

THE ASSOCIATION OF TEST PUBLISHERS

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YOUR REF: **PROFESSOR H KRIEK** OUR REF: **G K HAY/ah**
1033407

DATE: **3 May 2017**

Dear Professor Kriek

**RE: ASSOCIATION OF TEST PUBLISHERS OF SOUTH AFRICA / THE PRESIDENT OF THE
REPUBLIC OF SOUTH AFRICA, THE MINISTER OF LABOUR AND THE HEALTH
PROFESSIONS COUNCIL OF SOUTH AFRICA – CASE NUMBER 89564/14**

I write to advise you that judgment was delivered yesterday, 2 May 2017, by Judge Mali in the application brought on behalf of the Association of Test Publishers ("ATP") in regard to section 8 of the Employment Equity Act. The respondents in this application were the President, the Minister of Labour and the Health Professions Council of South Africa ("the HPCSA").

The ATP challenged the bringing into operation of the amendment to section 8 of the Employment Equity Act in terms of the Employment Amendment Act of 2013 ("the Amendment Act")

This Amendment Act added a sub-clause (d) to section 8 of the Employment Equity Act. Section 8 as it stood before the amendment recorded that psychological testing and other similar assessments of an employee were prohibited unless the test or assessment being used:

- (a) had been scientifically shown to be valid and reliable;
- (b) could be fairly applied to employees; and
- (c) was not biased against an employee or group.



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The addition of section (d) brought into operation by the Amendment Act stated that such testing would be prohibited unless it complied with section 8(a), (b) and (c) and in addition had been "certified by the HPCSA or any other body which may be authorised by law to certify those tests or assessments".

At the hearing of the application on the 29th and 30th November 2016 it was argued on behalf the ATP that the decision by the President to put the Employment Equity Amendment Act into operation and thereby to amend section 8 of the Employment Equity Act with effect from 1 August 2014 was irrational and failed the Constitutional requirement of legality in that it had the effect of immediately prohibiting the use of tests which were then being used without first having established procedures and criteria to obtain certification of such tests.

Judge Mali was called on to decide whether the procedures that were in place (for the purpose of classifying whether a test is a psychological test) could be held to be the necessary regulatory infrastructure for purposes of the certificate called for in terms of section 8(d). The court needed to consider this having regard to what was in place on 1 August 2014.

It was conceded by counsel for the respondents at the hearing of the matter that the reference to "other similar assessments" in section 8 referred to tests other than psychological tests and that there was currently no procedure in place, or body authorised to issue a certificate as envisaged in the new section 8(d) in respect of "other similar assessments".

The court was also called upon to determine whether the policy and guidelines of the HPCSA that were instituted in 1999 (for purposes of classifying psychological tests) could be said to be appropriate regulatory infrastructure for purposes of issuing the certificate required in terms of the new section 8(d).

The ATP argued that this was clearly not the case as the policy and guidelines stated that these were created only for purposes of classifying whether a test was a psychological test. The policy and guidelines were brought in long before the new section 8(d) came into effect.

In the judgment handed by Judge Mali she 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 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, 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 is of great significance in that employers have been refusing to make use of tests that have not been certified by the HPCSA. This has been so notwithstanding the fact that the necessary regulatory infrastructure for the certification of tests has never been brought into operation.

The approach of the ATP has been vindicated and the position has been remedied. The uncertainty that has existed in the market has now been dispelled.

Of course any psychological testing of an employee will still be prohibited if it does not meet the requirements of section 8(a), (b) and (c) of the Employment Equity Act.

Yours faithfully


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