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EMPLOYMENT ALERT

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

IN THIS **ISSUE**

PICK YOUR BATTLE

Strike action is not an appropriate solution for employees who are aggrieved by their union's conduct.

COLLECTIVE INSUBORDINATION CAN CONSTITUTE A STRIKE

The issue of unconventional strikes and ultimata were recently considered by the Labour Appeal Court in the case of *Jackson Mndebele and Others v Xstrata South Africa (Pty) Ltd* (case no JA57/12).

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PICK YOUR BATTLE

Employees embarked on an unprotected strike after learning that their union concluded an agreement with the employer without first obtaining a mandate from its members.

It is evident that Courts will not come to the aid of parties who try to enforce their rights by holding the wrong party accountable.

Strike action is not an appropriate solution for employees who are aggrieved by their union's conduct.

In the recent case of *Jacob Mele and 51 others v Chainpack Ltd (Pty) Ltd and 2 others* (JS940/13) [2016] ZALCJHB 191 (5 April 2016), employees embarked on an unprotected strike after learning that their union concluded an agreement with the employer without first obtaining a mandate from its members.

The employer instructed the employees to return to work. The employees were handed final written warnings, giving them an ultimatum that they would be dismissed if they failed to comply with the employer's instructions and that disciplinary inquiries would be instituted against all employees who participated in the unprotected strike. The employees failed to return to work and were subsequently dismissed.

The employees challenged their dismissal. The Court upheld their dismissal and took into account the fact that the employees complaint was against the union and not the employer.

Where employees are aggrieved by the conduct of their union officials and the employer has acted in good faith, the employees should raise their concerns directly with the union officials and not resort to unprotected strike action, as this may result in employees being exposed to disciplinary action, and even dismissal.

In recent judgments, it is evident that Courts will not come to the aid of parties who try to enforce their rights by holding the wrong party accountable. This is clear in the case 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), where the employer sought to interdict its employees from striking after a political party intervened. 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.

Aadil Patel and Stephanie Goncalves

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COLLECTIVE INSUBORDINATION CAN CONSTITUTE A STRIKE

Xstrata closed down all six of its furnaces and ceased all manufacturing activities at its Rustenburg plant for approximately a month between December 2008 and January 2009.

The issue of unconventional strikes and ultimata were recently considered by the Labour Appeal Court in the case of *Jackson Mndebele and Others v Xstrata South Africa (Pty) Ltd* (case no JA57/12).

As a result of the downturn in the demand for steel following the 2008 global recession, Xstrata closed down all six of its furnaces and ceased all manufacturing activities at its Rustenburg plant for approximately a month between December 2008 and January 2009. The employees were required to take annual leave during this period.

When the employees returned to work in January 2009, management convened a mass meeting with all employees informing them that it would not commence with manufacturing activities but that all employees were obliged to report for work and attend scheduled training sessions until manufacturing activities resumed at the plant.

Certain employees later raised various concerns pertaining to overtime, shift allowances and remuneration. Most issues were resolved and the employee representatives were required to submit a list in respect of the remaining issues. They failed to submit the list.

Subsequently, the employer initiated a wellness campaign which required the attendance of all employees. No work was to be done on the day and two sessions were arranged in order to accommodate all employees and to ensure full attendance. Despite the instruction, a group of employees refused to attend either of the sessions until their pay queries were resolved.

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The employees were informed that their conduct constituted an unprotected strike and were warned that their continued failure to attend the sessions would result in disciplinary action. Despite the repeated instruction, the employees failed to attend either of the sessions. The employer held disciplinary enquiries and dismissed the employees for having participated in an unprotected strike.

The employees referred an unfair dismissal dispute to the Labour Court where it was found that the dismissal of the employees for participating in an unprotected strike was fair. The employees were granted leave to appeal but failed to deliver the appeal record within the period and according to the procedures stipulated in the rules of the Labour Appeal Court.

The employees delivered the record three years later, but had to first be granted condonation by the Labour Appeal Court to reinstate the appeal. The Court reiterated that the test for condonation requires that an applicant show good cause as to why their default should be condoned. In doing so, certain factors must be taken into account, including a consideration as to the prospect of success of the applicant's case.

The Court stated that it is trite that where there is no prospect of success on the merits, other considerations become irrelevant.

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The employees referred an unfair dismissal dispute to the Labour Court where it was found that the dismissal of the employees for participating in an unprotected strike was fair.

The employees submitted that they did not attend the wellness sessions because they were doing recovery work, and that attending the wellness session was not a part of their contractual obligations. They also argued that was no proper ultimatum was issued to them.

The Court rejected their submissions and reasoned that other employees who worked at the production department had attended the sessions. The Court held that there is no requirement in law that each and every duty of an employee be expressly set out in a contract of employment and that the common law implies certain duties, including the duty to obey lawful and reasonable instructions. The employees' refusal to obey the instruction to attend the wellness session was a breach of their common law obligation.

As to the argument relating to the ultimatum, although it was not issued in the conventional sense, the employer had warned the employees of the consequences of not attending the wellness session and gave them sufficient opportunity to reflect on their conduct and modify it, thus having regard to the purpose of an ultimatum in the Code of Good practice of the Labour Relations Act, No 66 of 1995. The Court concluded that the employees were issued with a valid ultimatum. The dismissals were therefore held to be procedurally and substantively fair.

This judgment confirms that the concerted refusal to obey a reasonable and lawful instruction for the purpose of remedying a grievance falls within the definition of strike and may not simply constitute an act of insubordination.

Samiksha Singh and Zola Mcaciso

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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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