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EMPLOYMENT ALERT

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CDH
CLIFFE DEKKER HOFMEYR

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The Directive extends the period of long term visitors' visas to academics and business travellers who are passport holders of African countries to a maximum of 10 years and grants the visa holder the right to enter the country multiple times, provided that each visit lasts no longer than 90 days.

In an effort to regulate this process, the Minister has indicated that the concession will not apply to first-time applicants.

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The terms of this extended visa are similar to those that have been granted to nationals of non-African countries, except for the stipulation that these travellers may not stay for longer than 30 days. This will facilitate better business relations by easing the burden off of business travellers who were, historically, required to obtain visitor visas prior to travelling to South Africa. These changes aim to strengthen economic and diplomatic relations on the African continent while ultimately aiding the development of each state.

The extended long term visitor's visa for African nationals is undoubtedly a step in the right direction but needs to be strictly regulated to maintain the veracity of the process. As such, applicants are encouraged to ensure that all supporting documentation, as listed in the Standard Operating Process for Directive 4 of 2016, accompanies their application. These documents include proof of business interest or academic qualifications as the case may be, together with a letter of motivation and of course, a passport from an African country.

Michael Yates and Nihaal Maharaj

CDH
CLIFFE DEKKER HOFMEYR

REVISITING THE ENTITLEMENT TO EXERCISE ORGANISATIONAL RIGHTS IN THE WORKPLACE

In order for a union to exercise organisational rights in a workplace, the scope of the union's constitution must provide for the particular business of the employer.

The question of whether or not a union is entitled to exercise organisational rights in the workplace is one which often arises in practice. Of particular concern is whether or not a union is entitled to exercise organisational rights in a specific workplace, regardless of the scope of its constitution.

It is trite law that in order for a union to exercise organisational rights in a workplace, the scope of the union's constitution must provide for the particular business of the employer (see *Food and Allied Workers Unioin v Ferucci t/a Rosendal Poultry Farm (1992) 13 ILJ 1271 (IC) and SA Commercial Catering and Allied Workers Union on behalf of Members and King Edward VII School (2008) 29 ILJ 204 (CCMA)).*

When confronted with this well-established principle, unions often respond to employers by quoting dicta from case law which, so they aver, serves as clear authority for the opposite position.

When confronted with this well-established principle, unions often respond to employers by quoting dicta from case law which, so they aver, serves as clear authority for the opposite position. As a result, employment lawyers find themselves having to draw the employer's attention to the fact that the union failed to acknowledge one crucial aspect of their 'authority': context.

One such oft quoted judgment is that of *National Union of Metalworkers obo Mabote v Commission for Conciliation, Mediation and Arbitration and others 2013* 34 ILJ 3296 (LC). The following dictum from that case, when viewed in isolation, is enough to make the average employer think twice about their decision to deny a particular union recognition on the grounds of its constitutional scope:

> It could not have been the intention of the Legislature to unduly restrict the right to representation by a trade union to the extent that it is up to a third party – such as an employer's organisation – to deny a worker that right, based on the trade union's constitution.

However, this statement cannot be divorced from the facts and legal question in the *Mabote* judgment. Briefly, the case concerned the issue of whether or not an employee is entitled to be represented at arbitration by a trade union of which such employee is a member, if the employee's services to the employer do not fall within the scope of the union's constitution. In this case an employee referred an unfair dismissal dispute to conciliation and later to the CCMA. NUM, which had been exercising organisational rights in the workplace of the employer, represented the employee at the CCMA. The employer took issue with this, arguing that the scope of NUM's constitution did not provide for the business of the employer and that the employee therefore could not be represented by NUM.

The Labour Court held that s4(1)(b) of the Labour Relations Act, No 66 of 1995, which provides that "every employee has the right to join a trade union, subject to its constitution", serves to regulate "the relationship between the trade union and its members inter se." Therefore the court did indeed hold that an employer cannot prohibit an employee from joining a trade union of her choice (and being represented by such union at arbitration) because of the scope of that union's constitution.

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REVISITING THE ENTITLEMENT TO EXERCISE ORGANISATIONAL RIGHTS IN THE WORKPLACE

CONTINUED

Unions are not entitled to exercise organisational rights in the workplace where their constitutions do not cover the scope of the employer's business.

However, a distinction that must be drawn is that of the relationship between a union and its members *inter se* on the one hand and the relationship between the employer and its employees on the other. The latter relationship concerns, among other things, the exercise of organisational rights in the workplace. While any employee is certainly free to join a trade union of their choice, it does not automatically follow that the relationship between the union and the employer is affected by this. Nor does the *Mabote* case suggest that it is. The *Mabote* case is therefore a finding regarding the relationship between a union and its members and as such is authority for the fact that a union may represent its members at arbitration, regardless of whether such union is entitled to exercise organisational rights in the workplace.

Thus, the well-established principle that unions are not entitled to exercise organisational rights in the workplace where their constitutions do not cover the scope of the employer's business, remains firmly intact.

Hugo Pienaar and Roxanne Bain

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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

Mohsina Chenia
Director
T +27 (0)11 562 1299
E mohsina.chenia@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

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)11 562 1184
E michael.yeates@cdhlegal.com

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

Kirsten Caddy
Senior Associate
T +27 (0)11 562 1412
E kirsten.caddy@cdhlegal.com

Nicholas Preston
Senior Associate
T +27 (0)11 562 1788
E nicholas.preston@cdhlegal.com

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

Khanyisile Khanyile
Associate
T +27 (0)11 562 1586
E khanyisile.khanyile@cdhlegal.com

Katlego Letlonkane
Associate
T +27 (0)21 481 6319
E katlego.letlonkane@cdhlegal.com

Sipelelo Lityi
Associate
T +27 (0)11 562 1581
E sipelelo.lityi@cdhlegal.com

Thandeka Nhleko
Associate
T +27 (0)11 562 1280
E thandeka.nhleko@cdhlegal.com

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