

27 JUNE 2016

# EMPLOYMENT ALERT

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

## IN THIS ISSUE

### THE NATURE OF DISPUTES AND THE IMPACT ON STRIKES

In *Mawethu Civils (Pty) Ltd v National Union of Mineworkers and Others* (Case no: PA2/14), the court clarified that the nature of a dispute as either a right or interest dispute informs how the aggrieved party should seek recourse.

### WHEN POLITICAL DEMANDS AND STRIKERS' DEMANDS COLLIDE

Where a political party intervenes in a strike, any concerns which the employer has must be raised with the political party and not with the trade unions or employees.



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# THE NATURE OF DISPUTES AND THE IMPACT ON STRIKES

*The employer opposed the CCMA's diagnosis of the dispute as an interest dispute on the basis that it arose from a contractual arrangement between the employer and the employees.*

*The employer argued that s65(1)(c) should be interpreted to include disputes that may be referred to the Department of Labour or the Labour Court in terms of the Basic Conditions of Employment Act, No 75 of 1997 (BCEA) and as a result the employees were prohibited from striking.*



In *Mawethu Civils (Pty) Ltd v National Union of Mineworkers and Others* (Case no: PA2/14), the court clarified that the nature of a dispute as either a right or interest dispute informs how the aggrieved party should seek recourse.

In *Mawethu Civils*, employees were required to abide by a long-standing employment practice which required them to work five and a half additional hours the week preceding a public holiday, then receive paid leave for the day following the public holiday. The employees refused to work the additional hours and did not report for work on the day following the public holiday either. As a consequence of the employees' refusal to work, the employer, applying the principle no work no pay, did not remunerate the employees for the day following the public holiday.

The employees referred a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). The CCMA identified the dispute between the parties as one of mutual interest, declaring that it remained unresolved and recording that a strike could be proceeded with as the appropriate means for resolving the dispute. The employees accordingly embarked on a strike against which the employer sought to have interdicted by the Labour Court. The Labour Court granted an interim order. When the time came for a final order to be granted, the Labour Court refused to make such an order. It is on this basis that the employer approached the Labour Appeal Court.

The employer opposed the CCMA's diagnosis of the dispute as an interest dispute on the basis that it arose from a contractual arrangement between the employer and the employees and accordingly, remains a dispute over which strike action would be prohibited under s65(1)(c) of the Labour Relations Act (LRA) which provides that "no person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or a lock-out if the issue in dispute is one that a party has the right to refer to arbitration or to the Labour Court in terms of this Act". The employer, however, argued that s65(1)(c) should be interpreted to include disputes that may be referred to the Department of Labour or the Labour Court in terms of the Basic Conditions of Employment Act, No 75 of 1997 (BCEA) and as a result the employees were prohibited from striking. Recent amendments to the LRA now include a provision that s65(1)(c) includes disputes that a party has the right to refer to arbitration or the Labour Court in terms of the LRA or any other employment law, which includes the BCEA. However, at the time when the *Mawethu Civils* matter was argued, the amendments were not yet in effect.

# THE NATURE OF DISPUTES AND THE IMPACT ON STRIKES

CONTINUED

*The judge held that the issue in dispute involves an alleged unfair labour practice which could and should have been referred to the CCMA in terms of s191(1)(a) of the LRA.*



The judge held that the issue in dispute involves an alleged unfair labour practice which could and should have been referred to the CCMA in terms of s191(1)(a) of the LRA. If and when conciliation failed, the employees would at that point have acquired the right to request that the matter be arbitrated in terms of s191(5)(iv) of the LRA.

The court confirmed that the issue in dispute was one which the employees had the right to refer to arbitration in terms of s191(5)(iv) of the LRA and thus the strike

was indeed prohibited and unprotected with the result that the Labour Court should have confirmed the interim order and not discharged it.

This case reminds parties to an employment dispute to always critically assess the nature of the dispute as this assessment ultimately dictates the recourse available to an aggrieved party.

*Gavin Stansfield  
and Katlego Letlonkane*

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# WHEN POLITICAL DEMANDS AND STRIKERS' DEMANDS COLLIDE

*The employer contended that the strike was unprotected as it pursued political matters, violence and was not in support of legitimate demands.*

*The Court ruled that it could not find that the strike was no longer functional to collective bargaining because it had assumed a political hue.*



Where a political party intervenes in a strike, any concerns which the employer has must be raised with the political party and not with the trade unions or employees.

The issue of who is accountable when a political party intervenes in a protected strike has now been settled in the decision of *National Union of Food Beverage Wine Spirits and Allied Workers (NUFBWSAW) and others v Universal Product Network (Pty) Ltd* [2016] 4 BLLR 408 (LC) after a political party intervened in a strike, displaying banners criticising the employer's holding company. The employer contended that the strike was unprotected as it pursued political matters, violence and was not in support of legitimate demands.

In appropriate circumstances, the Labour Court may declare a protected strike unprotected as a result of violence that undermines constitutional values, it will not do so lightly. A court will intervene where the conduct of employees is not functional to collective bargaining. It is however unclear as to how much violence there should be, in order for a protected strike to transfer itself into an unprotected one.

The relevant question is whether a protected strike may transform itself into an unprotected where it has taken a political flavour. The Court ruled that it could not find that the strike was no longer functional to collective bargaining because it had assumed a political hue.

Where a political party interferes with a strike and the employer is aggrieved by such actions, the employer cannot hold the union liable; the correct course of action is for the employer to hold the political party and its members accountable for their misconduct and institute action against them. Therefore, the mere fact that a strike has taken on a political flavour cannot transform a protected strike into an unprotected one.

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**Aadil Patel and Stephanie Goncalves**



# Employment STRIKE GUIDELINE

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

Topics discussed include strikes, lock-outs and picketing.

 [CLICK HERE TO FIND OUT MORE](#)

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

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

Hugo Pienaar ranked by CHAMBERS GLOBAL 2014 - 2016 in Band 2: Employment.

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



## OUR TEAM

For more information about our Employment practice and services, please contact:



**Aadil Patel**  
National Practice Head  
Director  
T +27 (0)11 562 1107  
E aadil.patel@cdhlegal.com



**Gillian Lumb**  
Regional Practice Head  
Director  
T +27 (0)21 481 6315  
E gillian.lumb@cdhlegal.com



**Fiona Leppan**  
Director  
T +27 (0)11 562 1152  
E fiona.leppan@cdhlegal.com



**Hugo Pienaar**  
Director  
T +27 (0)11 562 1350  
E hugo.pienaar@cdhlegal.com



**Nicholas Preston**  
Director  
T +27 (0)11 562 1788  
E nicholas.preston@cdhlegal.com



**Samiksha Singh**  
Director  
T +27 (0)21 481 6314  
E samiksha.singh@cdhlegal.com



**Gavin Stansfield**  
Director  
T +27 (0)21 481 6313  
E gavin.stansfield@cdhlegal.com



**Michael Yeates**  
Director  
T +27 (0)11 562 1184  
E michael.yeates@cdhlegal.com



**Anli Bezuidenhout**  
Senior Associate  
T +27 (0)21 481 6351  
E anli.bezuidenhout@cdhlegal.com



**Kirsten Caddy**  
Senior Associate  
T +27 (0)11 562 1412  
E kirsten.caddy@cdhlegal.com



**Ndumiso Zwane**  
Senior Associate  
T +27 (0)11 562 1231  
E ndumiso.zwane@cdhlegal.com



**Katlego Letlonkane**  
Associate  
T +27 (0)21 481 6319  
E katlego.letlonkane@cdhlegal.com



**Sipelelo Lityi**  
Associate  
T +27 (0)11 562 1581  
E sipelelo.lityi@cdhlegal.com



**Anelisa Mkeme**  
Associate  
T +27 (0)11 562 1039  
E anelisa.mkeme@cdhlegal.com

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### JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.  
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

### CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.  
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

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