13 APRIL 2021

EMPLOYMENT LAW ALERT

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Let the people strike! Court guides State on the nature of guidelines

In the case of *Association of Mine Workers and Construction Union (AMCU) v The Minister of Employment and Labour* (06 April 2021), the North Gauteng High Court (NGHC) set aside the Guidelines issued by the Minister of Employment and labour (the Minister) providing for the system of voting contemplated in section 95(9) of the LRA.

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The employees' right to disclosure of an investigation report during CCMA proceedings

The employees contended that disciplinary action could not be equated with litigation and that it would be contrary to public policy should the employer be permitted not to disclose the report.

Are employees entitled to disclosure of an investigation report which forms the basis of the charges against them during CCMA proceedings? The Labour Court was called to answer this question in the recent judgment in *South African Sports Confederation and Olympic Committee (SASCOC) v Commission for Conciliation, Mediation and Arbitration and Others* (JR 2642/2019) [2021] ZALCJHB 23.

The employees made a formal application for disclosure of the investigation report which formed the basis of the charges against them. They submitted that the employer was only entitled to claim privilege in respect of communications which took place in preparation for the arbitration hearing, and in relation to the arbitration hearing itself. The employees further submitted that the nature of the investigation was such that it constituted an internal procedure, and that the subsequent disciplinary hearing did not constitute legal proceedings. The employees contended that disciplinary action could not be equated with litigation and that it would be contrary to public policy should the employer be permitted not to disclose the report.

The employer submitted that the investigation report was concluded after a fact-finding exercise but expressed a view between attorney and client on the findings of the investigation and was accordingly legally privileged. *In any event, the report was not relevant, since evidence would be given at the arbitration by relevant witnesses independent of the investigation report.*

The Labour Court found that Rule 29 of the CCMA rules was the starting point of the enquiry. The rule discloses only relevance as a criterion for the disclosure of documents. Since an arbitration is a new hearing, meaning that the evidence concerning the reason for dismissal is heard afresh before the arbitrator, the arbitrator had to determine whether the dismissal is fair in the light of the evidence admitted at the arbitration and does not merely review the evidence considered by the employer when it decided to dismiss. The employees had no right to discovery or disclosure of the investigation report when the disciplinary enquiry was convened. Independent witness evidence was led to substantiate the charges against them.

The employees' right to disclosure of an investigation report during CCMA proceedings...*continued*

The investigation report was thus entirely irrelevant to the issue of the fairness of the employee's dismissals, particularly given that it was not used in the disciplinary enquiry and would not be relied on by the employer in the arbitration proceedings.

To the extent that the arbitrator held that the investigation report contains information related to the substantive fairness of the dismissals as it was the investigation report that gave rise to the charges, this was found by the Labour Court to be incorrect. The chairperson of the disciplinary hearing provided the substantive reasons for the employees' dismissals in his findings, which have been discovered and provided to the employees. The investigation report was thus entirely irrelevant to the issue of the fairness of the employee's dismissals, particularly given that it was not used in the disciplinary enquiry and would not be relied on by the employer in the arbitration proceedings. It follows that the arbitrator committed a material error of law when he found that the report should have been disclosed on the basis that it was relevant.

Based on the court's decision, employees will not be entitled to disclosure of an investigation report where such report was not used in the disciplinary enquiry and will not be relied upon by the employer during arbitration proceedings. The key issue, therefore, is whether the investigation report is relevant to the issue of the fairness of the employee's dismissal. As long as an employer can establish the procedural and substantive fairness for an employee's dismissal by leading the necessary evidence at the disciplinary hearing / arbitration by relevant witnesses (as opposed to placing direct reliance on the investigation report) the investigation report itself is irrelevant and on that basis, not subject to disclosure.

Kirsten Caddy (Legal Consultant) and Thabo Mkhize (Legal Consultant)

Further adjustments made to visas expired during the national lockdown

It is important for visa holders to adhere to the terms and conditions of their visas and any activity not endorsed onto such visa or permits is prohibited.

Throughout the various stages of the South African National Lockdown, owing to the devastating COVID-19 pandemic, various temporary measures have been put in place in an effort to accommodate immigration needs of foreign nationals within the Republic. These temporary measures have mainly centred around extensions of the various visas by means of a series of amendments that have been made to the directions issued in terms of the Regulations of the Disaster Management Act 57 of 2002.

On 26 March 2021 the Minister of Home Affairs, Dr. Aaron Motsoaledi, once again extended the validity of visas and permits which expired during the national lock down from 31 March 2021 to 30 June 2021. However, this particular extension only applies to the South African visitors' visa and permits issued for less than 90 days. This effectively means that such holders will not be declared undesirable if their visas or permits expired during the course of the national lockdown because they are now deemed to be valid until 30 June 2021.

This concession does not apply to the following visas which have expired during the National State of Disaster namely:

- Study visas;
- Treaty visas;
- Business visas;
- Medical treatment visas;
- General work visas;
- Critical skills work visas;
- Retired person visas;
- Exchange visas;
- Visas issued for more than 90 days up to three years; and
- Any visa or permit obtained on or after 15 March 2021, or to any persons who entered on or after this date.

Instead the abovementioned holders who are not entitled to the South African visitors' visa extension should instead apply for visas at www.vfsglobal.com/dha/southafrica on or before 31 July 2021, or leave the country before this date.

It is important for visa holders to adhere to the terms and conditions of their visas and any activity not endorsed onto such visa or permits is prohibited.

In addition, the asylum seeker permits or refugee status, which has been granted in terms of the Refugees Act, which expired from 15 March 2020, is deemed to have been extended up to and including 30 June 2021.

Similarly, Lesotho Special Permits, which have expired, is deemed to have been extended to 30 June 2021.

Michael Yeates, Mapaseka Nketu and Shanna Eeson

Let the people strike! Court guides State on the nature of guidelines

Put differently, the court found that section 95(8) only permits the issuing of discretionary, as opposed to mandatory, requirements for balloting.

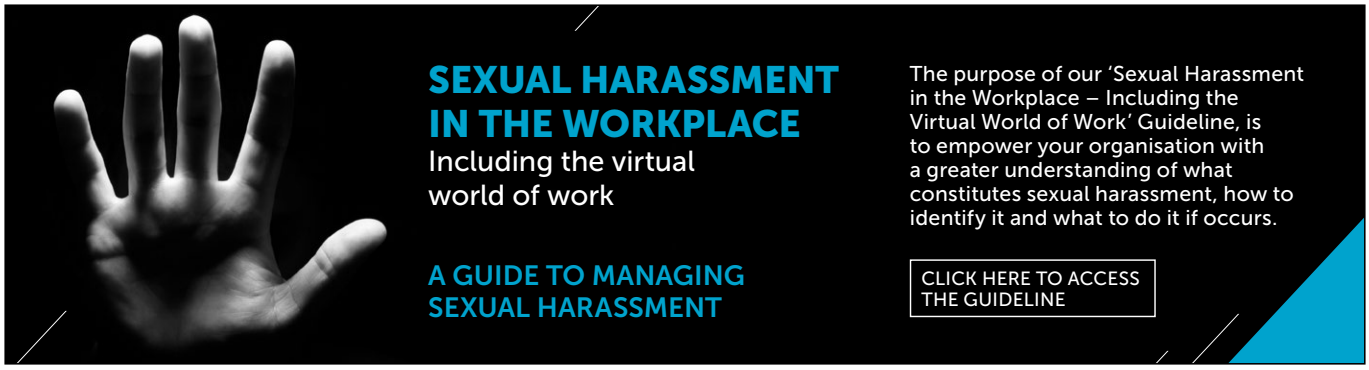
In the case of *Association of Mine Workers and Construction Union (AMCU) v The Minister of Employment and Labour* (06 April 2021), the North Gauteng High Court (NGHC) set aside the Guidelines issued by the Minister of Employment and labour (the Minister) providing for the system of voting contemplated in section 95(9) of the LRA. Paragraphs 9.1 - 9.6 of the Guidelines contained mandatory requirements for balloting before a strike could be called by a Trade Union.

The bone of AMCU's contention was that the Guidelines were invalid because the Minister issued the Guidelines in terms of section 95(9) of the Labour Relations Act 56 of 1995 (the LRA) as opposed to the correct section 95(8), being the section that creates the power to issue such Guidelines for the Minister. Furthermore, AMCU took issue with the mandatory requirements imposed by paragraphs 9.1 – 9.6 of the Guidelines, which, in AMCU's contention, were ultra vires the powers conferred on the Minister by sections 95(5) and 95(8).

The court held that there is a "*legislative imperative to act within the powers granted by the enabling legislation*". Section 95(9) did not empower the Minister to issue the Guidelines in question. Accordingly, the court found, the reference in paragraph 1 of the Guidelines to section 95(9) was clear evidence of reliance being placed on the incorrect section of the LRA by the Minister. Furthermore, the court found, the bulk of the provisions contained in the Guidelines were couched in mandatory terms, which rendered them ultra vires the powers conferred on the Minister by section 95 in that regard. Put differently, the court found that section 95(8) only permits the issuing of discretionary, as opposed to mandatory, requirements for balloting.

The case is of particular importance as it demonstrates the courts' attitude towards the protection of the rights and freedoms created for Trade Unions and Employees by the LRA, particularly those that relate to the sanctity of the Collective Bargaining process.

Bongani Masuku and Kananelo Sikhakhane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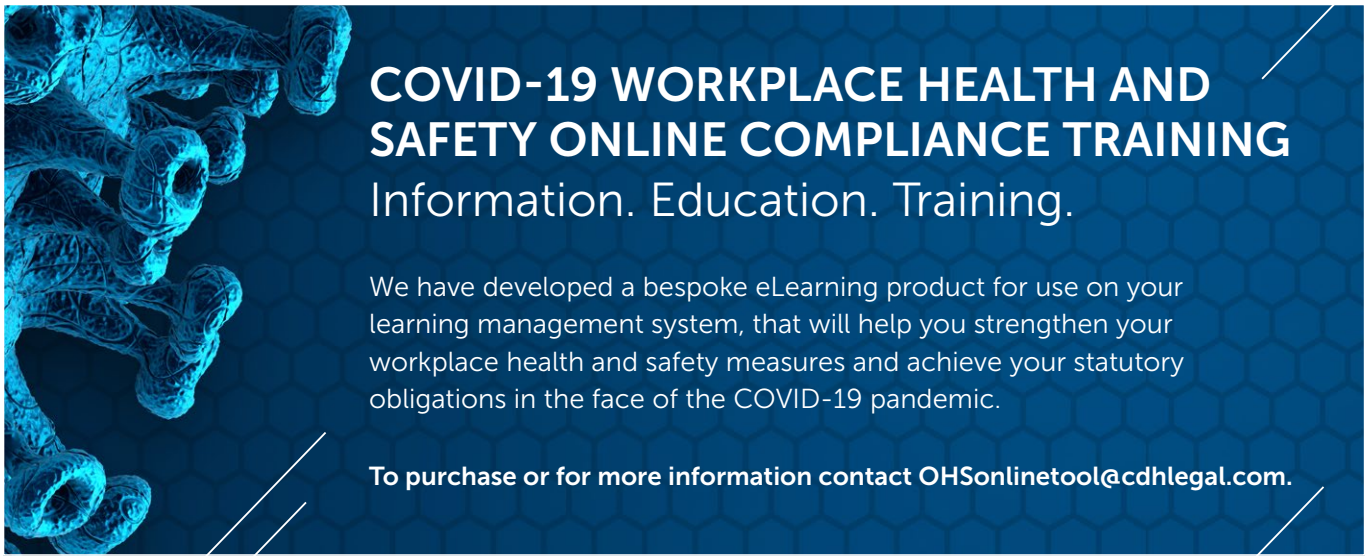
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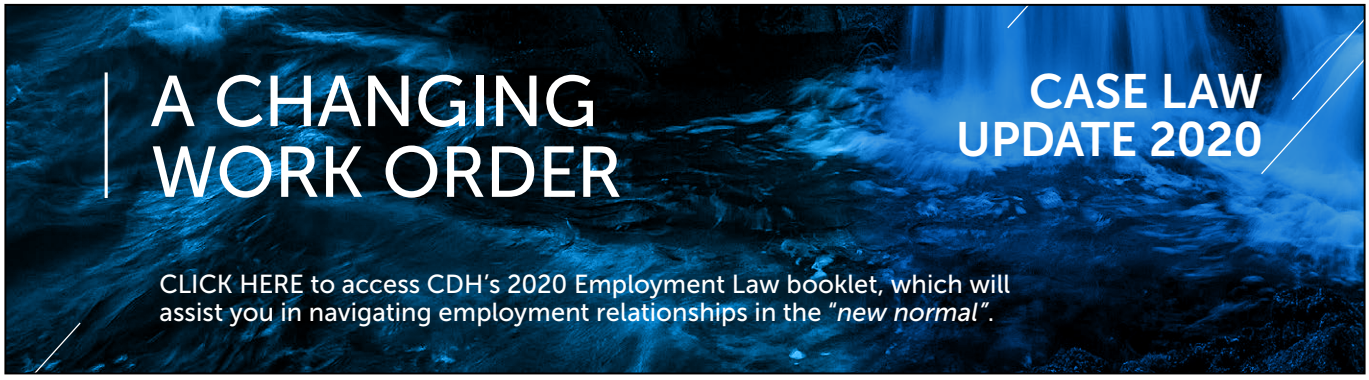
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EMPLOYMENT

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CLICK HERE for the latest thought leadership and explanation of the legal position in relation to retrenchments, temporary layoffs, short time and retrenchments in the context of business rescue.

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Aadil Patel ranked by CHAMBERS GLOBAL 2015 - 2021 in Band 2: Employment.

Fiona Leppan ranked by CHAMBERS GLOBAL 2018 - 2021 in Band 2: Employment.

Gillian Lumb ranked by CHAMBERS GLOBAL 2020 - 2021 in Band 3: Employment.

Imraan Mahomed ranked by CHAMBERS GLOBAL 2021 in Band 2: Employment.

Hugo Pienaar ranked by CHAMBERS GLOBAL 2014 - 2021 in Band 2: Employment.

Michael Yeates ranked by CHAMBERS GLOBAL 2020 - 2021 as an up and coming employment lawyer.

TOP RANKED Chambers Global 2021

Our Employment practice is ranked as a Top-Tier firm in THE LEGAL 500 EMEA 2020.

Fiona Leppan is ranked as a Leading Individual in Employment in THE LEGAL 500 EMEA 2020.

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Hugo Pienaar is recommended in Employment in THE LEGAL 500 EMEA 2020.

Michael Yeates is recommended in Employment in THE LEGAL 500 EMEA 2020.

Jose Jorge is recommended in Employment in THE LEGAL 500 EMEA 2020.

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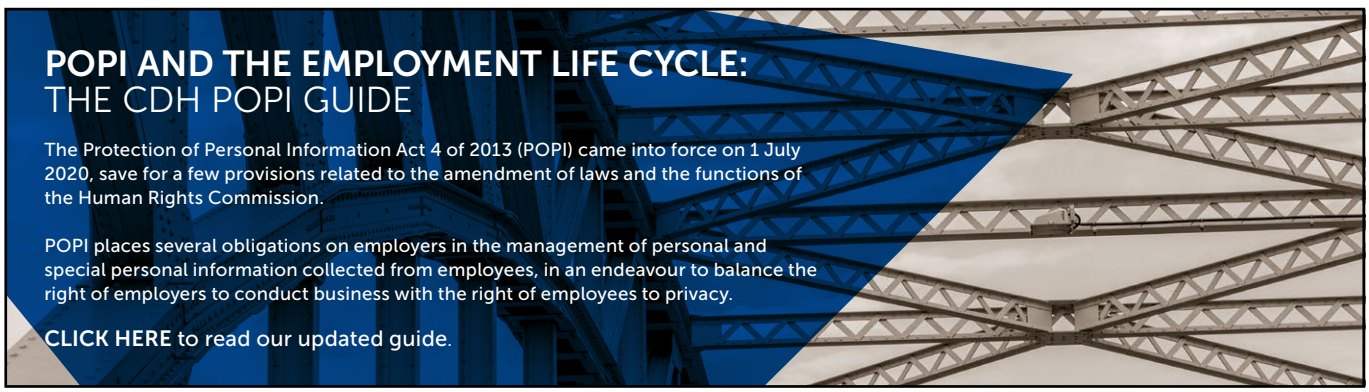
The LEGAL 500 EMEA



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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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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