

# EMPLOYMENT ALERT

## LET OUR STRIKE GUIDELINES BE THE STARTING POINT FOR YOUR STRIKE STRATEGY

At Cliffe Dekker Hofmeyr we pride ourselves in providing our clients with practical solution driven information in line with the current challenges faced by our clients.

Due to the increase in strikes and strike violence in South Africa, our employment practice developed useful strike guidelines for our clients' benefit. These guidelines will provide clients with practical information about strikes, lock-outs and picketing and answer some of the more complex questions around these topics. The guidelines are definitely the starting point when considering a strike strategy and when preparing for industrial action. Our strike guidelines can be accessed on our website.

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### WOMEN IN THE WORKPLACE

In South Africa, we have several laws ensuring the protection of women in the workplace. The Constitution of the Republic of South Africa confirms that "everyone is equal before the law and has the right to equal protection and benefit of the law". Employment legislation has been enacted in order to give effect to the Constitution and to protect all employees, including women in the workplace.

### CONTEMPT OF COURT... ON FACEBOOK AND WHATSAPP?

The Labour Relations Act regulates the right to strike and provides mechanisms to ensure the protection of employees who embark on protected strikes. Despite the clear letter of the law, some unions and employees have misunderstood the extent of the protections conferred by the right to strike. A tough lesson was learnt by the Commercial Stevedoring Agricultural & Allied Workers Union and certain striking employees when they embarked on a protected but acrimonious strike at Robertson Winery.

# WOMEN IN THE WORKPLACE

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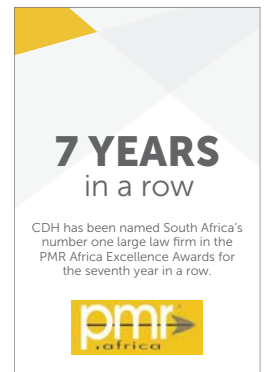
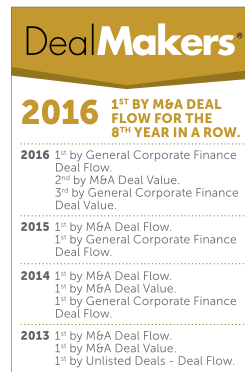


In South Africa, we have several laws ensuring the protection of women in the workplace. The Constitution of the Republic of South Africa confirms that “everyone is equal before the law and has the right to equal protection and benefit of the law”. Employment legislation has been enacted in order to give effect to the Constitution and to protect all employees, including women in the workplace.

Some of the important protections impacting women in the workplace include:

- 1. Protection against dismissal** - in terms of the Labour Relations Act, No 66 of 1995 (LRA), a dismissal is automatically unfair if the employee is dismissed because of her pregnancy, intended pregnancy or a reason related to her pregnancy. A dismissal which is found to be automatically unfair can attract an order of reinstatement or compensation up to 24 months’ salary.
- 2. Protection against unfair discrimination** - the Employment Equity Act, No 55 of 1998 (EEA) protects employees from unfair discrimination on listed grounds which include gender, sex, pregnancy, marital status, family responsibility or on any other arbitrary grounds.

- 3. Equal pay protection** – the EEA was recently amended to introduce the equal pay for work of equal value principle (equal pay principle). In terms of the amendment, a difference in terms and conditions of employment between employees of the same employer performing the same or substantially the same work or work of equal value that is directly or indirectly based on any one or more of the listed grounds or on any other arbitrary ground, is unfair discrimination. A Code of Good Practice on equal pay for work of equal value states that the equal pay principle “addresses a specific aspect of workplace discrimination and the undervaluing of work on the basis of a listed or any other arbitrary ground...” As stated above, the listed grounds include gender and sex.



# WOMEN IN THE WORKPLACE

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4. **Maternity leave protection** – in terms of the Basic Conditions of Employment Act, No 75 of 1997 (BCEA), an employee has a right to at least four consecutive months' unpaid maternity leave. The Unemployment Insurance Act, No 63 of 2001 provides for payment of maternity benefits.
5. **Protection before and after birth** - the BCEA also provides protection to employees before and after the birth of a child. In terms of s26(1) of the BCEA, "no employer may require or permit a pregnant employee or an employee who is nursing her child to perform work that is hazardous to her health or the health of her child." A Code of Good Practice on the protection of employees during pregnancy and after the birth of child has been issued in terms of the BCEA. The Code recognises that many women return to work while breast-feeding and provides guidelines for employers. It guides employers on how to assess

and control risks to the health and safety of pregnant and breast-feeding employees and provides a non-exhaustive list of hazards to pregnant and breast-feeding employees recommending steps to control or prevent those risks.

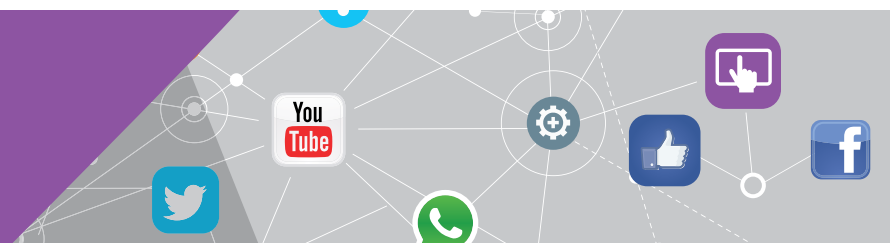
6. **Family responsibility leave** - subject to certain requirements, s27 of the BCEA grants employees three days paid leave which an employee can take when the employee's child is born or sick, or on the death of the employee's child, adopted child, spouse, life partner, parent, sibling or grandchild.

South African legislation has progressed in order ensure the protection and advancement of women in the workplace. Non-compliance with the legislation could lead to severe penalties being imposed or compensation being awarded.

*Samantha Coetzer  
and Samiksha Singh*



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FOR THE LATEST SOCIAL  
MEDIA AND THE WORKPLACE  
GUIDELINE



# CONTEMPT OF COURT... ON FACEBOOK AND WHATSAPP?

*Robertson Winery approached the Labour Court on an urgent basis to interdict and restrain the striking employees from engaging in unlawful conduct in furtherance of the strike.*

*Robertson Winery relied on the photographs uploaded to the union's Facebook account and affidavits and WhatsApp messages from the replacement employees who were threatened and intimidated to not tender their services.*



The Labour Relations Act regulates the right to strike and provides mechanisms to ensure the protection of employees who embark on protected strikes. Despite the clear letter of the law, some unions and employees have misunderstood the extent of the protections conferred by the right to strike. A tough lesson was learnt by the Commercial Stevedoring Agricultural & Allied Workers Union (CSAAWU) and certain striking employees when they embarked on a protected but acrimonious strike at Robertson Winery.

Robertson Winery approached the Labour Court on an urgent basis to interdict and restrain the striking employees from engaging in unlawful conduct in furtherance of the strike. The urgent application was opposed and the parties agreed on the terms of a final court order which was granted on 25 August 2016. They agreed on picketing rules which provided *inter alia* that the strikers conduct themselves in a peaceful and lawful manner and that they would not possess any weapons.

Four days after the agreement was made an order of court, the union updated its Facebook account with photographs of its members carrying sticks, sjamboks and golf clubs. Furthermore, the strikers chanted a song with the words 'dubula Reinetten', which directly translates to 'shoot Reinetten'. Reinetten is the Human Resources manager for Robertson Winery. Robertson Winery raised this with the union and reminded them that the conduct was in contravention of the picketing rules and agreed terms of the court order. However, the union maintained that there was nothing wrong with the song, but that the strikers would nevertheless stop singing it.

On 8 October 2016, Robertson approached the Labour Court and sought to hold the union in contempt of the court order issued on 25 August 2016. Robertson Winery alleged that the court order was not complied with in three respects,

- (a) replacement labourers were prevented from going to work;
- (b) by chanting the song 'shoot Reinetten'; and
- (c) by uploading photographs on Facebook of strikers carrying dangerous weapons.

The union opposed the application and alleged that these photographs were taken before the initial court order was granted. In support of its application, Robertson Winery relied on the photographs uploaded to the union's Facebook account and affidavits and WhatsApp messages from the replacement employees who were threatened and intimidated to not tender their services.

Judge Steenkamp restated the principles applicable in contempt of court proceedings and held that in this case, the court order was not in dispute as the parties agreed to the terms. The court then had to determine whether there was non-compliance by the

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*The Labour Court issued a 12 month suspended fine of R50,000 against the union.*



union with the court order and once this was established, whether the non-compliance was wilful and in bad faith.

In dealing with the allegations of intimidating replacement employees, the Labour Court highlighted that the purpose of picketing is to peacefully encourage non-striking employees to support the protected strike and that in doing so they must conduct themselves peacefully, unarmed and in a lawful manner. The union was specifically restrained from inciting, instigating or promoting any unlawful conduct by its members. The Labour Court considered the affidavits and WhatsApp messages of the replacement employees which contained allegations that were met with bare denials by the union. In considering the evidence, the Labour Court found that the union's denials were on the whole, so far-fetched or clearly untenable that the Labour Court could reject them on the papers. The Labour Court also found that the song 'shoot Reinettes' was a variation of a well-known struggle song which has been held to constitute hate speech and that an incitement to kill does not enjoy constitutional protection. It also held that even though the striking employees had stopped singing the song, the misconduct took place on a date after the court order was issued.

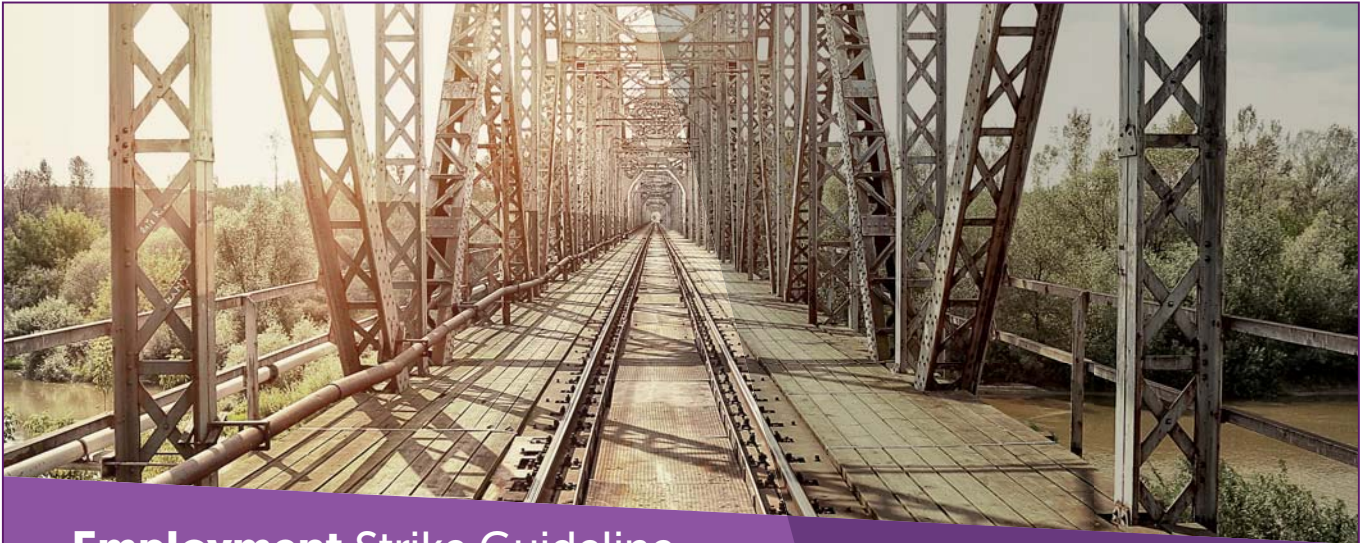
In relation to the carrying of dangerous weapons, the Labour Court found that Roberson Winery had proven that the uploading of photos of employees

carrying dangerous weapons on Facebook constituted a breach of the court order and picketing rules. Furthermore, the union did not show that it was not wilful or in bad faith, nor did it take any efforts to remove the photographs on Facebook. Whilst the Labour Court found that the misconduct did not progress into significant violence, contempt of court is always serious and undermines the rule of law.

In mitigation of the punishment, Judge Steenkamp held that although the strike was protected, the union breached certain aspects of the court order and therefore to leave it unpunished would countenance a culture of impunity and undermine the rule of law. The Labour Court issued a 12 month suspended fine of R50,000 against the union. Certain individual members of the union were also found to be in contempt of court but no penalties were imposed on them. No order was made as to costs of the application as the Labour Court was of the view that this would negatively affect a relationship which was already in a fragile state.

This case serves as a reminder to unions and employees that they are not absolved from liability and cloaked with unlimited protection when on a protected strike. It is also useful to note the ability of employers to use evidence from social media in order to protect its rights against unlawful conduct by unions and employees.

*Samiksha Singh and Zola Mcaciso*



## Employment Strike Guideline

Find out what steps an employer can take when striking employees ignore court orders.

 [Click here to find out more](#)

CHAMBERS GLOBAL 2014 - 2017 ranks our Employment practice 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'.



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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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