

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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INNOCENT ATTRACTION VS SEXUAL HARASSMENT

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INNOCENT ATTRACTION VS SEXUAL HARASSMENT

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The case of *Rustenburg Platinum Mines Limited v UASA obo Pietersen and Others* (JR641/2016) [2018] ZALCJHB 72 is a case that reflects and confirms the conflation that often exists and persists between employment law and issues of society at large, such as victimisation, discrimination, fairness, gender issues and constitutionalism.

This case related to a review application brought against the decision of a commissioner who found that the employee had made sexual advances towards the victim, however the victim's "docile" conduct encouraged him to do so and as such it did not amount to unwanted sexual harassment.

The victim had suffered unwanted sexual advances from the employee for an enduring period. The employee was in a senior position to the victim and relied on his position of authority whenever the victim would not comply with his advances.

He offered to help pay for the victim's expenses at one point, so that they could sleep together. He also suggested to the victim that they attend training together so that they are given an opportunity to sleep together. He even shared a test memorandum with her for a job/promotion that the victim had intended applying for. When the victim WhatsApped the employee to tell him that she will be reporting his behaviour, he assisted in suspending her and arranging a disciplinary hearing.

In the CCMA, the employee was the only person who testified for his case, while the victim called four other witnesses to testify on her behalf. The witnesses testified that the victim had on previous occasions confided in them about her perils and expressed to them why she felt uncomfortable and "not free" to report the incidents.



CHAMBERS GLOBAL 2014 - 2018 ranked our Employment practice in Band 2: Employment.

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INNOCENT ATTRACTION VS SEXUAL HARASSMENT

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The harassed employee had no obligation to say no unambiguously when she was in a junior position to the employee.



In the case of *Campbell Scientific Africa (Pty) Ltd v Simmers and Others* (CA 14/2014) [2015] ZALCCT 62 (23 October 2015), Savage JA held:

“At its core, sexual harassment is concerned with the exercise of power and in the main reflects the power relations that exist both in society generally and specifically within a particular workplace. While economic power may underlie many instances of harassment, a sexually hostile working environment is often less about the abuse of real economic power, and more about the perceived societal power of men over women. This type of power abuse often is exerted by a (typically male) co-worker and not necessarily a supervisor.”

The codes of good practice for sexual harassment essentially lay out what commissioners must look out for when determining sexual harassment cases. In this instance, the commissioner was of the view that if any of the elements outlined in the 1998 code of good practice: sexual harassment is “lacking” no sexual harassment would have occurred. The commissioner placed specific emphasis on whether the employee must have been aware or should have reasonably been aware that his conduct was unwanted by

and deemed offensive to the complainant. In considering this point, the Labour Court held that it could not have been the intention of the drafters of the code of good practice that one factor should be considered more important than another. The absence of one factor does not mean that sexual harassment did or did not occur. Commissioners are obliged to consider the impact of the sexual conduct of the employee.

We live in a time where victimisation of women cannot go without scrutiny and due consideration. Accordingly, in the Labour Court’s view “For the Commissioner therefore to not to have found anything wrong in the inappropriate advances made by [the employee]...and to merely treat them as actions of someone love-struck, or “proposing love” is worrying in the extreme.” The harassed employee had no obligation to say no unambiguously when she was in a junior position to the employee. It was also clear that there was no reciprocation and that is enough.

Employers and employees alike should remain aware of the fact that women continue to be harassed and victimised and that courts will not be willing to tolerate that behaviour.

Aadil Patel, Anli Bezuidenhout and Zama Madungandaba

Michael Yeates was named the exclusive South African winner of the **ILO Client Choice Awards 2015 – 2016** in the category Employment and Benefits as well as in **2018** in the Immigration category.





Employment Strike Guideline

Find out what steps an employer can take when a strike is unprotected.

 [Click here to find out more](#)

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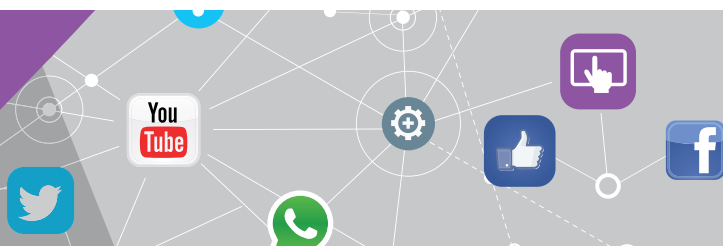
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Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 3 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving 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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