

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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COLLECTIVE DISCIPLINARY INQUIRIES – A NEW NORM?

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COLLECTIVE DISCIPLINARY INQUIRIES – A NEW NORM?

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Derivative misconduct arises where employees possess information that would enable an employer to identify wrongdoers and those employees fail to come forward. Such conduct violates the trust upon which the employment relationship is founded.

This concept was confirmed in the case of *Dunlop Mixing and Technical Services (Pty) Ltd and others v National Union of Metalworkers of South Africa (NUMSA) obo Nganezi and others* [2016] 10 BLLR 1024 (LC), where the Labour Court held that an employee bound implicitly by a duty of good faith towards the employer breaches that duty by remaining silent about knowledge possessed by the employee regarding the business interests of the employer being improperly undermined. The court further held, that on general principle, a breach of the duty of good faith can justify dismissal.

In recent times, derivative misconduct has commonly been applied in the context of strikes where there is a breach of picketing rules and an employer wishes to take action against the employees who fail to report breaches by their fellow employees of the picketing rules. The question that then arises is, how an employer proceeds with an inquiry involving a large number of employees. It is impractical to hold, for example, thirty individual inquiries. As a result, employers generally elect to hold collective inquiries.

The rationale for collective disciplinary enquiries is based on two principles. Firstly, that employees have acted collectively and associated themselves with an act of misconduct and therefore, they are charged collectively. It is sufficient that a particular employee merely witnessed the unlawful conduct. For example, should a group of employees intimidate a fellow employee, at his place of residence, for disassociating from the strike action, an employee who is

present during this unlawful act associates him/herself with the unlawful conduct. Secondly, if the employee witnesses the conduct but does not participate in the intimidation, and fails to disclose this information to the employer, he/she may in addition be charged in the collective inquiry, based on derivative misconduct.

These are the guidelines generally applied by employers when conducting a collective inquiry pursuant to a strike:

1. The provisions of the company's Disciplinary Code and Procedure are followed in order to ensure procedural fairness. Such Codes are generally only a guideline and seldom provide for collective misconduct.
2. Prior to the strike, the employer considers whether the employees' contracts of employment incorporate a condition of employment, that the employees have a duty to disclose the wrongdoing of fellow employees. Such provisions may also be found in disciplinary and other codes.
3. Prior to the strike or lock-out, the employer would ordinarily issue a general notice to alert employees to the rule regarding disclosure, as well as invite them to disclose any information, even on a continuous basis, however, with a cut-off date. The company's hotline may also be utilised for such purpose. The notice would provide that a failure to do so may result in employees being charged on the basis of derivative misconduct.

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An independent Chairperson is appointed to preside over the disciplinary proceedings so as to ensure impartiality and fairness. Often the independence of the Chairperson is later raised at arbitration.



4. Proper mechanisms are put in place to collect evidence and identify employees who engage in misconduct during strikes.
5. Witnesses are consulted with prior to charge sheets being drafted for each employee and employees are prosecuted where there is sufficient evidence to do so. Consistency in application of discipline is adhered to. Every charge in the charge sheet is supported by evidence which will allow for a finding on the basis of that charge.
6. Measures are taken to protect the identity of witnesses who have reason to fear for their lives as a result of giving evidence. This includes providing the means for witnesses to give evidence in camera, and where necessary to employ the use of a voice distorter. A proper foundation is laid before the Chairperson in order to call witnesses in camera. A formal application is made and the requirements as set out in the case of *National Union of Mineworkers and Others v Deelkraal Gold Mining Co Ltd* (2) (1994) 15 ILJ 1327 (IC) are complied with. These requirements were discussed in our Employment Alert dated 29 June 2015, entitled 'Inspecting In-Camera Evidence – A Process for Dealing with Fearful Witnesses'.
7. An independent Chairperson is appointed to preside over the disciplinary proceedings so as to ensure impartiality and fairness. Often the independence of the Chairperson is later raised at arbitration.
8. Employers ensure that they are sensitive when communicating with witnesses in the presence of other employees so as not to disclose their identity.
9. Item 4(2) of Schedule 8 of the Labour Relations Act is complied with in respect of Shop Stewards who are being charged.
10. The disciplinary hearing is interpreted into the accused's mother tongue. This right is not abused to delay the proceedings and to frustrate the right of the employer to prosecute misconduct at the workplace. When an employee testifies, the employer affords the employee the opportunity to testify in their mother-tongue and appoint an interpreter for the employee. However, there is no interpretation of all the evidence led, into for instance, five different languages of the employees. The language policy as well as the education levels of the employees are considered.
11. The employer does not allow for an appeal as this would require yet another chairperson, escalating the costs of the inquiry.
12. The proceedings are recorded as the parties sometimes wish to rely on the record at future proceedings.

Hugo Pienaar and Nomlayo Mabhena



Employment Strike Guideline

Find out what steps an employer can take when a strike is unprotected.

 [Click here to find out more](#)

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

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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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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



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



Jose Jorge
Director
T +27 (0)21 481 6319
E jose.jorge@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



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



Thabang Rapuleng
Director
T +27 (0)11 562 1759
E thabang.rapuleng@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



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



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



Steven Adams
Associate
T +27 (0)21 481 6341
E steven.adams@cdhlegal.com



Samantha Bonato
Associate
T +27 (0)11 562 1134
E samantha.bonato@cdhlegal.com



Sean Jamieson
Associate
T +27 (0)11 562 1296
E sean.jamieson@cdhlegal.com



Zola Mcaciso
Associate
T +27 (0)21 481 6316
E zola.mcaciso@cdhlegal.com



Anelisa Mkeme
Associate
T +27 (0)11 562 1039
E anelisa.mkeme@cdhlegal.com



Prinoleen Naidoo
Associate
T +27 (0)11 562 1829
E prinoleen.naidoo@cdhlegal.com



Bheki Nhlapho
Associate
T +27 (0)11 562 1568
E bheki.nhlapho@cdhlegal.com

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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.

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

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