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EMPLOYMENT ALERT

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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.

Lockdown Level-1: Good news for international travellers – South Africa will reopen its international borders soon

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POPI and the Employment Life Cycle: The CDH POPI Guide

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Responsible parties have been granted a grace period ending on 30 June 2021, to comply with the provisions of POPI. Non-compliance with POPI is a criminal offence attracting imprisonment not exceeding 10 years with or without a fine and/or an administrative fine not exceeding R10 million which may be imposed by the Information Regulator.

POPI applies to the 'processing' or 'further processing' of personal and special personal information of employees by an employer. The 'processing' of information relates to a comprehensive range of activities. It includes the initial obtaining or collection of personal information, the retention and use thereof, access and disclosure and finally the disposal of the data.

Although, POPI prohibits the processing of special personal information. An employer can process this information if, amongst others; it obtains express consent of the employee; it has a legal duty to do so; the information is available in the public domain or the information is being processed for historical; statistical or research purposes.

While POPI is not limited to employers and employees, there is no doubt that the employment relationship falls within its ambit. Our POPI guide contains a non-exhaustive list of the ways in which POPI applies to the employment life cycle as well as guidance notes on the various stages.

With the deadline for compliance with POPI fast approaching, employers need to, among others, appointment an information officer; conduct an assessment of their internal processes, provide their employees with POPI related training; adopt adequate controls to ensure the safety of personal information; and establish adequate policies and procedures to comply with the eight conditions for lawful processing of information, in order to be compliant on or before 30 June 2021. Our POPI guideline (available at the link below) will assist you in navigating this new terrain. The guideline answers general queries in relation to POPI in the employment environment. For more bespoke advice, please contact one of our practitioners.

Click here to read our updated POPI guide.

The Employment Law Practice

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Everything is down, even the prescribed interest rate

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.

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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 is particularly relevant. Section 143(3) 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 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

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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 published a notice in the Government Gazette on the revised prescribed rate of interest. With effect 1 June 2020, the prescribed rate of interest dropped from 8.75% to 7.75%.

Aadil Patel, Riola Kok and Kara Meiring

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Lockdown Level-1: Good news for international travellers – South Africa will reopen its international borders soon

All visa application centres in South Africa and abroad are expected to resume visa services to the public.

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International travel is subject to the following containment and mitigation measures:

- Travel may be restricted to and from certain countries that have high infection rates;
- International travel will only be allowed through the main border ports or through OR Tambo International, Cape Town International, or King Shaka International;
- Travellers will be required to have a COVID test taken within 72 hours from date of departure and provide a negative coronavirus certificate. Failure to do so will mean being placed in mandatory quarantine on arrival and at the traveller's own cost; and
- All travellers will be required to install the COVID-19 alert level app.

All visa application centres in South Africa and abroad are expected to resume visa services to the public.

Minister Aaron Motsoaledi issued a directive extending all visas that expired from mid-February 2020 – that extension remains in place until 31 October 2020. Simply put, foreign nationals already in the country but whose visas expired from mid-February 2020 will be allowed to renew their visas in South Africa. All visas that expired during lockdown can be renewed without any additional penalties.

Seemingly, foreign nationals whose work visas expired during the lockdown, will be allowed to legally work until 31 October 2020. It is unclear now as to whether or not this time frame will be extended to allow foreign nationals enough time to submit their applications.

However, these temporary measures apply only to foreign nationals who have been legally admitted into the Republic of South Africa.

Michael Yeates and Mapaseka Nketu

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Bound to pay twice or what – Are minority trade union members obliged to pay agency shop agreement fees in addition to subscription fees?

The question is whether employees belonging to the minority union should be compelled to contribute to the costs of collective bargaining through agency fees in addition to the subscription fees that they are already paying to their union.

It is common cause that the collective bargaining process requires time, effort and money from the majority union in order to strike good deals with the employer. However, the benefits of the deals secured through the efforts of the majority trade union are enjoyed by all employees including members of minority union and non-unionised employees.

The question that then follows is whether employees belonging to the minority union should be compelled to contribute to the costs of collective bargaining through agency fees in addition to the subscription fees that they are already paying to their union. The courts have answered this question in the affirmative and held that it would be unfair to permit non-members of the bargaining agent to enjoy benefits without contributing to the costs.

In the recent matter between the *Municipal & Allied Trade Union of SA v Central Karoo District Municipality & Others*, the Labour Appeal Court (LAC) was required to determine whether employees belonging to minority trade unions were exempted in terms of section 21(8C) of the Labour Relations Act 66 of 1995 (LRA) from paying the agency shop agreement fees arising out of an agency shop agreement between the employer and the majority trade union in terms of section 25 of the LRA.

In this appeal, the Appellant being the trade union did not challenge the constitutionality of section 25 of the LRA but contended that a proper interpretation of section 21(8C), which provides that the CCMA may grant specific rights to registered trade unions not meeting the thresholds of representativeness established by a collective agreement, had the effect of overriding the agencyshop agreement between the employer and majority trade union.

The trade union contends that by virtue of having had stop-order rights extended to it in terms of section 21(8C) of the LRA, its members ought to have been excluded from paying agency shop agreement fees (Agency fee) as they could not afford to pay both fees. Further, that the benefit of stop-order rights would be illusory if its members were required to still pay the agency fee.

In dismissing the appeal, the LAC held that the source of the obligation to pay an agency fee was distinct from that of union subscription membership fees . It was the LAC's view that agency fees are paid by the employer to the majority trade union pursuit to a section 25 of the LRA agreement. Thus being due by virtue of statue. These fees are paid for work done to advance the interests of workers through collective bargaining without compelling free riders to join the majority trade union. On the contrary, union fees are due in terms of an agreement between the trade union and its member.

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The LAC held that section 21(8C) of the LRA empowered the CCMA to only override a collective agreement setting a threshold for minority unions seeking organisational rights.

Accordingly, since the source of agency fees and union fees are distinct, there is no double payment.

In reaching this conclusion, the LAC affirmed the earlier judgement of the Labour Court, which held that agency shop agreements bind members of minority unions, even if this means they must pay both the union fee of their own union, and the agency fee.

Moreover, the LAC held that section 21(8C) of the LRA empowered the CCMA to only override a collective agreement setting a threshold for minority unions seeking organisational rights. It did not give any power to override a pre-existing agency shop agreement. The LAC concluded that agency shop agreements advance the legitimate legislative policy of majoritarianism in collective bargaining as the preferred option for orderly collective bargaining at sectoral level.

In light of the trade union not contending that section 25 of the LRA was unconstitutional, it follows that a majoritarian agency shop agreement promotes the spirit and objects of the constitutional rights to organise and collectively bargain.

Fiona Leppan, Bheki Nhlapo and Mayson Petla

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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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