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THE ASSOCIATION OF TEST PUBLISHERS

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YOUR REF:

OUR REF: **G K HAY/ah**
1033407

DATE: **2 December 2016**

Dear Sirs

RE : COURT APPLICATION: 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 ("HPCSA")

1. We previously advised that the application launched by the Association in the High Court, Pretoria, was due to be heard on the 29th and 30th November 2016. We provide this report for you and for members of the Association.
2. The ATP application was duly heard and argued before Judge Mali on those two days.
3. Judgment has been reserved. As the court recess is about to commence judgment is likely to be given in the first term next year which commences at the end of January 2017.
4. The issues were fully argued on behalf of ATP and the respondents (the President, the Minister of Labour and the HPCSA). In our view what the court will need to decide is 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) of the Employment Equity Act ("EE Act"). The court will need to consider this having regard to what was in place on the 1st August 2014.



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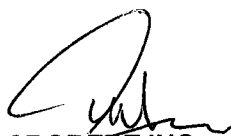
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5. The concession was made by counsel for the respondents that as it stands the reference to "other similar assessments" in section 8 refers to tests other than psychological tests and that there is currently no procedure in place, or body authorised, to issue a certificate as envisaged in section 8(d) in respect of other similar assessments. To this extent it was conceded that the bringing into effect of section 8(d) in respect of other similar assessments was incorrect.
6. The court will have to determine whether the policy and guidelines of the HPCSA that were brought 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 section 8(d).
7. On behalf of the Association it was argued that this clearly is not so as the policy and guidelines themselves clearly state that they were created only for purposes of classifying whether a test was a psychological test. They were brought in long before section 8(d) came into effect.
8. The Association pointed out to the court that there is a preliminary requirement that must be met before the provisions of section 8 come into play, namely, that the test in question must be a psychological test. If the HPCSA has classified a test as a psychological test then the provisions of section 8 will be triggered. A second requirement is that a certificate be issued by the HPCSA to the effect that the test also complies with sub-sections 8(a), (b) and (c) of the EE Act.
9. Counsel for the respondents conceded that a certificate to this effect (second requirement) would be required. In other words, mere classification of a test as a psychological test would not meet the requirements of section 8(d).
10. The order that the Association has asked the court to grant is the following:
 - 10.1. That the Proclamation in terms of which section 8(d) of the EE Act was brought into operation is null and void and of no force and effect; and
 - 10.2. That section 8 of the EE Act as it pertained on 31 July 2014 continued, and continues, unabated as from the aforesaid date.
11. We believe that strong arguments were made out that this relief should be granted. The effect of this relief, if granted, would be that section 8(d) will not have come into effect.

12. Tests that are used for testing an employee will still be prohibited if the tests do not meet the requirements of section 8(a), (b) and (c) of the EE Act. These sub-sections require that the test must have been scientifically shown to be valid and reliable, can be applied fairly to employees, and is not biased against any employee or group.
13. We will be reporting further as soon as the judgment is delivered.

Yours faithfully



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