



29 July 2016

The court case between the Association of Test Publishers (ATP), the President of the Republic of South Africa, the Minister of Labour and the Health Professions Council of South Africa

After the amendment to Section 8 of the Employment Equity Act (EEA) No. 55 of 1998 was passed in August 2014, the South African Association of Test Publishers (ATP) published three position papers (22 September 2014, 20 October 2014 and 7 August 2015) to formulate its feedback and comments on the legislation and associated processes that followed. The change in legislation was accompanied by the gazetting of an official list of tests classified and certified by the HPCSA, which created additional complications in the field of psychological testing.

Given that the implementation of the changes to the legislation came as a surprise to many, ATP decided to obtain legal advice on the implications of the changes, and to also approach the HPCSA to request a moratorium or amnesty period until such time that the Board of Psychology has the capacity to classify tests, as planned, according to proposed EFPA standards.

On the 17th of October 2014, the ATP met with the Psychometrics Committee of the HPCSA to indicate ATP's willingness to work with them to facilitate a better test classification process. ATP highlighted the significant impact that the amended EEA legislation had on organisations and individuals and requested consideration of an amnesty period for the certification of tests. The Board indicated that they did not have the power to institute a moratorium as the EEA was under the jurisdiction of the Department of Labour.

Given no other choice, the sheriff served the ATP's application on the three respondents on the 23rd of December 2014. Legal process dictated that the next step would be to await answering affidavits from each respondent to determine whether the case would be opposed or unopposed.

On 5 March 2015 the Board held a stakeholder meeting with regard to the new proposed test certification process. The meeting was very positive and there were even indications that the Board was contemplating granting an amnesty period for proposed test certification to assist with the backlog. No decision or any feedback has subsequently been received.

In June 2015 the Minister of Labour (also representing the President) and the HPCSA submitted answering affidavits indicating that they will oppose the ATP application in court. This eliminated all hope that the issue of an amnesty period could be resolved out of court.

A proposal for collaboration between the Psychometrics Committee of the Board and ATP was submitted to them on the 27th of October 2015. The Board responded that they welcomed the spirit of collaboration, but requested that all communication be done in writing, as their lawyers had advised them not to meet with ATP due to the pending court case.

It has now been confirmed that the court case between the South African Association of Test Publishers (ATP) and the President of South Africa, Department of Labour and the HPCSA is due to be heard in court on the 29th and 30th of November 2016. These are the only dates that Advocate Nic Maritz is available.

The following case management is being followed:

1. Heads of argument on behalf of ATP are to be filed by 29 July 2016 together with the duly paginated court file and index;
2. The respondents heads of argument are to be filed by 31 August 2016; and
3. The applicants practice notice is to be filed by 9 September 2016 in order to allow the respondents to file theirs timeously

We will make sure to keep you updated as to the progress.

Please feel free to share this update with your clients.

Kind Regards

Prof Hennie Kriek

On behalf of the steering committee.

Association of Test Publishers of South Africa