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EMPLOYMENT LAW ALERT

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When failure becomes fatal: The consequences of defective referral forms in CCMA and bargaining council disputes

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Mandatory vaccinations: A roadmap for considering medical exemptions

Employers who wish to implement a mandatory vaccination policy must permit employees to raise objections or apply for exemption from the policy on the basis of, amongst others, medical grounds. The road map below provides employers with some of the considerations to take into account when determining an exemption application based on medical grounds. As always, the law in relation to the processing of personal information must be adhered to.

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When failure becomes fatal: The consequences of defective referral forms in CCMA and bargaining council disputes

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The rules governing the conduct of proceedings before the Commission For Conciliation, Mediation and Arbitration (CCMA) and the various bargaining councils are binding on litigants before that forum. Any failure to obey the rules will attract the necessary consequences. In the Labour Appeal Court's (LAC) judgment in *Adams v National Bargaining Council for the Freight and Logistics Industry and Others* [2020] 9 BLLR 867 (LAC), this issue arose in relation to the propriety of a representative attorney signing referral forms on behalf of their client, a dismissed employee.

Background

The facts in this matter were largely common cause. The employee was dismissed for misconduct in the form of absconsion. The employee then referred a dismissal dispute to the National Bargaining Council for the Road Freight and Logistics Industry (NBCRFLI). However, the dispute referral forms were signed by the employee's attorney and not the employee. Conciliation failed and the dispute was subsequently referred for arbitration, and again the request for arbitration forms were signed by the employee's attorney. At the arbitration, the employer's representative raised a point in limine arguing that the NBCRFLI did not have the necessary jurisdiction to entertain this matter as the referral forms were signed by someone other than the employee and was, therefore, fatally defective in terms of the NBCRFLI Rules. The NBCRFLI upheld this point and dismissed the employee's referral. The employee challenged this decision on review to the Labour Court.

The issue before the Labour Appeal Court

The LAC considered the rules of the NBCRFLI, whose provisions are similar to the CCMA Rules in that they preclude the automatic right to legal representation of parties in dismissal for misconduct or incapacity disputes unless legal representation is applied for and granted by the arbitrating commissioner. This, in turn, means that employee parties in such disputes must personally sign the referral forms. Rule 6 specifically provides that, "A document that a party must sign in terms of the Act or these rules must be signed by the party or by a person entitled in terms of the Act or these rules to represent that party in the proceedings [in question]."

On appeal, the LAC accepted that the fact that the rules of the NBCRFLI have been simplified means that any non-compliance with the rules is not something to be "glossed over" but to be viewed in a serious light.

On the merits, the LAC found that both the conciliation and arbitration forms were fatally defective as they were signed by the employee's attorney who did not have the required standing to sign the documents on behalf of the employee on a reading of the provisions of Rule 6. The LAC found that this resulted in fatally defective non-compliance with the rules. The LAC accordingly found that the NBCRFLI's jurisdictional ruling was unassailable and dismissed the review application.

When failure becomes fatal: The consequences of defective referral forms in CCMA and bargaining council disputes...*continued*

It remains to be seen, however, whether the Labour Court and LAC will follow this interpretation of the rules in future challenges in other types of disputes where there is an automatic right to legal representation.

Analysis

The LAC made it clear that the rules of the NBCRFLI, and of the CCMA for that matter, do not automatically grant litigants the privilege of legal representation and such legal representation can only be granted in certain situations. Furthermore, the rules make it clear who is entitled to sign referral documents and a failure to follow the rules will be fatal to any such a referral. Clearly, due to the nature of the dispute and in the absence of an application for legal representation having been granted by the NBCRFLC, the employee's attorney was not entitled to represent them at the conciliation and any subsequent arbitration proceedings and was, accordingly, not entitled to sign the referral forms on behalf of the employee.

That being said, clients and attorneys ought to be careful when preparing referral documents to the CCMA and bargaining councils, lest they be found to have failed to comply with the provisions of the rules, to the detriment of the referring employee party.

An important question that remains is whether the signing of referral documents and the deposing to affidavits by attorneys in other types of disputes and preliminary

issues where parties before these fora enjoy an automatic right of representation employees would suffer the same fate as was the case in Adams.

In our view, and on a strict reading of the wording of Rule 6 of the NBCRFLI Rules (and the corresponding Rule 4(2) in the CCMA Rules, which has identical wording), giving those words their ordinary grammatical meaning while being mindful of the purpose of the rule (i.e. to eliminate the risk of unauthorised referrals), no bar seems to exist to attorneys, who enjoy an automatic right of representation in such disputes, signing referral forms and deposing to affidavits on behalf of their clients. This is because, as the rules require, the referral and other documents in that regard may be signed either by the referring party themselves or by any person who is entitled to represent such parties in those types of disputes.

It remains to be seen, however, whether the Labour Court and LAC will follow this interpretation of the rules in future challenges in other types of disputes where there is an automatic right to legal representation.

Bongani Masuku and Thato Maruapula

AN EMPLOYER'S GUIDE TO MANDATORY WORKPLACE VACCINATION POLICIES

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MANDATORY VACCINATIONS

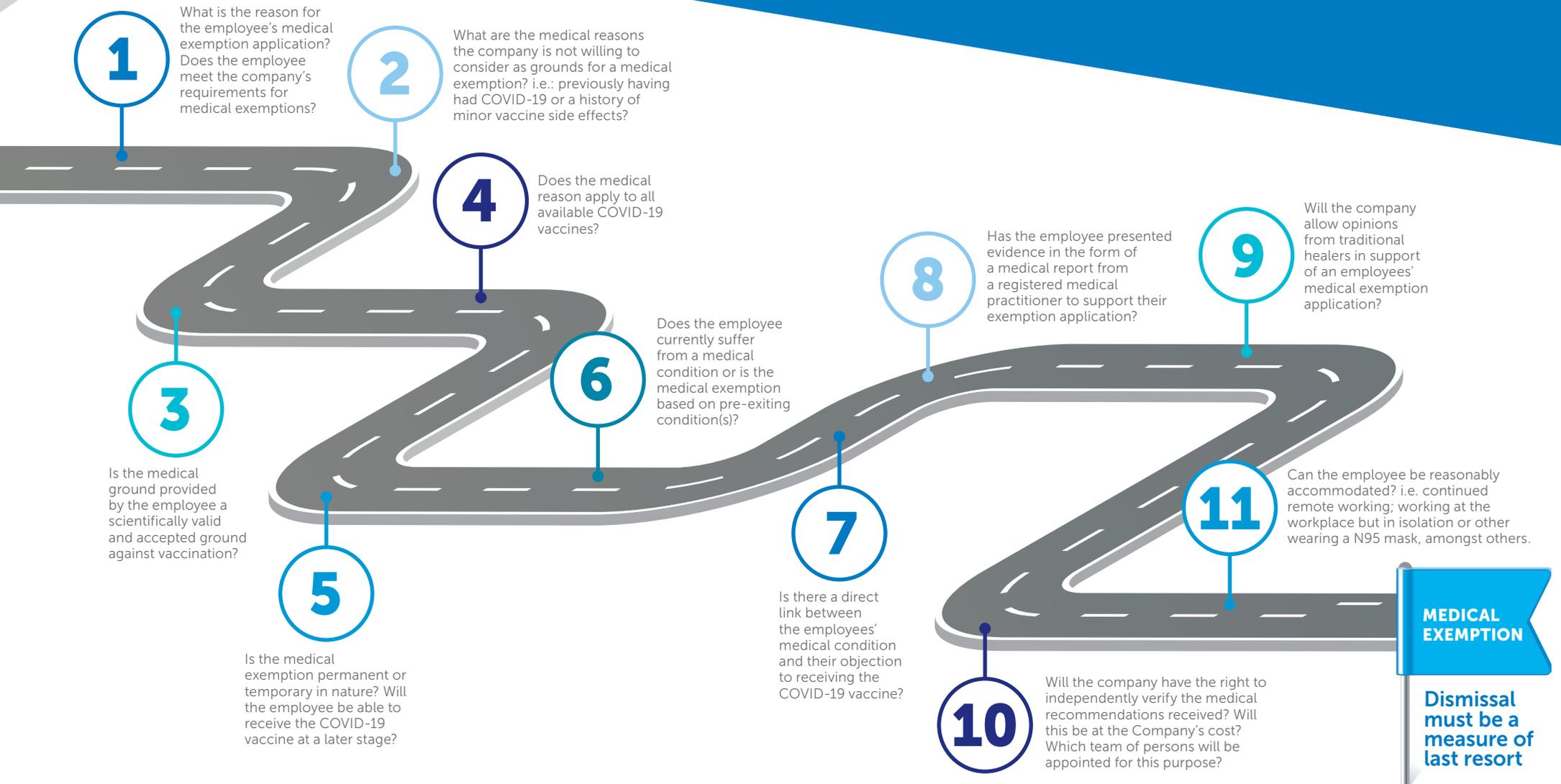
A ROADMAP FOR CONSIDERING MEDICAL EXEMPTIONS



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OUR TEAM

For more information about our Employment Law practice and services in South Africa and Kenya, please contact:



Aadil Patel
Practice Head
Director
T +27 (0)11 562 1107
E aadil.patel@cdhlegal.com



Bongani Masuku
Director
T +27 (0)11 562 1498
E bongani.masuku@cdhlegal.com



Hedda Schensema
Director
T +27 (0)11 562 1487
E hedda.schensema@cdhlegal.com



Anli Bezuidenhout
Director
T +27 (0)21 481 6351
E anli.bezuidenhout@cdhlegal.com



Phetheni Nkuna
Director
T +27 (0)11 562 1478
E phetheni.nkuna@cdhlegal.com



Njeri Wagacha
Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E njeri.wagacha@cdhlegal.com



Jose Jorge
Director
T +27 (0)21 481 6319
E jose.jorge@cdhlegal.com



Desmond Odhiambo
Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E desmond.odhiambo@cdhlegal.com



Michael Yeates
Director
T +27 (0)11 562 1184
E michael.yeates@cdhlegal.com



Fiona Leppan
Director
T +27 (0)11 562 1152
E fiona.leppan@cdhlegal.com



Hugo Pienaar
Director
T +27 (0)11 562 1350
E hugo.pienaar@cdhlegal.com



Mohsina Chenia
Executive Consultant
T +27 (0)11 562 1299
E mohsina.chenia@cdhlegal.com



Gillian Lumb
Director
T +27 (0)21 481 6315
E gillian.lumb@cdhlegal.com



Thabang Rapuleng
Director
T +27 (0)11 562 1759
E thabang.rapuleng@cdhlegal.com



Faan Coetzee
Executive Consultant
T +27 (0)11 562 1600
E faan.coetzee@cdhlegal.com



Imraan Mahomed
Director
T +27 (0)11 562 1459
E imraan.mahomed@cdhlegal.com

OUR TEAM

For more information about our Employment Law practice and services in South Africa and Kenya, please contact:



Jean Ewang
Consultant
M +27 (0)73 909 1940
E jean.ewang@cdhlegal.com



Abigail Butcher
Associate
T +27 (0)11 562 1506
E abigail.butcher@cdhlegal.com



Christine Mugenyu
Associate | Kenya
T +254 731 086 649
T +254 204 409 918
T +254 710 560 114
E christine.mugenyu@cdhlegal.com



Avinash Govindjee
Consultant
M +27 (0)83 326 5007
E avinash.govindjee@cdhlegal.com



Asma Cachalia
Associate
T +27 (0)11 562 1333
E asma.cachalia@cdhlegal.com



Peter Mutema
Associate | Kenya
T +254 731 086 649
T +254 204 409 918
T +254 710 560 114
E peter.mutema@cdhlegal.com



Riola Kok
Professional Support Lawyer
T +27 (0)11 562 1748
E riola.kok@cdhlegal.com



Jaden Cramer
Associate
T +27 (0)11 562 1260
E jaden.cramer@cdhlegal.com



Mayson Petla
Associate
T +27 (0)11 562 1114
E mayson.petla@cdhlegal.com



Tamsanqa Mila
Senior Associate
T +27 (0)11 562 1108
E tamsanqa.mila@cdhlegal.com



Rizichi Kashero-Ondego
Associate | Kenya
T +254 731 086 649
T +254 204 409 918
T +254 710 560 114
E rizichi.kashero-ondego@cdhlegal.com



Kgodisho Phashe
Associate
T +27 (0)11 562 1086
E kgodisho.phashe@cdhlegal.com



Dylan Bouchier
Associate
T +27 (0)11 562 1045
E dylan.bouchier@cdhlegal.com



Jordyne Löser
Associate
T +27 (0)11 562 1479
E jordyne.loser@cdhlegal.com



Taryn York
Associate
T +27 (0)21 481 6314
E taryn.york@cdhlegal.com

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JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

NAIROBI

Merchant Square, 3rd floor, Block D, Riverside Drive, Nairobi, Kenya. P.O. Box 22602-00505, Nairobi, Kenya.
T +254 731 086 649 | +254 204 409 918 | +254 710 560 114 E cdhkenya@cdhlegal.com

STELLENBOSCH

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.
T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com

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