CDH
CLIFFE DEKKER HOFMEYR

INCORPORATING
**KIETI LAW LLP, KENYA**

# EMPLOYMENT LAW
## ALERT

4 JULY 2022

FOR MORE INSIGHT INTO OUR EXPERTISE AND SERVICES

## IN THIS ISSUE

### Extended relief for foreign nationals with pending visa and waiver applications

In a circular dated 1 April 2022, the Minister of Home Affairs approved the introduction of certain temporary measures to address the severe backlog in the processing of visa and waiver applications that has been experienced since the beginning of COVID-19.

### Dishonesty vs negligence: The limits of an employee's duty of honesty and good faith

In *South African Society of Bank Officials (SASBO) and Another v The Standard Bank of South Africa Ltd and Others* JA32/2021, the Labour Appeal Court (LAC) heard an appeal by SAASBO against a judgment of the Labour Court (LC) dealing with the dismissal of a bank employee for the falsification of bank records – knowingly reflecting a balancing position on the bank's information system when that was not the case.

### To sue, or not to sue? Accountability of unions in respect of unprotected strikes in essential services

Stage 6 loadshedding descended upon the country abruptly on Tuesday, 28 June 2022 and sent many into a panic due to the dire consequences that prolonged stage 6 will have for business and the public at large. Sadly, this will also impact the income and job security of innocent workers.

# Extended relief for foreign nationals with pending visa and waiver applications

In a circular dated 1 April 2022, the Minister of Home Affairs approved the introduction of certain temporary measures to address the severe backlog in the processing of visa and waiver applications that has been experienced since the beginning of COVID-19.

This circular provided a blanket extension to foreign nationals who were still waiting for the outcome of their visa and waiver applications, who were allowed to legally remain in South Africa until 30 June 2022, without being declared undesirable when leaving South Africa.

Ahead of the expiry of the above period, and as the Department of Home Affairs (Department) is still trying to clear the backlog in the processing of visa and waiver applications, a further temporary blanket extension has been granted until 30 September 2022, in a circular dated 27 June 2022, with immediate effect.

The circular only applies to foreign nationals who have been legally admitted into South Africa and who are currently waiting for the outcome of their visa and/or waiver applications as follows:

- Applicants who have pending waiver applications are granted a blanket extension until 30 September 2022 for the processing of their applications, to collect the outcome of their applications and to apply for their appropriate visas. However, if applicants elect to abandon their waiver applications and leave South Africa, they will be allowed to do so on or before 30 September 2022 without the risk of being declared undesirable.
- Similar to the above, applicants whose visa applications are still pending are granted a blanket extension of their current visa status until 30 September 2022. If these applicants elect to abandon their pending applications, they are allowed to leave South Africa by this date without being declared undesirable. While waiting for their visa applications to be processed, these applicants are prohibited from engaging in any activity, other than those activities that are specifically provided for as part of their current visa conditions.

In addition to the above, the circular allows applicants with pending long-term visa applications to travel as follows:

- Applicants who originate from countries that are exempt from port of entry visa requirements may travel by presenting their receipt from the Visa Facilitation Services (VFS) when they arrive at the port of entry for admission back into South Africa, and to collect their visa outcomes.
- Applicants who originate from countries that are visa restricted will need to obtain a port of entry visa and present their receipt from the VFS before they are allowed to re-enter South Africa.

Foreign nationals who are currently still waiting for the outcome of their pending visa and waiver applications will undoubtedly welcome this extension as it provides them with further assurances that they will not be declared undesirable while their applications are being processed (at least until 30 September 2022). However, whether the Department will provide for a further blanket extension after 30 September 2022 remains to be seen.

MICHAEL YEATES, TARYN YORK AND MAPASEKA NKETU

# Dishonesty vs negligence: The limits of an employee's duty of honesty and good faith

In *South African Society of Bank Officials (SASBO) and Another v The Standard Bank of South Africa Ltd and Others* JA32/2021, the Labour Appeal Court (LAC) heard an appeal by SAASBO against a judgment of the Labour Court (LC) dealing with the dismissal of a bank employee for the falsification of bank records – knowingly reflecting a balancing position on the bank's information system when that was not the case.

The employee was employed by Standard Bank (the bank) as a foreign exchange consultant. Part of her job functions included possessing and counting copious amounts of cash and loading it into various automatic teller machines (ATMs). Once the cash was loaded into the ATMs, the employee was required to input the various amounts loaded into the ATMs into the bank's system to reflect the movement of that cash from her safe into the ATMs, thereby keeping accurate records of the movement of the bank's cash – balancing her safe daily.

In the period between 17 and 20 February 2017, the employee discovered that her safe did not balance. As a solution, she recorded a balanced position for the day – force-balancing her safe by knowingly recording an inaccurate amount into the bank's system. She was discovered, and was subsequently suspended and disciplined, which resulted in her dismissal.

After the Commission for Conciliation, Mediation and Arbitration arbitration that ensued, the Commissioner found that she had not been guilty of dishonesty but mere negligence in that what she had done was not to falsify, but rather to rectify her original error. Accordingly, the Commissioner concluded that she had not been proved guilty of dishonesty or falsification, and awarded her full retrospective reinstatement.

On review, the LC held that the Commissioner committed a material irregularity in failing to separate the employee's conduct on days preceding her wrongdoing from the misconduct itself. It held that since it was common cause that the employee had counted the cash and upon finding that the safe did not balance, she had knowingly recorded a false balanced position, she was clearly guilty of the charges preferred against her by the bank. Accordingly, it set aside the award and substituted it with an order that the employee's dismissal was fair.

On appeal by SASBO, the Labour Appeal Court (LAC) held that dishonesty is a generic term embracing all forms of conduct involving deception, and that deceitfulness manifests itself in various ways. The LAC reiterated the trite principle of South Africa's labour law that the fiduciary duty that employees generally owe to their employers often renders any dishonest conduct on their part dismissible. As to the duties of commissioners, the LAC held:

> *"The trier of fact [the Commissioner] is expected, in the context of discipline in the workplace, to deal with the wrong committed by an employee even if the charge may have been inelegantly phrased provided that the employee is not significantly prejudiced by the incorrect labelling of the charge…"*

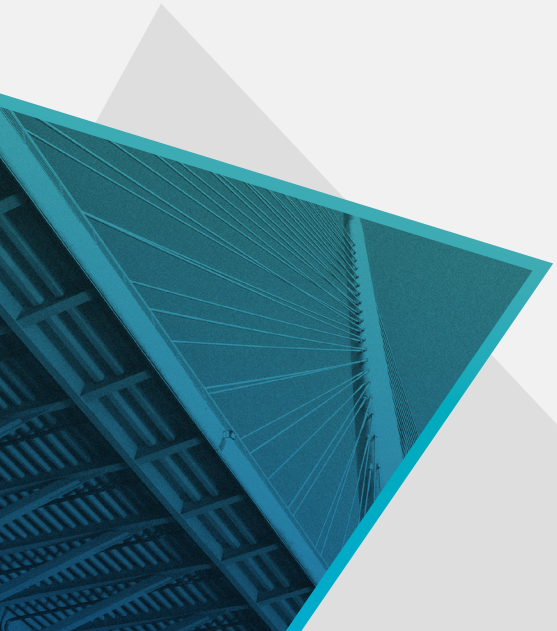
# Dishonesty vs negligence: The limits of an employee's duty of honesty and good faith

CONTINUED

The LAC then held that, on the evidence before the Commissioner, the falsification, rather than mere negligence in incorrectly capturing figures into the bank's system, was established on a balance of probabilities. Accordingly, the LAC upheld the judgment of the LC, and dismissed the appeal.

This case bears significant importance for dealing with dismissals for dishonesty or falsification, and in considering the duties resting on commissioners in arbitration proceedings conducted in terms of section 138 of the LRA. In short, a commissioner is enjoined to consider the substance, rather than the form, of the dispute between the employer and the dismissed employee. A commissioner is to remain mindful not to be bogged down by technicalities when considering the charges levelled against an employee – the drafting precision is not to be equated to that applicable in the criminal courts. Moreover, the case re-emphasises the duty of utmost good faith that employees generally owe to their employers.

BONGANI MASUKU, THATO MARUAPULA AND LISO ZENANI



# To sue, or not to sue? Accountability of unions in respect of unprotected strikes in essential services

Stage 6 loadshedding descended upon the country abruptly on Tuesday, 28 June 2022 and sent many into a panic due to the dire consequences that prolonged stage 6 will have for business and the public at large. Sadly, this will also impact the income and job security of innocent workers.

There has been concern that the current violent unprotected strike action at Eskom has attributed to stage 6 loadshedding, which begs the question of how accountable trade unions may be in these circumstances.

It is important to understand at the outset that Eskom is a designated essential service and certain of its sites are considered national key points. What this means is that Eskom is offered protection from strike action. In addition, persons tampering with or damaging essential infrastructure can be criminally prosecuted and held accountable for damages suffered.

The legal position is that trade unions cannot strike in respect of wage disputes that are subject to arbitration.

In addition, an employer can claim compensation from trade unions and their members in terms of the Labour Relations Act 66 of 1995. Third parties can also institute a claim for damages against the trade unions and their members acting unlawfully.

The violence that accompanied the unprotected strike also required the urgent intervention and protection of the South African Police Service (SAPS) and the military. Sadly, this was lacking, as has been the experience of many employers in South Africa who unsuccessfully call for the assistance of SAPS during violent action by employees in a strike situation. This means that SAPS can be cited as a co-defendant in an action for damages.

In terms of the National Keypoint Act 102 of 1980 it is considered an offence to hinder, obstruct or thwart any owner in taking any steps required in relation to the efficient security of any national key point. This is punishable by a fine and/ or imprisonment.

In terms of the Criminal Matters Amendment Act 18 of 2015, any person who unlawfully and intentionally tampers with, damages or destroys essential infrastructure (or colludes with or assists in this) can face conviction and a period of imprisonment not exceeding 30 years. In the case of a corporate body such as a trade union, they can face a fine of up to R100 million.

Despite the abovementioned remedies, it is often the case that trade unions do not take the requisite responsibility and properly perform their function – which is ultimately to guide their members and protect their rights and interests.

In the case of *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of South Africa Workers' Union & others* [2012] JOL 28755 (LC), employees embarked upon a strike which ultimately became violent. Van Niekerk J granted a costs order against the trade union stating that an order for costs would have a *"salutary effect"* and show that *"responsibility for the collective requires individual action"*.

# To sue, or not to sue? Accountability of unions in respect of unprotected strikes in essential services

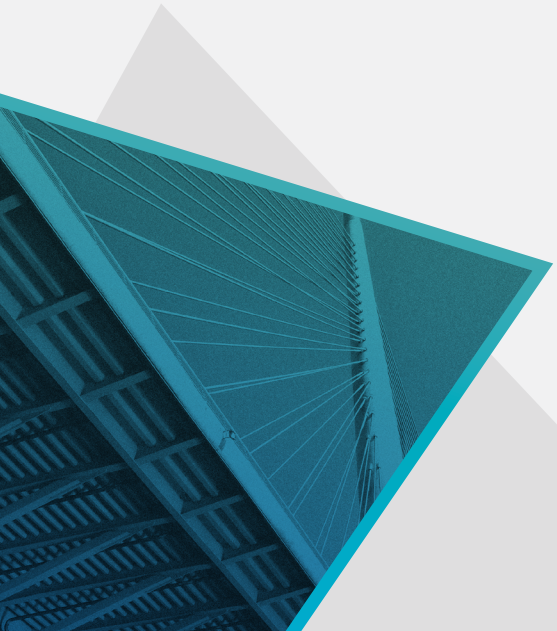
CONTINUED

If the trade unions continue to act with impunity in cases where employees are not permitted to strike or when strikes are unprotected, this can ultimately undermine workers' freedom to strike at all, which as we know is an integral part of the right to bargain collectively.

It is apt to conclude with the words of Van Niekerk J in Tsogo Sun where he stated in relation to violent strike action that: *"When the tyranny of the mob displaces the peaceful exercise of economic pressure as the means to the end of the resolution of a labour dispute, one must question whether a strike continues to serve its purpose…."*.

This debate will continue.

HUGO PIENAAR AND
ASMA CACHALIA

# OUR TEAM

For more information about our Employment Law practice and services in South Africa and Kenya, please contact:

**Aadil Patel**
Practice Head & Director:
Employment Law
Joint Sector Head:
Government & State-Owned Entities
T +27 (0)11 562 1107
E aadil.patel@cdhlegal.com

**Anli Bezuidenhout**
Director:
Employment Law
T +27 (0)21 481 6351
E anli.bezuidenhout@cdhlegal.com

**Jose Jorge**
Sector Head:
Consumer Goods, Services & Retail
Director: Employment Law
T +27 (0)21 481 6319
E jose.jorge@cdhlegal.com

**Fiona Leppan**
Joint Sector Head: Mining & Minerals
Director: Employment Law
T +27 (0)11 562 1152
E fiona.leppan@cdhlegal.com

**Gillian Lumb**
Director:
Employment Law
T +27 (0)21 481 6315
E gillian.lumb@cdhlegal.com

**Imraan Mahomed**
Director:
Employment Law
T +27 (0)11 562 1459
E imraan.mahomed@cdhlegal.com

**Bongani Masuku**
Director:
Employment Law
T +27 (0)11 562 1498
E bongani.masuku@cdhlegal.com

**Phetheni Nkuna**
Director:
Employment Law
T +27 (0)11 562 1478
E phetheni.nkuna@cdhlegal.com

**Desmond Odhiambo**
Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E desmond.odhiambo@cdhlegal.com

**Hugo Pienaar**
Sector Head:
Infrastructure, Transport & Logistics
Director: Employment Law
T +27 (0)11 562 1350
E hugo.pienaar@cdhlegal.com

**Thabang Rapuleng**
Director:
Employment Law
T +27 (0)11 562 1759
E thabang.rapuleng@cdhlegal.com

**Hedda Schensema**
Director:
Employment Law
T +27 (0)11 562 1487
E hedda.schensema@cdhlegal.com

**Njeri Wagacha**
Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E njeri.wagacha@cdhlegal.com

**Michael Yeates**
Director:
Employment Law
T +27 (0)11 562 1184
E michael.yeates@cdhlegal.com

**Mohsina Chenia**
Executive Consultant:
Employment Law
T +27 (0)11 562 1299
E mohsina.chenia@cdhlegal.com

**Faan Coetzee**
Executive Consultant:
Employment Law
T +27 (0)11 562 1600
E faan.coetzee@cdhlegal.com

**Jean Ewang**
Consultant:
Employment Law
M +27 (0)73 909 1940
E jean.ewang@cdhlegal.com

**Ebrahim Patelia**
Legal Consultant:
Employment Law
T +27 (0)11 562 1000
E ebrahim.patelia@cdhlegal.com

# OUR TEAM

For more information about our Employment Law practice and services in South Africa and Kenya, please contact:

**Asma Cachalia**
Senior Associate:
Employment Law
T +27 (0)11 562 1333
E asma.cachalia@cdhlegal.com

**Jordyne Löser**
Senior Associate:
Employment Law
T +27 (0)11 562 1479
E jordyne.loser@cdhlegal.com

**Tamsanqa Mila**
Senior Associate:
Employment Law
T +27 (0)11 562 1108
E tamsanqa.mila@cdhlegal.com

**Christine Mugenyu**
Senior Associate | Kenya
T +254 731 086 649
T +254 204 409 918
T +254 710 560 114
E christine.mugenyu@cdhlegal.com

**Dylan Bouchier**
Associate:
Employment Law
T +27 (0)11 562 1045
E dylan.bouchier@cdhlegal.com

**Abigail Butcher**
Associate:
Employment Law
T +27 (0)11 562 1506
E abigail.butcher@cdhlegal.com

**Rizichi Kashero-Ondego**
Associate | Kenya
T +254 731 086 649
T +254 204 409 918
T +254 710 560 114
E rizichi.kashero-ondego@cdhlegal.com

**Biron Madisa**
Associate:
Employment Law
T +27 (0)11 562 1031
E biron.madisa@cdhlegal.com

**Peter Mutema**
Associate | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E peter.mutema@cdhlegal.com

**Kgodisho Phashe**
Associate:
Employment Law
T +27 (0)11 562 1086
E kgodisho.phashe@cdhlegal.com

**Tshepiso Rasetlola**
Associate:
Employment Law
T +27 (0)11 562 1260
E tshepiso.rasetlola@cdhlegal.com

**Taryn York**
Associate:
Employment Law
T +27 (0)21 481 6314
E taryn.york@cdhlegal.com

**BBBEE STATUS:** LEVEL ONE CONTRIBUTOR
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.

**PLEASE NOTE**
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.

**JOHANNESBURG**
1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa.
Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

**CAPE TOWN**
11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

**NAIROBI**
Merchant Square, 3rd floor, Block D, Riverside Drive, Nairobi, Kenya. P.O. Box 22602-00505, Nairobi, Kenya.
T +254 731 086 649 | +254 204 409 918 | +254 710 560 114
E cdhkenya@cdhlegal.com

**STELLENBOSCH**
14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.
T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com



**CLIFFE DEKKER HOFMEYR** | cliffedekkerhofmeyr.com

CLIFFE DEKKER HOFMEYR

INCORPORATING
**KIETI LAW LLP, KENYA**