

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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CAN YOU RELY ON CCMA CONCILIATION DISCUSSIONS IN SUBSEQUENT PROCEEDINGS?

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The case of *September and Others and CMI Business Enterprise CC [2018] ZACC 4*, involved three employees' resignations, alleging unfair racial treatment at the hands of their employer. They referred an unfair discrimination dispute to the CCMA. After an unsuccessful conciliation, the commissioner issued a certificate of outcome recording that the "unfair discrimination" dispute remained unresolved and should be referred to the Labour Court.

The employees referred a dispute to the Labour Court seeking an order that their resignations amounted to an automatically unfair dismissal based on racial discrimination. The employer opposed the claim and raised a jurisdictional challenge. However, since the employer's opposition to the matter failed to comply with the

court rules and procedures, the court considered the claim on an unopposed basis. The court granted default judgment and found that the employees had been constructively dismissed, awarding each employee 24 months' compensation.

The employer applied for rescission of the court's judgment alleging that it was granted in error given the court's lack of jurisdiction. The basis for the employer's argument: the dispute before the court had not been conciliated at the CCMA. The employees initially referred an unfair discrimination dispute to the CCMA for conciliation but the dispute before the court alleged automatically unfair dismissals. In response, the employees argued that the dispute was only extensively canvassed, with the assistance of the commissioner, during



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The Appeal Court thus set aside the Labour Court decision.



conciliation and, only at that stage, did it become apparent that the dispute was one of constructive dismissal and not unfair discrimination. As a result, so the employees argued, the matter before the Labour Court had in fact not been conciliated before the CCMA.

The Labour Court confirmed that a matter of the kind before it had to be conciliated before it could be referred to the Labour Court. It went on to say that commissioners are not bound by how the parties describe their dispute on the referral form to the CCMA - commissioners have a duty to ascertain the true nature of the dispute. The court concluded that the matter was referred to conciliation and a certificate of outcome issued. In the circumstances, it had jurisdiction to hear the matter.

The employer took the matter on appeal to the Labour Appeal Court on the basis that the Labour Court lacked jurisdiction given that the dispute referred to the Labour Court had not been conciliated. The dispute referred to conciliation was based on unfair discrimination (as described in

the CCMA referral form) with the option of unfair dismissal crossed out with the words "cancel" in between two lines. The Appeal Court concluded that the Labour Court erred in finding that the unfair dismissal dispute had been conciliated and that evidence of what supposedly transpired during conciliation was admissible in the subsequent proceedings. Accordingly, the Labour Court was not entitled to venture beyond the referral form and certificate of outcome to determine the nature of the dispute that the commissioner conciliated. The Appeal Court thus set aside the Labour Court decision.

Disgruntled by the Appeal Court outcome, the employees approached the Constitutional Court. The Constitutional Court considered the interpretation and application of rule 16 (prior to the 2015 amendment) in the context of the Labour Relations Act, No 66 of 1995's purpose as a whole. In so doing, the majority held that rule 16 serves to facilitate the process of effective dispute resolution. It provides parties with a safe harbour to negotiate resolutions of disputes without the fear that what they say will be used against

Michael Yeates was named the exclusive South African winner of the **ILO Client Choice Awards 2015 – 2016** in the category Employment and Benefits as well as in **2018** in the Immigration category.



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The Labour Court's jurisdiction is limited to disputes that are referred to conciliation in terms of the CCMA processes.



them. Discussions at conciliation that seek to resolve the dispute are private and privileged from disclosure. However, this does not mean that everything that is discussed at conciliation is inadmissible in subsequent proceedings. Evidence as to the nature of the dispute is not privileged as it does not relate to the substance of the dispute - it is merely descriptive. To interpret rule 16 as providing a blanket ban of everything discussed at conciliation does not serve to promote its purpose.

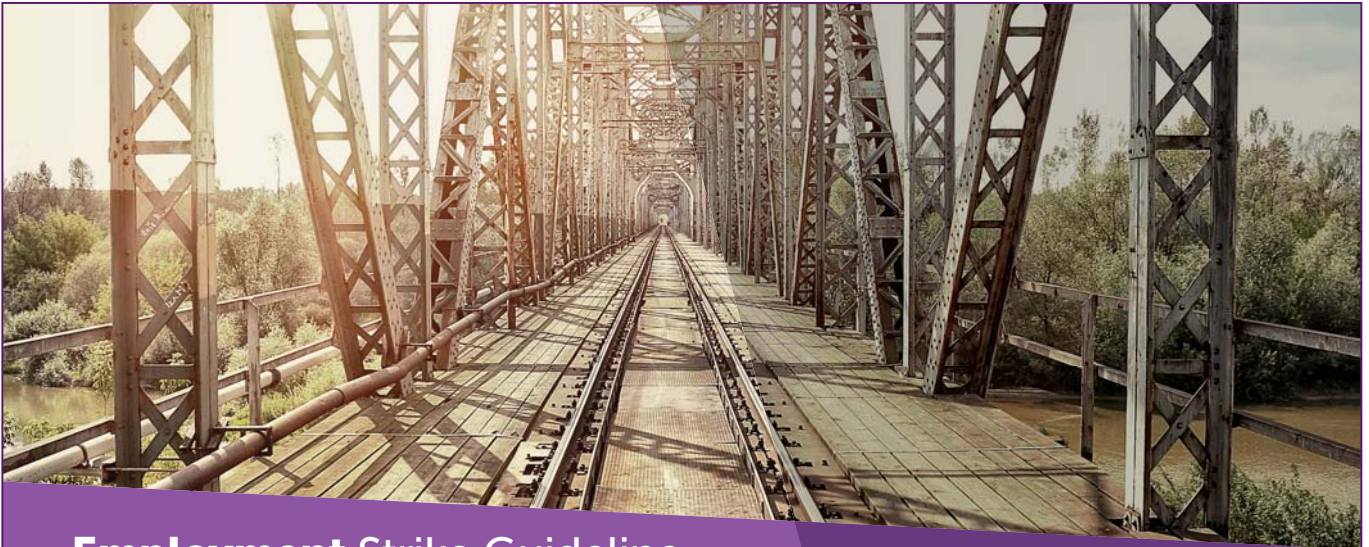
In a dissenting judgment, Zondo DCJ disagreed with this approach. Referring to previous case law, he concluded that the Labour Court has no jurisdiction over disputes that have not been conciliated. He found that if a dispute is not referred to conciliation, the fact that it is discussed at

conciliation does not confer jurisdiction on the Labour Court. The Labour Court's jurisdiction is limited to disputes that are referred to conciliation in terms of the CCMA processes. He concluded that, in this case, what was referred to conciliation was an unfair discrimination dispute, and not a constructive dismissal dispute, accordingly the Labour Court had no jurisdiction.

This decision may result in parties being more cautious about what they discuss, particularly regarding the nature of the dispute, in CCMA conciliation proceedings, for fear of it being used to their detriment in subsequent proceedings.

Gillian Lumb and Zola Mcaciso





Employment Strike Guideline

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

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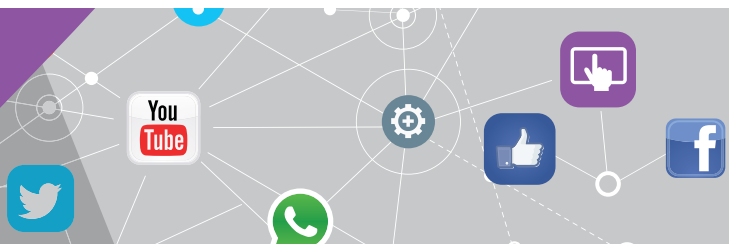
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Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 3 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving 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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