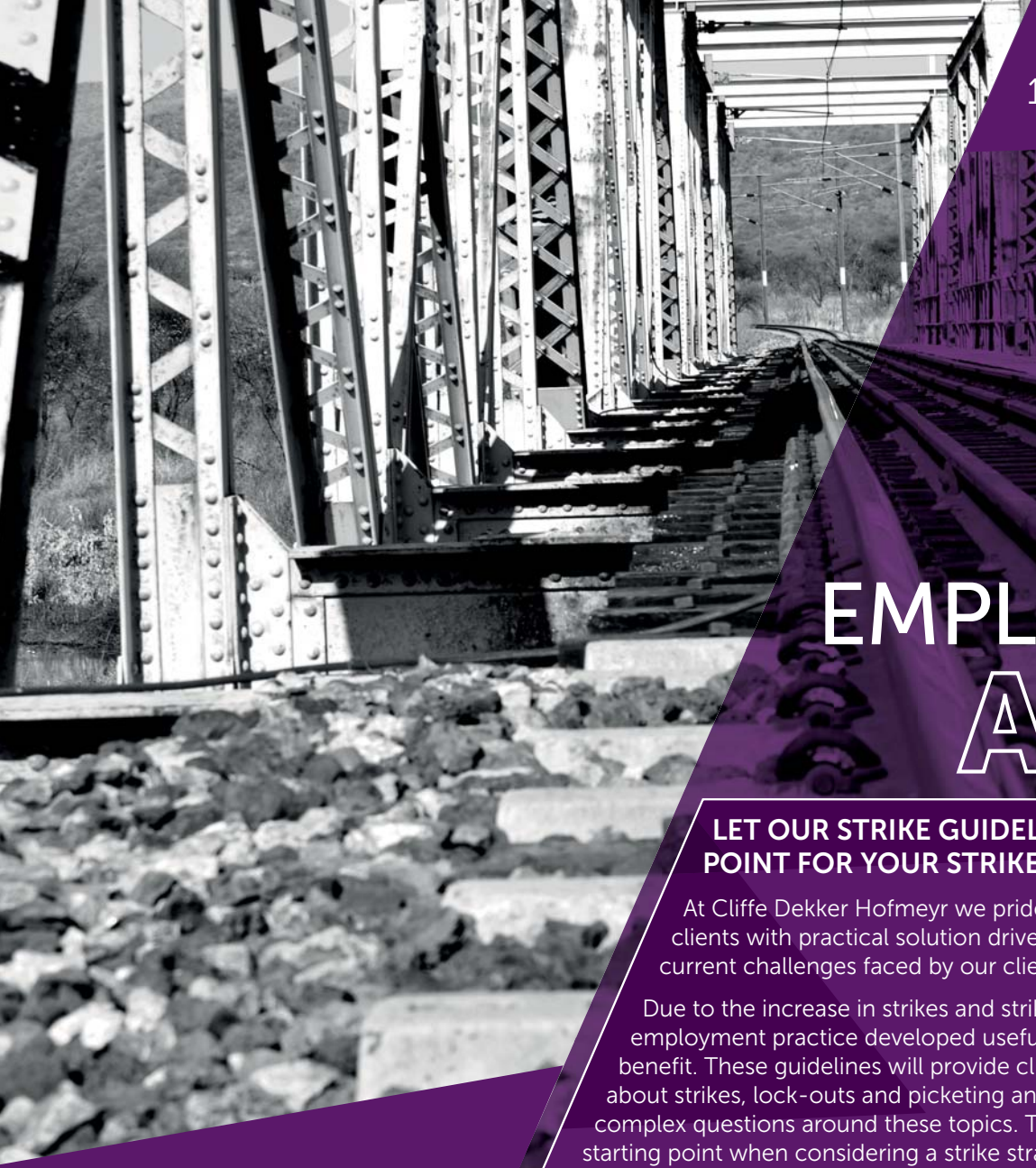

11 SEPTEMBER 2017

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**

TRANSFER OF BUSINESS: OUT WITH THE OLD AND IN WITH THE NEW, DOES NOT NECESSARILY MEAN THE BUSINESS HAS TRANSFERRED TO YOU

In *Imvula Quality Protection and Others v University of South Africa* (J435/17) [2017] ZALCJHB 310 (31 August 2017), the Labour Court had to determine whether the termination of the contracts with two service providers and the decision to employ a majority of their employees triggered s197 of the Labour Relations Act, No 66 of 1995.

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In terms of the contracts, in exchange for the two service providers providing their own uniforms and equipment, placing security officers at UNISA campuses in Gauteng and managing the security services UNISA would pay them a monthly fee.

UNISA argued that s197 did not apply and that there was no transfer of a business as a going concern despite its offers of employment to the staff.

In *Imvula Quality Protection and Others v University of South Africa* (J435/17) [2017] ZALCJHB 310 (31 August 2017), the Labour Court had to determine whether the termination of the contracts with two service providers and the decision to employ a majority of their employees triggered s197 of the Labour Relations Act, No 66 of 1995 (LRA).

In this case, UNISA contracted with Imvula Quality Protection (Imvula) and Red Alert TSS (Pty) Ltd (Red Alert) (collectively referred to as the 'two service providers') to provide it with security services. In terms of the contracts, in exchange for the two service providers providing their own uniforms and equipment, placing security officers at UNISA campuses in Gauteng and managing the security services UNISA would pay them a monthly fee.

UNISA, in accordance with the contracts, terminated the contracts with the two service providers. This occurred after it was faced with a demand to insource previously outsourced functions. Following the demand, UNISA agreed to partially insource the security function. UNISA offered employment to the majority, but not all, of the security staff employed by the two service providers on the contract.

UNISA contemplated a 'shared services' business model in terms of which the security services staff would be employed by UNISA but the security services would be provided by a new outsourced service provider using the UNISA staff. The new service provider would be required to provide its own equipment and infrastructure particularly torches, guard tracking, uniforms and vehicles to UNISA. It was to also provide managers and supervisors that it employed to manage the security service. UNISA would only manage the human resources.

The two service providers approached the Labour Court for an order declaring that all their employees working on the UNISA contracts be declared UNISA employees. They argued that s197 of the LRA was applicable to the termination of the contracts and UNISA's subsequent offers of employment to their staff. They argued that providing security guards is a service, therefore, a business and the insourcing of the service resulted in the service's continuation. UNISA argued that s197 did not apply and that there was no transfer of a business as a going concern despite its offers of employment to the staff.

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CONTINUED

The Labour Court held that although s197 is aimed at avoiding job losses, job losses do not necessarily trigger s197.

If s197 is triggered a number of consequences follow by operation of law. For instance, the "new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the date of transfer" and "all the rights and obligations between the old employer and an employee at the time of the transfer continue in force as if they had been rights and obligations between the new employer and the employee". If the two service providers succeeded with their argument that s197 applied, all of their employees on the UNISA contracts, and not only those selected by UNISA, would become UNISA employees.

The Labour Court recognised the dual purpose of s197 and that on the one hand it is aimed at protecting employees against job losses while on the other hand it facilitates the sale of business as a going concern. The Labour Court held that although s197 is aimed at avoiding job losses, job losses do not necessarily trigger s197.

It held that the section will be triggered when the following three requirements are simultaneously met :

(1) A transfer - a 'transfer' is defined in s197(1) to mean "the transfer of a business by one employer ('the old employer') to another employer ('the new employer') as a going concern.

(2) A transfer of a business - a 'business' includes a service, and importantly, the Labour Court held that it is the business supplying the service that is capable of being transferred not the service itself.

(3) The business is transferred as a going concern - whether there is a transfer as a going concern, the court held, is determined by a number of factors including whether the new employer takes over workers, whether assets (tangible and intangible) are transferred and whether the new employer carries on the same business.

Dealing with the issue of changing service providers, the Labour Court held that "the termination of a service contract or the appointment of a new service provider does not in itself trigger the application of s197".

It referred to two situations "within the realm of outsourcing and insourcing" identified by the Constitutional Court. In one situation s197 applies whereas in another it does not. The distinction between the situations arises due to the definition of the term 'business' in s197. As already indicated, the term business includes a service, however, the Labour Court held that although the definition of 'business' does include a service, it is the business supplying the service that is capable of being transferred, not the service itself.

In the first situation identified by the Constitutional Court, the right to provide the services is forfeited by the outgoing service provider but its business is not transferred. The court held that "in this instance, the right to provide the outsourced service may transfer, but no business is transferred as a going concern." In this situation, s197 is not applicable. In the second situation s197 applies, as in that situation when the service contract is terminated (either because the service is insourced or because there is a change in service providers) the business (and its infrastructure) supplying the service is transferred from the outgoing service provider back to the client or to the new service provider as a going concern.

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CONTINUED

Section 197 was not applicable in this case and the Court dismissed the application with costs.

The Labour Court held that the two service providers had failed to show that the termination of the contract fell within the second situation. It importantly held that the two service providers had not established that there was a transfer of a business, the second requirement already discussed above. It held that "[a]though it is not impossible for a transfer only of employees to constitute the transfer of a business for the purposes of s197, the requirement of the existence of a business must be met."

In this case, no assets and no infrastructure were transferred from the two service providers to UNISA. Other than the employees working on UNISA contracts, the two service providers retained all remaining components making up their own businesses and could offer security services to other clients.

The Court did not follow the Labour Appeal Court (LAC) decision in Rand Airport where the employer outsourced its gardening and security services and the LAC held the transaction to constitute the transfer of a service in terms of s197. The Labour Court distinguished the LAC decision on the basis that the Constitutional Court has developed the law to hold that it is the business rendering the service that must transfer for s197 to apply.

Section 197 was not applicable in this case and the Court dismissed the application with costs.

Faan Coetzee and Samantha Coetzer

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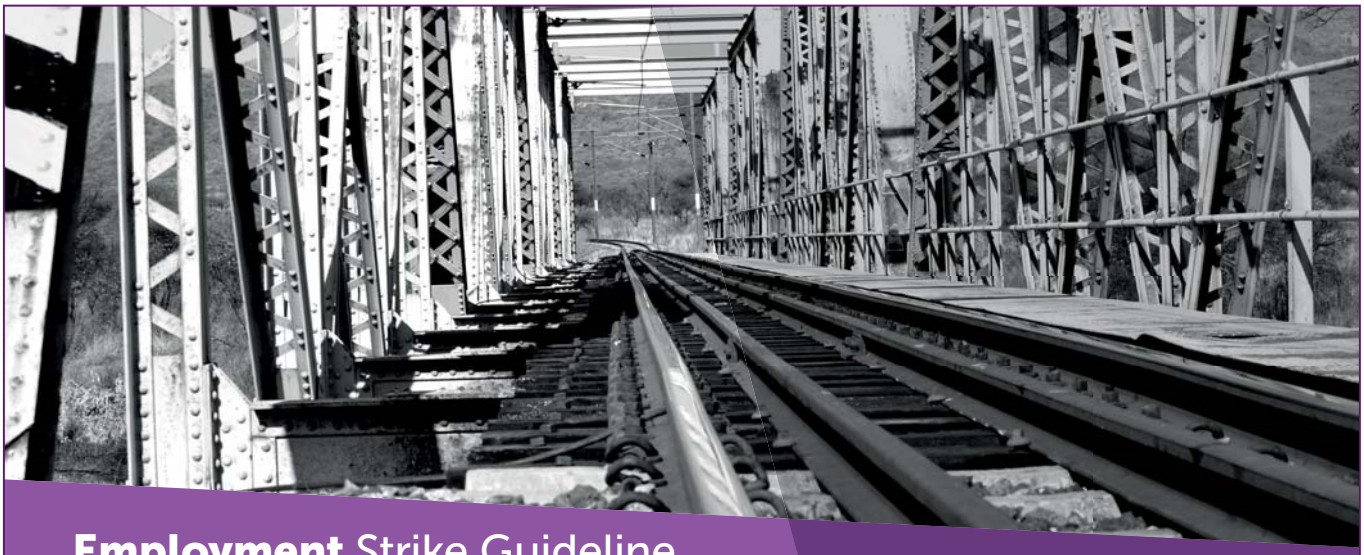

Employment Strike Guideline

Find out when a lock-out will be protected.

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CHAMBERS GLOBAL 2014 - 2017 ranks our Employment practice in Band 2: Employment.

Aadil Patel ranked by CHAMBERS GLOBAL 2015 - 2017 in Band 2: Employment.

Hugo Pienaar ranked by CHAMBERS GLOBAL 2014 - 2017 in Band 2: Employment.

Fiona Leppan ranked by CHAMBERS GLOBAL 2017 in Band 3: Employment.

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

Michael Yeates named winner in the **2015** and **2016 ILO Client Choice International Awards** in the category 'Employment and Benefits, South Africa'.

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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.

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