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EMPLOYMENT ALERT

Our programme on Conducting a Disciplinary Enquiry has been accredited by the Services SETA.

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DRIVING THE *AUDI* PRINCIPLE THROUGH AN UNPROTECTED STRIKE: ARE EMPLOYEES PARTAKING IN AN UNPROTECTED STRIKE ENTITLED TO A HEARING BEFORE DISMISSAL?

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DRIVING THE *AUDI* PRINCIPLE THROUGH AN UNPROTECTED STRIKE: ARE EMPLOYEES PARTAKING IN AN UNPROTECTED STRIKE ENTITLED TO A HEARING BEFORE DISMISSAL?

The audi principle advocates the notion that a person whose rights, interests or property are to be prejudiced by a particular decision, should be given the opportunity to make representations before such a decision is finalised.

The court drew a distinction between an ultimatum and the opportunity to be heard, holding that an opportunity to make representations should precede an ultimatum

The *audi alteram partem* principle has long since formed an integral part of South African law. There is an argument to be made that it goes as far back as the realms of natural justice.

However, it is not until relatively recently that the *audi* principle has found traction in South African employment law. Prior to this incorporation, the *audi* principle was utilised almost exclusively in the sphere of administrative law and was rarely found in private contracts of any nature.

In essence, the *audi* principle advocates the notion that a person whose rights, interests or property are to be prejudiced by a particular decision, should be given the opportunity to make representations before such a decision is finalised.

South African employment law regarding misconduct, strikes, dismissal as well as fair procedure, somewhat mirrors the standards delimited by the International Labour Organisation (ILO). Article 7, Convention 158 of the ILO sets out that unless reasonably impossible, an employer must provide an employee with an opportunity to make representations prior to a dismissal.

Section 188(1)(b) of the Labour Relations Act, No 66 of 1995 (LRA) states that a dismissal is unfair if an employer fails to adhere to fair procedure. In an attempt to provide a statutory framework for employers to follow, the South African Legislature fashioned the Code of Good Practice (Codes) which is integrated into the LRA in Schedule 8.

Item 6 of the Codes specifically deals with the correct procedure to follow when dismissing employees during an unprotected strike. Essentially, item 6 adopts a two-stage process to dismiss an employee during an unprotected strike:

- It places an obligation on an employer to first contact the relevant trade unions and inform them of the action that they intend taking.
- Subsequently, the employer is required to issue the unlawful strikers with a "clear and unambiguous" ultimatum, outlining the sanction that will be imposed if the ultimatum is not complied with. In addition, employees should be given reasonable time to consider the ultimatum before either accepting or rejecting it.

On the face of it, this two-stage approach seems to overlook the *audi* principle, which in turn would allow an employer to dismiss an employee without a hearing during an unprotected or unlawful strike.

The earliest and arguably the most prominent case to deal with this issue is *Modise v Steve's Spar Blackheath* 2000 ILJ 519 (LAC). Here the court drew a distinction between an ultimatum and the opportunity to be heard, holding that an opportunity to make representations should precede an ultimatum. The case thus confirms that even during an unprotected or unlawful strike, the *audi* principle must be adhered to.

DRIVING THE *AUDI* PRINCIPLE THROUGH AN UNPROTECTED STRIKE: ARE EMPLOYEES PARTAKING IN AN UNPROTECTED STRIKE ENTITLED TO A HEARING BEFORE DISMISSAL?

CONTINUED

While employees partaking in an unprotected strike are still entitled to a hearing, this entitlement should not over burden the employer.



The implication of this is there are now more hurdles to jump and boxes to tick before a company can move to dismantle an unprotected strike and sanction those who persist with the action.

However, it may be possible to take advantage of the oversight of the *audi* principle in the Codes which is only subsequently supplemented by the *Steve's Spar* judgment, by blurring the lines between an ultimatum and an opportunity to be heard.

After consulting with the relevant trade unions, a company may be able to provide for the opportunity to be heard in conjunction with an ultimatum. This may be done by building in a specific invitation for the striking employees to air their grievances with the company, in addition to the prescribed content of a normal ultimatum.

This amalgamated ultimatum should specifically invite the striking employees to make representations to demonstrate why their strike is in fact protected and why they should not be dismissed. By doing so, the company would have followed the requisite guidelines of the Codes as well as adhered to the precedent set out in *Steve's Spar* without losing valuable time.

In summation, while employees partaking in an unprotected strike are still entitled to a hearing, this entitlement should not over burden the employer.

Hugo Pienaar and Jeffrey Long

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Employment STRIKE GUIDELINE

Our Employment practice's new
EMPLOYMENT STRIKE GUIDELINE
answers our clients' FAQs.

Topics discussed include strikes, lock-outs and picketing.

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CHAMBERS GLOBAL 2014 - 2016 ranks our Employment practice in Band 2: Employment.

Aadil Patel ranked by CHAMBERS GLOBAL 2015 - 2016 in Band 2: Employment.

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Fiona Leppan ranked by CHAMBERS GLOBAL 2016 in Band 3: Employment.



Michael Yeates named winner in the **2015 and 2016 ILO Client Choice International Awards** in the category 'Employment and Benefits, South Africa'.



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BBBEE STATUS: LEVEL THREE CONTRIBUTOR

Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 3 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

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