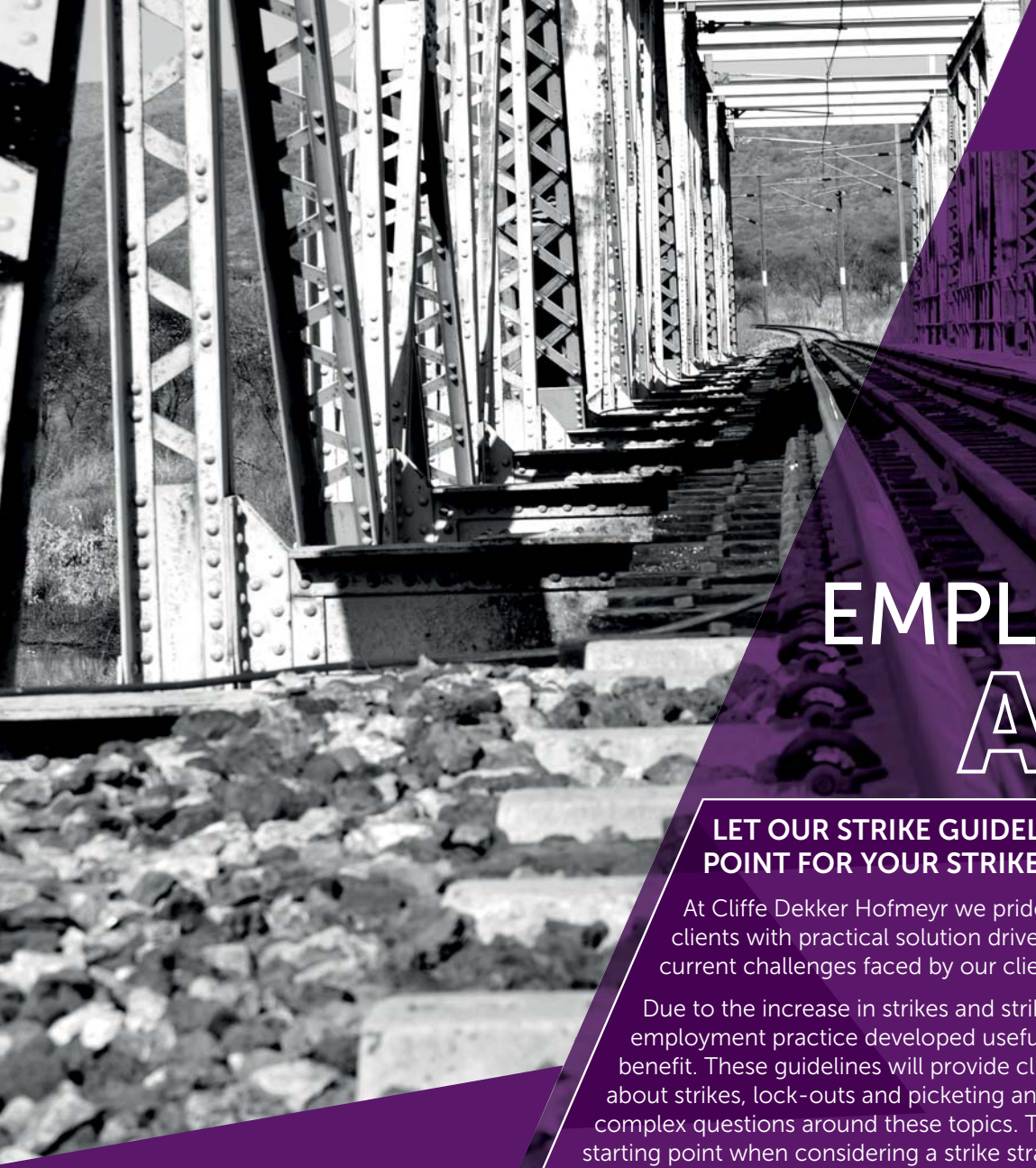

4 SEPTEMBER 2017

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

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CLIFFE DEKKER HOFMEYR

INTRA-TRADE UNION CONFLICTS: CAN EMPLOYERS ASSIST IN RESOLVING INTRA-UNION DISPUTES?

This election, however, did not comply with the requirements for a valid election, as no provincial executive committee meetings were called as required by SAMWU's Constitution.

As a general rule, the Labour Relations Act, No 66 of 1995 (LRA), cannot be used by employers as a tool to quell strife internally within trade unions. There are, however, circumstances where an employer may, as an external party, have an interest in these internal conflicts, especially where this hampers bargaining between the employer and employees or if this results in its employees being effectively unrepresented.

The Labour Court in City of Johannesburg v SA Municipal Workers Union & Others (2017) 38 ILJ 1342 (LAC) dealt with a situation where a trade union, the South African Municipal Workers Union (SAMWU), had elected provincial office-bearers for the Kwa-Zulu Natal province. This election, however, did not comply with the requirements for a valid election, as no provincial executive committee meetings were called as required by SAMWU's Constitution. The national office-bearers continued to "disband" the newly appointed provincial members. Following the "disbandment", another meeting was called on a provincial level to appoint new union leadership for the province.

The "disbanded" members did not recognise their removal claiming they were not properly disbanded. These members continued to perform functions as duly elected provincial office bearers. SAMWU continued to suspend these members and some were even expelled.

Two factions of leadership began to form with both factions denying the authority and validity of the other faction. Both factions claimed to be elected in terms of SAMWU's Constitution and both continued to elect new national office bearers to represent each faction. This divide resulted in the City of Johannesburg, as an employer of employees represented by SAMWU, seeking a declaratory order to determine which faction is duly authorised to deal with the employer on a day to day basis.

This divide resulted in the City of Johannesburg, as an employer of employees represented by SAMWU, seeking a declaratory order to determine which faction is duly authorised to deal with the employer on a day to day basis.

The court had to consider whether the employer had *locus standi* to bring such a matter before the court. The court referred to the case of *SA Airways SOC Ltd & Another v National Transport Movement & Others (2016) 37 ILJ 2128 (LC)*, which proclaimed that ordinarily an applicant in such instances would not have *locus standi* to bring such an application to interfere with the internal affairs of a trade union.

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CLIFFE DEKKER HOFMEYR

INTRA-TRADE UNION CONFLICTS: CAN EMPLOYERS ASSIST IN RESOLVING INTRA-UNION DISPUTES?

CONTINUED

It is the trade union itself who should initiate legal proceedings to resolve any internal disputes.

Likewise, in this case the court found that even an applicant with the best intentions could not result in the applicant acquiring *locus standi*. The employer was also warned that in such instances it should not prefer one faction to the other and should not confront the court for an order declaring that the selected faction is duly authorised to act. The court ultimately pronounced that the applicant will not have *locus standi* in this instance and would not have been able to decide the matter, but for the parties agreeing to it. The parties managed to reach an agreement that both factions would present evidence before the court to justify their authority to act on behalf of SAMWU. This agreement allowed for the matter to proceed to court.

In analysing the implications of failing to comply with the trade union's Constitution, the court referred to *SA Transport & Allied Workers Union v Zondo (2015) 36 ILJ 2348 (LC)*, which averred that the union's Constitution is a contract entered into by mutual agreement to which all members subscribe and is not subservient to any resolutions adopted by bodies of the trade union. Any adopted resolution which is in conflict with the provisions of the Constitution are *ultra vires* and of no force and effect. It held that any purported meeting or resolution passed by the disbanded members will be of no force and effect as the disbanded members were themselves not appointed in terms of the Constitution, thus all subsequent actions and resolutions passed by them would be null and void and of no effect. Consequently, the court made a declaratory order declaring the faction of the newly elected union members to be the lawful and duly authorised members.

What is clear from this case is that even when an employer is impacted negatively, in having to deal with different factions of the same trade union, in its bargaining relationship, it will have no legal recourse through the mechanisms of the LRA to stabilise the relationship and ensure its employees receive effective representation. It is the trade union itself who should initiate legal proceedings to resolve any internal disputes.

Employers, despite having an interest in the effective running of the trade union, should tread carefully not to enter litigation where it, as a third party, does not have *locus standi*.

Mohsina Chenia and Reece May

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PREGNANCY WAS NOT THE REASON FOR DIFFERENT TREATMENT

In the case of Impala Platinum Ltd v Jonase & others (JR 698/15), two employees who had worked underground at an Impala Platinum mine referred a dispute to the CCMA alleging that they had been discriminated against because they were pregnant.

Pregnant employees are protected in the workplace. For instance, s6 of the Employment Equity Act, No 55 of 1998 specifically provides that "[n]o person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including... pregnancy".

When the two pregnant employees were moved to the surface and when no suitable alternative employment could be found for them by the employer, they were told to take their four months' paid maternity leave.

In the case of *Impala Platinum Ltd v Jonase & others* (JR 698/15), two employees who had worked underground at an Impala Platinum mine referred a dispute to the CCMA alleging that they had been discriminated against because they were pregnant. They indicated that they wanted "to be treated fair like other pregnant employees."

Their employer had a policy that where reasonably practicable, it would place pregnant women who worked underground on the surface in suitable alternative employment to prevent risk to their health and safety and the health and safety of their unborn children.

In terms of the policy, a number of pregnant employees working underground were moved to the surface. However, only certain of those pregnant employees that were moved to the surface had the necessary skills to take up alternative employment in administrative posts. When the two pregnant employees were moved to the surface and when no suitable alternative employment could be found for them by the employer, they were told to take their four months' paid maternity leave.

The employees' dispute was referred to arbitration. The commissioner found that the employees had been discriminated against and found that "the employer's failure to find alternatives was unfair to the employees and that constitutes discrimination as the sole reason for the failure is the employees' pregnancy..."

The commissioner found that the employees had been treated differently to the other pregnant employees who took up alternative employment on the surface and that the employer was required to find alternative employment for the employees. The commissioner ordered the employer to compensate the employees for the unfair discrimination, to pay loss of salary and, despite no complaint by the employees about the fairness of the employer's policy, the commissioner ordered the employer to amend its policy to accommodate pregnant women.

The employer took the commissioner's award on appeal to the Labour Court where the appeal was successful and the award set aside.

The Labour Court considered the employees' complaint. The complaint did not relate to the fairness of the employer's policy. The employees claimed that they were treated differently from other pregnant employees. In essence, they compared themselves to other pregnant employees.

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PREGNANCY WAS NOT THE REASON FOR DIFFERENT TREATMENT

CONTINUED

In the absence of suitable alternative positions at the employer, the court found there was no obligation on the employer to create positions for the two employees and it found that the employer had acted lawfully.

The Court held that that their complaint of unfair discrimination "was negated by the comparator being other pregnant women". Importantly, it held that the employees "were not treated differently because they were pregnant; they were treated differently from some other pregnant employees who were given alternative employment because they did not have the requisite skills." It found that the employees had failed to prove discrimination on the ground of pregnancy.

In the absence of suitable alternative positions at the employer, the court found there was no obligation on the employer to create positions for the two employees and it found that the employer had acted lawfully.

As the employees had not complained about the fairness of the employer's policy, the Labour Court held that it was not within the commissioner's powers to order the employer to amend its policy.

Aadil Patel and Samantha Coetzer

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IS THE FAILURE TO FILE WRITTEN SUBMISSIONS IN AN APPEAL SIMILAR TO THE FAILURE TO APPEAR IN AN OPEN COURT?

From this, the question arises whether the failure to file written submissions in an appeal is similar to not appearing in an open court thereby constituting a ground for the appeal to be dismissed.

The development of our labour jurisprudence has introduced various ways for the expeditious resolution of labour disputes. The Practice Manual of the Labour Court of South Africa is one such example which empowers judges to determine the procedure to conduct court proceedings and this includes the power to decide an application for leave to appeal in chambers and not in an open court. From this, the question arises whether the failure to file written submissions in an appeal is similar to not appearing in an open court thereby constituting a ground for the appeal to be dismissed. This question was recently dealt with by the Labour Court in *Ndebele v South African Police Service and Another*.

Clause 15.2 of the Practice Manual states that an application for leave to appeal will be decided by the judge in chambers on the basis of the written submissions.

In this case, the employer brought a review application to review and set aside the outcome of the disciplinary hearing. The review application was successful and the disciplinary hearing outcome was substituted with an order that the employee was guilty of the charges. Unhappy with the order, the employee filed an application for leave to appeal. The judge's associate notified both parties of the provisions of clause 15.2 of the Practice Manual which requires the parties to file written submissions. Despite this, none of the parties filed their written submissions. Clause 15.2 of the Practice Manual states that an application for leave to appeal will be decided by the judge in chambers on the basis of the written submissions.

In dealing with the parties' failure to file their written submissions, the judge discussed the *Ralo v Transnet Port Terminals and Others* case where the Labour Court held that although the Practice Manual is flexible in its application, it is not a guideline to be complied with at the convenience of the parties. It is an established principle that the provisions of the Practice Manual are binding.

The judge found that:

> "Considering that a Judge is entitled... to decide a leave to appeal application in chambers based on written submissions, the failure to file written submission in these instances may be viewed to be similar to a party failing to appear in Court to argue the case..."

The judge also found that the employee's failure to file the written submissions despite the directive to do so is a sufficient reason to dismiss the application for leave to appeal.

It is clear from this decision that the written submissions for a judge sitting in chambers are similar to oral submissions by counsel in an open court. This case highlights that the failure to file written submissions in an application for leave to appeal is a ground for the judge deciding the application in chambers, to dismiss such application.

Ndumiso Zwane and Bheki Nhlapho

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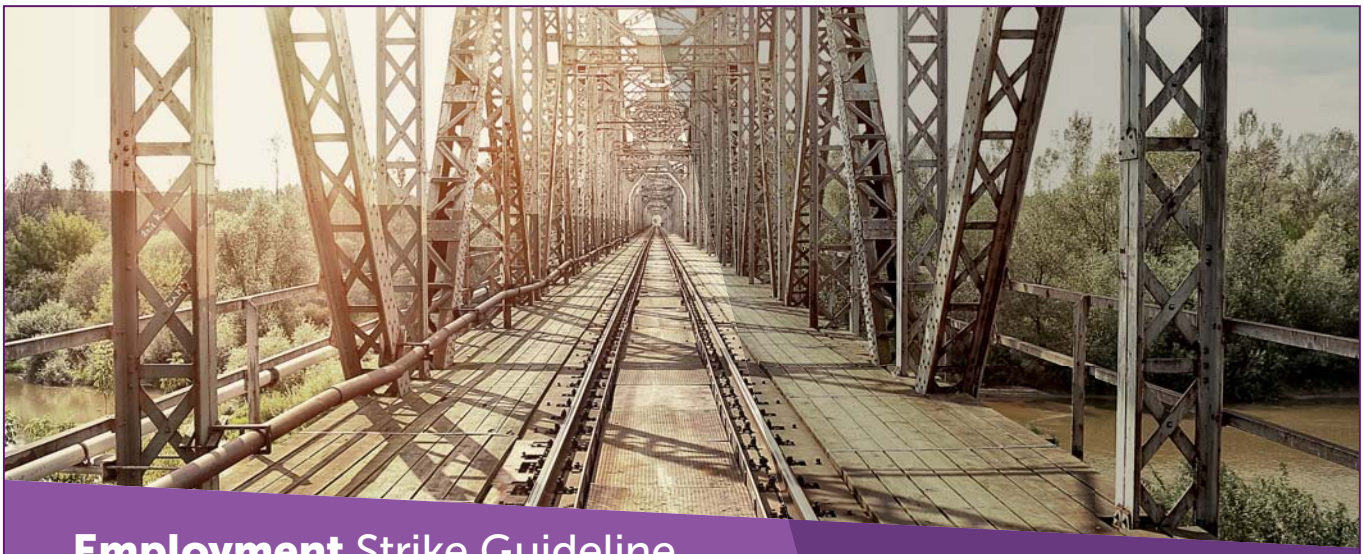

Employment Strike Guideline

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.

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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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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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