

# 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.

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### ASYLUM SEEKERS SEEK UIF?

It is safe to say that bona fide Asylum Seekers in South Africa generally don't have an easy life. Having to escape from one's own country for fear of being persecuted has its challenges. In many instances, Asylum Seekers escape with little more than the clothes on their back. Those Asylum Seekers who are lucky can adjust to a new lifestyle and integrate into the economic active population of the host country.

# ASYLUM SEEKERS SEEK UIF?

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South Africa acceded to the U.N. Convention Relating to the Status of Refugees and its 1967 protocol on January 12, 1996, and to the OAU Convention in 1995. The two conventions provide definitions of the term "refugee" and set out the principal rights of refugees in the host country, which in a number of respects are explicitly stated to be the same as those of nationals in that country.

However, Asylum Seekers are currently unable to access Unemployment Insurance Fund (UIF) benefits.

The apparent inability to claim is not a legislative prohibition, but rather because one needs to have a 13-digit South African identity number or passport number in order to successfully apply for UIF benefits. Currently, Asylum Seekers do not have ID numbers – they are simply issued with temporary s24 permits, which are usually renewed on a three or six-monthly basis. According to their permit conditions they are usually entitled to seek employment and to study.

It seems a bit anomalous that although Asylum Seekers despite making contributions to the UIF, are unable to claim. This raises a Constitutional issue – whether or not Asylum Seekers are entitled to social security in terms of s27(1) of the Constitution.

Both the Unemployment Insurance Act and the Unemployment Insurance Contributions Act clearly state that all workers are covered, with no reference to or qualification in terms of nationality. The legislation makes provision

for the exclusion of foreigners who enter South Africa in terms of a contract for the purpose of carrying out a contract or service, if upon the termination of the contract, the employer is required to repatriate that person, or if that person is required to leave South Africa. However, there is no duty of repatriation *vis-à-vis* Asylum Seekers at the time of employing them.

In a recent unreported judgment, *Saddiq v Department of Labour and Others* (Case number: EQ 04/2017) wherein, the Applicant – an Asylum Seeker who has been in South African since June/July 2011, employed by the same employer for the last two and a half years – approached the court to enforce a claim for UIF benefits and damages flowing from the rejection of such claim.

The basis of his application was prejudice based on his status as Asylum Seeker, which consequently impaired his dignity. The practical cause of this prejudice is that, as a legally present, ex-employee Asylum Seeker, the Applicant did not have an ID or Passport, which is required to claim benefits from the UIF. Throughout his employment, UIF contributions were made by his employer on his behalf. But for his lack of the requisite documents, which he cannot obtain due to his status, the Applicant would have been entitled to claim from the UIF.

Upon submitting a claim for such benefits, the Respondent, the Department of Labour (DOL), informed the Applicant that it had no system to accept or pay asylum seekers, due to the requirement of a 13-digit ID number or valid passport number.

# ASYLUM SEEKERS SEEK UIF?

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*The court found that the actions against the Applicant by the DOL were indeed unfair and discriminatory, which created systematic disadvantage to the Applicant.*



This results in a discrepancy in individuals who contribute to the fund and the consequent (in)availability of benefits to certain contributors who upon termination of employment otherwise, become eligible for such benefits. The alleged discrimination did not take place on one of the expressly mentioned prohibited grounds listed in the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA). Consequently, the Applicant had to prove that the prejudice he suffered is one which either, causes systematic disadvantage, undermines human dignity or adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner in terms of s13(2)(b) of PEPUDA.

After termination of his employment, the Applicant incurred a substantial amount of debt and had to sell his household assets to make ends meet after termination of his employment. The Applicant had no money to attend to his medical needs, which were aggravated due to stress arising from his unemployment and him not finding any protection or receiving any benefit from the fund, to weather the storm of unemployment despite his contributions.

Accordingly, the court found that the actions against the Applicant by the DOL were indeed unfair and discriminatory, which created systematic disadvantage to the Applicant.

PEPUDA provides the court with wide powers to make an appropriate order when unfair discrimination is established, including payment of damages in respect of proven and future financial loss, impairment of dignity/emotional and psychological suffering caused by discrimination. The court may also make an order restraining unfair discriminatory practices or directing that specific steps be taken to stop unfair discrimination.

Consequently, the court ordered the DOL to process the Applicant's UIF benefits. Significantly, the court also ordered the DOL to correct their computer systems, which seems to be the practical cause of the preclusion, to allow any asylum seeker who contributed to the fund to be compensated fairly. The court ordered that general damages be paid to the Applicant. The question as to the Constitutionality of such exclusion was left open. It remains to be seen whether UIF benefits will now generally be available to asylum seekers consequent to this judgment.

*Michael Yeates  
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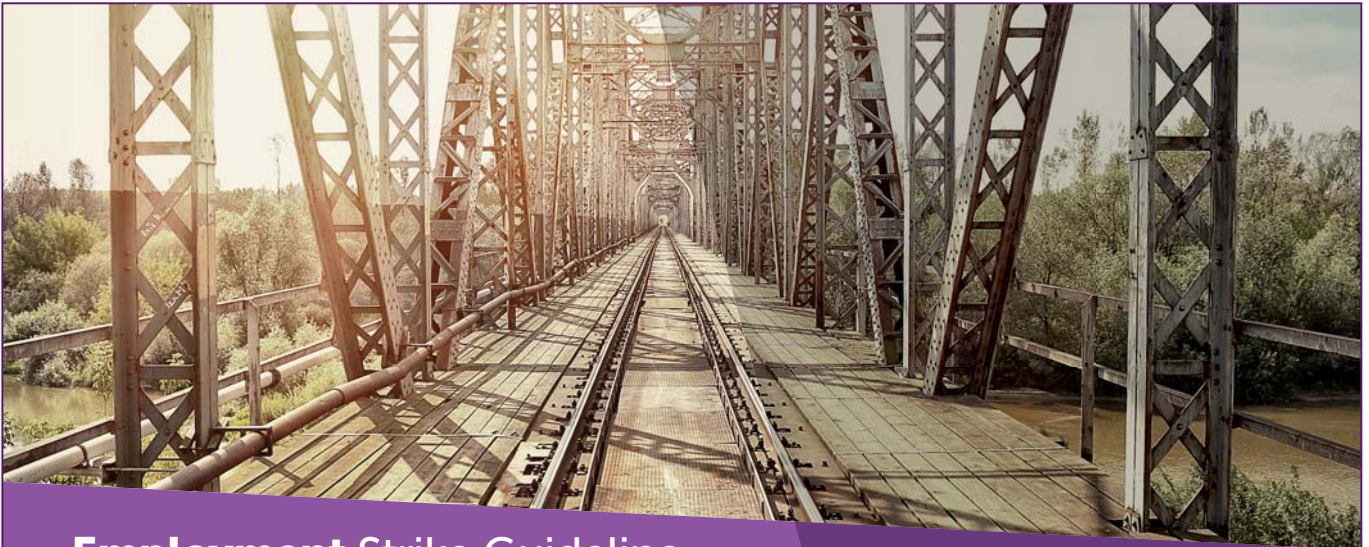
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## Employment Strike Guideline

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

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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.

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.

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