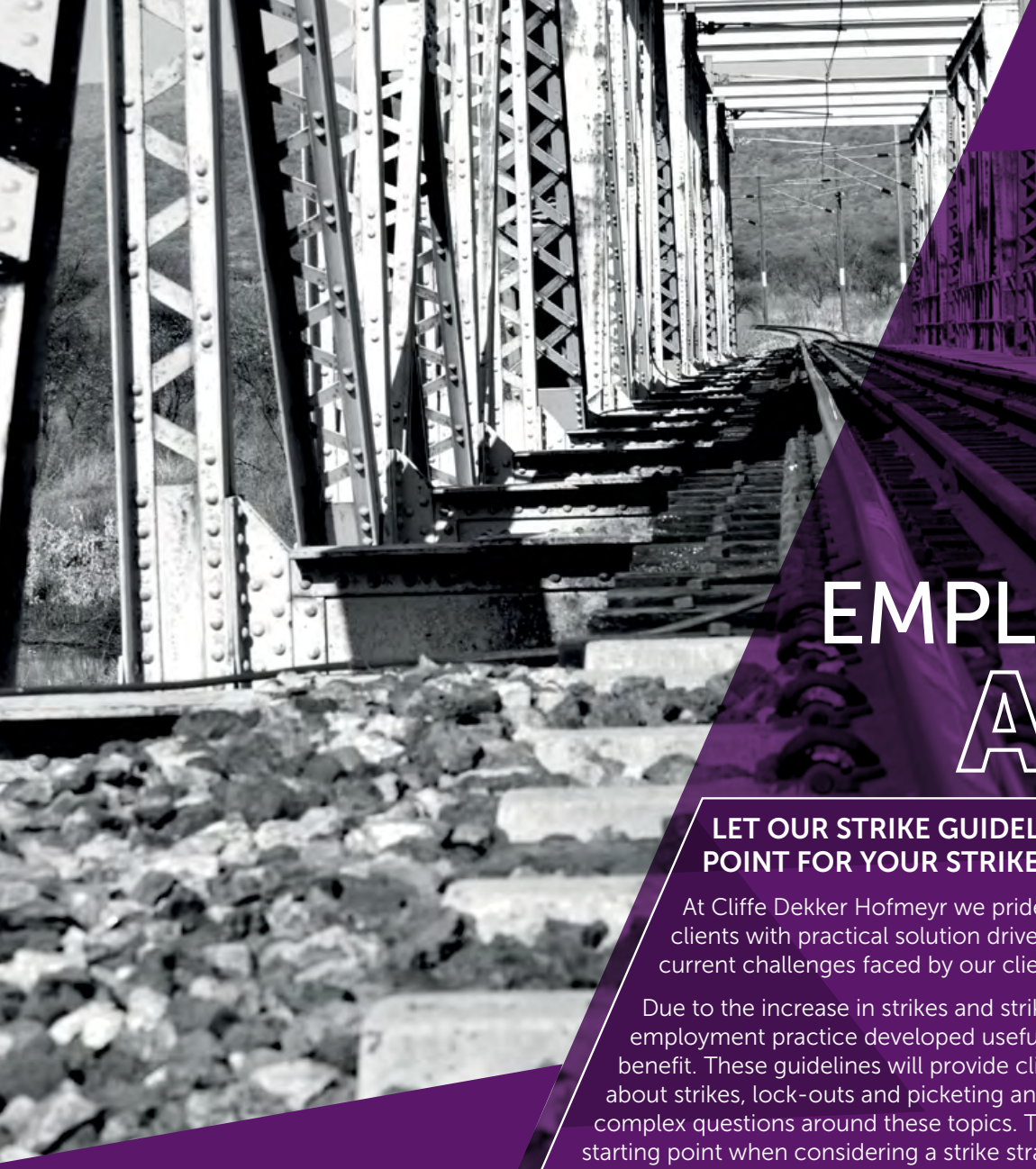

16 APRIL 2018

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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PROTECTED DISCLOSURES BY EMPLOYEES DO NOT NEED TO BE FACTUALLY ACCURATE

Section 6 only requires proof of a credible possibility of the issue outlined in the disclosure and any disclosure made in good faith must ultimately be protected.

In terms of the Protected Disclosures Act, No 26 of 2000 (PDA), if an employee makes a disclosure to his or her employer, the disclosure does not need to be factually accurate in order for the employee to later claim protection with reference to the disclosure.

The Labour Appeal Court (LAC) in the matter of *Lou-Anndree v Afrox Oxygen Limited*, confirmed the application of s6 of the PDA in respect of the requirement of factually accurate information disclosed by an employee in terms of the PDA.

In terms of s6 of the PDA, any disclosure made to an employer by the employee in good faith and substantially in accordance with any procedure authorised by the employer is a protected disclosure. Section 6 only requires proof of a credible possibility of the issue outlined in the disclosure and any disclosure made in good faith must ultimately be protected.

The employee in the Afrox matter became aware of an alleged discrepancy in the salary grading of one of her subordinates. Despite raising concerns with her direct superiors, the employer failed to address the employee's concerns. Some two months later, and in an ambush meeting, the employer offered the employee (Lou–Anndree) a mutual separation package which the employee rejected. She was subsequently summarily dismissed on the basis of alleged incompatibility with her subordinates.

In terms of s3, an employee may not be subjected to any occupational detriment by his or her employer on account of having made a protected disclosure.

Dissatisfied with her dismissal, the employee referred the dispute to the National Bargaining Council for the Chemical Industry, alleging an automatically unfair dismissal, arising from her protected disclosure. The Labour Court subsequently adjudicated the matter.

The employee alleged that her dismissal was automatically unfair, as she had been subjected to an occupational detriment arising from making a protected disclosure in terms of the PDA. In terms of the PDA, an occupational detriment is specifically described as harassment, dismissal, transfer against the will of the employee, non-promotion or a denial of appointment. In terms of s3, an employee may not be subjected to any occupational detriment by his or her employer on account of having made a protected disclosure.

In its judgment, the Labour Court held that the employee's alleged protected disclosure was based on factually inaccurate information and on that basis, her disclosure could not be considered a protected disclosure for purposes of the PDA.

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PROTECTED DISCLOSURES BY EMPLOYEES DO NOT NEED TO BE FACTUALLY ACCURATE

CONTINUED

The employee reasonably believed that there were inaccuracies in the salary grading process.

The employee appealed the judgment and the LAC held that the employee need only comply with s6 of the PDA. In respect of a disclosure by an employee to his/her employer, s6 only requires proof of a credible possibility that the information disclosed is accurate and any disclosure made in good faith must be protected. The employee made a disclosure to her employer and as such, the LAC held that only s6 of the PDA applies. The Labour Court, therefore, erred in applying s9 of the PDA. Section 9 of the PDA relates to a general disclosure made by an employee to any person and the employee reasonably believes that the information disclosed is substantially true. The Labour Court had elevated the requirement of "reasonable belief" of a disclosure to one of accuracy of the facts on which the belief was based and the LAC found that this was incorrect.

Reasonable belief need not be equated to personal knowledge of the information disclosed as that would frustrate the operation of the PDA. A reasonable belief may be deemed reasonable, even where the information turns out to be inaccurate. Disclosure of a hearsay opinion would even be reasonable; depending on its reliability. The employee reasonably believed that there were inaccuracies in the salary grading process. The employee was therefore not acting mala fide when she believed that the information she disclosed was substantively true.

The LAC has clarified that there is no requirement to factually prove the basis for such reasonableness as highlighted in this case. All that is required is reasonable belief by the employee of that disclosure. Employers should, therefore, steer clear of disregarding factually inaccurate disclosures and subsequently disciplining employees which may be regarded as subjecting the employee to an occupational detriment.

Samiksha Singh and Lee-Andrea Arenz

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FULL-TIME SHOP STEWARDS NOT IMMUNE FROM RETRENCHMENT

A shop steward's position was earmarked for possible retrenchment in 2015 and NUMSA was invited to consult on this issue as part of the s189A facilitations.

Full-time shop stewards, and shop stewards in general, enjoy certain rights that are not enjoyed by regular employees, including the organisational rights conferred in terms of s14 and s15 of the Labour Relations Act (LRA). However, the Labour Court has stated unequivocally that shop stewards are not entitled to any "special treatment" when an employer considers dismissing employees based on operational requirements.

NUMSA, on behalf of Phakathi, referred an unfair dismissal dispute to the Labour Court.

In *National Union of Metalworkers of South Africa (NUMSA) obo Mandla Phakathi v Assmang Machadodorp Chrome Works (Pty) Ltd* (JS548/16), the Labour Court confirmed that a shop steward is an employee in the first instance and is subject to the employer's operational requirements.

Phakathi was elected to a position of full-time shop steward in 2012, pursuant to a recognition agreement concluded between the employer and NUMSA.

In February 2015, the respondent embarked on a large-scale retrenchment exercise facilitated under the auspices of the Commission for Conciliation, Mediation and Arbitration (CCMA). This retrenchment exercise was the third in a series of large-scale retrenchments since Phakathi's election in 2012 and resulted in a significant reduction in the employer's workforce.

Phakathi's position was earmarked for possible retrenchment in 2015 and NUMSA was invited to consult on this issue as part of the s189A facilitations. In response, NUMSA adopted the position that Phakathi, as a full-time shop steward, was not subject to the s189A retrenchment process as his position was entrenched by virtue of the provisions of the recognition agreement. The parties continued to engage on this issue and Phakathi was retrenched at the conclusion of the s189A process. NUMSA, on behalf of Phakathi, referred an unfair dismissal dispute to the Labour Court.

The Labour Court, however, was critical of the union's argument that Phakathi was not subject to the s189A process and held that, "there is everything wrong and illogical with the applicant's approach" and "there was no basis in law or fact, for the applicant to approach this court with this claim, and they should have known better". In coming to this conclusion, the court specifically considered the following pertinent factors:

1. Phakathi was elected at a time where there was obviously a justification for the position of a full-time shop steward. Since then, the employer's workforce had been reduced significantly and this, in turn, no longer justified the continuation of that position.
2. The union failed to advance any rational basis why the position of full-time shop steward was still necessary after the number of employee's dwindled in 2015.

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FULL-TIME SHOP STEWARDS NOT IMMUNE FROM RETRENCHMENT

CONTINUED

The court held that once the substantive fairness of a dismissal is not challenged on any of the grounds listed above, a claim for substantive unfairness must fail.

3. Following a previous large-scale retrenchment in 2014, Phakathi agreed to render limited services directly to the employer. The fact that Phakathi was required to assume further roles demonstrated an appreciation that his full-time role as a shop steward had diminished to a large extent.
4. A full-time shop steward is not immune from any operational requirement exercise embarked upon by an employer as they are, first and foremost, an employee like any other.
5. To the extent that the applicants relied on the provisions of the recognition agreement, NUMSA failed to approach the CCMA with a s23(4) and s24(2) referral (dispute regarding the interpretation of a collective agreement). In fact, no action was taken after the dispute concerning Phakathi's position emerged during the facilitation process. And even if NUMSA had referred the dispute, this would not have prevented the employer from proceeding with the retrenchment of Phakathi. In other words, the fact that Phakathi was a full-time shop steward would not have shielded him from the application of fair and objective selection criteria.

The court further confirmed that a dismissal based on operational requirements would be substantively justified if the employer is able to demonstrate that:

1. The dismissal was to give effect to a requirement based on the employer's economic, technological, structural or similar needs;
2. The dismissal was operationally justifiable on rational grounds;
3. There was a proper consideration of alternatives, and
4. Selection criteria were fair and objective.

The court held that once the substantive fairness of a dismissal is not challenged on any of the grounds listed above, a claim for substantive unfairness must fail.

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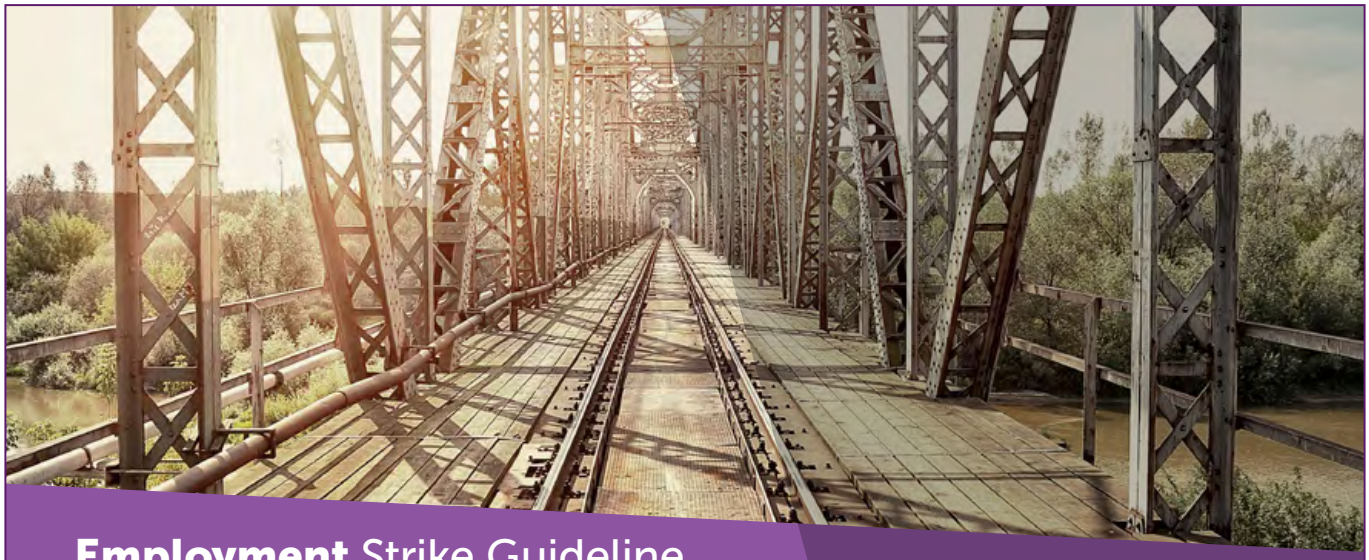

Employment Strike Guideline

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

Click here to find out more

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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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