

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.

IN THIS ISSUE

DO COSTS ALWAYS FOLLOW THE RESULTS AT THE LABOUR COURT?

In the case of *Zungu v Premier of the Province of KwaZulu-Natal and Others* (CCT136/17) [2018] ZACC 1 (22 January 2018), Dr. Sibongile Zungu was employed by the Premier of KwaZulu-Natal as the Head of Department of Health on a five-year contract.

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In the case of *Zungu v Premier of the Province of KwaZulu-Natal and Others* (CCT136/17) [2018] ZACC 1 (22 January 2018), Dr. Sibongile Zungu (the applicant) was employed by the Premier of KwaZulu-Natal (Premier) as the Head of Department of Health on a five-year contract.

The premier advised the applicant that her contract would not be renewed but the post would be advertised for her to re-apply for. The applicant re-applied for the position and was recommended by the committee to be re-appointed in the position. The premiere elected not to abide by the committee's recommendation and appointed someone else to act in the position. The applicant referred an urgent application to the Labour Court (LC). The matter was postponed by agreement and the premier undertook not to appoint someone permanently in the position.

The premier later reneged on her undertaking and made a permanent appointment in the position. The applicant then launched an urgent application in the LC. The LC dismissed the applicant's case on the basis that it lacked jurisdiction and that, in any event, no case for urgency was made by the applicant. The court held that the nature of the applicant's dispute with the premiere was connected to a dismissal issue, that is whether there was a legitimate expectation that the contract would be renewed. The court concluded that the matter fell within the exclusive jurisdiction of the CCMA and dismissed the case with costs.

On appeal the Labour Appeal Court (LAC) agreed with the LC. The LAC held that a claim that a fixed term contract be renewed on the grounds of a legitimate expectation is a species of dismissal as defined in s186 of the Labour Relations Act, No 66 of 1996 (LRA) and regulated by s191, which requires such dismissal to be arbitrated at the CCMA

or the relevant bargaining council, and not adjudicated by the court. The LAC also issued a cost order against the applicant.

The applicant took the matter further to the Constitutional Court (CC) and sought leave to appeal against the LAC decision and directly against the LC decision. The CC found that on merits, the applicant's leave to appeal must be refused for lack of prospects of success. It agreed with the LC and LAC that the applicant's complaint related to a dismissal and should have been referred to CCMA or relevant bargaining Council. The CC then embarked on dealing with the remaining issue of costs which were ordered against the applicant by both the LC and LAC.

The CC held that the rule of practice that costs follow the results does not apply in LC matters. The court referred to s169 of the LRA which governs the manner in which costs may be awarded in the LC. Section 169 provides *inter alia* that costs orders in the LC must be made according to requirements of the law and fairness taking into account various factors. Mhlantla J also referred to the principle set out in the 2007 case of *Wentworth Dorkin* in which it was held that in making decisions on cost orders the LC seeks to strike a fair balance between on the one hand, not unduly discouraging workers, employers, unions and employer's organisations from approaching the LC to have their disputes dealt with, and on the other allowing those parties to bring to the LC frivolous cases that should not be brought to court.

DO COSTS ALWAYS FOLLOW THE RESULTS AT THE LABOUR COURT?

CONTINUED

Losing a dispute at the LC does not automatically warrant a cost order to be issued against you.



In light of the principle set out in the Dorkin case, the CC concluded that there was nothing in this case that indicated why the LC and LAC awarded costs against the applicant. Mhlantla J held that it seems that both courts simply followed the rule that costs follow the results and this is not the correct approach to be taken by our judges in the LC. The judges in the LC and LAC in this matter failed to exercise their discretion judicially when mulcting the applicant with a cost order. In this instance, the LC and LAC should have followed the principle as set out in the Dorkin decision and thus committed an error for failing to do so. Mhlantla J concluded that considerations of law and fairness dictate that it will be in accordance with justice under the circumstances if the

CC sets aside the orders of costs of the LC and LAC and each party pays his/her own costs in those proceedings and the CC issued no orders as to costs.

This decision illustrates two important things, the first being the importance of referring a dispute to the right forum. Litigants cannot bypass the CCMA and relevant bargaining councils and go straight to the LC to launch their dismissal grievances. The second being a reminder that law and fairness are the guiding principles on how our Labour Courts should deal with cost orders. Losing a dispute at the LC does not automatically warrant a cost order to be issued against you.

Gavin Stansfield and Zola Mcaciso



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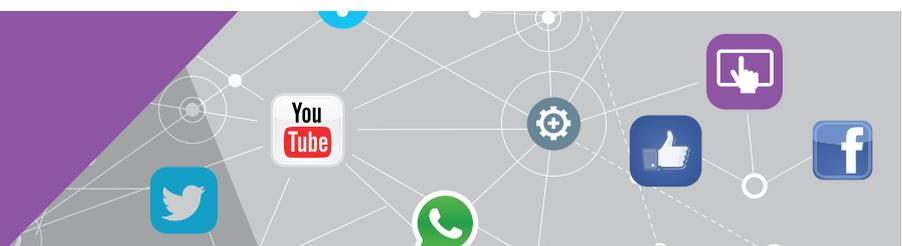
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Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 3 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving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