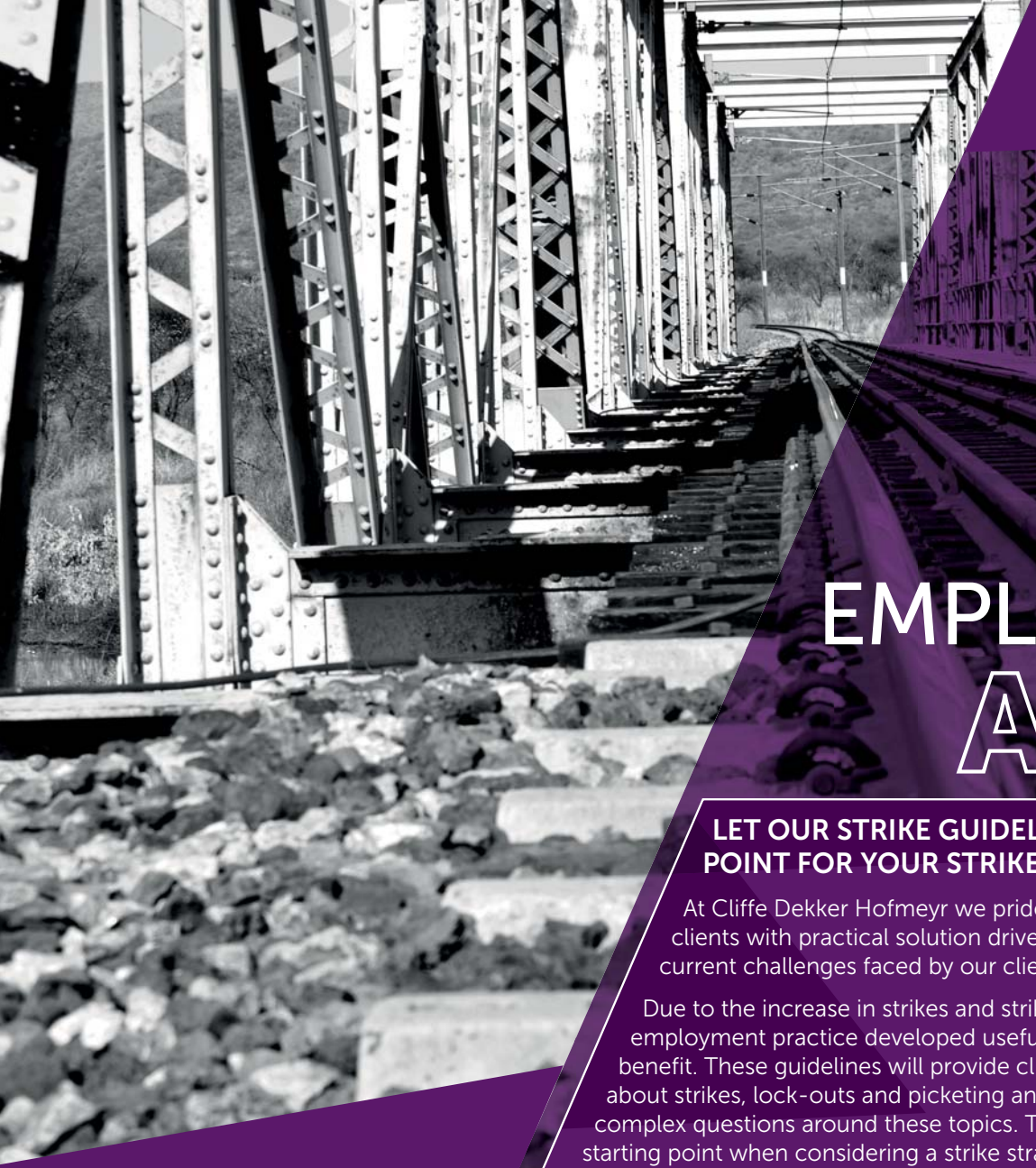

22 JANUARY 2018

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**

RELIEF FOR VIOLENT AND ONGOING STRIKE ACTION: WHAT'S ON THE CARDS?

It is no secret that strike action in South Africa is frequently accompanied by violence, often with far-reaching effects for employers, non-striking employees and the public. Strike action also regularly continues for a protracted period of time, detracting from a focus on collective bargaining. But what relief is available to employers who are faced with such industrial action?

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RELIEF FOR VIOLENT AND ONGOING STRIKE ACTION: WHAT'S ON THE CARDS?

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On 24 November 2017, parliament introduced the Labour Relations Amendment Bill comprising various proposed amendments to the LRA.

The Labour Relations Act, No 66 of 1995 (LRA) does not currently provide any direct means of obtaining relief for prolonged strike action. While employers may interdict protected strikes on account of violence, this often does not have the desired effect and the unlawful conduct simply continues.

An employer may, in theory, also approach the Labour Court to declare a protected strike to be unprotected where it is no longer conducive to collective bargaining, however this approach is yet to be successful and our courts appear hesitant to limit the constitutional right to strike for this purpose.

It's not all doom and gloom, however, and there appears to be some potential light at the end of the tunnel in the form of proposed amendments to the LRA in order to introduce alternative avenues to obtain relief in the circumstances.

On 24 November 2017, parliament introduced the Labour Relations Amendment Bill (the Bill) comprising various proposed amendments to the LRA. One such proposed amendment is to introduce the establishment of an advisory arbitration panel (the panel), appointed by the director of the CCMA (the director).

In terms of the proposed amendments, the director may appoint the panel if a strike has become violent and/or lengthy. The director may appoint the panel of his own accord, on application by a party to the dispute, where the Minister of Labour instructs the director to do so, where the Labour Court makes an order in this regard or when agreement is reached between the parties to the dispute. The appointment of the panel is subject to certain further conditions that must be met.

Interestingly, the amendments also propose that the Labour Court may make an order requiring the director to appoint a panel where the court receives an application by any person or association of persons that will be materially affected by the strike action. This opens the door for a member or members of the public who are not party to the dispute to approach the Labour Court for relief where they are affected by the strike action.

What is important to consider when utilising this approach is that an arbitration must first take place before any potential relief in the form of an advisory award may ensue. This may be a lengthy process under circumstances where intervention is urgently required.

Should this amendment be passed in its current wording, it may constrain an employer's ability to approach the Labour Court to declare a protected strike as unprotected. This is because the amendments provide an alternative avenue for employers to pursue in an attempt to resolve the dispute. Accordingly, it may be difficult for an employer to argue that the strike is no longer conducive to collective bargaining where it has not first pursued an advisory award in an attempt to resolve the dispute.

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RELIEF FOR VIOLENT AND ONGOING STRIKE ACTION: WHAT'S ON THE CARDS?

CONTINUED

While these proposed amendments appear to be encouraging, they may present certain obstacles where parties seek to obtain urgent relief.

The significance of the proposed amendment, however, lies in the effect of an advisory award. Once the advisory award is received, the parties have seven days to accept or reject the award (this period can be extended by a maximum of five days). Should a party to a dispute fail to accept or reject the award within that period, the party is deemed to have accepted the award.

The award will therefore only be binding on a party if that party accepts the award or is deemed to have accepted the award and on condition that at least one other party to the dispute accepts the award. Therefore, in circumstances where there are more than two parties to a dispute (such as where there are two or more unions involved) the award would be binding on those parties who accept or are deemed to have accepted the award and provided that at least one other party accepts that the award is binding. Where the third party rejects the award, it appears that award will not bind that party.

The advisory award would include a report on the findings, recommendations for the resolution of the dispute, the motivation as to why the recommendations ought to be accepted and a statement that the parties have 7 days to accept or reject the award.

It seems unlikely that either the employer or the trade union, after receiving an advisory award which is not in its favour, would nonetheless consent to the award being binding. In such circumstances, the effect of the panel's award may have no impact on resolving or facilitating the resolution of the dispute. However, where this process has been pursued and an advisory award has been issued declaring a strike to no longer be conducive to collective bargaining, this may potentially bolster the prospects of success in an application to declare a strike to be unprotected.

While these proposed amendments appear to be encouraging, they may present certain obstacles where parties seek to obtain urgent relief. The amendments are however still in the early stages of the legislative process and it may be some time before we see these amendments, in their current form or otherwise, adopted by the legislature. Updates to follow in due course.

Hugo Pienaar and Sean Jamieson

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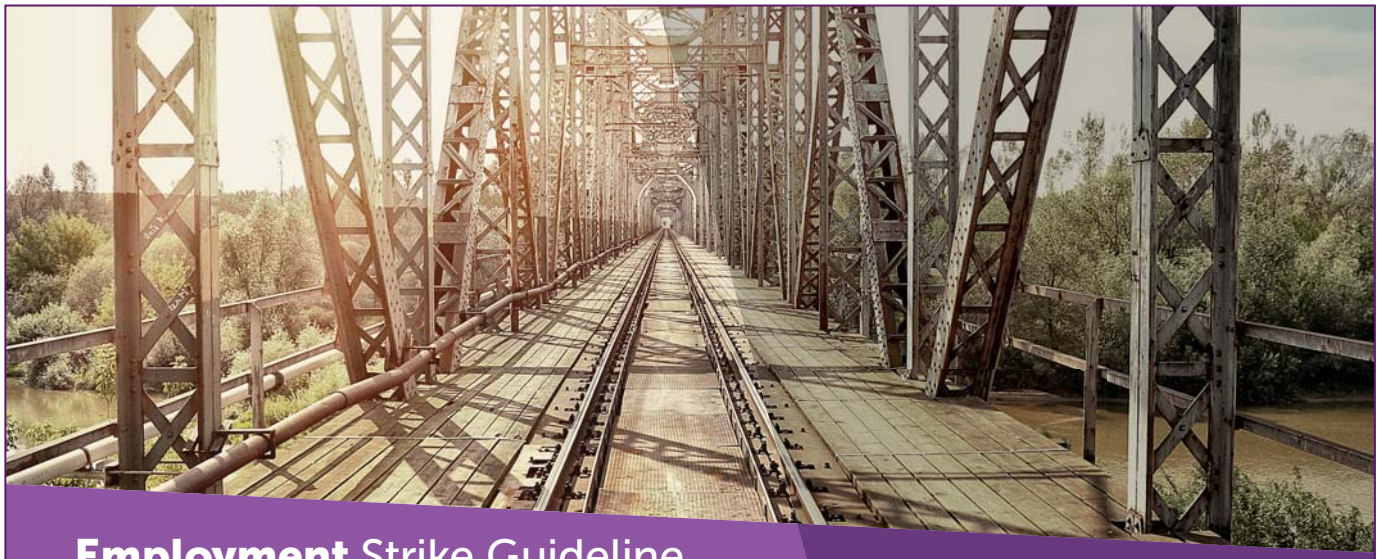

Employment Strike Guideline

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.

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Fiona Leppan ranked by CHAMBERS GLOBAL 2017 in Band 3: 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'.

CLIENT CHOICE 2015 · CLIENT CHOICE 2016

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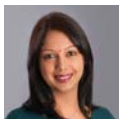

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BBBEE STATUS: LEVEL THREE CONTRIBUTOR
Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 3 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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