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# EMPLOYMENT LAW ALERT

## IN THIS ISSUE >

### Criminal behaviour VS criminal conduct: What is the issue?

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### Brandishing dangerous weapons during strike action and proving employees' awareness of the rule prohibiting this conduct

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INCORPORATING  
KIETI LAW LLP, KENYA

## Criminal behaviour VS criminal conduct: What is the issue?

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With the Information Regulator taking a hard stance against refusing any extensions to the 12-month grace period, and with the 1 July 2021 deadline fast approaching, employers are encouraged to ensure that they become compliant in terms of The Protection of Personal Information Act 4 of 2013 (POPIA).

POPIA instructs employers to comply with all the requirements for the lawful processing of personal information when collecting or processing the data of prospective, temporary, or full-time employees. Potential information includes information relating to an employee's past criminal history or behaviour. POPIA creates a distinction between that of 'criminal information' and 'criminal behaviour'.

'Criminal information' is defined within 'personal information' and refers to the criminal history of the employee. Employers often require certain reference checks before employing a person. This may include criminal or other background checks, and references from previous employers. 'Criminal behaviour' is defined as 'special personal information' and requires an employer to obtain, among others, consent from the employee before processing any special personal information. However, 'criminal information' is not defined as 'special personal information' and is therefore information that the employer can process without consent.

Special personal information includes, among others, pre-employment screening records relating to criminal convictions. Section 26(1)(b) of POPIA informs us that an employer may not process information

about the criminal behaviour of a third party if such information relates to the alleged commission of any offence or any proceedings regarding any offence allegedly committed by an employee or the disposal of such proceedings. The prohibition on the processing about an employee's criminal behaviour, or biometric information does not apply if the processing is carried out by bodies charged by law with applying criminal law or by responsible parties who have obtained that information under the law.

For example, where an employer is recruiting employees in positions that require employees to deal with expensive stock or large sums of money daily, the employer is not expected to be barred by the limitations set on special personal information. In such a situation, the employer will have to either get consent from the employee, or prove that processing the information is necessary, with reference to the exceptions set out in section 27(1) of POPIA to process information on the employees criminal behaviour.

Employers are advised, when recruiting new employees, to consider only processing that of criminal information, rather than that of criminal behaviour. Criminal behaviour, besides being regarded as special personal information, is rather onerous to secure the necessary consent and/or approval to process it. From an employment perspective, criminal behaviour may not be relevant to employ employees.

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*Aadil Patel and Dylan Bouchier*

## Brandishing dangerous weapons during strike action and proving employees' awareness of the rule prohibiting this conduct

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The arbitrator found that the employees were unfairly dismissed for a rule that they *"did not know existed, or which was not effectively communicated to them"*.

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In the recent case of *Pailpac (Pty) Ltd v De Beer N.O and Others* (DA 12/2018) [2021] ZALAC 3 (1 March 2021), the Labour Appeal Court (LAC) was tasked with assessing this scenario. In July 2014, NUMSA embarked on a national strike in the metal and engineering industry. The affected employees were dismissed for carrying dangerous weapons during the strike including sticks, PVC rods, sjamboks and golf clubs.

The employees challenged the fairness of their dismissals at the bargaining council. The arbitrator found that the employees were unfairly dismissed for a rule that they *"did not know existed, or which was not effectively communicated to them"*.

The employer took the award on review at the Labour Court (LC). The LC dismissed the review application, prompting the employer to take the matter on appeal at the LAC. The primary issue for the LAC's determination was whether the employees knew or could reasonably have been expected to be aware of the rule (prohibiting the brandishing of dangerous weapons).

The employer's argument had two legs in respect of what evidence it contended the arbitrator had unreasonably ignored. Firstly, the dismissed employees knew that the employer's rules prohibited the carrying of sticks, sjamboks and golf clubs in a hostile fashion during a strike. Secondly, the material contradictions in the versions of the dismissed employees regarding their knowledge of the rules and the notice board where the rules were published.

In contrast, the dismissed employees contended that there was no evidence that they were aware of the rules. While the rules were displayed on the notice board

at the main entrance of the employer's factory, the employees disputed having read the rules. However, they conceded to reading other information previously placed on the very same notice board.

The LAC therefore found that it is *"probable"* that the employees were aware of the rule or could reasonably have been expected to be aware of the rule. Accordingly, the arbitrator's finding was not one that could reasonably be reached.

The LAC also rejected the employees' defence that they were prevented from approaching the wall where the rules could be read. Accordingly, if the dismissed employees were able to approach the wall, it is probable that they would have been able to read the rule that prohibited the brandishing of dangerous weapons. Importantly, the LAC reiterated that the test is not whether the employees had approached the wall to read the rules, but whether the dismissed employees were aware of the rule or could reasonably have been expected to be aware of the rule.

The LAC held that *"the breach of the rule by the dismissed employees coupled with the ensuing harm to, and intimidation of, non-striking employees rendered their continued employment intolerable and made dismissal an appropriate sanction."* Accordingly, the dismissals were substantively fair.

This judgment provides clarity on the appropriate test to be applied when an employee's knowledge of a rule is disputed, namely whether the employee was aware of the rule or could reasonably have been expected to be aware of the rule.

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*Sean Jamieson and Michael Bailey*





## SEXUAL HARASSMENT IN THE WORKPLACE

Including the virtual  
world of work

A GUIDE TO MANAGING  
SEXUAL HARASSMENT

The purpose of our 'Sexual Harassment in the Workplace – Including the Virtual World of Work' Guideline, is to empower your organisation with a greater understanding of what constitutes sexual harassment, how to identify it and what to do if it occurs.

CLICK HERE TO ACCESS  
THE GUIDELINE



## COVID-19 WORKPLACE HEALTH AND SAFETY ONLINE COMPLIANCE TRAINING

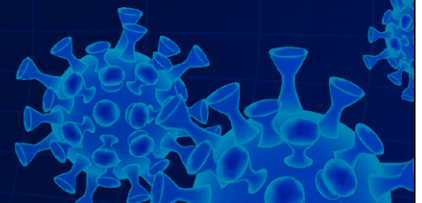
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## A CHANGING WORK ORDER

## CASE LAW UPDATE 2020

CLICK HERE to access CDH's 2020 Employment Law booklet, which will assist you in navigating employment relationships in the "new normal".

EMPLOYMENT

## RETRENCHMENT GUIDELINE



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.

## 2021 RESULTS

CHAMBERS GLOBAL 2014 - 2021 ranked our Employment practice in Band 2: Employment.

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.



## 2021 RESULTS

Our Employment Law practice is ranked as a Top-Tier firm in THE LEGAL 500 EMEA 2021.

Fiona Leppan is ranked as a Leading Individual in Employment Law in THE LEGAL 500 EMEA 2021.

Aadil Patel is ranked as a Leading Individual in Employment Law in THE LEGAL 500 EMEA 2021.

Gillian Lumb is recommended in Employment Law in THE LEGAL 500 EMEA 2021.

Hugo Pienaar is recommended in Employment Law in THE LEGAL 500 EMEA 2021.

Jose Jorge is recommended in Employment Law in THE LEGAL 500 EMEA 2021.

Imraan Mahomed is recommended in Employment Law in THE LEGAL 500 EMEA 2021.

Anli Bezuidenhout is recommended in Employment Law in THE LEGAL 500 EMEA 2021.



## 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.

## AN EMPLOYER'S GUIDE TO MANDATORY WORKPLACE VACCINATION POLICIES

FOR A COPY OF THE CDH  
EMPLOYMENT PRACTICE  
GUIDE, [CLICK HERE](#)

## EMPLOYMENT REVIVAL GUIDE Alert Level 1 Regulations

On 28 February 2021, the President announced that the country would move to Alert Level 1 (AL1) with effect from 28 February 2021. AL1 of the lockdown is aimed at the recommencement of almost all economic activities.

[CLICK HERE](#) to read our updated AL1 Revival Guide.  
Compiled by CDH's Employment law team.

## OUR TEAM

For more information about our Employment Law practice and services in South Africa and Kenya, please contact:



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



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



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



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



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



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



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



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



**Njeri Wagacha**  
Partner | Kenya  
T +254 731 086 649  
+254 204 409 918  
+254 710 560 114  
E njeri.wagacha@cdhlegal.com



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



**Desmond Odhiambo**  
Partner | Kenya  
T +254 731 086 649  
+254 204 409 918  
+254 710 560 114  
E desmond.odhiambo@cdhlegal.com



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



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



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



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

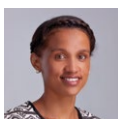


## OUR TEAM

For more information about our Employment Law practice and services in South Africa and Kenya, please contact:



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



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



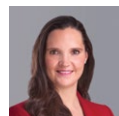
**Jaden Cramer**  
Associate  
T +27 (0)11 562 1260  
E jaden.cramer@cdhlegal.com



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



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



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



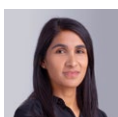
**Avinash Govindjee**  
Consultant  
M +27 (0)83 326 5007  
E avinash.govindjee@cdhlegal.com



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



**Peter Mutema**  
Associate | Kenya  
T +254 731 086 649  
+254 204 409 918  
+254 710 560 114  
E peter.mutema@cdhlegal.com



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

### PLEASE NOTE

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

### 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

### NAIROBI

CVS Plaza, Lenana Road, Nairobi, Kenya. PO Box 22602-00505, Nairobi, Kenya.  
T +254 731 086 649 | +254 204 409 918 | +254 710 560 114 E cdhkenya@cdhlegal.com

### STELLENBOSCH

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

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**KIETI LAW LLP, KENYA**



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