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EMPLOYMENT ALERT

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COVID-19 workplace health and safety guideline - redefining a "*safe*" workplace

The purpose of this guide is to assist you in understanding and complying with your regulatory obligations in relation to health and safety in the workplace as contained in the OHS Directions.

While South African businesses recommence or continue operations under Alert Level 1, it is imperative that health and safety guidelines are strictly adhered to in order to mitigate the risk of the dreaded "*second wave*". A "*changing work order*" and the "new normal" demand that employers reassess the potential transmission risks in their respective workplaces and redefine workplace health and safety.

As global pandemics become more frequent due to globalisation, climate change and the rate of international travel, it is imperative that employers are prepared for new health and safety challenges in order to survive in a pandemic where lockdown may not be economically possible.

On 1 October 2020, the Department of Employment and Labour (Department) gazetted updated Consolidated Directions on Occupational Health and Safety Measures in Certain Workplaces (OHS Directions). Accordingly, the Consolidated Health and Safety Directions issued on 4 June 2020 have since been withdrawn. The OHS Directions commenced with effect from 1 October 2020. The purpose of this guide is to assist you in understanding and complying with your regulatory obligations in relation to health and safety in the workplace as contained in the OHS Directions.

A COPY OF THE GUIDE CAN BE ACCESSED HERE

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"The first man on the ball": Can an employee avoid a sanction of dismissal by summarily resigning prior to the sanction being imposed?

Allegations surfaced that between February 2020 and May 2020, Mthimkhulu misconducted himself in a grossly dishonest and fraudulent manner.

The recent Labour Court judgment of *Mthimkhulu v Standard Bank of South Africa* (Standard Bank) (delivered on 18 September 2020) considered the legal effect of a summary resignation after a disciplinary enquiry had been held, but prior to the announcement of a sanction of dismissal.

The issue to be determined by the Labour Court in this matter was whether an employee who awaits the outcome of a disciplinary enquiry can avoid a sanction of dismissal by resigning with immediate effect (where contractually bound to a 30 day' notice period) before his or her employer announces the sanction. In the words of the Labour Court, the court was called upon to determine the following contention: "*The applicant before me takes a view that being the first man on the ball, the respondent forfeits the right to tackle and play the ball.*"

Mthimkhulu was employed by Standard Bank on 1 June 2016. Allegations surfaced that between February 2020 and May 2020, Mthimkhulu misconducted himself in a grossly dishonest and fraudulent manner. He was called to a disciplinary enquiry on 17 August 2020 and on 19 August 2020 was subsequently found guilty of the charges levelled against him. The chairperson of the hearing then granted both Standard Bank and Mthimkhulu an opportunity to make submissions of aggravating and mitigating factors prior to handing down a sanction.

Prior to the announcement of the disciplinary sanction, Mthimkhulu then, in breach of his contract, resigned with immediate effect on 21 August 2020. In light of his resignation, Standard Bank sought to hold Mthimkhulu to his contractual obligation to serve a 30-day notice period. On 24 August 2020, Standard Bank imposed a sanction of dismissal against Mthimkhulu pursuant to the finding of guilt on 19 August 2020.

EMPLOYMENT REVIVAL GUIDE
Alert Level 1 Regulations

On 16 September 2020, the President announced that the country would move to Alert Level 1 (AL1) with effect from 21 September 2020. AL1 of the lockdown is aimed at the recommencement of almost all economic activities.

CLICK HERE to read our updated AL1 Revival Guide.
Compiled by CDH's Employment law team.

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"The first man on the ball": Can an employee avoid a sanction of dismissal by summarily resigning prior to the sanction being imposed?*...continued*

In considering the urgent application, the Labour Court confirmed that the law is clear that a resignation is a unilateral act which is effective regardless of the acceptance of the resignation by the employer.

Mthimkhulu resisted the sanction, contending that Standard Bank no longer had jurisdiction over him owing to his resignation and that Standard Bank should abandon and nullify the sanction of dismissal. This contention was rejected by Standard Bank.

Dissatisfied with the approach taken by Standard Bank, Mthimkhulu approached the Labour Court for urgent relief to set aside his dismissal as unlawful, as opposed to being unfair, on the basis that he had already resigned and his contract had terminated when the outcome of dismissal was announced. Mthimkhulu argued that the matter was urgent owing to the fact that he had an interview on 18 September 2020 to become a pupil in 2021 with the intention to practice as an advocate at the Bar and that a negative disciplinary record would prejudice him in this regard. The court was not of the view that the matter was urgent or that it had jurisdiction to hear the matter but exercised its discretion to hear the matter as one of urgency notwithstanding.

In considering the urgent application, the Labour Court confirmed that the law is clear that a resignation is a unilateral act which is effective regardless of the acceptance of the resignation by the employer. For the court the critical question was whether the termination of the employment contract upon the above facts had taken effect or not.

The court referred to the Constitutional Court case of *Toyota South Africa (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and others* (2016) 37 ILJ 313 (CC) in which Zondo J (for the minority) concluded that because a valid resignation is incapable of being withdrawn, an employer has no right to conduct disciplinary proceedings once

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"The first man on the ball": Can an employee avoid a sanction of dismissal by summarily resigning prior to the sanction being imposed?*...continued*

The court held that the inability to discipline an employee in the context of the Toyota judgment does not equate to an employer being unable to deliver the outcome of the disciplinary process which had been completed at the time of resignation.

resignation has taken effect. The question, however, was when the resignation took effect. In the Toyota matter, the lawfulness of the resignation letter was not in dispute therefore the resignation took effect on 31 March 2011 according to the resignation letter. On 24 March 2011, seven days earlier, the employee was disciplined and dismissed. The Constitutional Court as per Zondo J held that he was dismissed prior to the employment contract terminated by resignation.

The court in Mthimhkulu drew a distinction between an employer's right to discipline an employee following a summary resignation and the right to announce the outcome of a disciplinary enquiry that was already concluded at the time of the resignation. The court held that the inability to discipline an employee in the context of the Toyota judgment does not equate to an employer being unable to deliver the outcome of the disciplinary process which had been completed at the time of resignation.

The court found that Mthimkhulu has repudiated his contract of employment by failing to work his notice period as required by his contract of employment and that Standard Bank as the aggrieved party had an election to cancel the contract and sue for damages, alternatively to seek specific performance. Standard Bank elected not to cancel the contract.

The Labour Court then rejected the reasoning in the judgment of *Naidoo and another v Standard Bank of South Africa* [2019] 9 BLLR 934 (LC) in terms of which Nkutha-Nkonwana J found that an employer who does not accept a repudiation may not proceed with a disciplinary hearing after the date of resignation of an employee who summarily resigned in breach of his or her contract of employment without first approaching the court for an order for specific performance to comply with the lawful resignation period.

The court in Mthimkhulu held that the correct position is as follows:

> *"An aggrieved/innocent party by making an election not to rescind as a party to the contract, keeps the contract alive. Should the aggressor persist with the repudiation the aggrieved party may approach a court of law on the strength of the same contract to compel the aggressor to comply with its contractual obligation. What keeps the contract alive is not an order for specific performance but an election by the aggrieved party."*

The court held further that the fundamental principle is that a breach of contract (in giving short notice) is not what brings a contract to an end, rather it's an aggrieved party's election to accept the

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"The first man on the ball": Can an employee avoid a sanction of dismissal by summarily resigning prior to the sanction being imposed?*...continued*

Going forward Zondo J's confirmation in the Toyota-case that no disciplinary steps can follow after the date upon which the contract ended, remains the law.

repudiation in light of the breach that ends the contract. Accordingly, the summary resignation by Mthimkhulu repudiated the contract but did not bring about the end of the contract as he was legally required to work his notice period. Standard Bank elected not to accept the repudiation which acceptance would have brought about a termination of the contract. This meant that the contract of employment had not come to an end. The court concluded that resignation prior to the announcement of a sanction of dismissal therefore has no legal effect where the contract of employment subsists and it is not necessary for an employer to first bring an application to compel the employee to perform in terms of the contract before it could impose the sanction.

On the matter of jurisdiction, the court held that where an applicant alleges that a dismissal is unlawful, as Mthimkhulu contended in his application, as opposed to the dismissal being unfair, the Labour Court has no jurisdiction to hear the matter as there is no such a remedy in the Labour Relations Act 66 of 1995. The court held that it was not empowered to make a determination as to lawfulness.

As the court held that it had no jurisdiction to hear the matter, the finding in respect of the termination of the contract of employment is obiter (not essential to the decision of the court) and not legally binding on another court.

Going forward Zondo J's confirmation in the *Toyota*-case that no disciplinary steps can follow after the date upon which the contract ended, remains the law.

What the *Mthimkhulu* case highlights is the importance for an employer to make an election to accept or reject the repudiation of an employee who resigns in breach of the contract of employment. The difference between the *Mthimkhulu*-case and the *Naidoo*-case lies in what an employer is permitted to do in respect of discipline during the remaining notice period after the summary dismissal if it elects to keep the contract alive. According to Mthimkhulu it is not necessary to first obtain an order for specific performance if only the sanction is outstanding. The last word on this topic has not been spoken.

Faan Coetzee, Aadil Patel, Riola Kok and Mmakgabo Makgabo

Updated: Even lower than expected – another drop in the prescribed interest rate

Litigants must ensure that they use the most recent and correct prescribed rate of interest when instituting any legal proceedings that includes a claim for interest.

According to the Prescribed Rate of Interest Act 55 of 1975, the prescribed rate of interest is calculated by adding 3,5% to the repurchase rate. Therefore, in order to calculate the prescribed rate of interest, one relies on the repurchase rate, which changes from time to time, subject to announcements by the Minister of Finance.

Litigants must ensure that they use the most recent and correct prescribed rate of interest when instituting any legal proceedings that includes a claim for interest. In terms of claims for interest in certain labour disputes, section 143(3) of the Labour Relations Act 66 of 1995 (LRA) is relevant. Section 143(3) of the LRA states that an arbitration award (sounding in money) earns interest from the date of the award at the prescribed rate of interest. The only exception to this general rule is if the arbitrator makes a ruling to the contrary.

On 23 July 2020, the Monetary Policy Committee of the South African Reserve Bank (SARB) decreased the benchmark interest rates by 25 basis points as follows:

BENCHMARK INTEREST RATE	PREVIOUS RATE	NEW RATE
Repurchase rate	3,75	3,5
Prime lending rate	7,25	7,00

According to SARB, the decrease can be attributed to various factors including uncertainty in financing conditions for emerging markets, depreciation of the rand and economic contraction.

The decrease in the repurchase rate has resulted in a drop in the prescribed rate of interest. On 11 September 2020, the Minister of Justice and Correctional Services (Minister) published a notice in the Government Gazette on the revised prescribed rate of interest, announcing that with effect from 1 June 2020, the prescribed rate of interest dropped from 8,75% to 7,75%. However, on 9 October 2020 - less than a month later - the Minister has issued a notice repealing the previous revision and announcing an even lower prescribed rate of interest. The new rate is 7,25% with effect from 1 July 2020.

Aadil Patel, Riola Kok and Kara Meiring

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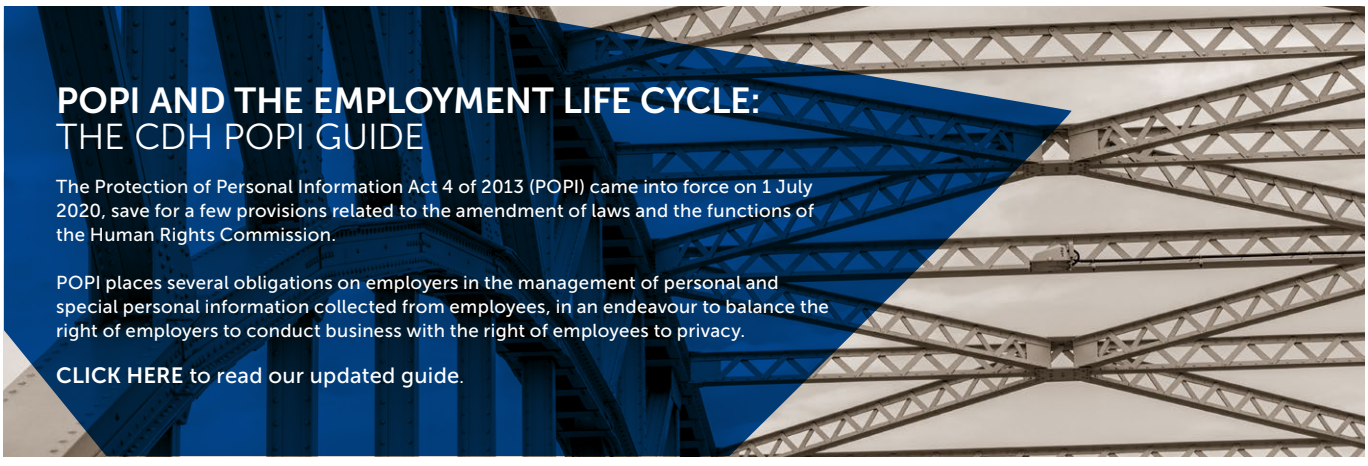
The LEGAL 500 EMEA



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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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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