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POPIA AND PAPERS AT THE CCMA

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Please find attached hereto Ruling issued by the CCMA in the Arbitration between Koliswa Sheburi and Railway Safety Regulator, case number GATW15200-21 for your attention.

The Respondent in this matter, Railway Safety Rgulator, raised a point in limine, complaining about documents contained in the applicant's bundle of documents and insisted that the Commissioner presiding over the matter should make a ruling in this regard. The applicant's bundle of documents contained two confidential offers of employment made to certain employees. These documents disclosed the salary levels linked to the respective employees' job profiles. The Respondent submitted that this constituted a contravention of the Protection of Personal Information Act, 2013 (hereinafter referred to as the "POPI Act"). The respondent consequently sought an order in terms of which the applicant was ordered to remove the two confidential offers of employment from her bundle of documents.

In response to the point in limine raised by the Respondent, the Applicant submitted that the POPI Act was not applicable and based his submission on section 6(1)(e) which provides that this act does not apply to the processing of personal information relating to the judicial functions of a court referred to in section 166 of the Constitution. Furthermore, it was contended that section 166 of the Constitution recognised the CCMA as a court.

The Commissioner held as follows:

1. Section 166 of the Constitution does not recognise the CCMA as a court. It is trite that the CCMA is not a court of law and the exclusion in section 6(1)(e) of the POPI Act is consequently not applicable.
2. The respondent seeks to prevent the processing (dissemination) of personal information by the applicant during this arbitration and the question is consequently whether the POPI Act is applicable to her in these circumstances.
3. Section 3(1)(a) of the POPI Act provides that the Act applies to the processing of personal information "entered in a record by or for a responsible party by making use of automated or non-automated means: Provided that when the recorded personal

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information is processed by non-automated means, it forms part of a filing system or is intended to form part thereof." It is debatable whether the applicant could be deemed to be a "responsible party", but the personal information about to be introduced as evidence at this arbitration will neither form part of any filing system, nor would it be intended to form part of any filing system. It follows that the Act will not be applicable to the applicant.

4. Section 6(1)(a) of the POPI Act also provides that the Act does not apply to the processing of personal information in the course of a purely personal or household activity and the presentation of a case by a party at a CCMA arbitration arguably constitutes a purely personal activity.

5. In the event that I am wrong in holding that the POPI Act is not applicable, attention is drawn to the fact that section 2 makes it clear that the safeguarding of personal information is subject to justifiable limitations aimed at: (a) balancing the right to privacy against other rights, particularly the right of access to information and (b) protecting important interests, including the free flow of information. The applicant's interests will consequently also have to be taken into consideration.

6. There is, in any event, no indication that the two employees whose confidential information is at stake, had requested the respondent to protect that information and the respondent's authority to bring the current application consequently has to be questioned. This is not about the integrity of personal information stored by the respondent. It is about information already in the possession of the applicant.

7. The question has to be asked whether the respondent is indeed concerned about the protection of the rights of those two employees and whether this might not be an ingenious ploy to prevent the applicant from tabling evidence which could be damaging to respondent's case

8. The respondent's application for an order in terms of which the applicant is compelled to remove two confidential offers of employment from her bundle of documents is dismissed.

The above case illustrates that Employers cannot simply rely on the provisions of the POPI Act in an attempt to remove information or documentation from proceedings that might be damaging to an employer's case and that there must be actual grounds to show that the Employer is acting with the intent to protect the rights of a data subject.

For more on the subject see original post by **Louis Podbielski**