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EMPLOYMENT ALERT

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Be wary of the chaos – procedural fairness in the face of a distractive employee(s)

In this matter, 16 of approximately 150 employees who participated in an unprotected strike were dismissed for engaging in unlawful conduct during strike action.

To what extent is an employer permitted to abort disciplinary processes and take a decision to dismiss employees due to such employees and their Trade Unions frustrating the disciplinary proceedings? This was the question for determination by the Labour Court (LC) in its recent judgment in *South African Custodial Management (Pty) Ltd & Another v Union for Police, Security and Corrections Organisation (UPSCO) & Others*.

In this matter, 16 of approximately 150 employees who participated in an unprotected strike were dismissed for engaging in unlawful conduct during strike action. These employees were also trade union leaders. The demand put forward by the striking employees was that they wanted the employers to increase their pension fund contributions by 16%.

At the three-month-long disciplinary process that ensued, the employees employed every trick in the book to frustrate the progress of that process and, ultimately, caused the independent disciplinary chairperson (a Practicing Advocate) to decide to recuse himself.

Thereafter, the Employers took a decision to dismiss the Employees as opposed to rescheduling the disciplinary process before a different disciplinary chairperson.

The matter was then referred to the Commission for Conciliation, Mediation and Arbitration (the CCMA) where, considering the nature of the referral (an automatically unfair dismissal dispute in terms of section 187(1) of the Labour Relation Act 66 of 1995 (the LRA), and the complexity of the matter, the Director of the CCMA directed, in terms of section 191(6) of the LRA, that the matter be referred to the LC for adjudication.

Before the LC, the issue for determination was whether the dismissal was procedurally fair.

In deciding the above issue, the LC Judge Graham Moshoana reaffirmed the legal principle that where Employees are offered the opportunity to state their case but choose to frustrate the disciplinary process leading to a premature decision to dismiss them, the requirements of the *audi alteram partem* principle will have been met.

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Be wary of the chaos – procedural fairness in the face of a distractive employee(s)*...continued*

Before the LC, the issue for determination was whether the dismissal was procedurally fair.

Accordingly, and taking into account the clear evidence of the Employees frustrating and deliberately delaying the disciplinary process in this case, the LC concluded that the dismissal was indeed procedurally fair. The court accepted that, on the facts of this case, it was not necessary for the Employers to reconvene the disciplinary process before another disciplinary chairperson as the Employees had been given the opportunity to be heard and had spurned it through their distractive conduct and delaying tactics (that is, the Stalingrad Approach that they adopted).

This judgment reaffirms the important legal principle that employers are not to be held to ransom at the altar of procedural fairness and are merely required, in terms of item 4 of the Code of Good Practice: Dismissal contained in the LRA, to give Employees an opportunity to be heard. If it objectively appears that an employee is intent on abusing the opportunity or is engaged in disingenuous endeavours with the intention to systematically undermine and render the disciplinary process dysfunctional, the employer would, under the circumstances, be justified in dismissing the said employee without proceeding further with the disciplinary process.

Interestingly, on a subsidiary point, the LC went on to affirm that the LRA, purposively interpreted, places an obligation on the shoulders of trade union leaders to promote order and to ensure the effective resolution of disputes within the workplace during strike action.

Bongani Masuku and Mayson Petla

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Still going down – 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 is 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 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 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%. Then, 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 of 7.25%.

Now, on 6 November, a third drop in the interest rate was announced. The new rate is 7% with effect from 1 September 2020.

Aadil Patel, Riola Kok and Kara Meiring

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Under the influence: No proof, no dismissal

The company's management is further empowered to exercise reasonable discretion in determining whether an employee is fit to report for duty.

Following the Constitutional Court judgment where the use of cannabis was decriminalised, employers have faced difficulty in policing and enforcing policies regulating the use of cannabis by employees reporting for duty. An example of this was demonstrated in *Rankeng/Signature Cosmetics and Fragrance (Pty) Ltd* [2020] 10 BALR 1128 (CCMA), where the CCMA commissioner ordered the reinstatement of an employee who had been dismissed after testing positive for cannabis.

Background

The applicant worked as a picker for Signature Cosmetics and Fragrance. The applicant was charged with being under the influence of cannabis while at work. When questioned by his supervisor, he admitted that he had smoked early in the morning a few hours prior to his shift. He was found guilty of misconduct and subsequently dismissed.

The two witnesses testifying on behalf of the company testified that the applicant reported to the office late and appeared with red and watery eyes. The applicant agreed to have the test taken which came back positive for cannabis.

The company has a strict policy which prohibits anyone from working while under the influence of alcohol or drugs in compliance with the Occupational Health and Safety Act. In terms of this policy, an employee may be dismissed even for the first offence. Furthermore, the company's disciplinary code states that any employee that is suspected of being under the influence of any drug may not remain on the premises. The company's management is further empowered to exercise reasonable discretion in determining whether an employee is fit to report for duty.

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Under the influence: No proof, no dismissal...*continued*

Employers should ensure that they have sufficient evidence to prove physical or mental impairment of an employee's faculties before a dismissal in these circumstances can be implemented, even in instances where the use is prohibited in the company policy.

Commissioner's findings

The commissioner held that the difficulty with a charge of this nature is that there is no scientific method of determining whether a person is under the influence of the drug such that there is an impairment in their performance. On these facts the commissioner found that the company's evidence did not point to any evidence of impairment of faculties, apart from red and watery eyes, which would suggest an inability to perform tasks allocated. On this basis, the commissioner found that although the applicant's conduct was irresponsible since it was in contravention of the company policy, dismissal was not an appropriate sanction and a final warning would have sufficed. The commissioner ordered that the employee be reinstated and issued with a final written warning

This ruling demonstrates the potential difficulties for employers who seek to enforce their policy on drug and alcohol use. The commissioner held that the burden is on employers to prove that the employee was under the influence of a narcotic drug such as cannabis. Employers may do so by relying on circumstantial evidence such as obvious signs of physical or mental impairments. Employers should therefore ensure that they have sufficient evidence to prove physical or mental impairment of an employee's faculties before a dismissal in these circumstances can be implemented, even in instances where the use is prohibited in the company policy.

The above scenario is, however, distinguishable from situations where employers enforce zero-tolerance policies on testing positive for alcohol/drugs due to the inherently dangerous working environments within which they operate.

Sean Jamieson, Jaden Cramer and Nyameka Nkasana

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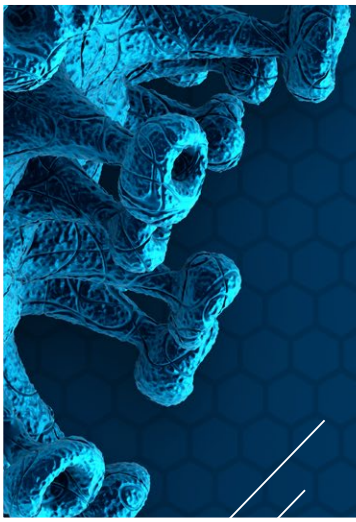

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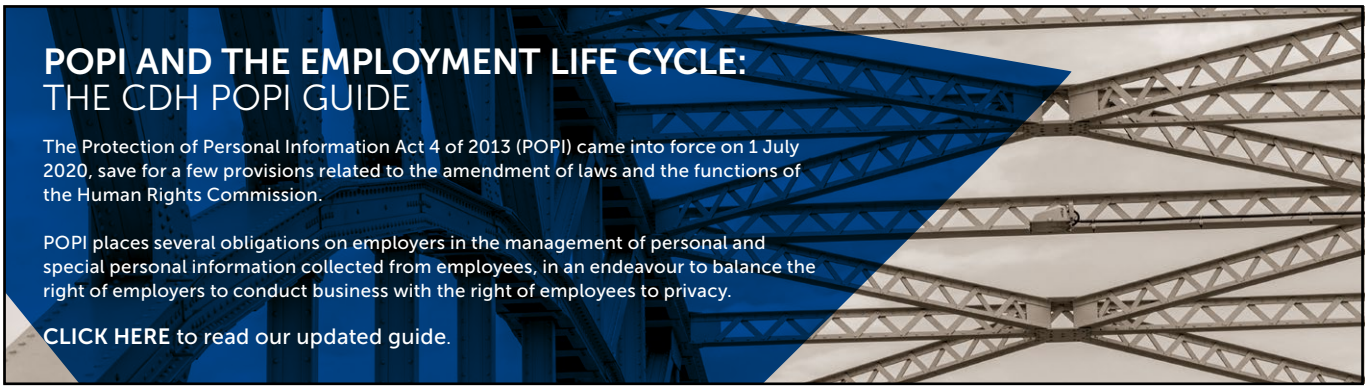

POPI AND THE EMPLOYMENT LIFE CYCLE: THE CDH POPI GUIDE

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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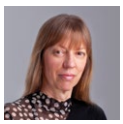
OUR TEAM

For more information about our Employment practice and services, please contact:

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

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



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

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

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

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

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

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

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

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

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

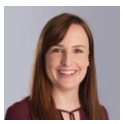
Mohsina Chenia
Executive Consultant
T +27 (0)11 562 1299
E mohsina.chenia@cdhlegal.com

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

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

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

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



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

Sean Jamieson
Senior Associate
T +27 (0)11 562 1296
E sean.jamieson@cdhlegal.com

Bheki Nhlapho
Senior Associate
T +27 (0)11 562 1568
E bheki.nhlapho@cdhlegal.com

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

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

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

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

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.

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

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

CDH
CLIFFE DEKKER HOFMEYR