide notice to the Regulator of its intention to do so.

Protection of Personal Information Act 4 of 2013: Regulations 5 and Guidelines for the development of codes of conduct...*continued*

A code is always subject to POPI, the Regulations and the Guidelines, with POPI being the main anchor in setting out the minimum requirements for a code and how it should apply in Chapter 7.

The purpose of a code, as set out in the Guidelines, is to establish a voluntary accountability tool and to promote transparency for relevant bodies on how personal information should be processed. The Guidelines are intended to be used by relevant bodies considering developing a code, the Regulator in developing a code at its own initiative, stakeholders considering a proposed code or stakeholders, and relevant bodies considering a proposed code from the Regulator.

What is a validly issued code?

A code is always subject to POPI, the Regulations and the Guidelines, with POPI being the main anchor in setting out the minimum requirements for a code and how it should apply in Chapter 7. Before developing a code, a relevant body must ensure that it has sufficient resources for, among others, legal advice, drafting and scoping, investigating the need for the code, and involving stakeholders in effective consultations in drafting the code.

A code must be in writing, in a form that prescribes how the conditions of lawful processing of personal information are to be applied and complied with, given the features applicable to the sector of the relevant body. In accordance with Chapter 7 of POPI, appropriate measures for, among other things, protecting legitimate interests of data subjects insofar as automated decision making is

concerned, and providing for the expiry of the code within a minimum of 5 years, must be specified in the code.

If the code is issued by the Regulator's own initiative in terms of section 61(1)(a) of POPI, they may issue the code after consultation with relevant stakeholders, and consideration has been given to the comments raised in such consultation. The Regulator must ensure that participation in the consultation is accessible to all affected persons. The Regulator may notify relevant stakeholders of the consultation in the following ways:

- a notice in the Gazette.
- a draft of a code can be made publicly available.
- an invitation to the public to make written submissions which the Regulator must consider.

If the code is submitted by application by a relevant body in terms of section 61(1)(b) of POPI, the application must be made in the form and manner prescribed by Regulation 5 (Form 3) and must be accompanied by certain documentation as detailed in the Guidelines, such as, among others, a copy of the proposed code being applied for and the methods that were employed by the relevant body to consult the relevant stakeholders. The Regulator must acknowledge receipt of the application within a period not exceeding 14 days after submission and a decision by the Regulator must be given within a period not exceeding 13 weeks.

Protection of Personal Information Act 4 of 2013: Regulations 5 and Guidelines for the development of codes of conduct...*continued*

The relevant bodies which are bound by the code have a duty to report systemic issues or serious violations of a code to the Regulator as soon as they become aware of them.

How do I ensure my code is compliant?

Relevant bodies must submit annual reports to the Regulator from one year after the code has been issued. Should parties not provide these reports, or indicate lack of compliance with the code, the Regulator may make a decision to review, revoke or vary a code.

The relevant bodies which are bound by the code have a duty to report systemic issues or serious violations of a code to the Regulator as soon as they become aware of them.

If a code sets out procedures for making and dealing with complaints, the Regulator must be satisfied that the code meets the standards prescribed in terms of the Guidelines.

The Regulator's powers in relation to an approved code

Failure by any relevant body to comply with an issued code is deemed to be a breach of the conditions for the lawful processing of personal information, in accordance with Chapter 3 of POPI and is dealt with in terms of Chapter 10 of POPI which includes the right to submit a complaint in terms of section 74, the investigative process of the Regulator in terms of section 81, the issuing of an Enforcement Notice in terms of section 95 and the civil remedies available in terms of section 99.

The Regulator may, on its own initiative, review the operation of an approved code with a five-year period of its enforcement or when deemed necessary. The relevant body will be notified in writing when the Regulator decides to review the applicable code and will be consulted during the review process. Following the review process of the code, the Regulator may decide to revoke the approved code.

The Regulator may also approve the variation of a code in writing. A variation may occur:

- 1) when the relevant body applies for variation, or
- 2) on the Regulator's own initiative.

The Regulator may consult with relevant bodies bound to the code and affected persons before deciding whether to approve a variation. Once approved, the relevant body must publish the varied code on its website within 14 days from the date of publication of the varied code in the Gazette. An application to vary an approved code must be in the form and manner prescribed in the Guidelines.

The Regulator may also revoke an approved code on application by one or more relevant bodies or any relevant body bound by a code, or on the Regulator's

Protection of Personal Information Act 4 of 2013: Regulations 5 and Guidelines for the development of codes of conduct...*continued*

Please contact us should you need any assistance with developing a code, submitting any application for a code, or having to make any submissions in regard to any developing code, or variance or revocation of any existing code.

own initiative, after consideration of various factors as detailed in the Guidelines, such as:

- a change in industry practices, technology or expectations of affected persons that may impact the effective operation of a code; or
- the lack of compliance with an approved code.

In revoking an approved code, the Regulator will undertake a consultation in a similar process as for the variation of an approved code. In the event an approved code is revoked, the Regulator must:

- 1) notify the relevant body of the decision to revoke the code including the date of revocation;
- 2) publish a notice of the revocation on the Regulator's website and in the Gazette; and
- 3) remove the approved code from the register.

The Guidelines are a great tool and guide to assist all relevant bodies and affected persons, both public and private, with preparing of a code of conduct and its subsequent submission. This is just one of many steps that businesses can take towards being fully POPI compliant and protecting your business from any consequences that may stem from non-compliance.

Please contact us should you need any assistance with developing a code, submitting any application for a code, or having to make any submissions in regard to any developing code, or variance or revocation of any existing code.

Lucinde Rhoodie, Ngeti Dlamini, and Charissa Barden

2021 RESULTS

CHAMBERS GLOBAL 2017 - 2021 ranked our Dispute Resolution practice in Band 1: Dispute Resolution.

CHAMBERS GLOBAL 2018 - 2021 ranked our Dispute Resolution practice in Band 2: Insurance.

CHAMBERS GLOBAL 2017 - 2021 ranked our Dispute Resolution practice in Band 2: Restructuring/Insolvency.

CHAMBERS GLOBAL 2020 - 2021 ranked our Corporate Investigations sector in Band 3: Corporate Investigations.

Chambers Global 2021 ranked our Construction sector in Band 3: Construction.

Chambers Global 2021 ranked our Administrative & Public Law sector in Band 3: Administrative & Public Law.

Pieter Conradie ranked by CHAMBERS GLOBAL 2019 - 2021 as Senior Statespeople: Dispute Resolution.

Clive Rumsey ranked by CHAMBERS GLOBAL 2013-2021 in Band 1: Construction and Band 4: Dispute Resolution.

Jonathan Witts-Hewinson ranked by CHAMBERS GLOBAL 2021 in Band 3: Dispute Resolution.

Tim Fletcher ranked by CHAMBERS GLOBAL 2019 - 2021 in Band 3: Dispute Resolution.

Joe Whittle ranked by CHAMBERS GLOBAL 2020 - 2021 in Band 3: Construction

Tobie Jordaan ranked by CHAMBERS GLOBAL 2020 - 2021 as an up and coming Restructuring/Insolvency lawyer.



Cliffe Dekker Hofmeyr's Dispute Resolution rankings in THE LEGAL 500 EMEA 2020:

CDH's Dispute Resolution practice is ranked as a Top-Tier firm in THE LEGAL 500 EMEA 2020.

Tim Fletcher is ranked as a Leading Individual in Dispute Resolution in THE LEGAL 500 EMEA 2020.

Eugene Bester is recommended in Dispute Resolution in THE LEGAL 500 EMEA 2020.

Jonathan Witts-Hewinson is recommended in Dispute Resolution in THE LEGAL 500 EMEA 2020.

Pieter Conradie is recommended in Dispute Resolution in THE LEGAL 500 EMEA 2020.

Rishaban Moodley is recommended in Dispute Resolution in THE LEGAL 500 EMEA 2020.

Kgosi Nkaiseng is ranked as a Next Generation Partner in THE LEGAL 500 EMEA 2020.

Tim Smit is ranked as a Next Generation Partner in THE LEGAL 500 EMEA 2020.

Gareth Howard is ranked as a Rising Star in THE LEGAL 500 EMEA 2020.

CDH's Construction practice is ranked in Tier 2 in THE LEGAL 500 EMEA 2020.

Clive Rumsey is ranked as a Leading Individual in Construction in THE LEGAL 500 EMEA 2020.

Joe Whittle is recommended in Construction in THE LEGAL 500 EMEA 2020.

Timothy Baker is recommended in Construction in THE LEGAL 500 EMEA 2020.

Siviwe Mccetywa is ranked as a Rising Star in Construction in THE LEGAL 500 EMEA 2020.



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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.

PLEASE NOTE

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

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