



PRESS RELEASE: Association of Test Publishers of South Africa wins challenge of EEA legislation

Judgment was delivered on 2 May 2017 by Judge Mali in the application brought by the Association of Test Publishers (“ATP”) in regard to the amendment to section 8 of the Employment Equity Act of 1998 (EEA). Before the amendment in August 2014, section 8 of the EEA specified that:

Psychological testing and other similar assessments of an employee are prohibited unless the test or assessment being used:

- (a) has been scientifically shown to be valid and reliable;*
- (b) can be fairly applied to employees;*
- (c) is not biased against any employee or group; and*

The amendment act added another sub-clause to section 8. The addition of section (d) stated that such testing would be prohibited unless it had been “certified by the HPCSA or any other body which may be authorised by law to certify those tests or assessments”.

The impact of the addition to the EEA was significant in terms of assessments used in the workplace. It resulted in some of the following dilemmas for test publishers and psychologists who use assessments:

- There was no clarity in terms of how “other similar assessments” would be certified by the Health Professions Council of South Africa (HPCSA). The only “certification” the HPCSA may actually do is to identify those assessments and tests that are psychological in nature. Their “certification” is therefore more of a “classification” that a test measures psychological constructs. They have no process or authority to classify or certify “other assessments”.
- It was unclear what was meant by: “or any other body which may be authorised by law to certify those tests or assessments”. No such body exists or existed or seemed to be planned to be identified or established in the near future.
- The submission of any test or assessment to the HPCSA is costly and comes with no guarantee that feedback on the assessment will be received timeously. It is quite common that after submission no feedback is received for up to 4 or more years. In addition, the feedback received is usually unclear and sometimes contrary to international standards in test evaluation. This means that even if test publishers submit tests for evaluation, after having followed international best practice standards in test development or revision and validation, they cannot be assured that their tests will appear on the list any time in the near future.
- For nearly 10 years the Psychometrics Committee have declared that they are in the process of updating the test classification process, but to date no changes have been communicated or implemented.
- There was no clear and detailed documentation of the criteria against which tests are evaluated.

- The HPCSA list of assessments includes tests that have been discontinued, could potentially be regarded as copyright infringements, or still use norm groups from the early 1970's. Some practitioners may have felt the need to use these obsolete assessments instead of newer tests that had not yet progressed through the evaluation process, even though they contravened sections a, b, and c of the EEA.
- In essence, the HPCSA did not have an effective test certification process to fulfil the requirements of the additional legislation specified in section "d".

The result of this legislation was far reaching. Some organisations and Psychologists reverted to using old tests. Some decided not to use any assessments. The existence or absence of an assessment on the list was used as grounds for CCMA appeals. Assessments required for filling crucial and critical positions were placed on hold for years because the HPCSA could not provide any resolution as to placing or not placing specific assessments on "the List".

Concerned about the chaos caused by the amendment to the EEA, ATP initially approached the HPCSA to ask for clarity, insight and a possible moratorium in the implementation of the additional section "d" until such time as there was a test certification process to support the legislation. ATP also offered to support the HPCSA in seeking constructive answers to the situation. This offer was not taken up by the HPCSA. The EEA falls under the Department of Labour's portfolio, and the HPCSA did not see itself as having the power to request or implement such a moratorium.

The ATP consequently had no choice but to seek legal advice. We launched an application in December 2015 seeking an order that:

- The Proclamation that brought into operation the amendment of section 8 of the EEA (section "d") be declared null and void and of no force and effect, and that section 8 of the EEA as it was on 31 July 2014 will continue un-amended.

The ATP application was opposed by the President, the Minister of Labour and the HPCSA, who were named as respondents in the application.

The court application brought by ATP in the High Court, Pretoria, was heard on the 29th and 30th November 2016. On Tuesday, 2 May 2017, Judge Mali handed down her judgement. The court found in favour of ATP's application and granted the following order:

1. That the Proclamation 50 published in Government Gazette 37871 on 25 July 2014 is null and void and of no force or effect to the extent that it brings into operation the amendment of section 8 (clause "d") of Employment Equity Act, Act 55 of 1998 in terms of section 4 of the Employment Equity Amendment Act, 2013, Act 47 of 2013.
2. That Section 8 of the Employment Equity Act, Act 55 of 1998 as it pertained on 31 July 2014 continued (clauses "a" to "c"), and continues, unabated as from the aforesaid date.
3. That this order be published by way of one notice in the Government Gazette, and a notice in each of the Sunday Times, Rapport and City Press.
4. That the respondents are ordered to pay costs of this application, costs to be paid jointly and severally the one paying the other to be absolved. Costs to include the cost of Senior Counsel.

This outcome of this court case is of great significance. Employers or psychologists and psychometrists who have been hesitant to make use of tests that have not been placed on the HPCSA list of certified assessments, can now reconsider their stance. This does not however take

away from the fact that all assessments used in the workplace as per the EEA section 8 (a), (b) and (c) should be able to provide concrete evidence as to its reliability, validity, fairness and non-biased nature in the South African context.

The ATP is gratified that this position has been remedied and that the uncertainty that has existed in the market has now been dispelled. The ATP will continue their efforts to work with the department of labour and the HPCSA to establish clear and detailed best practice processes and guidelines in line with international test regulation practices to ensure that psychological tests meet the stated requirements. We thank those members of ATP who supported the application.

*Founded in 2005, the Association of Test Publishers South Africa (ATP SA) is a non-profit association organised to represent providers of tests and assessment tools and/or services related to education, employment, certification/licensing or clinical uses. ATP SA is committed to promoting the benefits of best practices in testing and people assessment and the value of these benefits to society, and is dedicated to achieving the highest levels of professionalism and business ethics within the test publishing community. www.ATP.org.za

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