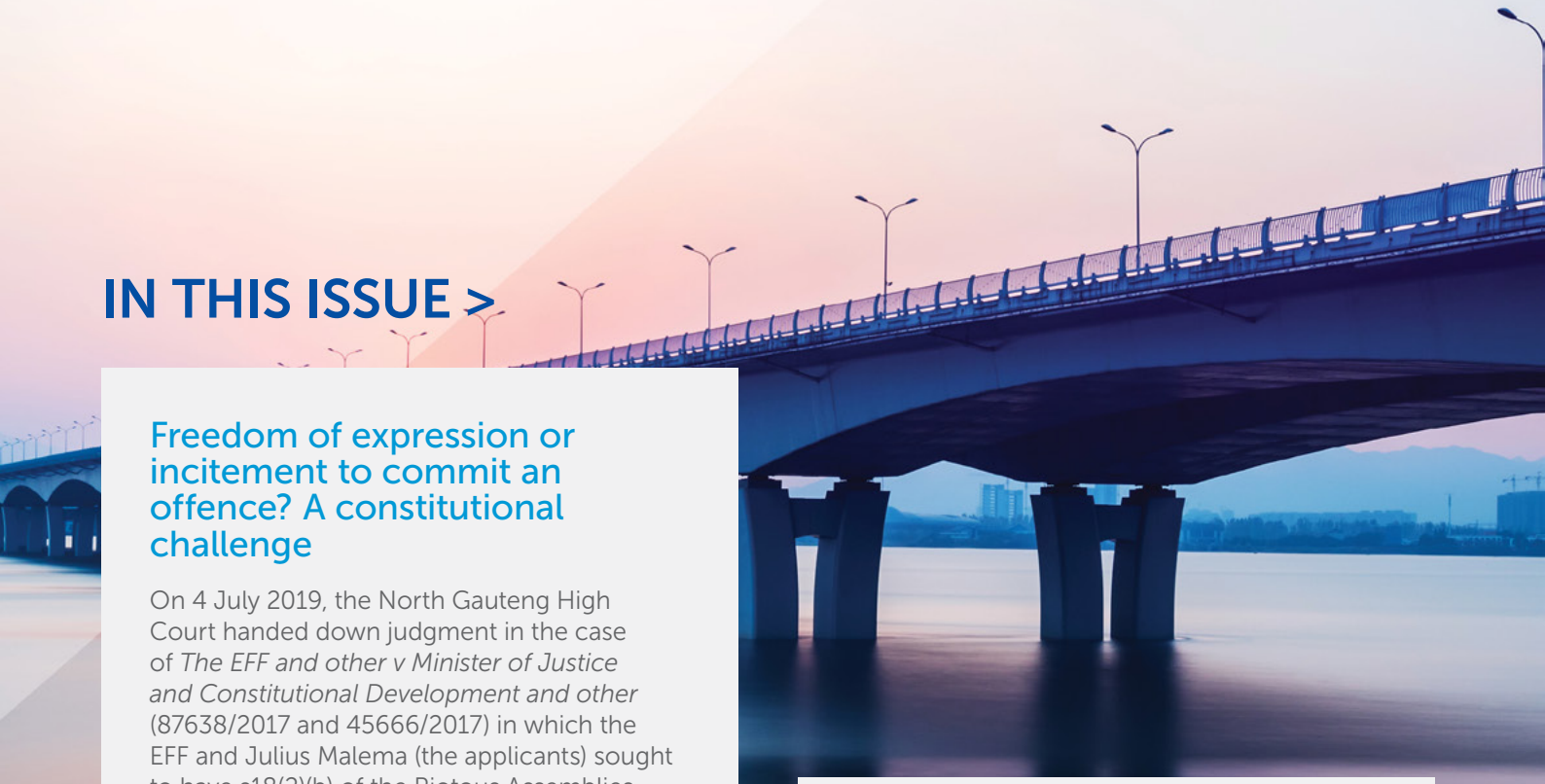
8 JULY 2019

EMPLOYMENT ALERT



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CLIFFE DEKKER HOFMEYR

Freedom of expression or incitement to commit an offence? A constitutional challenge

On 7 November 2016 and during a rally in Newcastle, Mr Malema told members of the EFF to occupy any vacant land they could find.

On 4 July 2019, the North Gauteng High Court handed down judgment in the case of *The EFF and other v Minister of Justice and Constitutional Development and other* (87638/2017 and 45666/2017) in which the EFF and Julius Malema (the applicants) sought to have s18(2)(b) of the Riotous Assemblies Act, No 17 of 1956 (Riotous Act) declared unconstitutional.

The applicants also sought a declaratory order excluding occupiers of land protected by the Extension of Security of Tenure Act, No 62 of 1997 (ESTA) and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, No 19 of 1998 (PIE) from the application of s1(1) of the Trespass Act, No 6 of 1959 (Trespass Act) and an order setting aside the criminal charges brought against Julius Malema (Mr Malema) by the National Prosecuting Authority (NPA) in terms of s18(2)(b) of the Riotous Act.

On 7 November 2016 and during a rally in Newcastle, Mr Malema told members of the EFF to occupy any vacant land they could find. As a result of this utterance, the NPA laid charges of incitement in terms of s18(2)(b) of the Riotous Act against Mr Malema alleging that he unlawfully and intentionally incited, EFF followers to commit the crime of trespassing in terms of s1(1) of the Trespass Act.

The High Court had to decide:

- Whether s18(2)(b) of the Riotous Act (impugned section) unjustifiably and unreasonably infringed on the constitutional right to freedom of speech guaranteed and protected in s16 of the Constitution of the Republic of South Africa, 1996 (Constitution);
- Whether a declaratory order outlining the proper interpretation of s1(1) of the Trespass Act was warranted due to an alleged conflict with PIE; and
- Whether the charges against Mr Malema could and should be set aside in light of the alleged unconstitutional vagueness thereof.

The applicants argued *inter alia* that the definition of incitement was too broad and that the impugned section unjustifiably limits the right to freedom of speech contained in s16 of the Constitution. The court held that the crime of incitement hinges on the intention of the inciter to influence the mind of an incitee to commit a crime through words or conduct and not the result of the incitement. The court further held that the criminalisation of incitement serves an important role in crime prevention as it seeks to stop crimes before they occur.

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Freedom of expression or incitement to commit an offence? A constitutional challenge...*continued*

Although the impugned section limits the right to free speech, the court found that the limitation was justified and reasonable under s36 of the Constitution and therefore not unconstitutional.

In analysing the Constitutionally guaranteed freedom of speech, the court drew a distinction between speech expressly protected in s16(1) such as the freedom of press and expression, and speech excluded from protection in s16(2) such as incitement of imminent violence. The court found that s16(2) exhaustively establishes which speech can be limited without infringing on freedom of speech, but s16(1) does not exhaustively establish which speech is protected by the right to freedom of speech. The court found that any speech not excluded by s16(2) is protected by s16(1) even if it is not specifically referenced in s16(1).

The court went on to find that in order for the impugned section not to limit protected free speech in terms of s16(1), it had to exclusively criminalise speech excluded from protection. The impugned section criminalises incitement to commit any offence. The scope of incitement which it criminalises is accordingly broader than "incitement of imminent violence" and "incitement to cause harm" in s16(2).

As a result, it criminalises incitement to commit offenses that are not explicitly prohibited by s16(2), criminalises and therefore limits free speech protected by s16(1). Although the impugned section limits the right to free speech, the court found that the limitation was justified and reasonable under s36 of the Constitution and therefore not unconstitutional.

The court dismissed two of the applications on the basis that the court was ill-suited to provide such relief. It held that there was no imminent conflict between s1(1) of the Trespass Act and ESTA and PIE and that as such, the provisions of the Acts could co-exist without the provision of a declaratory order.

Finally, the court held that the remedy in relation to the alleged vagueness of the charges against Mr Malema was to be found in s85 and s87 of the Criminal Procedure Act, No 51 of 1977 and should be raised at the trial.

The EFF has communicated its intention to appeal the judgment before the Constitutional Court.

Gillian Lumb, Siyabonga Tembe and Claire Rankin

Furnishing of security: Are all employers equal?

The application was granted on condition that the City furnish security in terms of s145(8) of the Labour Relations Act No, 66 of 1995.

The obligation to furnish security in order to stay the enforcement of an arbitration award pending the outcome of review proceedings can be onerous. The requirement is aimed primarily at preventing meritless review proceedings. Whether public sector employers are obliged to provide security or are prohibited from doing so in terms of the Local Government: Municipal Finance Management Act, No 56 of 2003 (MFMA) or Public Finance Management Act, No 1 of 1999 (PFMA) was the question answered by the Labour Appeal Court (LAC) in a judgment handed down in March 2019 in the case of *City of Johannesburg v SAMWU obo Monareng and Another* (JA 120/2017).

The City of Johannesburg (City) applied to review and set aside an arbitration award. Pending finalisation of the review proceedings the City applied to the Labour Court to stay the arbitration award. The application was granted on condition that the City furnish security in terms of s145(8) of the Labour Relations Act No, 66 of 1995 (LRA). The City appealed against the condition arguing that as a municipality it was automatically exempt from providing security because:

1 section 48 of the MFMA prohibits municipalities from furnishing security in terms of s145(8) of the LRA; and

2 *Free State Gambling and Liquor Authority v CCMA and Others* (2015) 36 ILJ 2867 (LC) is authority for public sector employers, specifically those regulated by the PFMA, being exempt from furnishing security.

In considering whether a public sector employer regulated by the MFMA is exempt from furnishing security, the LAC found:

- firstly, that the purpose of furnishing security is to prevent employers making meritless review applications, a consideration which applies to public and private employers alike;
- secondly, s48 of the MFMA does not prohibit the City furnishing security to stay an arbitration award; and
- thirdly, while the Labour Court in *Free State Gambling* held that public sector employers are automatically exempt from furnishing security, a contrary and correct view was held in *Rustenburg Local Municipality v South African Local Government Bargaining Council and Others* (2017) 38 ILJ 2596 (LC).

Furnishing of security: Are all employers equal?*...continued*

The LAC found that the City showed good cause not to provide security given the financially stability of the municipality.

The LAC found in favour of the approach adopted in *Rustenburg Local Municipality*. It held that the *Free State Gambling* ruling was incorrect and public sector employees regulated by the MFMA have no automatic exemption from furnishing security. Instead, and as with any other employer, security must be furnished unless the court exercises its discretion and finds otherwise. An employer must show good cause for a court to exercise its discretion in this manner. In this instance, the LAC found that the City showed good cause not to provide security given the financially stability of the municipality, that the quantum of the security it would be required to furnish would be staggering and policy considerations suggest that public funds should not be encumbered as security.

Given the finding of the LAC there is no automatic exemption for public sector employers when it comes to furnishing security and any employer, whether public or private sector, that seeks exemption must apply for and show good cause for not furnishing security.

Gillian Lumb and Khanya Sidzumo

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Not snitching may get you stitches too: The Constitutional Court decides on duty to rat on fellow employees

There have been, until now, many varying decisions regarding the notion of derivative misconduct.

Derivative misconduct stems from an employee's failure to offer reasonable assistance to the employer in the detection of those responsible for misconduct. In other words, it is seen as the failure of an employee to adhere to his/her duty to act in the best interests of the employer.

Many employers have relied on this principle to discipline employees during strike action where employees responsible for the misconduct could not necessarily be individually identified, but at the same time, where employees' fail, when requested, to come forward in assisting the employer to identify those who were responsible, Thereby ultimately associating themselves with the perpetrators by their failure to dissociate.

There have been, until now, many varying decisions regarding the notion of derivative misconduct. The Constitutional Court in *NUMSA obo Khanyile Ngannezi and Others v Dunlop Mixing and Technical Services (Pty) Ltd and Others (2018)* finally put the debate around this concept to bed when it sought to articulate and grapple with the concept in coming to definitive and precedential clarity on the notion.

In the *Dunlop* case, employees, all of whom were members of the applicant trade union, NUMSA, embarked on a protected strike pursuant of a wage dispute. As the strike continued it became increasingly violent with many of the employees committing serious acts of misconduct. An interdict was sought and granted in an effort to deter the violence and misconduct, alas to no avail.

The employer subsequently dismissed the striking employees pursuant to their alleged misconduct during the strike, and on the basis of derivative misconduct.

Challenging the fairness of the dismissals, *NUMSA* brought the matter before an arbitrator at the CCMA, and the arbitrator in coming to his decision distinguished the dismissed employees into three different categories:

1. Those positively identified as committing violence;
2. Those identified as present when the violence took place but who did not physically participate;
3. Those not positively and individually identified as being present when the violence was being committed.

The Arbitrator found that the first two groups had been fairly dismissed, but that the third group's dismissal was substantively unfair and ordered for their reinstatement.

On review by *Dunlop*, and in the LC, the court held that the employees' derivative misconduct consisted in the failure to come forward and either identify the perpetrators or exonerate themselves by disassociating themselves and confirming

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Not snitching may get you stitches too: The Constitutional Court decides on duty to rat on fellow employees*...continued*

The court found that the reciprocal duty argument had failed due to the absence of the provision of guaranteed safety and protection by the employer once an employee came forward.

that they were not present and therefore could not be identified as the perpetrators. The LC therefore set aside the Arbitration Award and found that the employees had been fairly dismissed. NUMSA then lodged an appeal before the LAC wherein the LAC upheld the LC's decision in finding.

NUMSA, still unhappy with the outcome, brought the matter before the Constitutional Court (CC) where the court considered the historical understanding of the concept of derivative misconduct as that of a common law duty on the employee to act in good faith and in the best interests of the employer, while in return the employer has the general duty of fair dealing with its employees.

The court described the reciprocal duty to be that of the expected duty on the employee to disclose the misconduct of fellow employees; while the employer had the obligation to offer protection and guarantee the employees safety while doing so.

The court sought to esatblish whether the above reciprocal good faith obligation, based on the facts in this case, was in fact reciprocal, or if it was merely a unilateral obligation of fiduciary duty, imposed on the employee by a body that is in a position of power in relation to that same employee. The court found that the reciprocal duty argument had failed due to the absence of the provision of guaranteed safety and protection by the employer once an employee came forward.

The CC went further to highlight that a right balance should be sought between the duties of good faith expected of both the employer and the employee, reciprocally. Where an employer fails to appreciate that there are many ways for an employee to participate in and associate themselves with the primary misconduct, it increases the risk of using the notion of derivative misconduct as a means for easier dismissal. Evidence that employees in some way associated themselves with the violence, even by way of having knowledge thereof, either before or after it commenced, may be sufficient to establish complicity in the misconduct.

In determining derivative misconduct by way of the LACs reasoning being that of inferential reasoning, the chain in determining whether an employee is guilty or not, is a lengthy one. In determining same one should consider that the most probable inference was that each employee was:

1. present when the violence was committed;
2. would have been able to identify those who committed the violent acts;
3. would have known that *Dunlop* needed that information from them;
4. with possession of that knowledge, failed to disclose the information to *Dunlop*;
5. did not disclose the information because they were guilty.

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Not snitching may get you stitches too: The Constitutional Court decides on duty to rat on fellow employees...*continued*

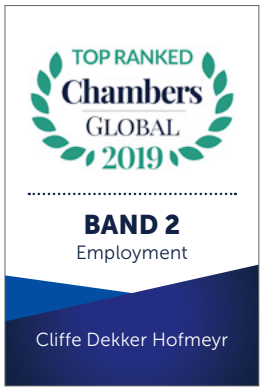
The most probable inference in this case was found to be that only some of the employees were present and therefore to dismiss all in the absence of individual identification would not be justified.

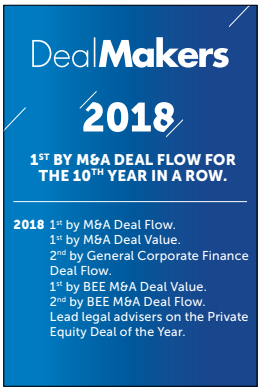
The most probable inference in this case was found to be that only some of the employees were present and therefore to dismiss all in the absence of individual identification would not be justified.

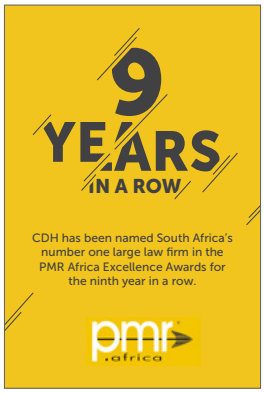
Dunlop's expectation of its employees to come forward with information regarding those who had committed acts of misconduct, coupled with its failure to ensure their safety and protection thereafter was ultimately what lead to its demise before the Constitutional Court. Furthermore *Dunlop's* case failed on the consideration of probable inference, and the court found that to dismiss all employees in the absence of individual identification would not be justified, and therefore the employer's case also failed on these facts. The Arbitration Award therefore stood, and the third group of employees were ultimately reinstated.

Ultimately it would be for the employer to satisfy the court with regard to the manner in which it provides protection and security to an employee upon whom it expects a duty to disclose.

Hugo Pienaar and Jessica Osmond







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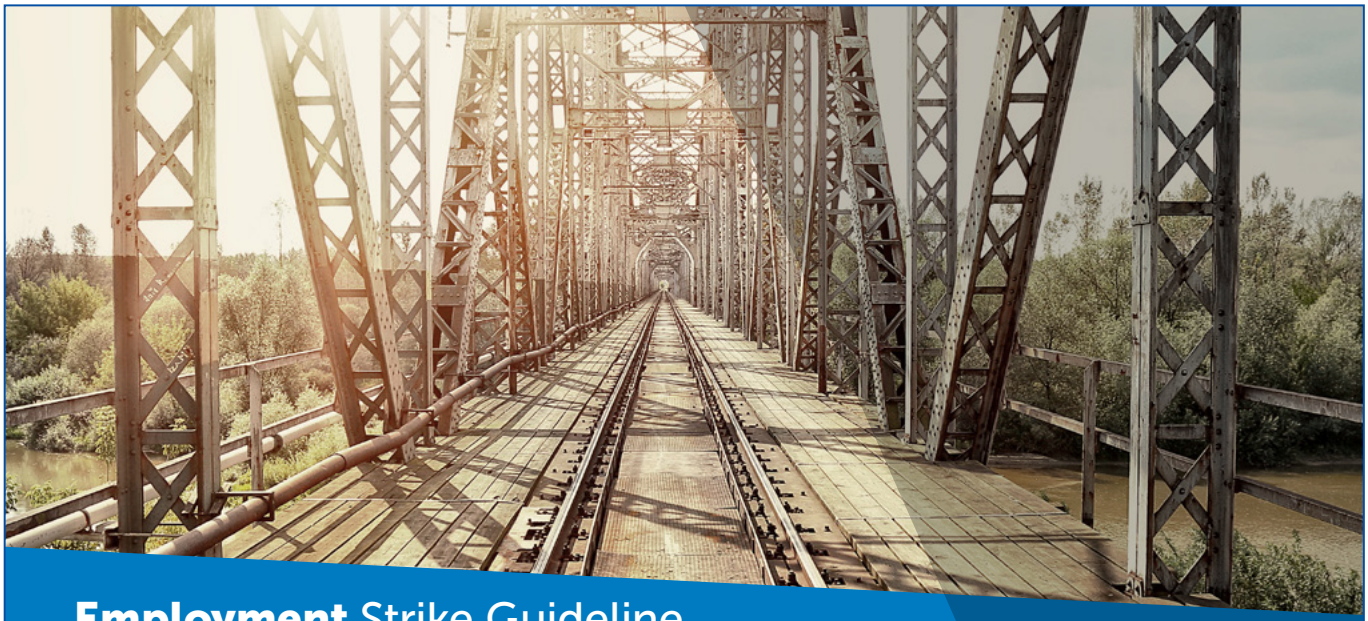

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BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 1 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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