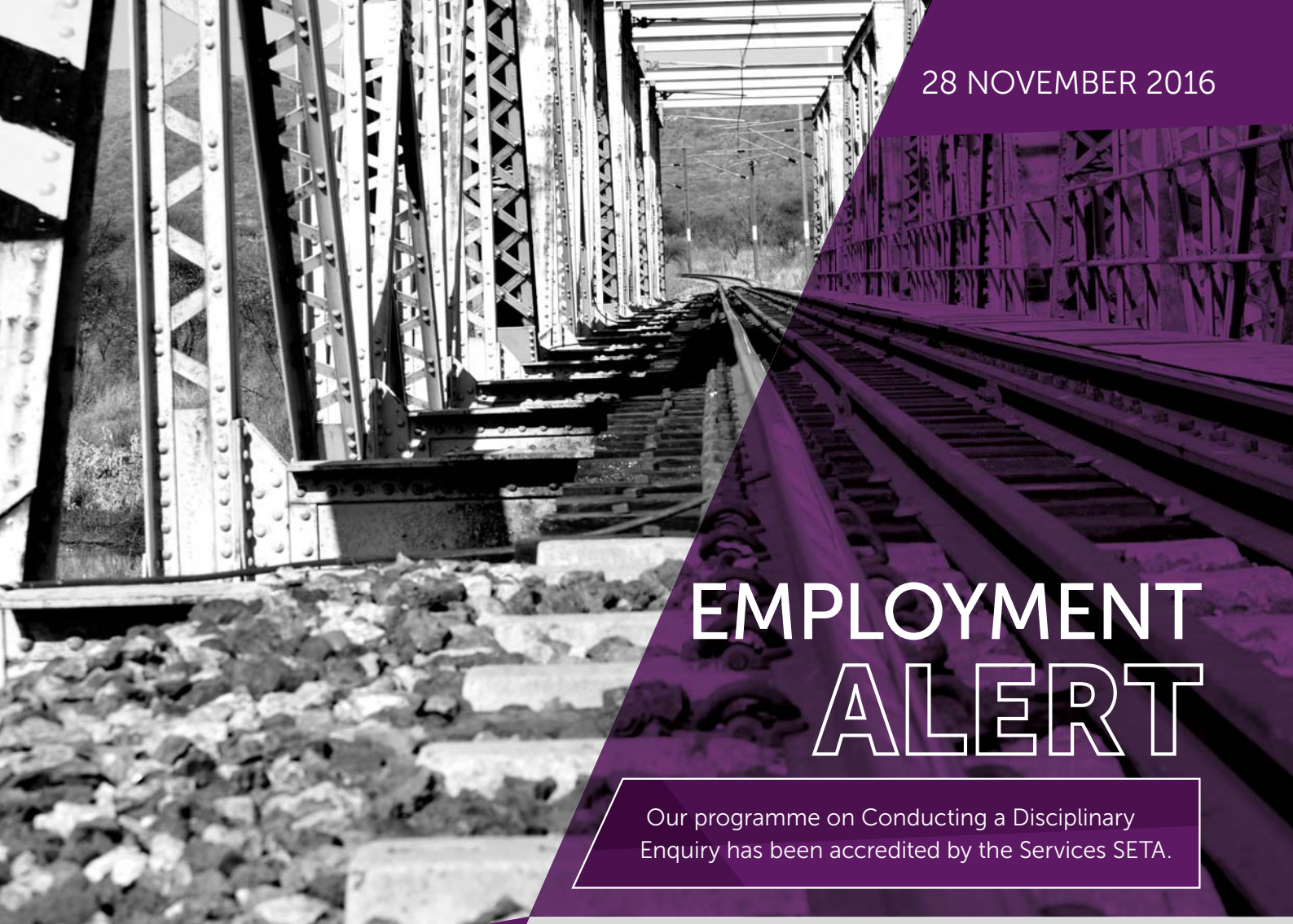

28 NOVEMBER 2016

EMPLOYMENT ALERT

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

IN THIS ISSUE

CLICK HERE to view our NEW Employment Strike Guideline

CDH
CLIFFE DEKKER HOFMEYR

A LITTLE EXTRA FESTIVE CHEER IN EMPLOYEE LEAVE CALENDARS THIS YEAR

Our courts have confirmed that where a public holiday falls on a Sunday, it does not cease to be a public holiday on the Sunday, the Monday following the public holiday is an additional public holiday.

Many South Africans spend a large part of December and January on leave celebrating the holidays with friends and family.

Four public holidays fall during December and January each year: 16 December is the day of Reconciliation, 25 December is Christmas Day, 26 December 2016 is the day of Goodwill and 1 January is New Year's Day. These are four out of 12 public holidays provided for by the Public Holidays Act, No 36 of 1994 (Act).

The Act provides that "whenever any public holiday falls on a Sunday, the following Monday shall be a public holiday". The court has confirmed that where a public holiday falls on a Sunday, it does not cease to be a public holiday on the Sunday, the Monday following the public holiday is an additional public holiday.

This year 25 December 2016 falls on a Sunday. This means that the following Monday, 26 December 2016 shall also be a public holiday. However, 26 December 2016 is already a public holiday in terms of the Act.

The 2016 calendar gives rises to a situation where the "additional public holiday" on the Monday falls on a day already scheduled as a public holiday. President Zuma has, however, declared an additional day a public holiday in 2016, that being Tuesday, 27 December 2016. Questions arise as to whether an employer is obliged to pay an employee for the Sunday and Monday or only one of these days. The legal position in this regard is as follows.

If an employee works on a public holiday, the employer must consider the provisions of the Basic Conditions of Employment Act, No 75 of 1997 (BCEA) when determining the amount to pay the employee. In particular, the employer must consider whether the public holiday falls on a day on which the employee would ordinarily work. If the public holiday falls on a day on which the employee would ordinarily work and the employee works on that public holiday, the employee is entitled to double his/her ordinary wage for the day or, if greater, the employee's ordinary wage for the day "plus the amount earned by the employee for the time worked on that day". However, if the employee does not work on the public holiday which falls on a day the employee would ordinarily work, the employee is entitled to his/her ordinary wage for the day.

If the public holiday falls on a day on which the employee would not ordinarily work and the employee works on that public holiday, the employee is entitled to his/her ordinary wage for the day and "the amount earned by the employee for the work performed that day, whether calculated by reference to time worked or any other method". Importantly, the Labour Appeal Court has held that based on an interpretation of the Act, if the public holiday falls on a Sunday, the Sunday remains a public holiday in addition to the following Monday.

if the employee does not work on the public holiday which falls on a day the employee would ordinarily work, the employee is entitled to their ordinary wage for the day.

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A LITTLE EXTRA FESTIVE CHEER IN EMPLOYEE LEAVE CALENDARS THIS YEAR

CONTINUED

An employer is required to treat both days as a public holiday and to remunerate an employee accordingly.

In other words, an employer is required to treat both days as a public holiday and to remunerate an employee accordingly with reference to the abovementioned provisions of the BCEA depending on whether the employee works on such public holidays. It follows that in those instances where the public holiday falls on a Sunday, employees shall enjoy an additional public holiday for the year in question. The same applies in respect of Sunday, 1 January 2017 where both that day together with the following Monday are deemed to be public holidays.

Gavin Stansfield, Samantha Coetzer and Craig Thomas

CDH
CLIFFE DEKKER HOFMEYR

BUSINESS TRANSFERS: WHEN IS ENOUGH NOT ENOUGH?

The issues central to the dispute were whether components vital to run a business were withheld by the transferor.

The Constitutional Court (CC) in a majority judgment rejected, in no uncertain terms, three important arguments advanced in support of an application for leave to appeal the Labour Appeal Court (LAC) decision in *Maluti-A-Phofung Local Municipality v Rural Maintenance (Pty) Ltd and Another* (JA79/2014) [2015] ZALAC 41.

The issues central to the dispute were whether components vital to run a business were withheld by the transferor and if so, whether as a result the business did not transfer as a going concern for purposes of s197 of the Labour Relations Act, No 66 of 1995 (LRA).

The Municipality, responsible for supplying electricity to residents, outsourced the function of supplying electricity to Rural, a service provider. The municipal manager concluded a contract with Rural, in terms of which Rural was appointed to "manage, operate, administer, maintain and expand the municipal electricity distribution network for a period of 25 years, after which the obligation to supply electricity to residents would revert back to the Municipality".

The LAC held that it was clear that the overall assessment of whether a business transferred "seamlessly" depends on examining the totality of the business operated by Rural before the transfer.

Rural also accepted 16 dedicated employees from the Municipality in terms of a transfer agreed to be governed by s197 of the LRA.

When the outsourcing agreement came to an end, Rural returned to the Municipality the electricity distribution infrastructure consisting of tools, equipment, properties and vehicles that the Municipality had initially transferred to Rural. Rural also sought to transfer 127 (instead of 16) employees to the Municipality as Rural had expanded the business. Rural argued this resulted in a transfer of the business as a going concern in terms of s197 of the LRA.

The Municipality disputed that the business transferred and claimed that Rural failed to return vital components of the business such as that of metering, billing and collecting the debts (Vital Components) to run the business. It claimed not enough of the business of Rural was handed to the Municipality. Rural in turn disputed that the Vital Components were vital or required for the Municipality to run the business previously conducted by Rural.

The LAC held that it was clear that the overall assessment of whether a business transferred "seamlessly" depends on examining the totality of the business operated by Rural before the transfer and that the test so applied was also in accordance with the test applied in terms of the TUPE Regulations.

The LAC overturned the Labour Court's decision and held that a significant component of the overall business was not retransferred by Rural to the Municipality and that as a result not enough transferred to the Municipality and the business conducted by Rural had not been transferred to the Municipality. The transfer of components did not result in a seamless transfer of the business.

Rural approached the CC and presented three main arguments in support of its application for leave to appeal the LAC judgment.

BUSINESS TRANSFERS: WHEN IS ENOUGH NOT ENOUGH?

CONTINUED

Rural's application for leave to appeal was refused by the CC with costs. Rural did not transfer enough of its business to constitute a transfer of a business as a going concern.

The first was that the LAC adopted a new and thus wrong test to determine if there had been a transfer of the business. It argued that the LAC when referring to a transfer that must be "seamless" thereby introduced a new test, that of a seamless transfer.

The CC rejected this argument stating that it was clear that the LAC applied the test enumerated previously by the LAC and the CC. The test is that the court must make an overall assessment of the business to determine whether it transferred as a going concern. The CC held that the reference to a seamless transfer was within the context of the LAC applying the correct test.

The second argument was that the LAC made a wrong finding on the facts when finding that the components withheld were vital for the business to transfer. The LAC on the facts resolved that the components were vital to the running of the business. The CC was unimpressed with the argument and held that the LAC correctly interpreted the facts.

The third argument was that "local and international developments in relation to so-called 'service provision changes' as opposed to standard transfer of business, necessitated the reformulation or development of our law".

The LAC was referred to these developments in the UK law known as the TUPE Regulations in terms of which a distinction was drawn between a business and a service. The CC was urged to have regard to those developments to develop South African law. The CC firmly rejected this argument for the following reasons:

- Some concepts used in TUPE are foreign to the wording of s197 of the LRA and s197 already refers to a "service". There is no need to look any further.
- While it is useful to refer to comparative foreign law instruments and judgments it must be with due regard to differences in language and concepts.
- The TUPE amendments introducing special considerations relating to the transfer of a service had already been introduced before and not after the amendment to s197 to make provision in s197 for the transfer of a service. Section 197 thus adequately caters for transfers of a service. The CC again emphasised that it was the business rendering the service that must be the subject of the transfer.

Rural's application for leave to appeal was refused by the CC with costs. Rural did not transfer enough of its business to constitute a transfer of a business as a going concern.

Faan Coetzee

CDH
CLIFFE DEKKER HOFMEYR

WHEN EMPLOYEES TAKE PERMANENT VACATIONS

Often, employees fail to return to work on the day that they are due back after their annual leave.

How to address absenteeism, abscondment and desertion following the taking of annual leave.

An employee's failure to return to work following annual leave does not necessarily warrant dismissal. The reason for the employee's absence should be established first. Once this has been done, the employer can determine the action to be taken.

The 'silly season' has arrived and most employees are counting down the days until their annual leave begins in mid- to late- December. Unfortunately, December and January can be extremely challenging from a human resources perspective.

Often, employees fail to return to work on the day that they are due back after their annual leave. In terms of the common law, an employee has a duty to enter into and remain in service, other than during authorised periods of leave. If an employee is unable to return to work after a period of annual leave, the employee can reasonably be required to inform the employer of his/her whereabouts and the reason for the absence from work. However, this requirement is often not fulfilled and the employer is required to investigate the employee's absence from work and the reason for the absence.

An employee's failure to return to work following annual leave does not necessarily warrant dismissal. The reason for the employee's absence should be established first. Once this has been done, the employer can determine the action to be taken.

Our law draws a distinction between absenteeism, abscondment and desertion. Absenteeism relates to a short period of unauthorised absence from work. Abscondment is unauthorised absence from work for an unreasonably long period of time. Desertion involves an employee who has left the employer's employment or failed to return to work with a clear intention of not returning to work at all. The intention of not returning to work must be apparent from the employee's actions. If the employee has an intention of returning to work at some point, then he/she will not have deserted but rather simply have been absent from work or absconded, depending on the duration of the absence.

In instances of absenteeism and abscondment, an employee must be afforded a hearing prior to his/her employment being terminated (other than in exceptional circumstances). The employee should be notified of the disciplinary hearing and cautioned that the hearing will continue in his/her absence if he/she elects not to attend the hearing. In the event that the employee fails to attend the disciplinary hearing and depending on the reason for the failure to attend, the hearing can continue in the employee's absence and a decision can be made.

In some instances, the facts may indicate that the employee has in fact deserted. Examples of facts indicating desertion include the employee relocating/moving to another town or province, or the employee taking up employment with another

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WHEN EMPLOYEES TAKE PERMANENT VACATIONS

CONTINUED

In every instance of an employee failing to return to work following annual leave, the employer should investigate the matter before taking any action.

employer. In a case of desertion, it is advisable, at minimum, for the employer to address a letter to the last known address of the employee to inform the employee that the employer is of the view that he/she has deserted and that his/her employment will be terminated on a specified date should the employee fail to return to work or to contact the employer by a stipulated deadline. If the stipulated deadline is not complied with by the employee, the employee's employment will be terminated.

In every instance of an employee failing to return to work following annual leave, the employer should investigate the matter before taking any action, as this will determine what process is to followed by the employer.

Gillian Lumb and Anli Bezuidenhout

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A PROPOSED MINIMUM WAGE FOR SOUTH AFRICA...

The Panel recently proposed a new minimum wage. The proposed starting amount suggested by the Panel is R3,440.

During the State of the Nation address in 2014, President Jacob Zuma urged the National Economic Development and Labour Council (NEDLAC) to explore issues such as wage inequality in the Country. Following this, South African policy makers recently presented a report to Deputy President Cyril Ramaphosa regarding recommendations on the implementation of a proposed national minimum wage.

The Panel explained that a lower minimum wage would have minimal or no impact on poverty and that a higher number may result in unemployment.

An Advisory Panel (Panel), established in August 2016, consulted with NEDLAC, its social partners, experts from various areas of the labour market, and other interested parties.

As a result of various socio economic challenges, the Panel recently proposed a new minimum wage. The proposed starting amount suggested by the Panel is R3,440. It is important to note that this amount was calculated by setting the hourly wage at R20, which would make the weekly wage R800 (if the employee works for 40 hours a week). Furthermore, the month is calculated by using an amount of 4,3 weeks per month.

In explaining how the amount was decided on, the Panel explained that a lower minimum wage would have minimal or no impact on poverty and that a higher number may result in unemployment. In addition, the Panel decided that it was necessary to set a specific number, ie R20, rather than a range of a wage rate and this would avoid confusion as well as dispute on applicability. If this new minimum wage policy is implemented, South Africa joins many other developing and developed economies in the world which have successfully implemented a similar policy in their own jurisdictions.

The Panel has also been tasked with ensuring that proper institutional arrangements are proposed so that proper mechanisms are implemented in order to ensure compliance and enforcement of the minimum wage.

The intention of the Panel is to legislate the institutional arrangements and enforcement procedures by early 2017. Thereafter, there will be a two-year transitional period in order to fully implement the new minimum wage.

The proposed timeline will commence with an agreement between all parties on the initial national minimum wage amount, the legislation to regulate it, and the particular details of the of the minimum wage model by December 2016. This process will culminate in July 2019 with the implementation of the National Minimum Wage across South Africa, with fines being imposed for non-compliance.

The Panel considered that the implementation of the minimum wage may have dire consequences on the vulnerable sectors such as small businesses, youth employment, and vulnerable workers (such as farm workers and domestic workers), especially in light of the two-year transition period. To cater for this, the Panel argued that there are policies and legislation in place that regulate these sectors, and that the introduction of the

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A PROPOSED MINIMUM WAGE FOR SOUTH AFRICA...

CONTINUED

The national minimum wage will be reviewed and adjusted once a year from 2020 by a new body to be established.

proposed national minimum wage into these sectors will not have a negative impact if it is introduced over a longer period than the proposed two years. Employers in vulnerable sectors, who cannot meet the minimum wage, will be temporarily exempt from enforcement.

It is proposed that the national minimum wage will be reviewed and adjusted once a year from 2020 by a new body to be established. When making such a determination in the future, significant emphasis will be placed on documented research which identifies the needs of employers, employees and the impact on the economy.

Whilst the implementation of the national minimum wage may prove to be a great victory for employees, it may however prove to be a challenge for employers and their continued financial viability. It is therefore advisable for all employers to start identifying and forecasting the impact that an imposed minimum wage will have on its business and to consider measures to implement in order to avoid any adverse consequences on business as well as continued employment.

Zola Mcaciso, Reabetswe Mampane and Samiksha Singh

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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.

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.

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