23 NOVEMBER 2020

EMPLOYMENT ALERT

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The protection of your reputation is not for the Labour Court's consideration- a closer look at section 157 of the LRA

There is no provision in the Labour Relations Act 66 of 1995 (LRA) that confers jurisdiction on the Labour Court to adjudicate a dispute between parties that concerns the redemption of an employee's reputation. In *Monyepao v Road traffic Management and 6 others*, the Labour Court took a closer look at what type of disputes fell within the jurisdiction of the Labour Court for adjudication.

Objection and withdrawal of consent in the age of information

We are in the Fourth Industrial Revolution, the age of information. With the increase of modern smart technologies the protection of data is becoming increasingly important. The measures introduced to this end in the Protection of Personal Information Act 4 of 2013 (POPI), are welcome.

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The protection of your reputation is not for the Labour Court's consideration- a closer look at section 157 of the LRA

On 6 August 2020 the applicant resigned and was no longer in the employ of the first respondent and ceased to be an employee of the first respondent on 31 August 2020.

There is no provision in the Labour Relations Act 66 of 1995 (LRA) that confers jurisdiction on the Labour Court to adjudicate a dispute between parties that concerns the redemption of an employee's reputation. In *Monyepao v Road traffic Management and 6 others*, the Labour Court took a closer look at what type of disputes fell within the jurisdiction of the Labour Court for adjudication.

The applicant was previously charged with allegedly intimidating, threatening and victimising employees. On 6 August 2020 the applicant resigned and was no longer in the employ of the first respondent and ceased to be an employee of the first respondent on 31 August 2020. The Applicant commenced new employment with a different employer from 1 September 2020. However, during the month of September 2020, the first respondent instituted disciplinary proceedings against the Applicant which resulted in his summary dismissal on 30 September 2020. Shortly before the outcome of those disciplinary proceedings were announced. The applicant instituted urgent proceedings seeking a declaratory order that he was not an employee when findings were about to be furnished at the disciplinary hearing. He withdrew that application and approached the Court again for a declaratory order that the conduct of the first, second and third respondents to exercise disciplinary powers over him was unlawful and unconstitutional and reviewing and setting aside the outcome of the disciplinary hearing and further interdicting any distribution or publication of the fourth respondent's findings as this would damage his reputation.

The Labour Court directed that argument be addressed on issues of jurisdiction and urgency. The issue of jurisdiction is one that should be dealt with first, since the issue or urgency does not arise unless the Court is satisfied that it has the jurisdiction to grant the relief sought. Van Niekerk, J emphasised that there is a general misconception that the Labour Court has jurisdiction over all employment related matters, which is incorrect. Section 157(1) of the LRA provides that subject to the Constitution and section 173 of the LRA, and except where the LRA provides otherwise, the Labour Court

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The protection of your reputation is not for the Labour Court's consideration- a closer look at section 157 of the LRA...*continued*

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has exclusive jurisdiction in respect of all matters that elsewhere in terms of the LRA or any other law are to be determined by the Labour Court. Stated simply, this requires that when a party refers a dispute to the Labour Court for adjudication, that party must point to a provision of the LRA or other law that confers jurisdiction on the Labour Court to adjudicate the matter.

Furthermore, section 157(5) of the LRA provides that the Labour Court does not have jurisdiction to adjudicate an unresolved dispute if the LRA or any other law requires the dispute to be resolved through arbitration. For purposes of the present case, a dismissal for misconduct should be one that is resolved through arbitration. In the present instance, it was not in dispute that the first respondent was no longer the applicant's employer, the applicant was employed by another employer. The dispute between the parties did not arise out of the employment relationship or from labour relations. The applicant did not seek to challenge or reverse the decision made by an employer that he be summarily dismissed, except that when that decision was made, he was no longer in its employ. To the extent that the applicant sought a declaratory order as to his status on that date, this would not deliver tangible legal relief because the factual and legal conditions for a declaratory order were absent.

The applicant was concerned that the disciplinary finding and the prospect of those findings entering the public domain would prejudice his '*hard earned reputation*'. In essence the applicant's cause of action is one in which he sought to protect his reputation. The applicant did not seek any declaratory order that rests on a right that arises from a provision of the LRA or any other law that requires that the dispute be adjudicated by the Labour Court.

In closing, any assertions of reputational or career damage can be addressed in a claim for damages in the normal course before a civil court having jurisdiction, but not the Labour Court. The application was dismissed with costs.

Fiona Leppan and Kgodisho Phashe

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Objection and withdrawal of consent in the age of information

In terms of POPI where a person (a data subject) consents to his or her personal information being processed, the information may be processed lawfully in the manner prescribed by POPI.

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In terms of POPI where a person (a data subject) consents to his or her personal information being processed, the information may be processed lawfully in the manner prescribed by POPI. This seems relatively straightforward.

However, a person may withdraw his or her consent at any time. Furthermore, in terms of POPI, where a person reasonably objects to their information being processed, the information may not be processed, unless legislation provides otherwise. POPI distinguishes between the consequences of a person's *"withdrawal of consent"* and his or her *"objection to"* the processing of personal information.

Withdrawal of consent

Although Section 11 of POPI allows for the withdrawal of consent it does not set out how the withdrawal must take place. There is little in the way of local precedent in respect of POPI. It is likely that the Information Regulator will look to other jurisdictions, such as the European Union for guidance. The European Union's General Data Protection Regulation 2016/679 (GDPR), provides that in respect of the withdrawal of consent *"it shall be as easy to withdraw as to give consent"*. Accordingly, verbal consent can be withdrawn verbally, and where written consent involved no more than the ticking of a box, a person should simply be able to untick the relevant box to withdraw consent.

In the employment context the withdrawal of consent by an employee may however impede an employer's ability to carry out legitimate functions which require the processing of an employee's personal information. In terms of section 11(2)(b) of

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Objection and withdrawal of consent in the age of information *...continued*

Once an employee objects to the processing of this information, an employer may no longer process the information.

POPI the withdrawal of consent does not affect the lawfulness of the processing of personal information before the withdrawal. It also does not affect the processing of personal information:

- necessary to carry out actions for the conclusion or performance of a contract to which the data subject is party;
- that complies with an obligation imposed by law on the responsible party;
- that protects a legitimate interest of the data subject;
- necessary for the proper performance of a public law duty by a public body; or
- necessary for pursuing the legitimate interests of the responsible party or of a third party to whom the information is supplied.

Objection to processing

An employee may also object to the processing of his or her information. The requirements for objections to processing are however more stringent than when an employee withdraws consent. The objection has to be on reasonable grounds and communicated in a prescribed manner, through Form 1 of the Regulations to POPI. The objection does not apply to processing that is necessary to carry out actions for the conclusion or performance of a contract to which the data subject is party or where it complies with an obligation imposed by law on the responsible party. An employee may however object to processing where it may protect a legitimate interest of the data subject, be necessary for the proper performance of a public law duty by a public body, or for pursuing the legitimate interests of the responsible party or of a third party to whom the information is supplied.

It will be up to the Information Regulator to determine what constitutes *"reasonable grounds"*. However, the employee would have to show that the processing undermines his or her right to privacy and that the right to privacy outweighs any right that the employer might have in respect of the information.

Once an employee objects to the processing of this information, an employer may no longer process the information.

Conclusion

Employees should be aware that a withdrawal of consent, or an objection to the processing of private information does not constitute a blanket withdrawal. An employer may still process certain personal information where it is necessary to pursue a lawful and legitimate purpose as described above.

In certain instances the Information Regulator may be called upon to determine what constitutes a reasonable ground for an objection to the processing of private information, and will need to balance the employee's constitutional right to privacy with the right of the processor (the employer).

Jose Jorge and Kara Meiring

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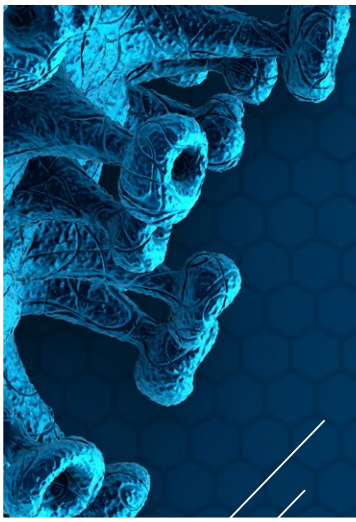

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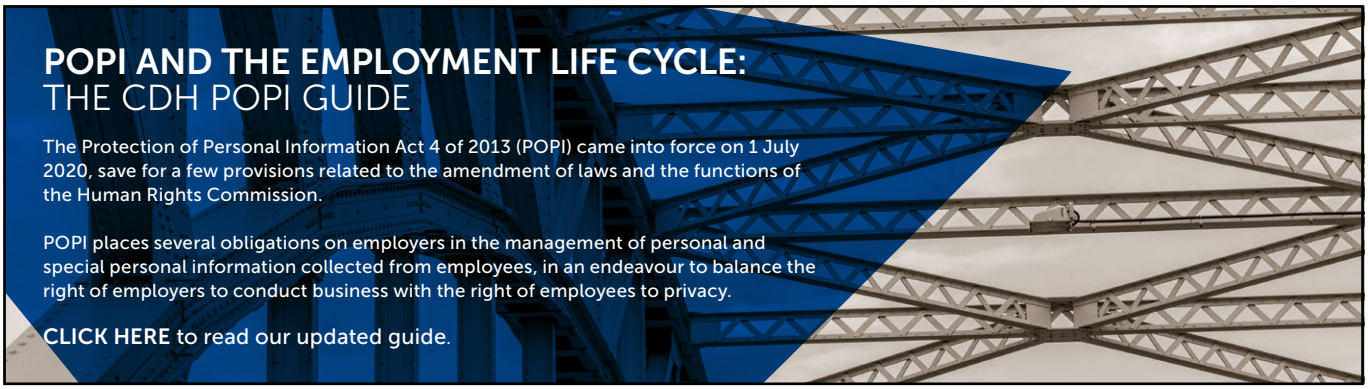

POPI AND THE EMPLOYMENT LIFE CYCLE: THE CDH POPI GUIDE

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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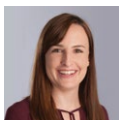

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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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