

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

AN EMPLOYEE WHO'S NOT "FIT AND PROPER" IS NOT A PROPER FIT

In *First National Bank, A Division of First Rand Bank Ltd V CCMA and Others*, the employee was employed as a FAIS representative and was required to satisfy the requirement to be "fit and proper" in terms of the FAIS Act. To this end, the employee had to complete the regulatory examination level 1 (RE1) within the stipulated timeframe. The employee failed to successfully complete the RE1 and was subsequently dismissed on grounds of incapacity.

AN EMPLOYEE WHO'S NOT "FIT AND PROPER" IS NOT A PROPER FIT

The Labour Court held that the employee's dismissal for continued failure to comply with the requirements for continued employment may amount to incapacity.

In order to ensure that dismissal is fair, the employer must conduct an incapacity hearing and do all that is necessary to prevent the dismissal.



In *First National Bank, A Division of First Rand Bank Ltd V CCMA and Others*, the employee was employed as a FAIS representative and was required to satisfy the requirement to be "fit and proper" in terms of the FAIS Act. To this end, the employee had to complete the regulatory examination level 1 (RE1) within the stipulated timeframe. The employee failed to successfully complete the RE1 and was subsequently dismissed on grounds of incapacity.

The Labour Court held that the employee's dismissal for continued failure to comply with the requirements for continued employment may amount to incapacity.

Subsequent to the *Discovery Health Limited v CCMA & Others* case, there had been confusion as to how employers should deal with an employee whose continued employment is prohibited by the FAIS Act or any other statutory provision.

Employers, employees and CCMA commissioners are frequently misguided to believe that where there is insufficient evidence to substantiate charges of misconduct, an employee must be retrenched as it is a "no fault dismissal".


In the *First National Bank* case, the Commissioner found that an employee's failure to attain a standard imposed by law in respect of his continued employment ought to have been dealt with as a dismissal for operational reasons and not as one for incapacity.

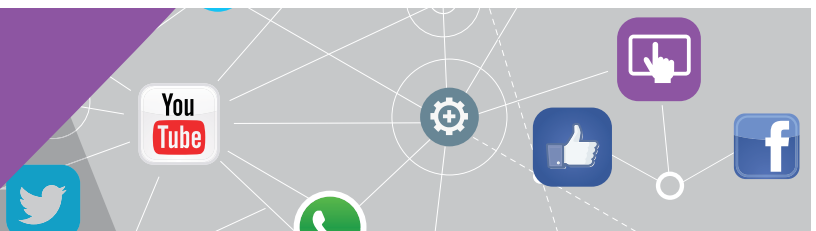
The Labour Court set aside the Commissioner's award and referred, with approval, to the *Armaments Corporation of South Africa v CCMA & Others*, which held that dismissal conceives of incapacity as ill health or injury but it can take other forms, such as imprisonment and military call-ups, which incapacitate the employee from performing his obligations under the contract.

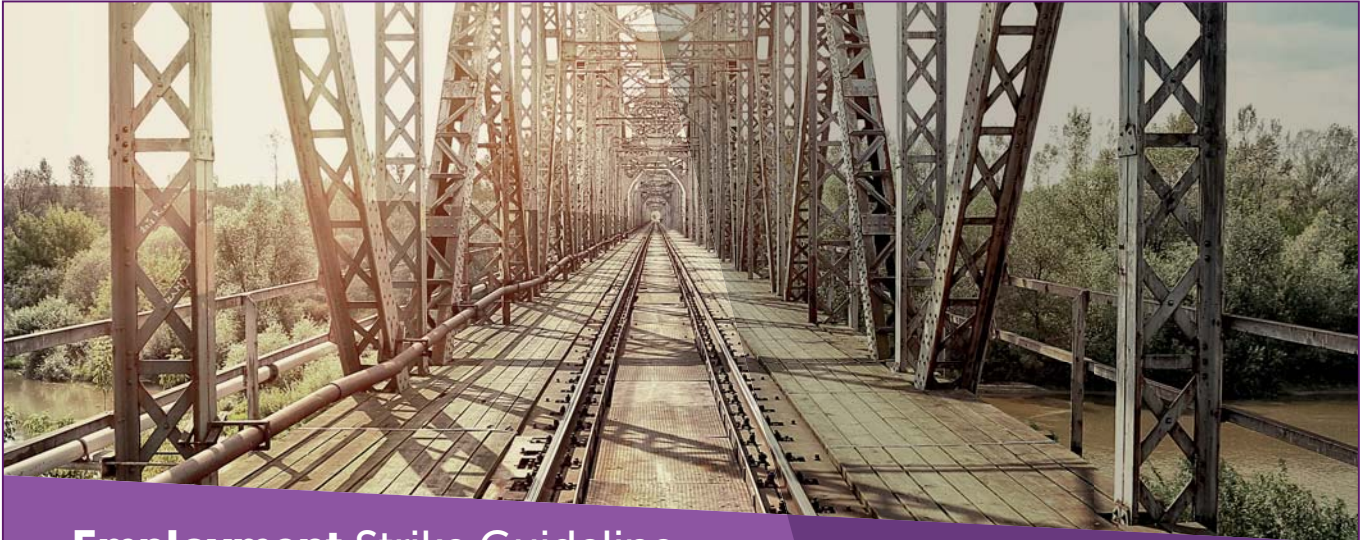
Even if it is a "no fault dismissal" the difference between operational requirements and incapacity should be drawn - where the employer determines or acknowledges the needs to restructure its business and where the employer cannot employ an employee because of a statutory provision prohibiting such employment.

In order to ensure that dismissal is fair, the employer must conduct an incapacity hearing and do all that is necessary to prevent the dismissal.

***Thabang Rapuleng and
Gopolang Kgaile***

 **CLICK HERE
FOR THE LATEST SOCIAL
MEDIA AND THE WORKPLACE
GUIDELINE**

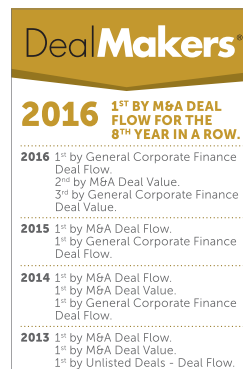




Employment Strike Guideline

Find out what steps an employer can take when striking employees ignore court orders.

 [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.

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

©2017 1786/JULY

