

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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MEAL ALLOWANCES: NO SECOND BITE OF THE CHERRY

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MEAL ALLOWANCES: NO SECOND BITE OF THE CHERRY

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An employee's constitutional right to strike is not absolute. Section 65 of the Labour Relations Act, No 66 of 1995 (LRA) restricts an employee's right to engage in industrial action if he or she is bound by a collective agreement which prohibits strike action. This statutory restriction on the right to strike was considered in a recent decision of the Labour Court in *South African Airways (SOC) Ltd v South African Cabin Crew Association and Others* (J949/17) 2017 ZALC (JHB). While the South African Cabin Crew Association (SACCA) had complied with the procedural requirements to ensure that their intended strike action would be protected, SAA successfully interdicted the strike on an application of s65 of the LRA.

SAA and all the representative trade unions including SACCA had concluded a main bargaining forum constitution (which is a collective agreement under the LRA) creating a main bargaining forum (MBF) and a main consultation forum (MCF). The MBF dealt with substantive issues, while the MCF dealt with operational issues. Collective bargaining took place in terms of the constitution resulting in a wage agreement being concluded between the majority trade unions and SAA. The wage agreement was extended in terms of s23(1)(d) of the LRA to all non-parties including SACCA (which had refused to sign the agreement).

Following conclusion of the wage agreement SACCA referred a mutual interest/refusal to bargain dispute to the CCMA alleging that SAA refused to negotiate with it on an increase in meal allowances. SACCA referred the dispute despite the fact that the wage agreement included a provision that meal allowances are an operational issue to be dealt with in the MCF. A certificate of failure to settle the dispute was issued by the CCMA reflecting that the dispute was one of mutual interest and as such, strike action was competent. SACCA issued a notice of intention to strike. SAA then approached the Labour Court for urgent interdictory relief.

The two main issues to be decided by the court were:

- whether the issue in dispute forming the subject matter of the intended strike action was regulated by collective agreement ie the wage agreement and as a result, the strike action was prohibited in terms of s65 of the LRA; and
- whether the CCMA certificate of failure to settle recording that the dispute related to a matter of mutual interest, rendered the strike action lawful.

When determining the first issue, the court considered s65 of the LRA, the nature of the issue in dispute forming the subject matter of the proposed strike and whether this issue was already directly or indirectly regulated or determined by a collective agreement. In terms of s65(1)(a) and s65(3)(a) of the LRA, employees are prohibited from taking part in a strike if they are bound by a collective agreement that prohibits a strike in respect of the issue in dispute. SACCA argued before the Labour Court that there was nothing in the wage agreement which expressly prohibited strike action on the issue of increased meal allowances. While the court agreed with this argument, it found that s65 contemplates not only an express prohibition on strike action, but a much wider prohibition.

MEAL ALLOWANCES: NO SECOND BITE OF THE CHERRY

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Given that the agreement was extended to non-parties including SACCA it was not open to SACCA to seek to reopen the negotiations on meal allowances.



The wage agreement provided that "meal allowances are an operational cost intended to provide sustenance to employees on official business and it therefore does not constitute a term and condition of employment". The agreement further provided that meal allowances must be dealt with in the MCF. The wage agreement was concluded in full and final settlement of all issues relating to wages and conditions of employment for the year 2016/2017.

The court considered the issue in dispute namely, the demand for an increase in meal allowances and found that while this issue may constitute a matter of mutual interest in certain instances, in this instance the court had to examine whether the wage agreement regulated this issue. If it did, this would render the intended strike action incompetent. The court concluded that the wage agreement specifically determined that meal allowances are not considered a condition of employment but rather an operational issue that must be dealt with in the MCF and that SAA had the power to determine the allowances, subject only to consultation with the MCF. The wage agreement thus excluded bargaining on the meal allowances. In the circumstances, SACCA could not in effect seek to bypass the terms of the wage agreement and embark on strike action. Any strike action would be unprotected.

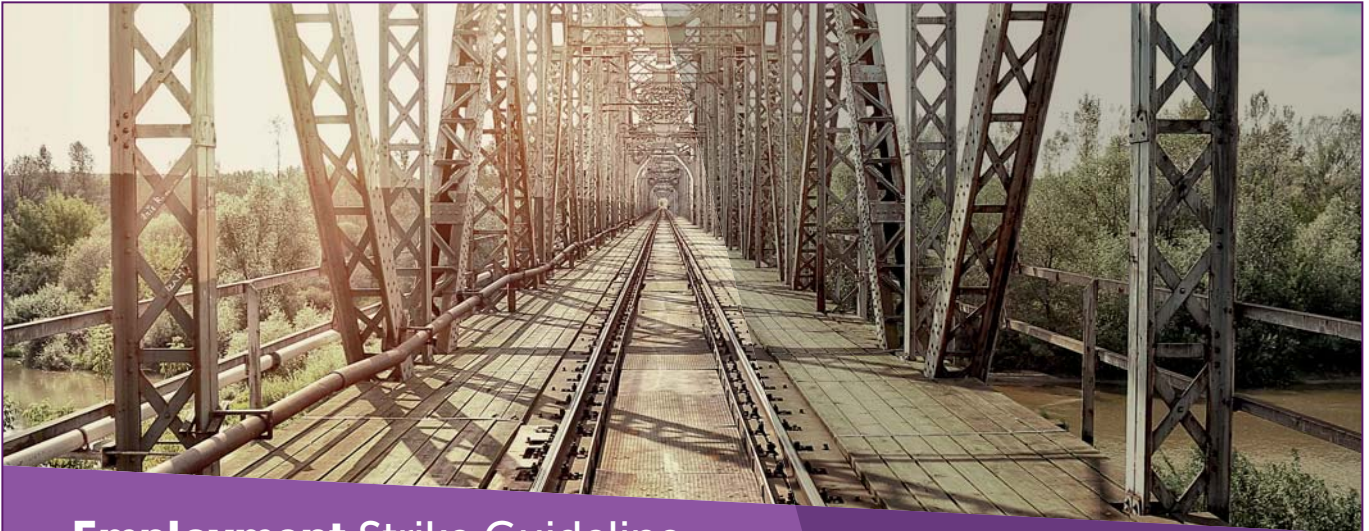
Insofar as the second issue was concerned, the court found that SACCA's argument was without merit. The court held that the issuing of a certificate by the CCMA at conciliation does not decide the nature of the dispute. The certificate cannot usurp the role of the Court in determining the nature of the real issue in dispute when dealing with a possible unprotected strike.

This case is important as it upholds the importance of collective bargaining, collective agreements and majority rule in the workplace. While SACCA may not have been in agreement with the terms of the wage agreement relating to meal allowances and had not signed the agreement, given that the agreement was extended to non-parties including SACCA it was not open to SACCA to seek to reopen the negotiations on meal allowances. The allowances were regulated in the wage agreement to which SACCA was bound and SACCA was obliged to wait on the next round of negotiations on wages to revisit the issue.

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Gillian Lumb and Rebecca Cameron



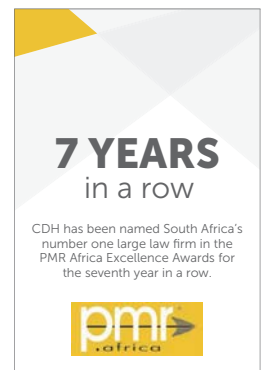
CLICK HERE to view our NEW Employment Strike Guideline



Employment Strike Guideline

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

 [Click here to find out more](#)



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Aadil Patel ranked by CHAMBERS GLOBAL 2015 - 2017 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.

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