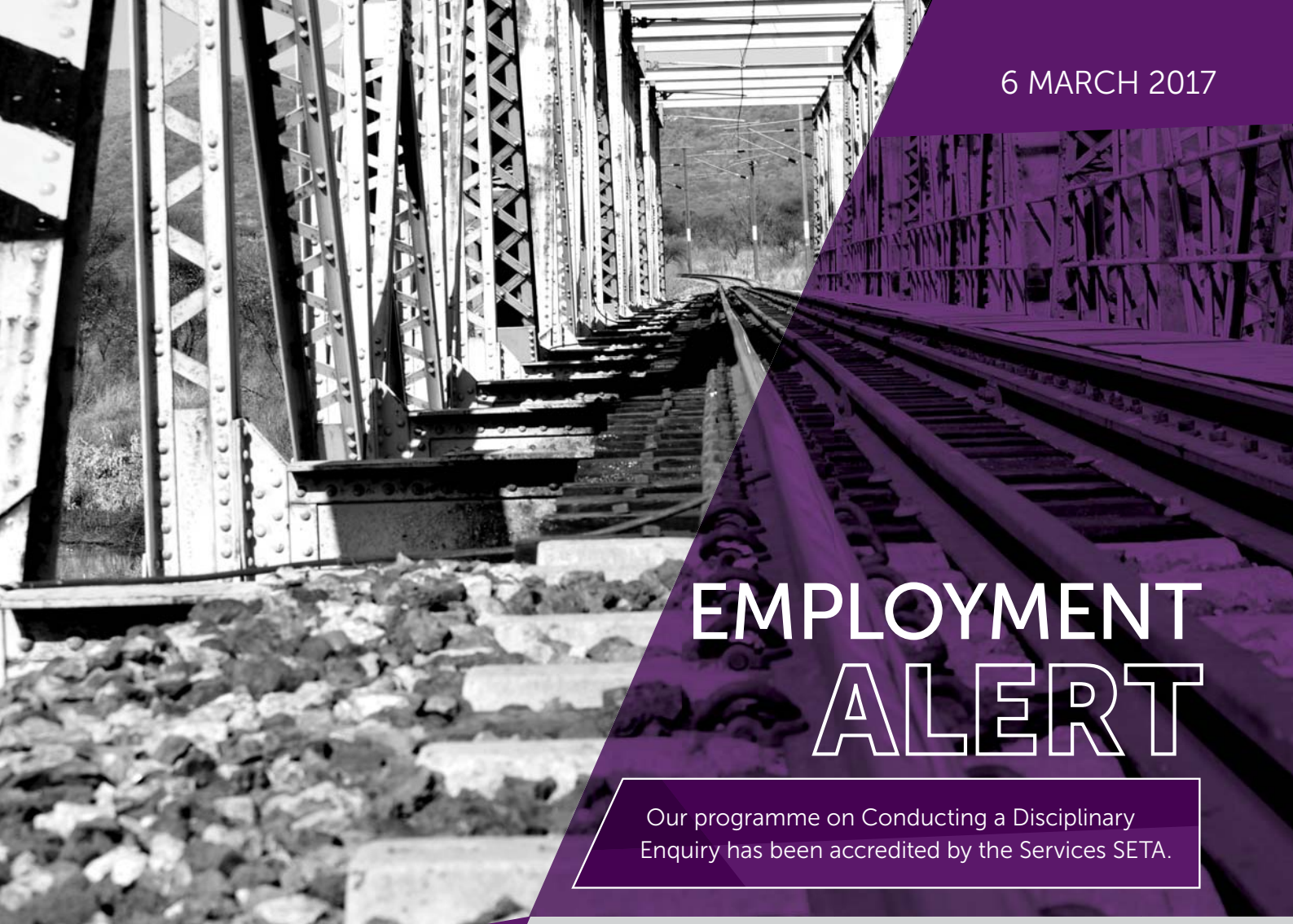

6 MARCH 2017

EMPLOYMENT ALERT

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

IN THIS **ISSUE**

CDH
CLIFFE DEKKER HOFMEYR

LONG-STANDING PRACTICE OR CONTRACTUAL TERM?

The CCMA found that the employee had a contractual right to work at the warehouse - the custom and practice of him working there had created a term and condition in his employment contract.

It is trite law that the employment contract commences from the moment the parties reach agreement on its essential terms. The parties are free to regulate their respective rights and duties in the contract in any manner they please, subject to the requirements of the law. It is also an accepted principle that a long-standing practice may give rise to a tacit term. However, such a practice will not necessarily be contractually binding. The case of *Edcon Ltd v Commission for Conciliation, Mediation and Arbitration and others* (PR09/15)[2016] ZALCPE 25 (9 December 2016) has recently confirmed this principle.

The Labour Court had a different view and held that the regularity of an occurrence does not in itself give rise to a contractual term unless it is the intention of the parties to create a contractual right.

The employee was employed by Edcon (Pty) Ltd (Edcon) as a store assistant on a casual contract. The contract recorded that Edcon could place the employee in any department where business needs required, provided he was competent for the job. At the time of his dismissal for gross insubordination, the employee enjoyed eight years of service, mostly at the warehouse, in terms of the casual contract.

When the employee challenged the fairness of his dismissal, the CCMA ordered Edcon to reinstate the employee on the same terms and conditions as governed at the date of dismissal.

Edcon required the employee to report to the Greenacres store as the staff complement at the warehouse was full. The employee refused as he was of the view that the CCMA award required him to work at the warehouse. Ultimately, the employee was again dismissed for insubordination as a result of his refusal to report for duty at the Greenacres store.

In finding in the employee's favour, the CCMA observed that the "days of slavery are long gone". The CCMA also found that the employee had a contractual right to work at the warehouse - the custom and practice of him working there had created a term and condition in his employment contract. He was re-instated once more.

Taken on review, the Labour Court had a different view and held that the regularity of an occurrence does not in itself give rise to a contractual term unless it is the intention of the parties to create a contractual right. The Labour Court confirmed that there is authority to support the proposition that a long-standing practice can give rise to a term of the contract of employment, however, this is dependent upon the parties' intention. In this instance, there was no intent on the part of Edcon to change the terms of the contract. The commissioner had made a material error of law in the absence of evidence of such intention and had accordingly exceeded his powers by effectively rewriting the contract between the parties.

CLICK HERE to view our NEW Employment Strike Guideline

CDH
CLIFFE DEKKER HOFMEYR

LONG-STANDING PRACTICE OR CONTRACTUAL TERM?

CONTINUED

Establishing a long-standing practice will not give rise to a contractual obligation unless the intention of the parties supports such additional contractual term.

The employee therefore remained employed on the terms of his initial contract and was contractually bound to render services as required by Edcon in accordance with its operational needs.

The Labour Court's decision in *Edcon* emphasises the well-known principle that the intention of the parties when drawing up a contract of employment is paramount and a court will therefore exceed its powers if it seeks to re-write a contract without any evidence of the relevant intention. Establishing a long-standing practice will not give rise to a contractual obligation unless the intention of the parties supports such additional contractual term.

Rebecca Cameron and Gavin Stansfield

CDH
CLIFFE DEKKER HOFMEYR

THE ENFORCEMENT OF ARBITRATION AWARDS

This application was brought after the Dispute Resolution Centre for the Motor Industry Bargaining Council finalised an arbitration hearing between the employee and the employer, where the Commissioner ruled that the dismissal of the employee was procedurally and substantively unfair.

In the case of *Mlaudzi v Metro South Towing CC* (J1007/15) [2017] ZALCJHB 37 (8 February 2017), an employee brought a dual application to the Labour Court. The first part of the application was brought in terms of s158(1)(c) of the Labour Relations Act, No 66 of 1995, as amended (the LRA) and the second part of the application in terms of s77(3) of the Basic Conditions of Employment Act, No 75 of 1997 (the BCEA).

In the second part of the application, the employee sought an order from the Labour Court to direct his employer to pay him his outstanding salary.

Factual Background

This application was brought after the Dispute Resolution Centre for the Motor Industry Bargaining Council finalised an arbitration hearing between the employee and the employer, where the Commissioner ruled that the dismissal of the employee was procedurally and substantively unfair. The Commissioner ordered that the employee must be reinstated and that the employer must pay the employee an amount of R15,600.

The employer failed to comply with the terms of the arbitration award, whereafter the employee brought the abovementioned dual application before the Labour Court. The Labour Court dealt with the two parts of the application separately:

Section 158(1)(c) Application

The Labour Court held that if an arbitration award is certified by a director of the CCMA in terms of s143 of the LRA, then it becomes unnecessary to approach the Labour Court in terms of s158(1)(c) of the LRA. Instead, the aggrieved party can enforce the certified arbitration award directly in terms of s143(4) of the LRA by way of contempt proceedings in the Labour Court. This is also in line with the judgement of the Labour Court in the *SATAWU obo Phakathi v Ghekko Services SA (Pty) Ltd and Others* (2011) 32 ILJ 1728 (LC) case, where the Labour Court held that s158(1)(c) applications are not a prerequisite for contempt proceedings.

However, in the *Mlaudzi* case, the Labour Court also stated that a s158(1)(c) application cannot be dismissed based on the fact that the arbitration award was certified. In this specific case, the Labour Court ruled that the employee made out a proper case and therefore made the arbitration award an order of the Labour Court.

Section 77 of the BCEA

In the second part of the application, the employee sought an order from the Labour Court to direct his employer to pay him his outstanding salary. The Labour Court referred to the *Coca-Cola Sabco (Pty) Ltd v Van Wyk* [2015] 8 BLLR 774 (LAC) case, in which it was held that the effect of a reinstatement order is to revive the contract of employment.

CDH
CLIFFE DEKKER HOFMEYR

THE ENFORCEMENT OF ARBITRATION AWARDS

CONTINUED

The Labour Court ordered that the Respondent must pay the Applicant the remuneration the Applicant claimed.

Further, the Labour Court held in the *Coca-Cola Sabco* case that if the employee tendered his services between the date of the order and the implementation date, then the employee is entitled to his remuneration for that period.

Therefore, the Labour Court found that in the *Mlaudzi* case the employee did report for duty (as was required by the arbitration award) and that when he reported for duty he was not reinstated. The Labour Court thus ordered that the Respondent must pay the Applicant the remuneration the Applicant claimed.

Conclusion

This is a noteworthy judgment, because if the suggestion of the Labour Court in this case is applied in practice, it would contribute to the speedy resolution of employment disputes as envisaged by the LRA.

Ndumiso Zwane and Stephan Venter

CDH
CLIFFE DEKKER HOFMEYR

RESURRECTION FROM THE ARCHIVE

The Practice Manual does not substitute the Rules of the Labour Court; it must be read in line with the Rules in order to give clarity to the application of these Rules in the operation of matters before the Labour Court.

The Labour Court Practice Manual (Practice Manual), which came into effect on 1 April 2013, provides guidelines on the standards of conduct in the Labour Court and also promotes consistency in practice and procedure. Whilst the Practice Manual does not substitute the Rules of the Labour Court (Rules); it must be read in line with the Rules in order to give clarity to the application of these Rules in the operation of matters before the Labour Court. Amongst various types of matters, the Practice Manual also sets out specific procedures and time periods in respect of review applications, thereby amplifying the Rules.

In terms of the procedure for a review application, the applicant is required to file the record of the arbitration proceedings within 60 days of having been informed by the Registrar of the Labour Court that the record has been received and may be uplifted.

An important aspect of review applications is that they are considered urgent. Therefore, applicants are required to ensure that all papers (excluding heads of arguments) are filed within twelve months of launching the review application (paragraph 11.2.7 of the Practice Manual). If this time limit is not complied with, then the review application is archived and considered to have lapsed until good cause is shown as to why the application should be removed from archive.

This is one of the hurdles that Ms Samuels had to overcome in *Samuels v Old Mutual Bank* (DA30/15) [2017] ZALAC 10 (25 January 2017). Ms Samuels was dismissed for misconduct in 2007 and referred an unfair dismissal dispute to the CCMA. The Arbitration took place on 28 days over a period of four years. In 2011, the arbitrator found the dismissal to be substantively unfair and ordered that compensation equivalent to 12 months' salary be paid to the employee. Ms Samuels instituted review proceedings, as she sought the award of compensation to be substituted with a reinstatement order.

In terms of the procedure for a review application, the applicant is required to file the record of the arbitration proceedings within 60 days of having been informed by the Registrar of the Labour Court that the record has been received and may be uplifted. In this regard, it was argued by Ms Samuels that the CCMA failed to produce the complete record of the arbitration proceedings resulting in it being filed in a piecemeal fashion. Despite launching the review application in May 2011, the final part of the transcript was only delivered in May 2014.

The Court file was archived in terms of paragraph 11.2.7 of the Practice Manual. A file being archived has the same consequences as the matter having been dismissed. In July 2014, Ms Samuels launched an application to have the file retrieved from the archive. The Labour Court dismissed her application to retrieve the archived file and held that in order for her to succeed with her application she was required 'to prove an exceptional explanation, exceptional prospects of success, a material injustice and no

CDH
CLIFFE DEKKER HOFMEYR

RESURRECTION FROM THE ARCHIVE

CONTINUED

Although Ms Samuels has overcome the obstacle of having to resurrect the file from archive, the LAC did not make any finding on her prospects of success in the matter.

prejudice to the respondent'. The Labour Court did acknowledge that the CCMA had also played a role in the delay but found that Ms Samuels' legal representatives were not proactive enough in approaching the respondent's representatives for a collaborative reconstruction of the record. Having regard to the merits, the court noted that her prospects of success were not 'excellent.' The court found that the respondents right to finality will assume more weight in cases where there has been an excessive time delay, even where the 'excuses' for the delay are acceptable.

Ms Samuels filed an appeal to the Labour Appeal Court (LAC) which took a very different stance. It was emphasised that courts can exercise discretion in applying the provisions of the Practice Manual depending on the 'facts and circumstances' of a matter. The requirement to show 'good cause' to have a file removed from archive was given an entirely different interpretation. Showing good cause demands that:

- the application must be bona fide;
- the applicant must provide a reasonable explanation which covers the entire period of the default;
- he/she has reasonable prospects of success in the main application; and
- it is in the interests of justice to grant the order.

The applicant need not go into the merits of her case to show reasonable prospect of success and it is sufficient to 'set out facts that if established would result in his/her success'.

The LAC found that although the delay was excessive, the CCMA was solely responsible for the delay in filing the record in a piecemeal fashion. In such a case, the respondent's right to finality does not 'supersede the appellant's right not to be unfairly dismissed.' It was emphasised that the Practice Manual was implemented to facilitate the fair adjudication of disputes.

Although Ms Samuels has overcome the obstacle of having to resurrect the file from archive, the LAC did not make any finding on her prospects of success in the matter. The Labour Court will now have to determine whether the Arbitration Award is reviewable.

This case sends an important message to litigants to ensure that both the Rules of the Labour Court as well as the Practice Manual are complied with to the full extent.

Rebecca Cameron and Samiksha Singh

CDH
CLIFFE DEKKER HOFMEYR

CAN YOU JUSTIFY YOUR FIXED-TERM CONTRACT?

During November 2016, Exarro terminated the commercial contracts with the employers by giving them one month's notice.

Since the implementation of the amendments to the Labour Relations Act (LRA) in 2015, there have been several interesting judgments dealing with the justification for concluding a fixed-term contract of employment. Earlier this year, Judge Steenkamp delivered judgment in the matter of *AMCU and Another v Piet Wes Civils CC and Another* (J2834/16, J2845/16) [2017] which further assists in clarifying the issue of fixed-term contracts.

The employers argued that the employees were employed on fixed-term contracts, which was terminable on the occurrence of a specified event, namely the early termination of the commercial contract with Exarro, and as such s189 and 189A of the LRA was not applicable.

Two employers, Piet Wes Civils CC and Waterkloof Skoonmaakdienste CC (the employers) contracted with Exxaro Coal (Exxaro) in order to provide various services to Exxaro until 2021. The employers then contracted a number of employees, on fixed-term contracts of employment, in order to carry out these services to Exxaro. The fixed-term contracts of employment included a clause which provided for automatic termination in the event that the commercial contract between Exxaro and the employers prematurely terminated. This meant that the fixed term contracts of employment would be in operation for as long as the contract with Exxaro remained in operation. By inclusion of this clause, the employers were of the view that these employment contracts constituted fixed-term contracts of employment.

During November 2016, Exarro terminated the commercial contracts with the employers by giving them one month's notice. The employers then relied on the automatic termination clause in the fixed-term contracts of employment and terminated the employment relationship with their employees.

The Association of Mineworkers and Construction Union (AMCU), which represented the employees, launched an urgent application to the Labour Court in terms of s189(13) of the LRA. AMCU contended that the employees were dismissed for operational requirements as envisaged by s189A of the LRA (retrenchments), and accordingly the employers were under an obligation to consult with the employees prior to termination of the employment relationship. In its application, AMCU requested the Labour Court to order reinstatement, therefore forcing the employers to engage in consultation with the employees as envisaged in s189 of the LRA.

The employers argued that the employees were employed on fixed-term contracts, which was terminable on the occurrence of a specified event, namely the early termination of the commercial contract with Exarro, and as such s189 and 189A of the LRA was not applicable. The employers further argued that the fixed-term contracts of employment were governed by s198B of the LRA, which provides that employees may be employed on fixed term contracts or successive fixed-term

CDH
CLIFFE DEKKER HOFMEYR

CAN YOU JUSTIFY YOUR FIXED-TERM CONTRACT?

CONTINUED

The Labour Court ordered the reinstatement of the employees and that the employers consult with them in accordance with the procedure prescribed under s189A of the LRA.

contracts of employment for longer than three months if the nature of the work is for a limited duration or that the employer can demonstrate a justifiable reason for fixing the term of the contract.

The Labour Court found that the employers failed to demonstrate justifiable reasons as contemplated in s198B of the LRA as the fixed term contracts of employment were not for a specific project that had a limited duration. Exarro terminated its contract with the employers, which resulted in the automatic termination of the fixed-term contracts of employment. There was no evidence that a specific project had come to an end as envisaged by s198B of the LRA (being one of the justifiable reasons set out in the LRA).

The Labour Court reaffirmed the position that employers cannot terminate an employment contract at the behest of a third party as this undermines the employee's right to fair labour practice entrenched in our Constitution. Consequently, the Labour Court concluded that these contracts of employment did not constitute fixed-term contracts in terms of s198B of the LRA and that s189A was applicable as there may be justifiable grounds for dismissing the employees for operational requirements. The Labour Court ordered the reinstatement of the employees and that the employers consult with them in accordance with the procedure prescribed under s189A of the LRA.

It is important for employers to ensure that they are able to justify the grounds for fixing a limited duration of employment and that there is full compliance with the relevant provisions of the LRA insofar as ensuring the protection of employees and avoiding any adverse orders of the Labour Court.

Zola Mcaciso and Samiksha Singh

CDH
CLIFFE DEKKER HOFMEYR

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'.

CDH
CLIFFE DEKKER HOFMEYR

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

Jose Jorge
Director
T +27 (0)21 481 6319
E jose.jorge@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

Thabang Rapuleng
Director
T +27 (0)11 562 1759
E thabang.rapuleng@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

Steven Adams
Associate
T +27 (0)21 481 6341
E steven.adams@cdhlegal.com

Samantha Bonato
Associate
T +27 (0)11 562 1134
E samantha.bonato@cdhlegal.com

Sean Jamieson
Associate
T +27 (0)11 562 1296
E sean.jamieson@cdhlegal.com

Zola Mcaciso
Associate
T +27 (0)21 481 6316
E zola.mcaciso@cdhlegal.com

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

Prinoleen Naidoo
Associate
T +27 (0)11 562 1829
E prinoleen.naidoo@cdhlegal.com

Bheki Nhlapho
Associate
T +27 (0)11 562 1568
E bheki.nhlapho@cdhlegal.com

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.

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

CDH
CLIFFE DEKKER HOFMEYR