

# EMPLOYMENT ALERT

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### THE END OF A STRIKE DICTATES THE END OF REPLACEMENT LABOUR

In the recent judgment of *SACCAWU v Sun International (J1951/15) [2015] ZALCJHB 341* handed down on 6 October 2015, the Labour Court (LC) held that the statutory right of an employer to hire replacement labour is restricted to the period during which a protected strike pertains, and not after it has ceased.

# THE END OF A STRIKE DICTATES THE END OF REPLACEMENT LABOUR

*The members of the union participated in a limited duration protected strike in accordance with their strike notice, issued in terms of s64 of the Labour Relations Act, No 66 of 1995 (LRA).*

*The employer submitted that it was entitled to use replacement labour even after the end of strike because it had embarked on a defensive lock-out in response to the strike.*



In the recent judgment of *SACCAWU v Sun International (J1951/15) [2015] ZALCJHB 341* handed down on 6 October 2015, the Labour Court (LC) held that the statutory right of an employer to hire replacement labour is restricted to the period during which a protected strike pertains, and not after it has ceased.

The facts of the case were as follows: The members of the union participated in a limited duration protected strike in accordance with their strike notice, issued in terms of s64 of the Labour Relations Act, No 66 of 1995 (LRA). The employees demanded wage increases, minimum working hours and a housing subsidy. The employer then issued a notice for the commencement of a lockout in terms of s64(1)(c), read with s76(1)(b), of the LRA demanding that the employees accept the employer's final offer regarding changes in wages and terms of employment, and stating that the lockout would continue until such time as the final offer was accepted. The issue before the LC was whether an employer, in terms of s76(1)(b) of the LRA, may continue to use replacement labour after a strike has ended.

Section 76 of the LRA provides as follows:

- (1) An employer may not take into employment any person-
  - (a) to continue or maintain production during a protected strike if the whole or a part of the employer's service has been designated a maintenance service; or
  - (b) *for the purpose of performing the work of any employee who is locked out, unless the lock-out is in response to a strike.*

- (2) For the purpose of this section, 'take into employment' includes engaging the services of a temporary employment service or an independent contractor.

The employer submitted that it was entitled to use replacement labour even after the end of strike because it had embarked on a defensive lock-out in response to the strike. The employer relied on the decision of *Ntimane & others v Agrinet t/a Vetsak (Pty) Ltd (1999) 20 ILJ 896* (LC) to support this argument. In the *Agrinet* case, the Labour Court stated that a 'reasonable interpretation' of s76(1)(b) is that where the nature of the lock-out is a defensive one, the concomitant right to employ replacement labour, accrues at the stage the defensive lock-out is implemented and endures until the lock-out ceases.

In the *Sun International* case, the LC disagreed with *Agrinet* decision, stating that s76(1)(b) of the LRA is one of the exceptions to the prohibition of the use of replacement labour by an employer. No replacement labour can be used where the employer initiates a lock-out in terms of the LRA, but the exception provides that it may do so 'in response to a strike'. The plain meaning of 'in response to' is 'in reply or reaction to'. The LC explained that it was necessary to determine whether the phrase should be read to mean 'whether the strike has ceased or not.'

# RETRENCHED EMPLOYEES FAIL TO NOTIFY LIQUIDATORS

CONTINUED

*The effect of the judgment is that employers may use temporary replacement labour in response to a protected strike but only for as long as the strike subsists.*



After considering the interpretation provision in the LRA, the LC concluded that the constitutionally protected right to strike is not equivalent to the statutory right to lock-out as provided by the LRA. The LC took cognisance of this principle in its interpretation of s76(1)(b). Following on from this reasoning, the LC pointed out that "the interpretation of s76(1)(b) "should not lend itself to a limitation of the right to strike, bearing in mind that there are no internal limitations of that right in the Constitution". In light of this, the LC found that "the statutory right of

an employer to hire replacement labour is restricted to the period during which a protected strike pertains, and not after it has ceased".

The effect of the judgment is that employers may use temporary replacement labour in response to a protected strike but only for as long as the strike subsists. Employers should unequivocally state these terms to the temporary replacement labour.

*Lauren Salt and Tricia Tsoeu*

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