

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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DAY ZERO: THE EVER-LOOMING CRISIS

The Western Cape is currently in the grips of the worst drought it has suffered in 100 years. Dams in the Western Cape are currently at an average 24.2% of capacity and Level 6B water restrictions are currently underway. This requires that businesses reduce their monthly consumption of municipal drinking water by 45% compared to the corresponding period in 2015.

DAY ZERO: THE EVER-LOOMING CRISIS

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We are told that Day Zero will be reached when the storage level of dams supplying the Western Cape with drinking water reach the critical level of 13.5%. On Day Zero the affected municipalities will most likely cut the supply of water to households and businesses, with only vital services, such as hospitals and clinics receiving water.

Unless there is drastic intervention either through unprecedented massive early winter rainfall, or the extraction of ground water and desalination of seawater on a grand scale, it is anticipated that Day Zero, may be reached on 9 July 2018. The date is, however, a moving target.

The detail of how Day Zero will affect business is not yet clear. It is important that employers prepare for a worst case scenario. Assuming Day Zero arrives, some businesses may not have any access to municipal water. This may make their businesses' continued operations impossible. This may leave employers with no work for their employees to perform.

Must an employer pay its employees if there is no work?

The contract of employment is the basis of the employment relationship. One of the fundamentals of the employment contract is that an employee renders his or her services and in return receives remuneration for doing so from the employer. The duty of an employer to pay remuneration continues as long as the employee tenders his or her services. This applies even where an employee is prevented from working due to an unanticipated or unpreventable act such as a natural disaster.

An employer would have to pay its employees that tender to work even if it cannot provide them with any work.

Our labour law recognises certain measures which deviate from the payment of contractually agreed hours of work in periods where there is no work for an employee.

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.



DAY ZERO: THE EVER-LOOMING CRISIS

CONTINUED

An employer will have to consider whether its employees' inability to work will be for an unreasonable period.



The two most common are short-time and the temporary suspension of payment of remuneration. Both can only be implemented by agreement.

Short-time is a system of work that is used for periods when there is little or no work. The system recognises that paying an employee for periods when he or she is not working places undue strain on the financial position of the employer. It seeks to pay the employees only for the reduced periods that they do work or to pay a minimum payment for each portion of a day the employee may work as a result of the shortage in work.

Employees may either agree to short-time in a contract of employment, or an employer may enter into a collective agreement regulating short-time with a union representing the affected employees.

Where employees have not agreed to short-time, implementing short-time without an agreement will constitute a unilateral change to terms and conditions of employment.

The temporary suspension of payment of remuneration may be implemented where there is some prospect of the work situation improving in the near future and the employer being able to provide the employee with work. This may be implemented, by agreement, as an alternative to dismissal.

Where there is no agreement as to these alternatives an employer will have to engage with its employees and explain its position and attempt to secure agreement in this regard. If an employer is unable to obtain the consent of its employees, it may have to consider dismissals for operational requirements (retrenchments).

Can an employer retrench employees as a result of the drought?

A factor that complicates the matter is that the drought is likely to be a temporary, albeit reoccurring, event. An employer will have to consider whether its employees' inability to work will be for an unreasonable period.



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

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

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

DAY ZERO: THE EVER-LOOMING CRISIS

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It is important that employers are prepared for a worst case scenario.



There is no way of knowing how long the drought will continue. It is accepted that modern weather and climate forecasting has become more difficult with the unpredictable effects of global warming.

The World Wildlife Fund anticipates that if we have the same winter rainfall as last year we will not see an increase in dam levels until August 2018. It anticipates that we may have to live with very little water for up to six months.

The Labour Relations Act, No 66 of 1995 (LRA) allows an employer to retrench employees for "operational requirements". Operational requirements are defined as "requirements based on economic, technological, structural or similar needs".

In order to discharge the onus to establish that an operational requirements dismissal is substantively fair, an employer must establish that, objectively speaking, genuine and bona fide operational requirements exist.

If the anticipated consequences of the drought is that a business may not be able to continue with its operations without access to municipal water, this would constitute an operational requirement.

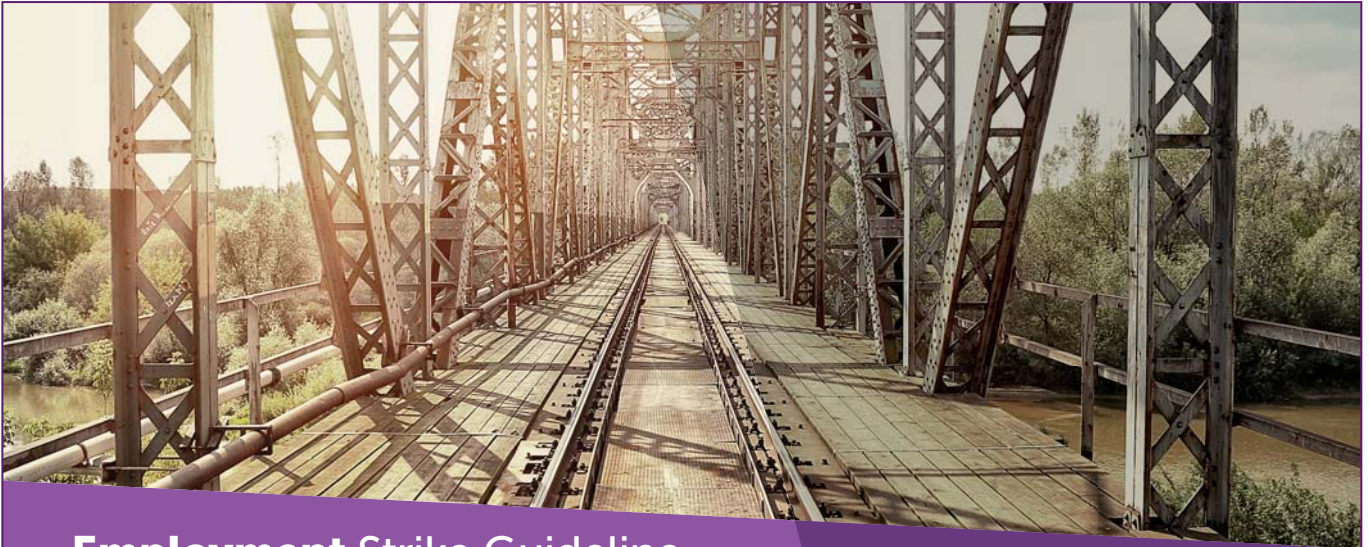
If there is no production, then there is no work for the affected employees and there is no revenue generated. Both of these factors will lead to a dramatic deterioration of a company's financial situation. While it is not generating revenue it will still be forced to pay employees that are not working. This is clearly an untenable situation for any business.

Conclusion

It is important that employers are prepared for a worst case scenario. It is advisable that employers consider mitigating steps in advance of situations such as a drought, load shedding or some other unforeseen occurrence by entering into working arrangements, such as short time, that will help alleviate the pressures of the situation on the employer and provide an alternative to retrenchments.

Jose Jorge and Steven Adams





Employment Strike Guideline

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

 [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).


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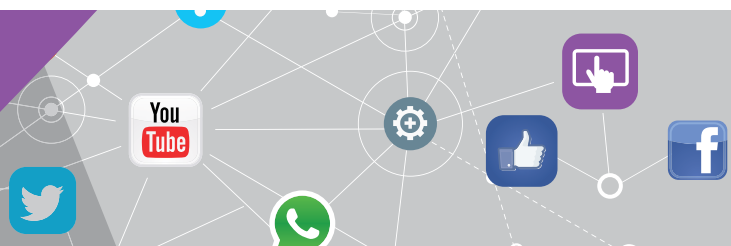
Recognised Peter Hesselning as Lawyer of the Year for M&A Law (Cape Town).

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

Named Cliffe Dekker Hofmeyr Litigation Law Firm of the Year.

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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.

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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