

3 July 2023

# Employment Law ALERT

## IN THIS ISSUE

### The protection against self-help: Employers be aware

The Labour Appeal Court recently confirmed that an employer may not deduct or withhold any amount from an employee's remuneration if the employee participated in an unlawful strike and the employer failed to implement the 'no work no pay' principle during the month in which the employee did not render services.

### Are the establishment of picketing rules a requirement for lawful strike action?

The On 21 April 2023, the Commission for Conciliation, Mediation and Arbitration (CCMA) published amended Rules for the Conduct of Proceedings Before the CCMA (Rules). One of these amended rules relates to the establishment of picketing rules prior to the issuing of a certificate of non-resolution in disputes relating to the right to strike.



FOR MORE  
INSIGHT INTO  
OUR EXPERTISE  
AND SERVICES



CLIFFE DEKKER HOFMEYR

INCORPORATING  
KIETI LAW LLP, KENYA

## The protection against self-help: Employers be aware

The Labour Appeal Court recently confirmed that an employer may not deduct or withhold any amount from an employee's remuneration if the employee participated in an unlawful strike and the employer failed to implement the 'no work no pay' principle during the month in which the employee did not render services.

The principle is that, if an employer fails to withhold remuneration at the end of the month during which the employee participated in an unprotected strike, as opposed to work, the employer may not deduct or withhold any amount from an employee's remuneration unless (i) the employee in writing agrees to the deduction in respect of a debt specified in the agreement; or (ii) the deduction is required or permitted in terms of a law, collective agreement, court order or arbitration award.

### Section 34 of the BCEA

This matter concerned an appeal against the judgment of the Labour Court in terms of which the appellant, the North West Provincial Legislature (NWPL), was interdicted and restrained from deducting any remuneration from members of the respondent, the National Union of Education, Health and Allied Workers Union (NEHAWU) until it had complied with section 34 of the Basic Conditions of Employment Act 75 of 1997 (BCEA).

From 16 November 2020 until 15 December 2020, employees of the NWPL engaged in unprotected strike action. On 14 December 2020, the NWPL informed staff that the principle of no work no pay was to be implemented from 15 December 2020.

Despite this, remuneration was paid to all striking employees by the NWPL, apparently because the NWPL failed to halt its payroll run to striking workers. Following this, the NWPL advised the respondent employees that it would deduct remuneration paid to employees who had been on strike from their salaries over a number of months.

### Labour Court relief order

In response, NEHAWU approached the Labour Court on an urgent basis seeking urgent interim relief interdicting the NWPL from effecting and/or causing to effect any deductions from the remuneration of the respondent employees on the

basis of their alleged participation in an unlawful strike. This was pending the hearing of Part B of the application in which an order was sought that the deductions made were in contravention of the BCEA and, as such, unlawful. The Labour Court granted final interdictory relief and it is that order which was the subject of the appeal.

Remuneration is paid in terms of a contract of employment in exchange for services rendered. Where services are not rendered by an employee, as a general rule, remuneration is not payable. The employees exercising their constitutionally protected right to strike in the context of collective bargaining involves a power play between the parties. Within this context, the withholding of labour by employees and the concomitant withholding of remuneration by employers are powerful tools available to each.

## The protection against self-help: Employers be aware

CONTINUED

The principle of no work no pay to which section 67(3) of the LRA gives effect means that *"an employer is not obliged to remunerate an employee for services that the employee does not render during a protected strike or a protected lock-out"*. The same applies to an unprotected strike.

### Compliance obligations

In spite of the fact that the NWPL was not obliged to remunerate the respondent employees for services that they did not render during their unprotected strike, it did so and, thereafter, sought to deduct such remuneration paid from their salaries unilaterally, without agreement, or in terms of an order obtained through an adjudicative or judicial process. In other words, in compliance with section 34 of the BCEA, which provides that: An employer may not make any deduction from an employee's remuneration unless

(i) the employee in writing agrees to the deduction in respect of a debt specified in the agreement; or (ii) the deduction is required or permitted in terms of a law, collective agreement, court order or arbitration award.

Since it is not common cause on what days or over what period all employees were on strike to allow deductions to be made unilaterally by the NWPL, without any agreement or impartial adjudication of the issue, would be patently unfair, unjust, and in violation of the express requirements of section 34. As has been made clear by our courts, the rule against self-help is necessary for the protection of the individual against arbitrary and subjective decisions and conduct of an adversary. It serves as a guarantee against partiality and the consequent injustice that may arise.

The legal position is simple and, as of now, trite and settled. Any contrary view fails to appreciate the distinction between an entitlement

not to make payment of remuneration under certain circumstances, such as those that prevail during a strike, and the entitlement to deduct an amount from remuneration under circumstances such as those provided for in section 34.

In conclusion, the principle is then that, as far as section 34 of the BCEA is concerned, if an employer fails to withhold remuneration at the end of the month during which an employee participated in an unprotected strike, the employer may not deduct or withhold any amount from the employee's remuneration unless (i) the employee in writing agrees to the deduction in respect of a debt specified in the agreement; or (ii) the deduction is required or permitted in terms of a law, collective agreement, court order or arbitration award.

**JJ van der Walt**

## Are the establishment of picketing rules a requirement for lawful strike action?

On 21 April 2023, the Commission for Conciliation, Mediation and Arbitration (CCMA) published amended Rules for the Conduct of Proceedings Before the CCMA (Rules). One of these amended rules relates to the establishment of picketing rules prior to the issuing of a certificate of non-resolution in disputes relating to the right to strike.

In light of recent case law, the amendment raised the question of whether the establishment of picketing rules is a requirement for a lawful strike?

### Section 64 of the LRA and the CCMA rule

Section 64(1) of the Labour Relations Act 66 of 1995 (LRA) states that every employee has the right to strike if the issue in dispute has been referred to a council or the CCMA and a certificate stating that the dispute remains unresolved has been issued; or a period of 30 days has elapsed since the referral was received by the CCMA or council.

A separate section of the LRA deals with establishing picketing rules. Section 69 states that the commissioner conciliating the dispute in terms of section 64 must attempt to secure agreement between the parties on picketing rules, and if there is no agreement then the

commissioner must determine picketing rules. Section 65 of the LRA does not limit the right to strike in the absence of picketing rules.

The new CCMA rule, Rule 13(1A), now clarifies this connection between a commissioner's responsibilities in conciliating relevant disputes that could result in strike action if a certificate is issued. The section reads as follows:

*"In the event that a dispute relates to section 64 of the Act [LRA], picketing rules must be established before a certificate of non-resolution is issued, unless a party provides a signed picketing rules agreement as required by section 69(6A) of the Act."*

The CCMA rule indicates that in terms of striking and lock-out disputes under section 64 of the LRA, a certificate can only be issued once picketing rules are established.

However, does this mean that if there are no picketing rules established prior to the issuing of a certificate, is the strike unlawful?

### Case law

In *Southern African Clothing and Textile Workers' Union obo Members v KZN Marketing (Pty) Ltd and Another* [2023] 1 BLLR 83 (LC), the Labour Court (LC) recently grappled with the interplay between strikes and picketing, particularly relating to the lawfulness of strike action where no picketing rules were established.

In this case, a certificate was issued by the CCMA in terms of section 64(1) of the LRA, but the commissioner did not establish any picketing in terms of section 69(5) of the LRA. The employees went on strike and picketed at locations connected to the employer's operations. The employer was of the view that due to the unlawful picketing, the strike action by the employees was unlawful.



## Are the establishment of picketing rules a requirement for lawful strike action?

CONTINUED

The LC made a distinction between the right to strike and picketing. Strike action entails:

*"... the partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee, and every reference to 'work' in this definition includes overtime work, whether it is voluntary or compulsory."*

Picketing is a peaceful demonstration in support of the strike action.

According to the court, these are two distinct actions and the failure to establish picketing rules does not render a strike unlawful where a certificate has been issued. In other words, while a connection may exist between a strike and a picket, the latter in and of itself does not constitute strike action. In this case, the court upheld the lawfulness of the strike while acknowledging that the picketing was unlawful.

The court also bemoaned the fact that the conciliating commissioner issued the certificate without a determination on the picketing rules, which had been requested by the trade union. Nonetheless, despite this failure, the strike was lawful.

The implication of the new Rule 13(1A), despite its possibly inarticulate wording, attempts to close the gap within the CCMA rules framework between section 64 of the LRA and the obligations on a commissioner in terms of section 69 of the LRA. This amendment should avoid an instance in future, such as in this case, where a commissioner issues a certificate without establishing picketing rules.

**Aadil Patel, Hugo Pienaar,  
Nadeem Mahomed and  
Keanen Naidoo**

## 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



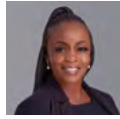
### Gillian Lumb

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



### 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

Counsel:  
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



### Mohsina Chenia

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



### Nadeem Mahomed

Professional Support Lawyer:  
Employment Law  
T +27 (0)11 562 1936  
E nadeem.mahomed@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



**Rizichi Kashero-Ondego**

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



**Jordyne Löser**

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



**Leila Moosa**

Senior Associate:  
Employment Law  
T +27 (0)21 481 6318  
E leila.moosa@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



**JJ van der Walt**

Senior Associate:  
Employment Law  
T +27 (0)11 562 1289  
E jj.vanderwalt@cdhlegal.com



**Biron Madisa**

Associate:  
Employment Law  
T +27 (0)11 562 1031  
E biron.madisa@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)11 562 1732  
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](mailto: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](mailto:ctn@cdhlegal.com)

**NAIROBI**

Merchant Square, 3<sup>rd</sup> 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](mailto:cdhkenya@cdhlegal.com)

**STELLENBOSCH**

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.

T +27 (0)21 481 6400 E [cdh Stellenbosch@cdhlegal.com](mailto:cdh Stellenbosch@cdhlegal.com)

©2023 12454/JULY