

23 APRIL 2018

EMPLOYMENT ALERT

S*XUAL HARASSMENT IN THE WORKPLACE

[CLICK HERE](#) to access our guideline

Due to the title of our guideline, spam-filters may block this email, misidentifying it as explicit material. To avoid this, we have inserted an asterisk.

IN THIS ISSUE

EMPLOYERS BEWARE - LIABILITY FOR S*XUAL HARASSMENT IN THE WORKPLACE

S*xual harassment in the workplace is not a novel, nor a historic issue. The manner in which the law has come to deal with s*xual harassment in the workplace has evolved over time. S*xual harassment in the workplace may have serious implications for the employer extending beyond bad publicity, to the possibility of financial liability for the conduct of its employees. Employers beware that he who acts through another is deemed to act himself – even in cases of s*xual harassment.

EMPLOYERS BEWARE – LIABILITY FOR S*XUAL HARASSMENT IN THE WORKPLACE

The Plaintiff instituted a claim against the perpetrator and the employer for damages in excess of R4 million.

The employer must therefore be aware that the decision of the chairperson will be attributed to the employer.

S*xual harassment in the workplace is not a novel, nor a historic issue. The manner in which the law has come to deal with s*xual harassment in the workplace has evolved over time. S*xual harassment in the workplace may have serious implications for the employer extending beyond bad publicity, to the possibility of financial liability for the conduct of its employees. Employers beware that he who acts through another is deemed to act himself – even in cases of s*xual harassment.

In light of recent media headlines concerning s*xual harassment in the workplace, it is worth re-visiting the decision of the High Court in Grahamstown, *PE v Ikwezi Municipality and others* 2016 (5) SA 114 (ECG). This case concerned s*xual harassment in the workplace, which gave rise to the plaintiff's Post Traumatic Stress Disorder. It is on this basis the Plaintiff instituted a claim against the perpetrator and the employer for damages in excess of R4 million.

In this matter, the perpetrator was suspended for two weeks without payment pursuant to the outcome of the disciplinary enquiry. In considering the matter, the court referred to the case of *Ntshangase v MEC for Finance: Kwa-Zulu Natal and Another* 2009 30 ILJ 2653 (SCA) and pointed out that a decision by a chairperson of a disciplinary enquiry constitutes administrative action and as such is required to be lawful, reasonable and procedurally fair. The employer must therefore be aware that the decision of the chairperson will be attributed to the employer. The Court further stated that if a decision by a chairperson prejudices the employer, it is allowed and obliged to approach the Labour Court to review it, where such decision fails to pass the test of rationality and reasonableness. In the *PE-case* the court stated that the perpetrator's conduct towards the Plaintiff was intolerable, despicable and a violent abuse of his position of authority.

After the employee's return from suspension, the employer undertook to notify the Plaintiff if the perpetrator employee would visit its offices. The attempts by the employer to warn the Plaintiff was predictably impractical. The Plaintiff ultimately found the possibility of running into the perpetrator intolerable and subsequently resigned.

The question before the court in this matter is similar to the question in *Grobler v Naspers Bpk en n Ander* 2004 4 SA 221 (C):

"[I]s the unlawful act sufficiently connected to the conduct authorised by the employer to justify the imposition of vicariously liability? The existence of a significant relationship between the creation or increase in the risk of the commission of the unlawful act and resultant wrong indicated a sufficient relationship for imposition of vicarious liability. Relevant factors were the opportunity presented to the harasser to abuse his authority, the ambit of his authority and the vulnerability of the potential victim to the abuse therefor."

The court held that the Municipality placed the perpetrator in the position where he was able to act the way he did. Therefore, the employment relationship facilitated his actions. Employers need to be aware that when it places an employee in a special position of trust, the employer bears

EMPLOYERS BEWARE - LIABILITY FOR S*XUAL HARASSMENT IN THE WORKPLACE

CONTINUED

In addition to the common law, employees may have an alternative remedy against the employer in terms of s60 of the Employment Equity Act.



the responsibility of ensuring that the employee is capable of trust. The implicit trust in the collegial relationship "forged a causal link" between the perpetrator's position as a Corporate Services Manager and the wrongful behaviour. Ultimately the court held the Municipality vicariously liable for the s*xual harassment by its employee.

In addition to the common law, employees may have an alternative remedy against the employer in terms of s60 of the Employment Equity Act. In terms of subsection 2, an employer is enjoined to take all reasonable steps to eliminate contravention of the Act, which includes s*xual harassment. Failure by the employer to take such reasonable steps, will render the employer liable for the conduct of the employee in that the employer will be deemed to have committed the wrongful conduct. The Labour Appeal Court has awarded damages in the amount of R250 000 to an employee who was a victim of s*xual harassment. *Liberty Group Limited v Margaret Masango* (Case no: 105/2015)

This judgment emphasises that there is a growing realisation and appreciation of the prevalence and the devastating effects of s*xual harassment in the workplace and enjoins employers to take proactive steps to avoid liability.

These cases issue a serious caution to employers to renew its efforts to rid its workplace from s*xual harassment. Employers should take complaints of s*xual harassment seriously and deal with it in accordance with a pro-active policy which is in line with the Code of Good Practice on the Handling of S*xual Harassment Cases. Efforts by the employer to protect employees will be viewed favourably by a court, when assessing liability. An employer will be well advised to provide its employees with training on s*xual harassment in the workplace and set a structure in place which provide employees with an effective channel of reporting s*xual harassment in the workplace.

*Michael Yeates
& Marissa van der Westhuizen*

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.



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

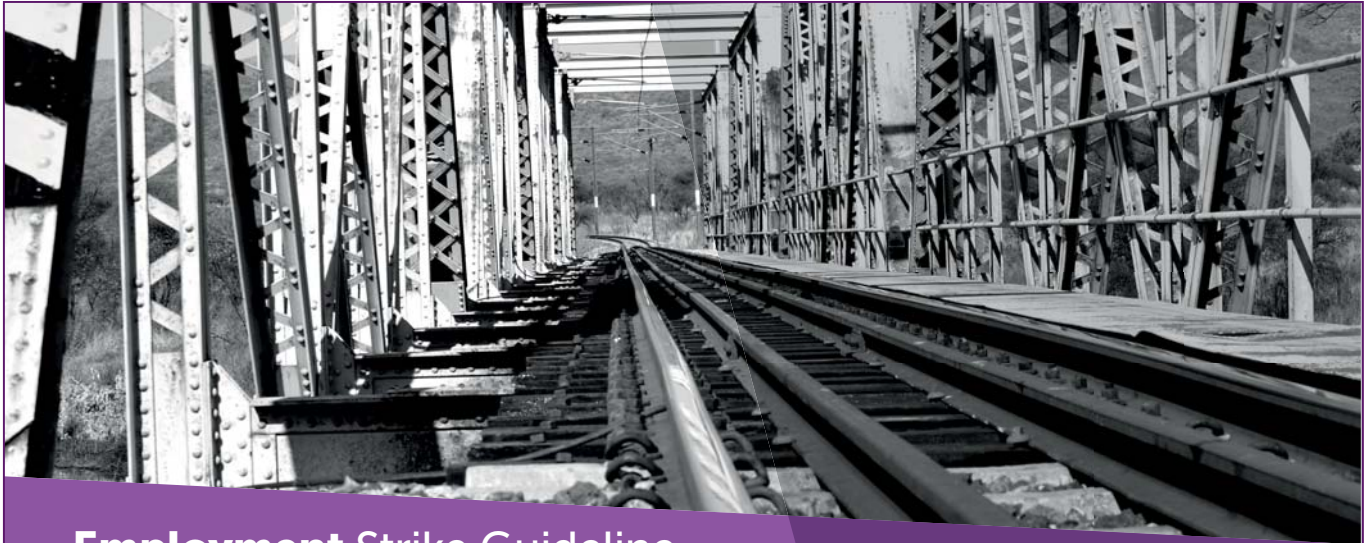
Aadil Patel ranked by CHAMBERS GLOBAL 2015 - 2018 in Band 2: Employment.

Hugo Pienaar ranked by CHAMBERS GLOBAL 2014 - 2018 in Band 2: Employment.

Fiona Leppan ranked by CHAMBERS GLOBAL 2018 in Band 2: Employment.

Gillian Lumb ranked by CHAMBERS GLOBAL 2017 - 2018 in Band 4: Employment.

Gavin Stansfield ranked by CHAMBERS GLOBAL 2018 in Band 4: Employment.



Employment Strike Guideline

Find out when a lock-out will be protected.

 [Click here to find out more](#)



Best Lawyers 2018 South Africa Edition

Included 53 of CDH's Directors across Cape Town and Johannesburg.

Recognised Chris Charter as Lawyer of the Year for Competition Law (Johannesburg).


Recognised Faan Coetzee as Lawyer of the Year for Employment Law (Johannesburg).

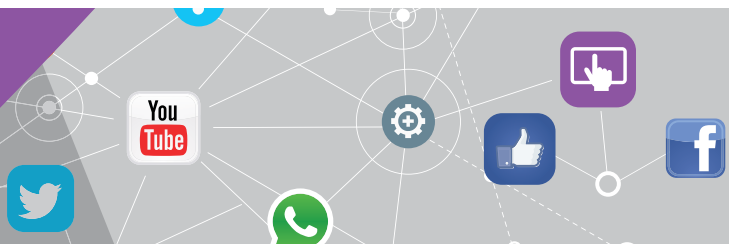
Recognised Peter Hesseling as Lawyer of the Year for M&A Law (Cape Town).

Recognised Terry Winstanley as Lawyer of the Year for Environmental Law (Cape Town).

Named Cliffe Dekker Hofmeyr Litigation Law Firm of the Year.

Named Cliffe Dekker Hofmeyr Real Estate Law Firm of the Year.

 **CLICK HERE**
FOR THE LATEST SOCIAL
MEDIA AND THE WORKPLACE
GUIDELINE



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



Kirsten Caddy
Director
T +27 (0)11 562 1412
E kirsten.caddy@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



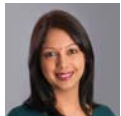
Hugo Pienaar
Director
T +27 (0)11 562 1350
E hugo.pienaar@cdhlegal.com



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)21 481 1184
E michael.yeates@cdhlegal.com



Ndumiso Zwane
Director
T +27 (0)11 562 1231
E ndumiso.zwane@cdhlegal.com



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



Anli Bezuidenhout
Senior Associate
T +27 (0)21 481 6351
E anli.bezuidenhout@cdhlegal.com



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



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



Devon Jenkins
Associate
T +27 (0)11 562 1326
E devon.jenkins@cdhlegal.com



Precness Mohlahlo
Associate
T +27 (0)11 562 1875
E precness.mohlahlo@cdhlegal.com



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



Nonkululeko Sunduza
Associate
T +27 (0)11 562 1479
E nonkululeko.sunduza@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.

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.

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

©2018 2314/APR

