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EMPLOYMENT ALERT

IN THIS ISSUE

Deemed if you do, deemed if you don't

Is there a difference between a TES (Temporary Employment Service) and an independent service provider/contractor when it comes to the amendments made to the Labour Relations Act 66 of 1995 (LRA) in 2014 and which came into effect on 1 January 2015? As most lawyers will tell you...it depends.

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As will become apparent from the case discussed below, the rationale for the amendments i.e. the protective and social purpose of vulnerable employees i.e. TES employees, is of particular significance when grappling with this question.

Section 198(1) of the LRA defines a TES as any person who for reward, procures for, or provides to a client other persons who perform work for the client and who are remunerated by the TES.

In essence, the amendments determine that employees placed by a TES will be deemed to be employees of the client as opposed to an employee of the TES where they earn below the threshold and are employed for longer than three months.

In addition, those employees deemed to be employed by the client cannot be treated on the whole less favourably than the employees of the client performing the same or similar work.

Any contractual arrangements to bypass these provisions will be frowned upon and the courts will *"pierce the veil"* of a disguised commercial arrangement should the need arise.

True to its convoluted history, however, the application of the deeming provision has raised more questions than provided answers.

A cautionary example

In the reported Labour Appeal Court case of *David Victor & 200 Others v Chep South Africa (Pty) Ltd & Others* (2020) JA55/2019 (LAC) a strong message comes though.

The salient facts of the case are:

1. In 2009 C-Force concluded an agreement with Chep to repair wooden pallets for the benefit of Chep and it was not disputed that C-Force operated as a TES during this time. It must be noted at this point that this was a core function of Chep's business.
2. The fee or reward payable by Chep to C-Force was calculated based on the number of pallets conditioned by C-Force and Chep was obliged to compensate C-Force for any loss in production caused by Chep
3. In November 2014, the parties concluded a service level agreement which was substantially similar to the first agreement with the express provision that, among other things, C-Force is now an independent contractor rendering the same service to Chep. The importance of the timing of the agreement cannot be overstated and it was clearly designed to contract out of the then newly amended LRA provisions regulating TES's.

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Deemed if you do, deemed if you don't...*continued*

On appeal, the appellants (the employees) contended that the Labour Court had erred in interpreting the relevant provisions of the LRA with insufficient regard to their protective and social purpose.

4. The Applicants referred a dispute alleging that the provider was in fact a TES and sought a declaration deeming them to be employees of Chep which entitled them to equal treatment with existing employees of Chep performing the same or similar work as determined in the amended LRA provisions. [section 198A(3)(b) and section198A(5)]
5. The Commissioner held that the true relationship between Chep and the independent service provider C-Force was actually one between a TES and a client based on three critical issues:
    a. The nature of the service level agreement.
    b. The degree of control exercised by Chep over the independent service provider and its employees.
    c. The degree that the independent service provider was integrated into Chep's workplace.
6. On review before the Labour Court, the arbitration award was set aside on the basis of an incorrect interpretation of the law and in particular that the degree of control and integration into Chep's work place are not considerations in the determination of deemed employment.
7. On appeal, the appellants (the employees) contended that the Labour Court had erred in interpreting the relevant provisions of the LRA with insufficient regard to their protective and social purpose.
8. The appellants reinforced that the LRA was amended to address more effectively abusive practices and balance important constitutional rights.
9. The LAC found that C-Force did not deliver repaired wooden pallets, its employees were under Chep's supervision and control, and refurbished the pallets at Chep's premises using raw material and equipment supplied by Chep.

Deemed if you do, deemed if you don't...*continued*

This case rings as a warning shot to employers who have service level agreements which on the face of it appear to omit them from the realm of paying for a product, rather than productive capacity.

10. Ultimately, C-Force did not deliver a product but was driven primarily by the labour costs of employees who refurbished pallets at a rate per man-hour in performing the core businesses of the client. This meant that Chep was not receiving the output of the employees but rather the employees themselves who performed a function of their core business. This was based on:
    a. Raw materials, plant and equipment supplied by Chep;
    b. That the employees performed an integral function of the business;
    c. C-Force did not have discretion over how the work was performed;
    d. The employees had to comply with Chep's policies and instructions, including their rules of conduct; and
    e. Chep could stop an employee working and even initiate disciplinary proceedings against them.

Important considerations arising out of the case

This case rings as a warning shot to employers who have service level agreements which on the face of it appear to omit them from the realm of paying for a product, rather than productive capacity. This judgment makes it clear that in interpreting the relationship, the courts will use a purposive approach informed by policy, equality and equity, and *"pierce the veil"* of the commercial relationship.

Hugo Pienaar, Jaden Cramer and Tony Phillips

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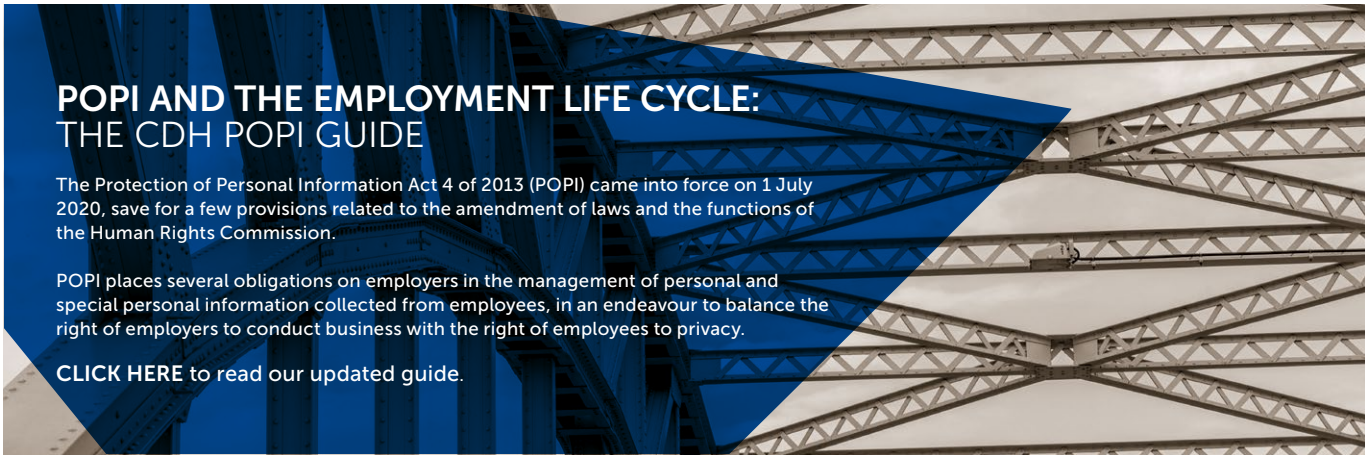

POPI AND THE EMPLOYMENT LIFE CYCLE: THE CDH POPI GUIDE

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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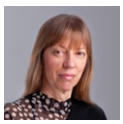

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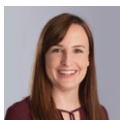

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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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