

# 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

### I'LL TAKE THAT BACK, THANK YOU VERY MUCH

In the matter of *Sekhute and Others v Ekurhuleni Housing Company SOC* (J1862/17) [2017] ZALCJHB 318, the employees challenged the lawfulness of the employer's deduction from their remuneration of overpayments made to them in error.

# I'LL TAKE THAT BACK, THANK YOU VERY MUCH

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*The Labour Court accepted that the employer had made a genuine overpayment in error.*



**In the matter of *Sekhute and Others v Ekurhuleni Housing Company SOC (J1862/17) [2017] ZALCJHB 318*, the employees challenged the lawfulness of the employer's deduction from their remuneration of overpayments made to them in error.**

The employees' posts were regraded and they received commensurate increases in their remuneration. However, when paying the increases, the employer erroneously also added the increased contributions to the pension fund and medical aid scheme to the employees' remuneration and paid this over to the employees. These amounts should have been deducted from their remuneration and paid over to the pension fund and medical aid on the employees' behalf. This resulted in some of the employees enjoying an increase of almost 40% when they were only entitled to an increase of 18%. The employer informed the employees of the overpayments and requested that the employees complete a salary deduction form wherein they agreed to the deduction of the overpayments from their future remuneration over a period of time. The employees refused to agree to the deductions. When the employer proceeded to make the deductions the employees launched an urgent application to prevent the employer from making future deductions and reversing deductions already made. The

employees alleged that the deductions were unlawful as they were contrary to clause 13.2 of the employer's HR policy which states:

"No deduction, unless in the form of a legal instruction such as a collective agreement, court order or arbitration award, will be made from an employee's salary without the authority of the employee..."

The Labour Court accepted that the employer had made a genuine overpayment in error. As a result, the employer could cease making the overpayment in future. The question which the court then had to determine was whether the employer was entitled to recover the overpayments by way of deduction from the employees' remuneration, in the absence of employees' consent to the deductions. The employer relied on s34(5) of the Basic Conditions of Employment Act, No 75 of 1997 (BCEA) as the basis for the deduction and the lawfulness thereof.



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CONTINUED

*The Labour Court found that the repayment of overpaid remuneration is a unique category of money that is lawfully recoverable by an employer from an employee.*



The Labour Court considered s34 of the BCEA and held that s34(1) identifies two classes of deductions that can be made by an employer from an employee's remuneration. The first is a deduction which may be made in respect of an acknowledged debt and which would require the employee's consent in writing. The second is a deduction which does not require the employee's written consent. The deduction may, for example, be authorised by law or a court order. The court then considered s34(5) of the BCEA which states:

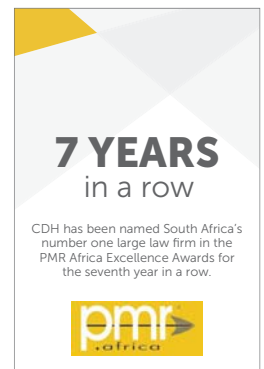
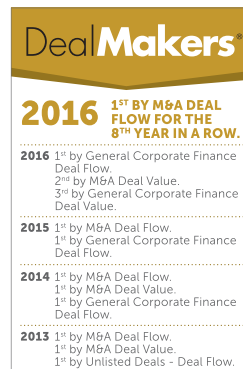
- (5) An employer may not require or permit an employee to:
  - (a) repay any remuneration except for overpayments resulting from an error in calculating the employee's remuneration..."

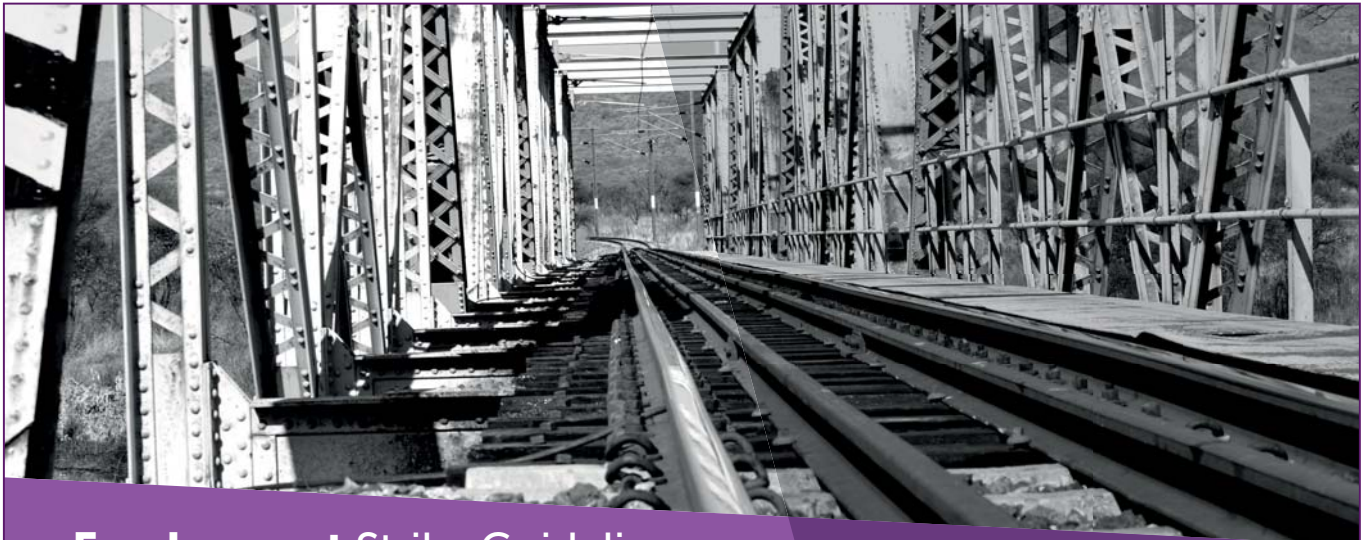
The Labour Court found that the repayment of overpaid remuneration is a unique category of money that is lawfully

recoverable by an employer from an employee. It held that s34(5) was intended to permit a deduction for amounts due to an employer and the employees' consent is not required. The legislature's intention with this section was to specifically authorise deductions for overpayment of remuneration. Insofar as the employer's policy was concerned and the employees' allegation that the policy prohibited the deduction given that it was not made in terms of a "legal instruction", the court found that s34(5) is a provision of a law. In the circumstances, the policy did not prohibit the deduction.

This judgment is of significant assistance to employers that have made overpayments to employees in error. In terms of s34(5) of the BCEA, the employer is permitted to deduct the overpayment from the employees' remuneration, without the employees' consent.

*Gillian Lumb, Anli Bezuidenhout and Brynn Travill*





## Employment Strike Guideline

Find out when a lock-out will be protected.

 [Click here to find out more](#)

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'.



## 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

### 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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### 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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