

# EMPLOYMENT LAW ALERT

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CLIFFE DEKKER HOFMEYR

INCORPORATING  
KIETI LAW LLP, KENYA

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## Abuse of a confidentiality agreement

During the *Jacobs v KwaZulu-Natal Treasury* [2021] DA7-20 (LAC) case, the question of how much protection a confidentiality agreement affords an employer, was brought to the spotlight by the Labour Appeal Court (LAC).

The case involves an employee who was a panel member during a recruitment and selection process. The employee had signed a confidentiality agreement, undertaking not to disclose any matters raised in any part of the interview process, and acknowledging that she could be subjected to disciplinary action for breaching the confidentiality agreement. A breach was defined as the employee *"disclosing, either verbally or in writing or by any other means, any matters raised in any part of the shortlisting/ interviews"*. Years after the process had been completed, and as part of arbitration proceedings, the employee deposed to an affidavit relating to the process. The employee did not secure the employer's consent before making the disclosure in the affidavit, and the employer alleged that in doing so the employee had breached the confidentiality agreement and thus was dismissed.

The employee deposed to the affidavit after being approached by a trade union representative (representing another employee in a dispute) who requested that she submit evidence relating to the selection process for the purposes of arbitration proceedings. The affidavit recorded that the minutes of the recruitment and selection panel had been amended and that they *"did not really reflect what took place during the interviews"*. While the panel recommended that a Ms van der Merwe be appointed, when Parthab, the secretary of the selection panel, sent the minutes to the employee for signature, the minutes recorded that a Ms Jamile was the recommended candidate. The employee initially refused to sign the minutes but reluctantly did so after the chairperson of the selection panel informed her that it was the chairperson's prerogative to change the minutes.

The employee challenged the fairness of her dismissal. The arbitrator found that the employee had lied, that the contents of her affidavit were false, and that the employee did not obtain the employer's permission prior to submitting the information contained in the affidavit. On this basis, the arbitrator found that the employee's dismissal was procedurally and substantively fair.

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## Abuse of a confidentiality agreement

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The employee then launched review proceedings. The Labour Court refused to review and set aside the award, to which the employee appealed. Before the LAC, the main issue for determination was the truthfulness of the employee's affidavit and whether the minutes had been changed. The LAC reasoned that if the employee's affidavit was truthful the issue surrounding confidentiality would not arise.

The LAC found that Parthab, one of the employer's witnesses, confirmed that the minutes had been changed. This evidence was crucial as he was the secretary of the selection committee and had been responsible for drafting the minutes. As such, he would have known if the minutes had been amended. The LAC found that on the evidence and based on the concessions made it was common cause that the minutes had been amended. Having found that the affidavit was truthful the LAC held that in the circumstances the employee had not breached the

confidentiality agreement and that *"It would be a great travesty of justice if this court were to make a finding that ... she [the employee] breached the confidentiality agreement when she disclosed the irregularities and/or dishonesty that were committed by members of the selection panel at a hearing related to what transpired at the selection panel"*.

This judgment highlights that an employer cannot invoke a confidentiality agreement to conceal wrongdoings in the workplace and that an employee who has signed a confidentiality agreement is not required to obtain the employer's permission to reveal wrongdoings if the employee is required to make such revelations in legal proceedings. As the LAC noted, an employee cannot be silenced in instances of wrongdoing - *"If permission is to be obtained first, any dishonest conduct will never see the light of day"*.

**GILLIAN LUMB AND TARYN YORK**

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## A retrospective on the Economic Freedom Fighters' involvement in labour matters

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Undeterred, leader of the EFF, Julius Malema, publicly broadcasted his intention to visit businesses in the hospitality industry to “inspect labour practices”, including the ratio of foreign nationals to South African workers employed. On 19 January 2022, Malema visited the restaurant ‘Kream’ at the Mall of Africa demanding a meeting with the owner. However, Kream’s representatives refused the meeting on the basis that Malema’s authority to conduct an inspection of the restaurant’s labour practices was not established. Malema responded that he was attending in his capacity as a member of parliament.

Responding to the events of 19 January 2022, the Department of Employment and Labour (DoL) has expressed the view that violence affects labour market stability and labour peace, stating that “One cannot seek to see the enforcement of the law by breaking the law too.” The DoL stressed that non-compliance with labour laws is in the domain of the DoL and relevant bargaining councils which in our

view is the correct assessment of the law. Urging any political party or organisation that wishes to raise issues relating to non-compliance with the labour law to do so through the right channels, without violence and intimidation.

In light of these events, a retrospective of the judgments dealing with EFF interference in workplace matters, was necessary. CDH also considered the legitimacy of the EFF’s latest quest from a different perspective, the Protection of Personal Information Act 4 of 2013 (POPI). Essentially, this raised the question, “can a political party demand that an employer disclose the national origin of employees?”

### **GORDON ROAD SPAR V THE ECONOMIC FREEDOM FIGHTERS AND OTHERS**

In June 2021 the Labour Court in *Gordon Road Spar v The Economic Freedom Fighters and Others* interdicted the EFF from interfering with the employer’s business and instigating violence at the workplace.

The position of the court was that where unlawful conduct is perpetrated in the name of the party, the EFF is empowered by its constitution to enforce its provisions and act against members, such as protestors who participate in unlawful protest action. In this matter the EFF did not hold its members accountable in accordance with its constitution. The court found that the EFF could not contend in such instance that it existed separately from its members and could not be held liable for their actions. Accordingly, it was found

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## A retrospective on the Economic Freedom Fighters involvement in labour matters

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that there was no substance to the argument that the EFF could not be held liable for the conduct of its members who ostensibly acted on their own behalf. Read the detailed discussion on this important case in the [4 October 2021](#) Employment Law Alert.

### **CALGAN LOUNGE V EFF AND OTHERS**

In this matter, the court stated that the Labour Relations Act 66 of 1995 (LRA) designated employers' organisations, trade unions and workplace forums to resolve workplace issues. The EFF however was not a registered trade union and therefore had no standing to deal with the workplace disputes of its members. Orderly collective bargaining and dispute resolution are pivotal objectives of the LRA, after all.

The position of the Labour Court on the interference of the EFF in workplace business was epitomized by the words of the court as

follows *"the practicing of any form of politics, be it under the guise of protecting employee rights or other socio-economic aspirations, in the workplace, is an untenable proposition."* This is discussed at length in the [12 November 2018 Employment Law Alert](#).

The legal principles developed in these cases would apply where the EFF carry out *"labour inspections"*. They simply have no authority.

It is only the DoL that has the authority to carry out labour inspections through its labour inspectorate appointed in terms of section 63 and 64 of the Basic Conditions of Employment Act 75 of 1997. Without the necessary authority, citizens cannot purport to have any right to carry out these functions, even if they are high ranking political members or even members of parliament. The EFF have tested another boundary in the labour arena.

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## A retrospective on the Economic Freedom Fighters involvement in labour matters

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The circumstances of 19 January 2022 also speak to an employer's obligations to safeguard employees' personal information in terms of POPI.

### IS AN EMPLOYEE'S NATIONAL ORIGIN PROTECTED PERSONAL INFORMATION?

In terms of POPI, personal information includes the national origin of a data subject, being the employee. This information, together with an array of other personal information that would be shared during a labour inspection is therefore subject to the protections afforded under the act, justifiably protecting employees' privacy in circumstances where the basis for sharing such information is not established in law.

POPI requires employers to have a lawful basis for processing personal information, which extends to sharing such information with a

third party. Grounds to process personal information may arise (1) in terms of an obligation imposed by law, (2) for the performance of a contract, (3) in performance of a public law duty by a public body, (4) in the legitimate interest of the subject or the third party, or (5) by the consent of the subject.

The EFF are not appointed labour inspectors by the DoL and thus cannot contend that an employer has an obligation in law to share the personal information of its employees. If the employees do not consent to their information being shared for the purpose of the EFF conducting a census of foreign nationals employed in the hospitality industry or any other reason, there are no legal grounds for the employer to share the personal information of its employees with the EFF, and to do so would be in breach of POPI.

**HUGO PIENAAR, IMRAAN MAHOMED, AND PALESA MALOLO**

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## COVID-19 vaccines: A crime against humanity? The International Criminal Court to determine

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The criminal complaint is brought against various alleged perpetrators including the Prime Minister of the United Kingdom, Director-General of the World Health Organisation, co-chairs of the Bill and Melinda Gates Foundation, and senior executives of multinational pharmaceutical companies involved in the production of vaccines, for allegedly perpetrating crimes against humanity, war crimes, crimes of aggression and violations of the Nuremberg Code.

At the heart of the complaint lies the safety of COVID-19 vaccines. The complainants contend that with COVID-19 vaccine trials ongoing and not due to conclude until late 2022 or early 2023, it renders COVID-19 vaccines currently experimental with only limited short term data, and no long-term adult safety data available. The complainants further argue that the mRNA vaccine technology used to develop COVID-19 vaccines has not

previously been approved for human use, nor do the vaccines actually meet the requirements to be categorised as such. Also, the complainants relying on statistical evidence argue that there has been an increase in deaths attributable to COVID-19 vaccinations.

The ICC is established in terms of the Rome Statute and is mandated to investigate and, where warranted, convene proceedings against individuals charged with crimes of concern to the international community such as genocide, war crimes and crimes against humanity.

Whilst the ICC has acknowledged receipt of the criminal complaint, no decision has been taken yet by the ICC to investigate the complaint which is a precursor to the prosecution of alleged perpetrators.

WEBINAR  
INVITATION

## REFLECTING ON 2021 AND NAVIGATING 2022

**IT IS A GIVEN THAT COVID-19  
WILL CONTINUE TO DISRUPT  
THE WORKPLACE IN 2022.**

Join our Employment Law experts as we reflect on the impact of COVID-19 on the workplace and discuss how to navigate the year ahead.



Thursday,  
3 February 2022



09h00 – 10h15 (CAT)

Register Here





## COVID-19 vaccines: A crime against humanity? The International Criminal Court to determine

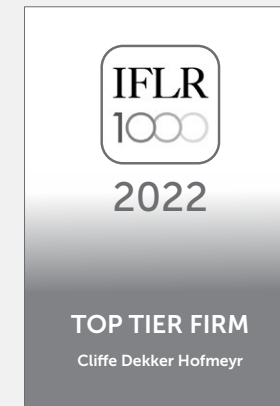
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With the roll out of mandatory vaccines in South African workplaces and universities, this development is of interest in that there has been a growing number of employees, at least, who rely upon an argument that the COVID-19 vaccines are “*experimental*” and for such alleged reason they should not be compelled to vaccinate. This form of argument may not fall within the legitimate legal grounds to object to a mandated vaccine in the workplace and employers should be aware thereof.

In late 2021 an application was filed with the Constitutional Court, challenging the implementation of COVID-19 mandates in workplaces by the South African National Christian Forum. Recently, a similar application has been filed by the National Black Consumer Council. One of the issues raised in these applications, is the lack of data available on the safety of COVID-19 vaccines. The Constitutional Court has yet to pronounce on these applications. The University of the Free State is also facing a legal challenge to its vaccine policy.

**IMRAAN MAHOMED  
AND MBULELO MANGO**

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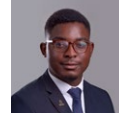
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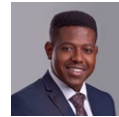
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### BBBEE STATUS: LEVEL ONE CONTRIBUTOR

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.

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