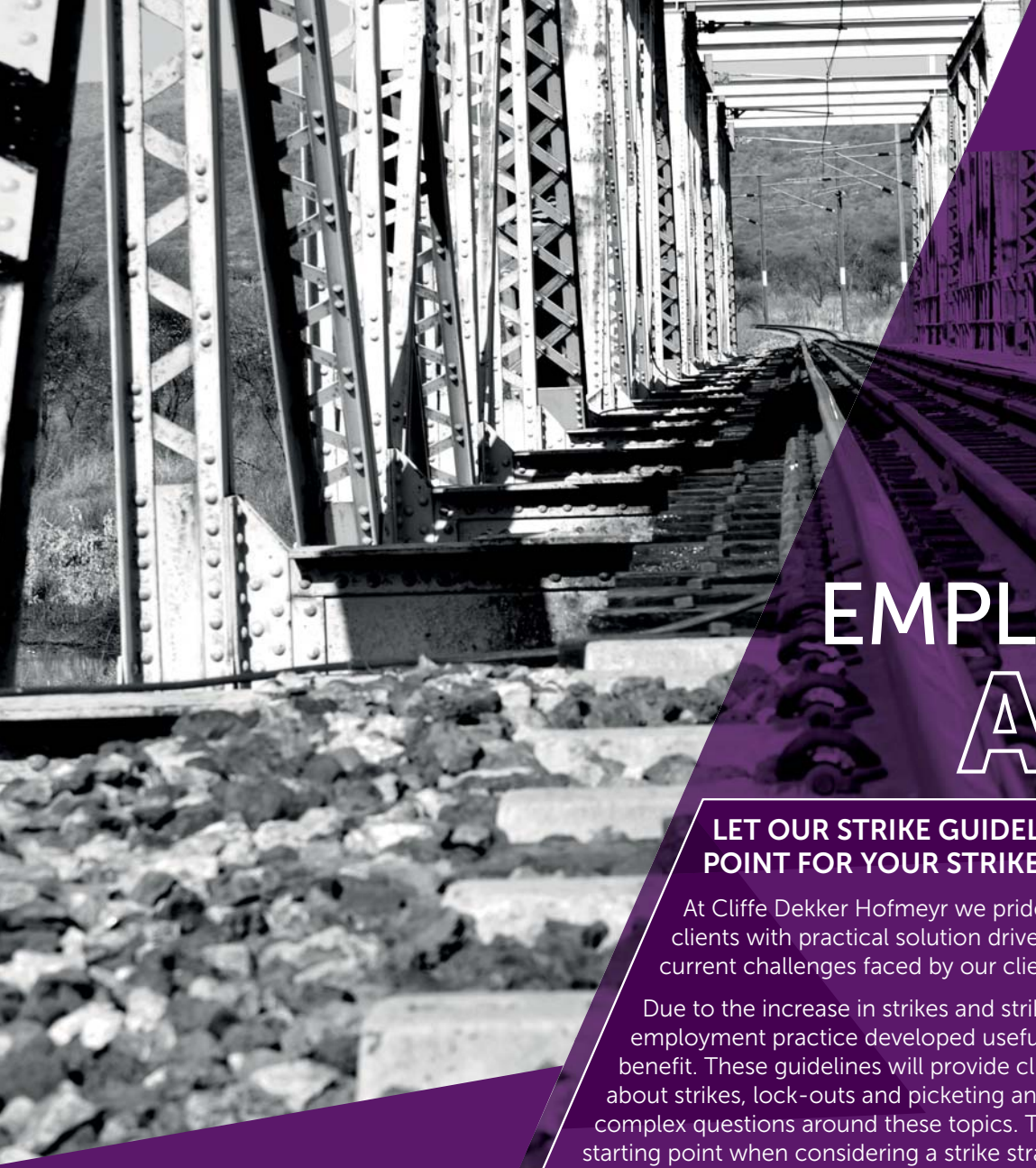

7 AUGUST 2017

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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FIRED FOR REFUSING A MEDICAL TEST

The case was recently taken to the Labour Appeal Court which further scrutinised the relevant issues.

The Labour Court case of *Pharmaco Distributors (PTY) LTD v Weideman LAC* (2017) ZALCJHB 258 was the topic of discussion recently with emphasis placed on the role that the employment contract played in the matter. The case was recently taken to the Labour Appeal Court which further scrutinised the relevant issues. First, let us recap what the case involved.

This matter involved an employee suffering from bipolar disorder who refused to undergo medical testing despite her contract of employment containing a clause which provided that she had to undergo medical testing whenever the employer deemed it to be necessary. The employer ultimately dismissed the employee for disobeying this instruction and the Labour Court found that her dismissal was automatically unfair.

The employer then took this judgment on appeal to the Labour Appeal Court. The Labour Appeal Court ultimately confirmed the decision of the Labour Court. It emphasised the below important principles.

Firstly, it held that the clause in the employee's contract of employment relied on by the employer is patently offensive and invasive of the privacy rights of the employee. It held that it was plainly inconsistent with s7(1) of the Employment Equity Act, No 55 of 1998 (EEA), which prohibits medical testing of employees unless certain conditions are met. The employer's argument that "the testing was justified given that the [employee] had consented to undergoing a medical test..." therefore had to fail as consent was not one of the exceptions contained in s7(1) of the EEA.

The Labour Appeal Court also held that there was a clear manifestation of discrimination against the employee because of her bipolar disorder.

The Labour Appeal Court also held that there was a clear manifestation of discrimination against the employee because of her bipolar disorder. This was because regardless of her exceptional performance reviews, the mere fact that she suffered from a bipolar disorder was a matter of such concern to the employer that she was dismissed when she refused to undergo the medical testing. Therefore, there was a direct causal connection between the employee's disorder and the dismissal.

What the Labour Appeal Court importantly added to the Labour Court's judgment is that no matter what the reasoning behind a request by an employer for an employee to undergo medical tests, such request must be in strict compliance with s7 of the EEA. The Labour Appeal Court dismissed the employer's appeal in this case and essentially held that neither the argument of consent in terms of the contract, nor operational requirements for the job would stand as a legitimate defence in such circumstances. Therefore, as stated above, the 'motive' is irrelevant.

Aadil Patel and Samantha Bonato

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THE RISE OF RESTRAINTS: AN INEVITABLE REALITY DURING JUNK STATUS

The consequence of the current state of affairs has been an inevitable rise in the enforcement of restraint of trade agreements.

South Africa has been unfortunate over recent months to experience more than one ratings downgrade to sub investment grade, otherwise known as junk status. This has not only resulted in an all-time low in investor confidence but has demanded that employers take an active role to protect their slice of the pie, so to speak.

Restraint of trade applications are also being opposed more frequently and actively than before.

During these tough economic times, employers cannot afford to have their star employees approached by fellow competitors, hoping to achieve star appointments themselves and in some cases, the hope that these appointments will also bring with it some much-needed market share in the form of *inter alia* customer connections and additional business.

In return, employees, like employers, are subject to the same tough economic conditions that currently prevail, and as such attractive promises of handsome packages easily persuade these employees to take up employment with competitors in breach of their restraint of trade undertakings.

The consequence of the current state of affairs has been an inevitable rise in the enforcement of restraint of trade agreements, which are being pursued more frequently and more actively than ever before. On the same score, restraint of trade applications are also being opposed more frequently and actively than ever before, with prospective employees seeking to protect their ability to take up employment with their new employers and thereby, benefit from the handsome packages that they are offered in return.

In doing so, employees will put forward an array of defences, one of which includes that their employer forced them to sign the restraint of trade or that they had no option but to do so. This issue came before the Labour Court in the decision of *Hi Tech Recruitment (Pty) Ltd and Others v Nel and Another.*

In brief, Nel's employment with Hi Tech was conditional upon her signing a contract of employment, which contained a restraint of trade clause. Nel later resigned and took up employment with a direct competitor of Hi Tech and as such, Hi Tech sought to enforce her restraint of trade. When doing so, Nel raised the defence that she had signed her contract of employment (which contained the restraint of trade provision), under duress.

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THE RISE OF RESTRAINTS: AN INEVITABLE REALITY DURING JUNK STATUS

CONTINUED

The Court rejected Nel's argument and held, inter alia, that if an employee did not understand the contract or required more time to read it, she should have requested this.

She amplified her defence by stating that she was only 28 years' old when she signed the contract and was overwhelmed by the employment contract. She contended further, that she had no choice but to sign the employment contract failing which she would have been left unemployed.

The Court rejected Nel's argument and held, *inter alia*, that if an employee did not understand the contract or required more time to read it, she should have requested this. The employee was gainfully employed at the time that she signed the offer of employment and had a choice whether to sign it or not. It went on to state that requiring an employee to agree to a restraint as part of the contract of employment cannot, by itself, constitute duress as contemplated in the law of contract.

What was also noteworthy, was that despite the fact that Nel had given undertakings not to breach the restraint of trade provisions and whilst employed by the competitor, this did not bar Hi Tech from approaching the Court to enforce her restraint. The Court reiterated its reasoning from earlier decisions, namely that an employer should not have to content itself with, "crossing its fingers and hoping that the respondent party will honour its undertakings".

Accordingly, and even in the face of such undertakings or claims of duress, restraints of trade can still be enforced and your business protected during present times, subject to the other requirements for enforceability being present.

Nicholas Preston and Prinoleen Naidoo

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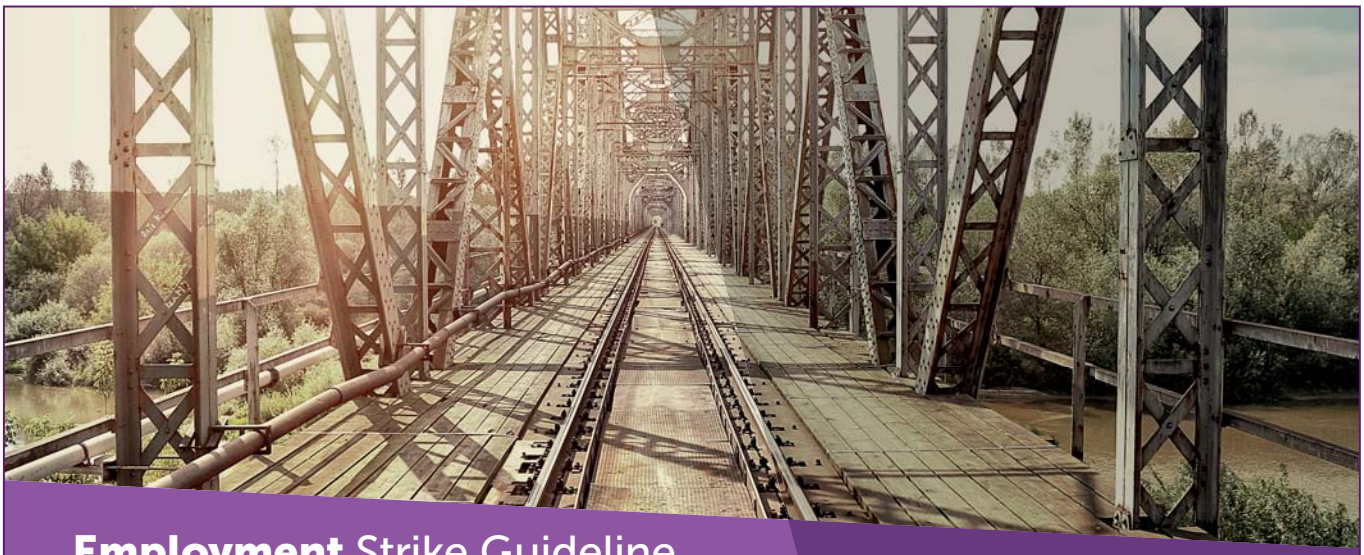

Employment Strike Guideline

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.

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'.

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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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