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EMPLOYMENT ALERT

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The provisions of s189 of the Labour Relations Act, No 66 of 1995 (LRA) require an employer and other consulting parties to, among other things, engage in a meaningful joint consensus-seeking process. This implies that the parties must engage in good faith to reach consensus on the issues listed in s189(2) and (3) of the LRA. But what happens when another consulting party frustrates the consultation process to the extent that the employer is unable to meaningfully consult over all of the issues required in s189(2) and (3)?

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The LC held that a union that fails to engage with the employer and seeks to protract the consultation process is not entitled to adopt the position of an armchair critic and then subsequently claim that the consultation process was inadequate.

This question was recently considered in the matter of *Association of Mineworkers and Construction Union and Others v Tanker Services* (JS148/16) [2018] ZALCJHB 226.

One of the unions, AMCU, alleged that its members' dismissals were procedurally unfair because the company had failed to consult with the union over all of the issues listed in s189(2) and (3) of the LRA before taking the decision to retrench. This was in addition to AMCU's claim that the retrenchments were also substantively unfair. In response, the company contended that the union was uncooperative and obstructive throughout the consultation process and intentionally sought to delay the consultation process at every turn. As such, the company submitted that it was entitled to implement the retrenchments in these circumstances.

The disruptive behaviour of the union included, *inter alia*, accusing the company of being corrupt, failing to respond to any written invitations for submissions, failing to confirm attendance at consultation meetings resulting in postponements, alleged inability to access computer and other resources and refusing to continue with a consultation meeting because of another union's actions.

The question before the Labour Court (LC) was whether the company had, in the circumstances, discharged the onus of establishing that the retrenchments were procedurally fair in light of the union's conduct.

The LC relied on the established legal principle that where a consulting party is responsible for frustrating a retrenchment process to the detriment of its members, it is not for that party to subsequently claim that the company had failed to comply with the provisions of s189. The LC also referred to the 'correlative duty' on a union as the other consulting party to cooperate in an attempt to reach consensus before the employer exercised its right to take the final decision.

The LC held that a union that fails to engage with the employer and seeks to protract the consultation process is not entitled to adopt the position of an armchair critic and then subsequently claim that the consultation process was inadequate. In this case, the LC found that the union elected to be a passive but obstructive participant in the consultation process and accordingly had to accept its ill-advised decision to delay the consultation process as far as possible.

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The LC found that the company did everything that was reasonably required to consult with the union and was thwarted at every turn.

In conclusion, the LC found that the company did everything that was reasonably required to consult with the union and was thwarted at every turn. It was accordingly reasonable for the company to draw the process to a close.

This case reinforces the principle that a company must do everything reasonably possible to meaningfully consult on all issues set out in s189(2) and (3) of the LRA. However, a company cannot be held at ransom by the other consulting party who deliberately seeks to frustrate and delay the consultation process. It also stresses the importance of adequately documenting all engagements during a consultation process in the event that the company is required to produce evidence of its good faith efforts at a later stage.

*CDH represented the company at the Labour Court proceedings.

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‘THE UNTOUCHABLES – DISCIPLINING EMPLOYEES AFTER RESIGNATION’

Almost all contracts of employment require the employee to give notice of termination of employment.

It is an increasingly frequent occurrence that when an employee is faced with disciplinary action, the employee elects to resign, with immediate effect, just before the disciplinary hearing takes place.

The question, therefore, is whether the employer can or should institute, or proceed with, a disciplinary hearing against an employee who resigns with “immediate effect” before or during the disciplinary hearing?

In *Sihlali v SA Broadcasting Corporation Ltd* (2010) 31 ICJ 1477 (LC) it was held that resignation is a ‘unilateral’ act and its effectiveness is dependent on whether or not the resignation is lawful, ie whether it complies with the notice requirements of the employment contract or, in the absence of that, the provisions of the Basic Conditions of Employment Act, No 75 of 1997 (BCEA).

Almost all contracts of employment require the employee to give notice of termination of employment. The BCEA prescribes the minimum notice period, therefore an employee who resigns with immediate effect is in breach of contract and/or the BCEA.

In *Mtati v KPMG Services (Pty) Ltd* (2017) 38 ILJ 1362 (LC), the company was investigating allegations of serious misconduct against an employee. The employee decided to resign by giving notice. When the company indicated its intention to take disciplinary action, the employee resigned again, this time ‘with immediate effect’.

At the disciplinary hearing the employee raised the point that the chairperson did not have jurisdiction to continue with disciplinary proceedings, as she had resigned. The employee indicated that, if the company intended to continue with the disciplinary hearing, she would take steps to interdict the proceedings. The chairperson, however, ruled that the hearing would continue. The employee *“walked out”* and the disciplinary proceedings continued in her absence. She was found guilty of the allegations against her and dismissed. The employee approached the Labour Court on an urgent basis to obtain an interdict. The Judge held:

> *“In my view, the second letter of resignation of the applicant changed the status of the employee from that of being an employee, in the ordinary sense of the word, to that of being the erstwhile employee of the respondent (company). This means that the termination of the employment contract with immediate effect took away the right of the first respondent (company) to proceed with the disciplinary hearing against her.”*

The court thus declared the disciplinary hearing null and void and set it aside. However, Mtati judgment was taken on appeal by KPMG. The Labour Appeal Court (LAC) dismissed the appeal on the basis that the point raised on appeal was moot.

The court thus declared the disciplinary hearing null and void and set it aside. KPMG appealed against the Mtati judgment. The appeal was dismissed on the basis that the point was moot.

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‘THE UNTOUCHABLES – DISCIPLINING EMPLOYEES AFTER RESIGNATION’

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The employer is entitled to proceed with the disciplinary hearing even if the employee has resigned.

Most recently, the LC in *Coetzee v The Zeitz MOCCA Foundation Trust and Others* [2018] (heard on 8 June 2018), Judge Rabkin-Naicker held as follows:

1. *An employee is entitled to resign with immediate effect only in the case of a preceding material breach of contract by the employer or where the employer accepts the resignation with immediate effect.*
2. *Statutorily and contractually, the employee is bound to give at least four weeks’ notice of his resignation.*
3. *During an employee’s notice period, there is no legal impediment to the prosecution of disciplinary proceeding and if warranted, the subsequent dismissal of an employee for misconduct.*

The employer is entitled to proceed with the disciplinary hearing even if the employee has resigned. Employees must remember that when they tender a letter of resignation, their employment contract does not immediately terminate upon handing the resignation letter to the employer.

Employers must equally be cognisant of ‘accepting’, whether expressly or tacitly, a resignation with immediate effect from an employee as this may result in the court finding that the employer has waived its right to proceed with disciplinary proceedings. In cases of serious misconduct, employers are advised to expeditiously commence disciplinary hearings, should they intend to do so, despite the employee resigning so as to conclude the disciplinary hearing process within the employee’s notice period.

Lastly, employees should also remember that, in the face of allegations involving a criminal element, such as assault, theft or fraud, the employer is still entitled to report such conduct to the relevant authorities, despite the fact that the employee may have tendered his/her resignation.

Ndumiso Zwane and Ngcebo Buthelezi

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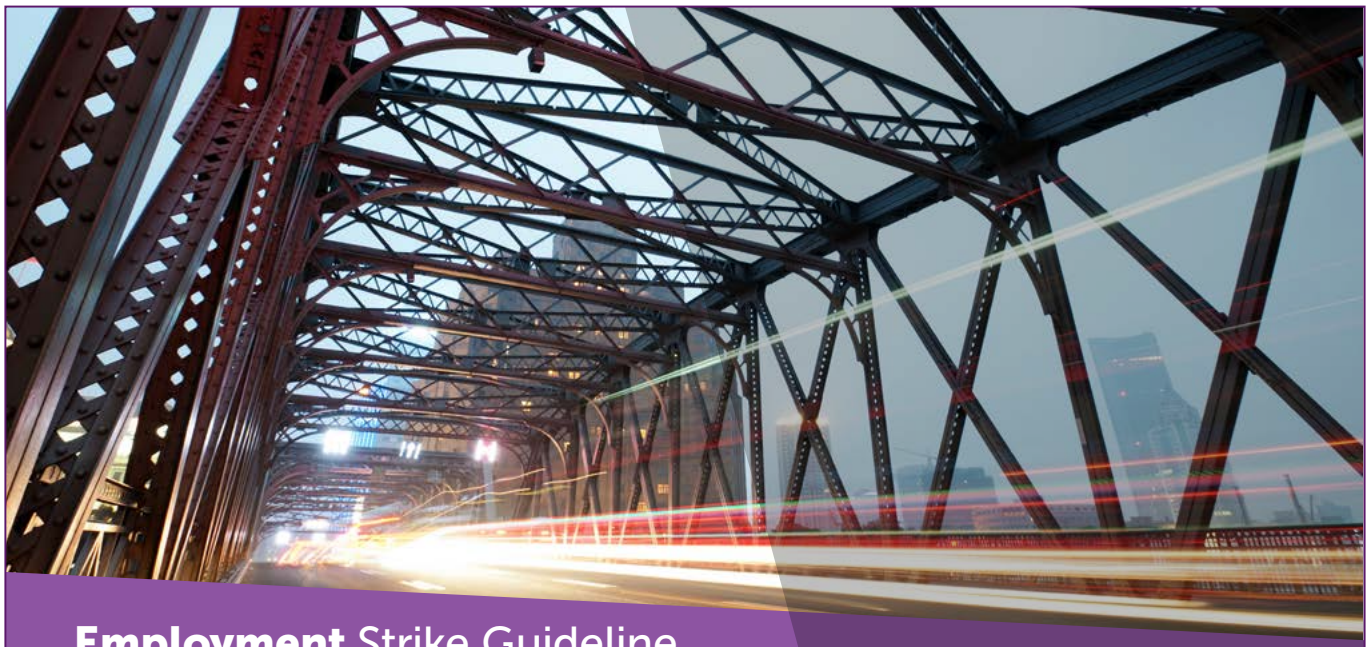

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Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 2 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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