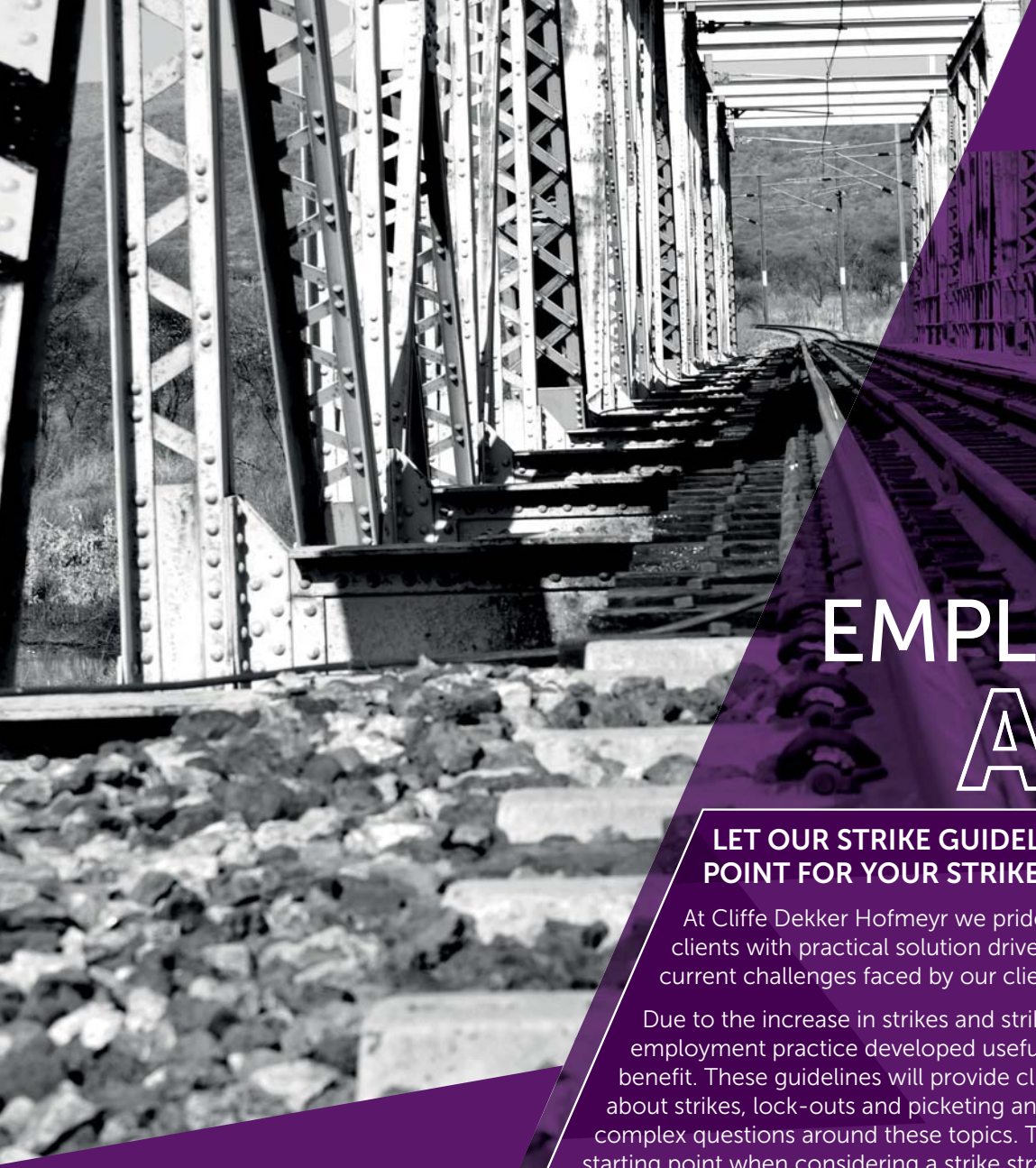

19 JUNE 2017

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**

WHAT WAS THE TRUE REASON FOR THE DISMISSAL?

In the recent case of *Willem Hendrik du Plessis v AMIC Trading (Pty) Ltd t/a Toys' R Us* (JS230/15) [2017] ZALCJHB 196 (23 May 2017), the employee referred a matter to the Labour Court seeking an order declaring his dismissal by AMIC Trading (Pty) Ltd (the employer) automatically unfair in terms of s187(1)(g) of the Labour Relations Act, No 66 of 1995 (LRA).

INTERESTING JUDGMENT ON INTEREST

If you were ever unclear about what effect substitution of an arbitration award has on interest payable on compensation awarded in terms of an arbitration award, the Labour Court in the recent Judgment of *Khwaile Rufus Malatji V Minister of Home Affairs* (JR 2326-06) [2017] sheds some light.

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WHAT WAS THE TRUE REASON FOR THE DISMISSAL?

The employee was employed previously by Redgwoods (Pty) Ltd, however, in 2012 the employer purchased the business of Redgwoods (Pty) Ltd and the employee's employment was subsequently transferred to the employer.

Once the employee has successfully discharged the abovementioned evidentiary burden, the onus shifts to the employer to prove that the reason for the dismissal was a reason that is not automatically unfair.

In the recent case of *Willem Hendrik du Plessis v AMIC Trading (Pty) Ltd t/a Toys' R Us* (JS230/15) [2017] ZALCJHB 196 (23 May 2017), the employee referred a matter to the Labour Court seeking an order declaring his dismissal by AMIC Trading (Pty) Ltd (the employer) automatically unfair in terms of s187(1)(g) of the Labour Relations Act, No 66 of 1995 (LRA).

The employee was employed previously by Redgwoods (Pty) Ltd, however, in 2012 the employer purchased the business of Redgwoods (Pty) Ltd and the employee's employment was subsequently transferred to the employer. The employer's head office was originally based in Modderfontein.

In 2013, a fellow employee informed the employee about an email she discovered, where the Human Resources Department of the employer and the employee's directors discussed a strategy to dismiss the employee. The strategy was that the employer would relocate its offices to Durban and the employee would be requested to relocate, and when he refused he would be retrenched.

After the employee became aware of the abovementioned email, he was informed by the employer that its head office was going to relocate to Durban. The employee was requested to move to Durban to work at the new head offices of the employer. The employee, being aware of the email, initially agreed but later changed his mind and then refused. The employer then commenced retrenchment procedures.

An independent company facilitated the retrenchment consultations, during which three offers were made to the employee. One of these offers was that the employee did not have to relocate, but would then be employed as an area manager in Gauteng at a reduced salary. All the offers were rejected by the employee and he was consequently dismissed. The employee referred the matter to the Labour Court claiming that his dismissal was automatically unfair because the dismissal was due to the transfer of a business as a going concern.

The Labour Court considered the earlier decision of *Van der Velde v Business & Design Software (Pty) Ltd & Another* (2006) 27 ILJ 1738 (LC) (the Van der Velde case), which can be seen as the *locus classicus* when considering whether a dismissal is automatically unfair, where it took place due to a transfer of business. In that decision the Labour Court highlighted the different factors that need to be considered during this enquiry, namely:

- The employee must prove that he/she was dismissed and that "the underlying transaction is one that falls within the ambit of section 197 of the LRA."
- The employee must further provide compelling evidence that indicates that the dismissal was causally connected to the transfer. When taking this factor into consideration, the Court will conduct an objective enquiry.
- Once the employee has successfully discharged the abovementioned evidentiary burden, the onus shifts to the employer to prove that the reason for the dismissal was a reason that is not automatically unfair.

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WHAT WAS THE TRUE REASON FOR THE DISMISSAL?

CONTINUED

The Labour Court held that the employer's conduct, after the email, demonstrates that the strategy in the email was not carried through.

- If the employer argues that the dismissal was based on a fair reason, for example operational requirements, the Court must apply a two stage test to establish "whether the true reason for the dismissal was the transfer itself, or a reason related to the employer's operational requirements." This test includes:
    - Factual causation test (the "but for" test) – would the dismissal have taken place but for the transfer?
    - Legal causation test – this test must be applied if the factual causation test has been satisfied. With this test the Court will objectively determine "whether the transfer is the main, dominant, proximate or most likely cause of the dismissal."
- It is insufficient for an employer to claim that the reason for the dismissal was not the transfer itself, if the dismissal was effected in anticipation of a transfer and in response to the requirements of a potential purchaser.
- The court will take an objective stance in determining whether the dismissal was used by the employer as a means to avoid its obligations under s197. If the employer relied on the dismissal to avoid its s197 obligations, then the dismissal would have been related to the transfer. If not, the dismissal relates to the employer's operational requirements or other fair reason.

In the present matter, the Labour Court held that the email that the employee became aware of (where his possible dismissal was discussed) was discovered in September 2013, after this the employer searched for other premises in Johannesburg and even extended its lease in Modderfontein for a further three years. It was only after the terms of the lease became uneconomical that the decision was made to relocate the business to Durban. Therefore, the Labour Court held that the employer's conduct, after the email, demonstrates that the strategy in the email was not carried through. The Labour Court reached the conclusion that there was no evidence that the employee's dismissal was related to the transfer of the business from Redgwoods (Pty) Ltd to the employer. The Labour Court granted the employer's application for absolution from the instance and as a result, the employee was unsuccessful.

This case reaffirms the correct approach to determine whether a dismissal was automatically unfair, if it took place due to a transfer of business in contravention of s187(1)(g) of the LRA. All employers anticipating to be involved in a transfer of business should consider the factors listed in the *Van der Velde* case, to ensure that their actions are in line with the provisions of the LRA.

Fiona Leppan and Stephan Venter

CLICK HERE to view our NEW Employment Strike Guideline

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INTERESTING JUDGMENT ON INTEREST

The employee, in this case, was dismissed in 2005. Following the dismissal, the employee referred an unfair dismissal dispute to the Bargaining Council.

If you were ever unclear about what effect substitution of an arbitration award has on interest payable on compensation awarded in terms of an arbitration award, the Labour Court in the recent Judgment of *Khwaile Rufus Malatji V Minister of Home Affairs* (JR 2326-06) [2017] sheds some light.

The employer's case was that the interest payable on the compensation is determined by interpreting "substitution as a whole" and other relevant factors.

The employee, in this case, was dismissed in 2005. Following the dismissal, the employee referred an unfair dismissal dispute to the Bargaining Council. The matter was arbitrated and the arbitrator issued an arbitration award followed by a variation award. In respect of the arbitration award, dated 14 August 2006, the arbitrator ordered that the employee be reinstated and paid back pay. On 30 August 2006, the arbitrator varied the arbitration award by stating that, "if the compensation was not paid by 30 September 2006 then it should accrue interest on a normal basis".

Shortly after, the employer challenged the arbitration award and launched a review application in the Labour Court. On 2 April 2013, Snyman AJ made an order setting aside the reinstatement order and substituted the arbitration award *in toto* (as a whole) by granting the employee compensation equivalent to nine months' salary. The employee was paid the compensation but the issue then arose as to whether interest was payable on that compensation.

Following the judgment of Snyman AJ and the payment of the compensation, the employee reverted the matter back to the Labour Court before Harper AJ to determine whether interest was payable from the date of the arbitration award or as from the date of the Labour Court judgment which dealt with the review application.

The employer's case was that the interest payable on the compensation is determined by interpreting "substitution as a whole" and other relevant factors. On the other hand, the employee's case was that interest payable is fortified by s143(2) of Labour Relations Act, No 66 of 1995 (LRA), which essentially provides that "if an arbitration award orders a party to pay a sum of money, the amount earns interest from the date of the award... unless the award provides otherwise".

The court held that s143(2) of the LRA is straightforward however it fails to account for circumstances where an arbitration award is later substituted by an order of the Labour Court. It further held that while s143(2) of LRA bears no reference to the Labour Court, there is a direct link between s143(2) and review proceedings. This is because the court "is being asked to review the arbitration award and essentially acts as the arbitrator to the extent determined by it in the Judgement. The Labour Court is therefore entitled to review the issue of interest and decide whether to grant interest from the date of the arbitration award or from a later date or not grant interest at all". The Courts' position in this regard is premised on the all-encompassing provision of s145(4)(a) of the LRA, which empowers it to determine the dispute "in the manner it considers appropriate".

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INTERESTING JUDGMENT ON INTEREST

CONTINUED

Interest payable on compensation in terms of s143(2) of the LRA falls away and the order of the Labour Court would substitute the arbitration award on the issue of interest.

The court ultimately held that in applying the meaning of "substitution", which is defined as putting something "in the place of another", the interest payable on compensation in terms of s143(2) of the LRA falls away and the order of the Labour Court would substitute the arbitration award on the issue of interest. In the review application, Snyman AJ elected not to grant interest on the compensation payable, which this Court upheld. In upholding this decision, the Court stated that Snyman AJ was entitled to make such a finding considering the interpretation of substitution, s143(2) read with s145(4)(a) of the LRA and the Labour Courts inherent jurisdiction to deal with interest payable on compensation. The court found that the substitution of the arbitration award was intended to rectify the arbitration award issued by the Arbitrator and not to penalise the employee in permitting that interest be paid from the date of review judgment.

It held that where a Judge issues an order which is punitive in respect of interest payable, he or she must substantiate such an order and reasons thereof must be fully cognisant with the provisions of s143(2) of the LRA. Therefore, where a party is aggrieved by the Labour Court's pronouncement on interest payable, such party must lodge an appeal with a higher court which has the necessary jurisdiction to overrule such an order.

Taryn Jade Moonsamy and Thabang Rapuleng

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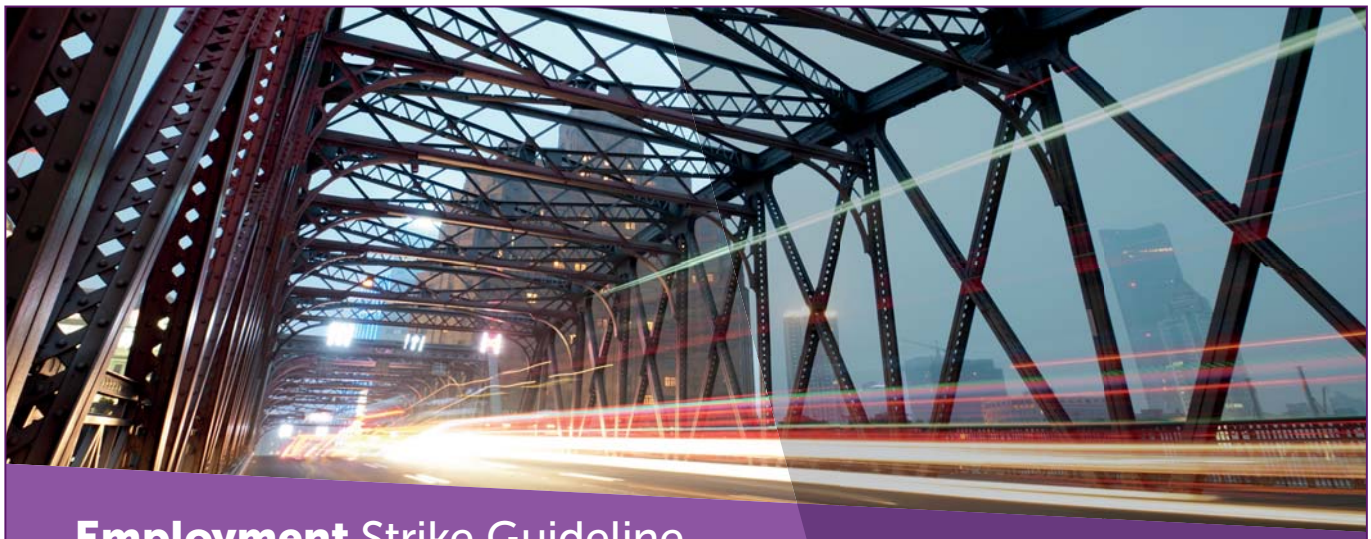

Employment Strike Guideline

Find out the steps an employer can take when a strike becomes violent.

Take a look at the remedies available to an employer 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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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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