25 JANUARY 2021

EMPLOYMENT LAW **ALERT**

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The 10 fundamentals for compulsory vaccinations in the workplace

The advent of the COVID-19 pandemic saw the world as we know it drastically altered. All of life's ordinary pleasures and comforts have had to be reimagined. However, not all hope is lost. A needle of hope has presented itself in the form of a vaccination. While this may appear to be the solution to the problems of many employers across the globe, a dosage of caution must be taken. The following is a brief overview of the principles that an employer should consider before embarking on such a project.

A tale of an unfettered discretion exercised reasonably – changing the provisions of a policy governing benefits which form part of the T&Cs of employment

On 24 November 2020, the Labour Appeal Court (LAC) handed down judgment in *Skinner & 208 Others v Nampak Products Limited & Others*. The appeal related to a decision of the Labour Court by Moshoana J which found that Nampak, represented by writer hereof, could unilaterally change its level of contribution in respect of the Appellants' post-retirement medical aid benefit (PRMA).

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The 10 fundamentals for compulsory vaccinations in the workplace

The obligation to ensure that the workplace is a safe and healthy environment conducive to optimal productivity rests primarily on the employer. A mandatory vaccination policy could be helpful in ensuring such an environment.

The advent of the COVID-19 pandemic saw the world as we know it drastically altered. All of life's ordinary pleasures and comforts have had to be reimagined. However, not all hope is lost. A needle of hope has presented itself in the form of a vaccination. While this may appear to be the solution to the problems of many employers across the globe, a dosage of caution must be taken. The following is a brief overview of the principles that an employer should consider before embarking on such a project.

1. The obligation to ensure that the workplace is a safe and healthy environment conducive to optimal productivity rests primarily on the employer. A mandatory vaccination policy could be helpful in ensuring such an environment.
2. Whether any instruction to undergo compulsory vaccination constitutes a reasonable instruction by the employer to its employees.
3. It is also important to consider the relationship between the employees and the unwritten obligation that exists amongst themselves not to endanger one another's health and safety.
4. The policy may benefit the entire workforce, including applicants for positions. However, employers should not negate the fact that their employees have constitutionally and protected rights. These rights include freedom and security of person, bodily and psychological integrity and the right to enjoy religious and cultural freedom. Although no right is absolute, these rights may impact on the right of the employer to impose a compulsory vaccination policy.
5. In addition, the employees may take issue to a possible unilateral change to the conditions of the terms and conditions of employment.
6. It has become a known fact that many businesses currently face the fear of job losses and closures. The imposition of such a policy may act in mitigating the likelihood of such occurrences.

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The 10 fundamentals for compulsory vaccinations in the workplace...*continued*

Employers should strive to obtain their employees voluntary buy-in.

7. The full scope of the right to privacy and the POPI Act should similarly be considered.
8. Further, if an employee is adversely affected by the vaccination, the employer could be liable for same.
9. In taking such action, the provisions of the Labour Relations Act may also be considered. For example, the utilisation of section 23 of the Act to conclude a Collective Agreement with a majority trade union/s in order to ensure the proper enforcement of such a policy.
10. The policy may also have an effect on the workforce of the employers' subcontractors – such employees' access to the employers' workplace may be impacted as well as the service level agreement with its subcontractors.

Employers should strive to obtain their employees voluntary buy-in. Accordingly, it is always the preferred option for the Employer to engage in meaningful consultations with the Employees and/or their representatives before embarking on any changes that will impact them.

Hugo Pienaar

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A tale of an unfettered discretion exercised reasonably – changing the provisions of a policy governing benefits which form part of the T&Cs of employment

The Appellants approached the Labour Court claiming that the decision to cap the PRMA benefit constituted a breach of their conditions of employment and alternatively that Nampak's decision to cap the benefit constituted an unfair labour practice.

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Since this alert is a follow up on our previous article on the Labour Court judgment, titled Changing the Provisions of a Policy governing Benefits which form part of the terms and conditions of employment, which alert was published on 1 July 2019, we will only recap the central facts which are of importance to the current discussion.

The Appellants are all former or current employees of Nampak. As part of their contracts of employment they qualified for medical aid benefits in terms of a policy (the Medical Aid Society Contribution: Employees and Pensioner Policy) which was incorporated in the terms and conditions of their employment.

Clause 3.3.3 of the policy reads as follows:

> *'Subject to the provisions of clauses 3.3.6, 3.3.7 and 4, the Company will pay 100% of the medical aid contribution where the employee has at least 25 years' continuous years' service in the Company and 10 years' membership of a Company acknowledged medical aid society at the date of retirement and was employed prior to 1 June 1996…'*

Whereas clause 4.1 of the policy read as follows:

> *'The Company may, at its sole discretion, in respect of future pensioners, set a maximum level at which it is prepared to contribute towards medical aid society benefits. The pensioner will be responsible for the difference between the actual medical aid society contribution levied by the applicable medical aid society and the maximum level set by the Company.'*

Facing difficult trading conditions, and having employed other cost cutting measures, Nampak, having considered its legal position and taken legal advice thereon, introduced a cap on the amount of the monthly contribution that it was prepared to pay towards the PRMA benefit to manage the extra-ordinary costs associated with medical aid inflation over which it had no control.

The Appellants approached the Labour Court claiming that the decision to cap the PRMA benefit constituted a breach of their conditions of employment (breach of contract) and alternatively that Nampak's decision to cap the benefit constituted an unfair labour practice (ULP).

In dismissing the matter, the Labour Court held that the decision to cap the benefit could not constitute a breach of contract as the use of the phrase "*subject to*" in clause 3.3.3 of the policy was a clear indication that the policy intended to create a condition applicable to the contribution to be made by Nampak in future. Further, the Appellants failed to

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A tale of an unfettered discretion exercised reasonably – changing the provisions of a policy governing benefits which form part of the T&Cs of employment...*continued*

In the circumstances, the LAC held that a breach of contract or unfair labour practice could only exist if it was shown that Nampak exercised its discretion in terms of clause 4.1 of the policy unreasonably or unfairly.

lead evidence on non-performance or malperformance by Nampak so there could be no breach of contract. The Labour Court found that the capping of the benefit could not be faulted on the evidence as Nampak had acted lawfully and with a clear commercial rationale.

On appeal, the LAC was called upon to determine whether clause 4.1 of the policy, which granted Nampak the 'sole discretion' to alter its contribution, was valid. In addition, thereto, whether the discretion, if it were valid, had been exercised reasonably.

In determining the validity of clause 4.1 of the policy, the LAC dismissed the Appellants' contention that the clause was void for vagueness. It found that this was untenable as the object of clause 4.1, reserving Nampak's discretion to alter its PRMA liability in respect of eligible employees who were still employed and had not yet retired, was clear and unambiguous.

Further, the LAC found that the right to the benefit in clause 3.3.3 only vested in the Appellants at retirement and stated that while clause 3.3.3 conferred eligible employees with the right to 100% of the PRMA contribution, this right was specifically subject to clause 4.1.

The LAC endorsed the Labour Court's finding that clause 4.1 was valid and Nampak could alter its contribution amount at its 'sole discretion'. This discretion, however, is not unfettered as it must be exercised reasonably. Moving on to determining whether Nampak had exercised its 'sole discretion' reasonably. The LAC emphasised that a contractual discretion ought to be exercised reasonably, *arbitrio bono viri*, meaning that the relevant party must not act in bad faith and should endeavour proportionally to balance adverse and beneficial effects of the proposed decision or action.

In the circumstances, the LAC held that a breach of contract or unfair labour practice could only exist if it was shown that Nampak exercised its discretion in terms of clause 4.1 of the policy unreasonably or unfairly.

Considering the Appellants' contention that Nampak's decision to cap the PRMA benefit was unfair or unreasonable because, according to them, Nampak could afford to pay the full benefit, the LAC held that the issue of affordability was not decisive. Further, that when assessing whether the employer had acted reasonably or fairly in exercising its discretion, its operational needs ought to be a relevant factor for consideration. In dismissing the Appellants contention and accepting Nampak's commercial rationale for capping the PRMA benefit, the LAC went on to conclude that an employer's intention to increase profitability was an entirely legitimate commercial rationale. Thus, exercise of the discretion within that context could not be considered

A tale of an unfettered discretion exercised reasonably – changing the provisions of a policy governing benefits which form part of the T&Cs of employment...*continued*

Evidence of the mounting commercial difficulty was clear from Nampak's decision to consult affected employees and endeavour to reach a cash offer to buy out the individual PRMA benefits.

unreasonable. Having regard to the evidence before it, the LAC went on to find that Nampak was indeed in a tough position and constrained in its operations and pursuit of profitability by a number of cost-factors and adverse business conditions, including the indisputable fact that medical inflation was outstripping the CPI by a considerable margin.

Evidence of the mounting commercial difficulty was clear from Nampak's decision to consult affected employees and endeavour to reach a cash offer to buy out the individual PRMA benefits. The fact that more than 70% of the active employees accepted the cash offers, was evidence that Nampak had made reasonable and advantageous offers to all the concerned employees, including the Appellants. In finding that Nampak had exercised its discretion reasonably with no evidence of any illegitimate or ulterior motive and dismissing the appeal, the LAC held that the Labour Court had not erred in concluding that the employer had not acted in breach of contract.

This judgment is an important reminder to employers to ensure that their company policies adequately make provision for them to adjust their position and obligations in accordance with compelling operational and commercial requirements, within the ambit of legal permissibility.

Fiona Leppan, Mayson Petla and Kananelo Sikhakhane

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CDH'S 2020 EDITION OF

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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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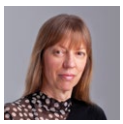
CLIFFE DEKKER HOFMEYR

OUR TEAM

For more information about our Employment Law 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
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

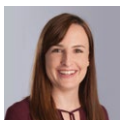
Mohsina Chenia
Executive Consultant
T +27 (0)11 562 1299
E mohsina.chenia@cdhlegal.com

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

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

CLIFFE DEKKER HOFMEYR