



EMPLOYMENT LAW

# FROM RECOGNITION TO STRIKE



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## AN OVERVIEW OF COLLECTIVE LABOUR LAW

The right to freedom of association has not always been recognised in South Africa, nor has collective bargaining always been promoted. Similar to the rest of the world, industrialisation led to the development of trade unions and employer organisations. As a result, local legislation had to catch up to deal with the reality of workers who organised themselves and started flexing their combined industrial muscle to improve working conditions.

*In the early part of the twentieth century, the protection of workers' right to form trade unions and engage in collective bargaining was limited to white employees.*

From 1953, however, workplace committees could represent black employees in terms of the Black Labour Relations Act, No 48 of 1953. Full collective bargaining protection remained inaccessible to employees of colour, which did not satisfy unions and led to increased labour unrest. In 1979, pursuant to the work of the Wiehahn commission of enquiry, trade union rights were extended to black employees.

One of the first legislative initiatives embarked on after the election of a democratic government in 1994, was the appointment of a task team to re-evaluate labour legislation. South Africa subsequently left behind its pariah status, and increasingly became a leader in implementing international constitutional and labour standards.

Rampant strike violence has resulted in the National Economic Development and Labour Council (NEDLAC) issuing an Accord on Collective Bargaining and Industrial Action which aims to address issues surrounding the prevention of prolonged and violent strike action and seeks to reaffirm recognition of the following principles of the Ekurheleni Declaration of 2014:

- The constitutional right to strike and the statutory right to lockout must be peaceful, free of intimidation and violence, including violence and intimidation that may be associated with police action
- Strike action by workers and trade unions is a legitimate exercise of power to pursue demands
- Prolonged strike action has the potential to cause serious harm not only to strikers and their employers but also to others inside and outside the workplace

The parties and signatories to this Accord committed themselves and their members to this Accord.

In terms of the Accord, the parties also undertook to abide by the Code of Good Practice: Collective bargaining, Industrial Action and Picketing (the Code). The Code was issued in December 2018. The Code also emphasizes the need for measures to prevent violent and prolonged strikes and lockouts and aims, among others, to promote peaceful industrial action free of violence and intimidation.

## CONSTITUTIONAL FRAMEWORK

South Africa re-joined the International Labour Organisation (ILO) in 1994. The core ILO conventions were subsequently ratified, creating international law obligations for South Africa which needed to find expression in local legislation.

The interim South African Constitution was enacted in 1993, and the final Constitution (Constitution of the Republic of South Africa Act, No 108 of 1996) took effect in February 1997. Both incorporated labour rights in a Bill of Rights. The final Constitution protects, among others, the rights of assembly, demonstration, picketing and petition (s17); freedom of association (s18); freedom of trade, occupation and profession (s22) and the more detailed labour rights set out in s23, simply titled, *Labour Relations*.

Section 23 of the final Constitution provides expressly that "everyone has the right to fair labour practices" and that "every worker" may form, join and participate in the activities of a trade union, as well as engage in strike action. Employers enjoy similar constitutional protection insofar as the rights to join and participate in employer organisations are concerned.

However, there is no constitutional equivalent to the right to strike for employers. They do, however, enjoy the right to embark on a lockout in terms of subordinate legislation. Section 23 also guarantees every trade union, employers' organisation and employer the right to engage in collective bargaining. However, neither the Constitution nor the Labour Relations Act, No 66 of 1995 (LRA) – the primary statutes giving effect to these constitutional rights – imposed a duty to bargain on any party to the employment relationship. We explain this in greater detail below.

The right to freedom of association can be subject to limitations. It is possible for South African employers to conclude closed shop or agency shop agreements with majority trade unions.

### LIMITATIONS TO THE FREEDOM OF ASSOCIATION (CLOSED SHOP AND AGENCY SHOP AGREEMENTS)

The effect of a closed shop agreement is that all employees to whom such an agreement is extended must be, or become, members of the trade union. Only trade union members that are party to the closed shop agreement may be employed by the employers.

In an agency shop arrangement, employers are required to deduct union dues from the wages of non-union employees and to pay the money into a special fund administered by the union. This does not compel the non-union employees to become union members, and the employer is free to employ non-union employees. Conclusion of either of these agreements will impact on an individual's otherwise unfettered freedom to join any trade union of their choosing.

## STATUTORY EXPRESSION OF COLLECTIVE BARGAINING AND FREEDOM OF ASSOCIATION RIGHTS

The work of the task team appointed in 1994 to re-evaluate labour legislation, resulted in the promulgation of, among others, the LRA.

The LRA was promulgated to give effect to the aforementioned constitutional rights in a South African context, and further to give voice to the international law obligations that were acquired through the ratification of ILO conventions. Here we focus on the manner in which the LRA gives effect to the protection of collective bargaining and freedom of association rights, including the right to join trade unions or employer organisations, participate in their activities, embark on industrial action, and the right to engage in collective bargaining.

The LRA does not impose a duty to bargain on any party to the employment relationship. While parties are encouraged to resolve matters of mutual interest between them on a voluntary basis, through bargaining (and preferably on a collective basis), courts will not compel any party to bargain on any specific topic, or indeed reach any specific outcome, with the possible exception of the essential or maintenance services situation. The general view is that, in any dispute that fails to be determined by collective bargaining, it ought to be determined between the parties, without outside interference, but with potential recourse to economic power play. In other words, should either of the parties refuse to participate in the bargaining process, or should no agreement be forthcoming, the disaffected bargaining party cannot approach a court to compel the other party to bargain with it, or reach an agreement, but must resort to industrial action.

The manner in which collective bargaining is encouraged in the LRA, is by the creation of a framework within which parties may engage with each other, and the creation of parameters within which industrial action may take place.

## THE RIGHT TO ORGANISE AND THE RIGHT TO FREEDOM OF ASSOCIATION

### COLLECTIVE REPRESENTATION BODIES

The LRA recognises and provides for the registration of three institutions to engage in collective bargaining:

- Trade unions
- Employers' organisations
- Workplace forums

and provides that parties to the employment relationship may join and participate in the activities of the collective representation bodies. It further creates the framework within which organisational rights may be exercised.

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Chapter III of the LRA extends organisational rights to registered trade unions provided that they meet representivity thresholds. The organisational rights that may be acquired, and how to determine representivity are:

#### TRADE UNIONS

A trade union is an association of employees whose principal purpose is to regulate relations between employees and their employers, or employers' organisations. Trade unions' functions include engaging in collective bargaining with their members' employers or employers' organisations, and representing their members in grievance, disciplinary, and other adversarial matters such as litigation in the labour or civil courts.

Employees' right to elect and join a trade union of their choice, forms part of the general right of freedom of association. Unions may not discriminate against any person on the grounds of race or sex. Racially exclusive trade unions may not be registered. Unions can also not permit job seekers to join as members.

Employees who join a trade union will be bound by the union's constitution, and will be expected to contribute union dues.

Registration of trade unions takes place in accordance with the requirements of s96 of the LRA. This entails, among others, that an application for registration must be submitted to the registrar of labour relations. The trade union's constitution and any other information that may assist in determining whether it meets the requirements for registration must accompany the application. The registrar may refuse to register a union (or employers' organisation) if it is not "genuine". The Minister of Labour has issued guidelines on how to distinguish a "genuine" organisation from a phony one. A refusal of an application is subject to appeal to the Labour Court.

#### EMPLOYERS' ORGANISATIONS

An employers' organisation is "any number of employers associated together for the purpose, whether by itself or together with other purposes, of regulating relations between employers and employees or trade unions".

The general right to freedom of association which entitles employees to belong to trade unions is also extended to employers, who may join employers' organisations. There is a registration requirement for employers' organisations in the LRA, however nothing prevents two or more employers from grouping together on a non-statutory basis (hence without complying with the registration requirements) for the purposes of collective bargaining.

Employers' organisations may also form federations, which have *locus standi* to bring actions in their own names. Officials of employers' organisations are entitled to represent their members in proceedings before the dispute resolution bodies created in the LRA, being the Commission for Conciliation, Mediation and Arbitration (CCMA), bargaining councils and the Labour Court, provided that the employers' organisations are *bona fide*.

#### WORKPLACE FORUMS

An aim of the LRA is to encourage centralised collective bargaining and to remove it from plant (or workplace) level to sectoral level. To counteract the possible lack of workplace issues being addressed in such a removed structure, the LRA also created the possibility that workplace forums be formed.

The general functions of workplace forums are to promote the interests of all employees in the workplace, not just the interests of union members, to enhance efficiency in the workplace, to consult with the employer with a view to reaching consensus about a list of issues, and to participate in joint decision making with the employer on certain other matters.

Once a workplace forum is established it obliges consultation between management and employees on certain mandatory

consultation topics (eg plans to restructure the workplace, the introduction of new technology and work methods). It will further result in joint decision making, which goes further than consultation and collective bargaining, on topics such as disciplinary codes and procedures, rules relating to the proper regulation of the workplace in so far as they apply to conduct not related to the work performance of employees, and measures designed to protect and advance persons disadvantaged by unfair discrimination.

Workplace forums are not trade unions. The workplace forum draws its members only from the employees of that particular workplace. The purpose of the workplace forum is to move away from adversarial collective bargaining, to a joint problem solving and participatory regime where employees can become involved in the day-to-day management of the business, and share the burden of managerial decision making.

The process of establishing a workplace forum can only be triggered by an application to the employer from a registered trade union, or trade unions acting jointly, which represents a majority of employees in a workplace with more than 100 employees. It can ultimately be established against the will of the employer (with the intervention of the CCMA), but if agreement is reached, the CCMA will allow the parties to regulate their own relationship.

## ORGANISATIONAL RIGHTS

Not all trade unions may insist on making use of the organisational rights set out in the LRA. Trade unions must be “representative” and must be registered to qualify for these rights. Certain of the rights are reserved for majority trade unions, as opposed to the merely “sufficiently representative”. Other rights are afforded to all trade unions, irrespective of registration or level of representivity (such as the right not to be discriminated against due to trade union membership).

The organisational rights which majority trade unions may exercise are:

- Trade union access to the workplace
- Deduction of trade union subscriptions
- Election of trade union representatives (shop stewards)
- Leave for trade union activities
- Disclosure of information
- Establish thresholds of representivity by agreement with the employer

Sufficiently representative trade unions may exercise the same rights, except for the election of shop stewards and disclosure of information, both of which are reserved for majority unions.

Pursuant to the amendments to the LRA, organisational rights have been extended further. Instances of such extended organisational rights include:

- An election by trade unions representing temporary employment service (TES) employees, as to whether it will seek to exercise organisational rights at the workplace of the TES, or of the client (such trade union has, in any event, rights in respect of the client’s workplace)
- Trade unions without majority status may be granted the right to appoint shop stewards and/or access to information by the CCMA if no other trade union already enjoys such rights at the workplace

- Despite a collective agreement that sets thresholds of representivity, a trade union that represents a ‘significant interest, or a substantial number of employees’ may be granted organisational rights, even if its membership falls below the agreed threshold

### MAJORITY REPRESENTATION

A majority trade union is a registered trade union that can claim membership of the majority of the employees employed by the employer in a workplace.

A registered trade union may act jointly with another trade union to qualify as “majority representative”.

### SUFFICIENTLY REPRESENTATIVE

The concept of “sufficiently representative” is not defined in the LRA. It falls at a level somewhere below 50% of the employees employed by the employer in a workplace, and could be as low as a few percent, but is more often somewhere between 20% and 30% depending on the circumstances at the particular workplace.

An agreement may be reached with a majority trade union regarding what the membership percentage within the bargaining unit will be for any other trade union to be considered sufficiently representative.

This may, however, (pursuant to the amendments to the LRA) be overlooked when determining whether organisational rights should nonetheless be granted to a trade union.

A registered trade union may act jointly with another trade union in order to qualify as “sufficiently representative”.

### INITIATING THE EXERCISE OF ORGANISATIONAL RIGHTS

When a registered trade union believes that it qualifies as either sufficiently or majority representative, it can approach the employer in writing regarding its intention to exercise any organisational rights within a given workplace. The submission must be accompanied by the prescribed proof of the union’s contention, for instance a copy of its certificate of registration, and a submission that it is representative and why it should be considered so.

The employer must subsequently meet with the union within 30 days. The parties must seek to reach an agreement about whether the union is representative, and which organisational rights (if any) may be exercised by the trade union, as well as the manner in which such rights will be exercised. This agreement takes the form of a recognition agreement, which is a type of collective agreement. The recognition agreement may regulate the manner in which organisational rights will be exercised, and the circumstances in which they may be withdrawn.

If the trade union and the employer cannot reach an agreement, either party may refer the dispute to the CCMA for conciliation, and if that fails, for arbitration. The appointed arbitrator may, for instance, be called upon to determine disputes about what constitutes a workplace, or whether the trade union is either sufficiently or majority representative.

The determination of what the workplace should be will depend on the particulars of each case. The LRA defines a workplace as: “the place or places where the employees of an employer work. If an employer carries on or conducts two or more operations that are independent of one another by reason of their size, function or organisation, the



place or places where employees work in connection with each independent operation, constitutes the workplace of that operation." The concept of the "workplace" does not always coincide with the juristic entity, or geographical proximity of a group of employees, for instance, one juristic entity may include one or more workplaces, whether or not it conducts its business in more than one geographical location.

Section 21 of the LRA further provides guidelines that a commissioner must take into account when determining whether a trade union is sufficiently representative. The presiding commissioner must seek to minimise the proliferation of trade unions in a single workplace, and to minimise the financial and administrative burden on the employer. Various factors must be taken into account, including the nature of the workplace, the nature of the organisational rights which the trade union seeks to exercise, the history of bargaining relationships in the workplace, whether the workplace is divided into coherent bargaining units with distinct employee groupings with separate interests the attitudes of the majority union, and the composition of the workforce, taking into account employees in all the categories of non-standard employment (eg TES or fixed term employees).

#### **REFUSAL TO BARGAIN DISPUTES AND THE RIGHT TO STRIKE OVER RECOGNITION**

Disputes that constitute a refusal to bargain are instances where a party refuses to recognise a registered and representative union as a bargaining agent, refuses to agree to the creation of a bargaining council where the conditions for its creation have otherwise been met, withdraws recognition or disagrees about appropriate bargaining units, levels and topics.

Such refusal to bargain disputes must be referred to conciliation by the CCMA, and if conciliation fails, must be referred for advisory arbitration. Thereafter, however, industrial action may follow to compel bargaining.

### **COLLECTIVE BARGAINING FORUMS**

#### **BARGAINING COUNCILS**

The LRA encourages collective bargaining at a centralised level as much as possible. To facilitate this, bargaining councils and statutory councils can be created and registered.

Bargaining councils are voluntary bodies, established by registered trade unions and registered employers' organisations that have achieved a threshold of representivity in a defined sector.

The primary function of bargaining councils is to conclude and enforce collective agreements between its members. A secondary but also important function is the prevention and resolution of disputes. To exercise the centralised bargaining function, the bargaining council must be registered by the Registrar of Labour. To exercise the dispute resolution function, it must be accredited by the CCMA. Bargaining councils that have been accredited to do so may take over many of the dispute resolution procedures that would otherwise have been conducted by the CCMA, for parties falling under its purview.

In addition, bargaining councils often administer and promote employee benefit funds such as pension funds, training schemes etc. They also develop proposals for NEDLAC relating to applicable legislation and policy for the sector.

#### **STATUTORY COUNCILS**

Statutory councils can be introduced in sectors where union representivity is fairly low, and only if no bargaining council has jurisdiction over that sector. They have a modest set of powers and functions, with the idea that it may gradually grow organically and ultimately establish itself as a forum for the negotiation of wages and conditions of employment for the sector. Statutory councils may perform certain limited dispute resolution functions, promote and establish training and education schemes, and establish and administer pension, provident, medical aid, sick pay and other employment related funds. They can also conclude agreements to give effect to the matters falling within its authorised functions.

### **COLLECTIVE AGREEMENTS**

Collective agreements are written agreements concerning terms and conditions of employment or other matters of mutual interest concluded between, on the one hand, a registered trade union, and on the other, one or more employers, registered employers' organisations, or one or more employers and one or more employers' organisations. There is no requirement that such agreements must be signed, although the parties may by agreement include signature as a formal requirement prior to the agreement taking effect.

Collective agreements have a binding effect on the parties to them and the members of such parties. They may even potentially bind employees who are not members of participating unions, in instances where the employees are identified in the relevant agreement, the agreement expressly states

that it binds such employees, and the participating trade union (or unions acting jointly) has (or have) majority status at the particular employer.

Insofar as collective agreements are concluded at bargaining council level, their effect may be extended to non-parties, to the agreement, and even to employers and employees who are not parties to the bargaining council. The bargaining council may request the Minister of Labour to extend a collective agreement concluded in the bargaining council to non-parties to the agreement that are within the registered scope of the bargaining council, and are identified in the request. Additional protections for non-parties to whom the collective agreement may be extended have further been introduced by amendments to the LRA. These include the introduction of strict time limits and efficiency requirements to allow for fast and effective consideration of requests for exemption from the provisions of the collective agreement.

Collective agreements may include a period for which it will be effective, and can also include a termination notice period. In the absence of an agreement regarding validity period and termination on notice, the term will be indefinite and either party may terminate on reasonable notice.

The LRA requires that each collective agreement should contain a process for the resolution of disputes about interpretation or application of the agreement. Where no such procedure has been agreed, interpretation or application disputes must be referred to the CCMA for conciliation and thereafter arbitration.

## INDUSTRIAL ACTION

Industrial action that may be protected in terms of the LRA could consist of strikes, lockouts, or protest action. Other industrial actions, which do not fall under one of these definitions, are not protected.

### STRIKE ACTION

Industrial action is protected by the Constitution and the LRA. However, there are substantive and procedural requirements that must be complied with, before industrial action is protected.

Strike action may be either primary or secondary. Primary strike action is a form of industrial action that is defined in the LRA as: "... 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 purposes 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." Secondary strike action refers to strike action that takes place in support





# **INDUSTRIAL ACTION THAT MAY BE PROTECTED IN TERMS OF THE LRA COULD CONSIST OF STRIKES, LOCKOUTS, OR PROTEST ACTION**

of a strike by other employees against their employer (ie the employees that have a demand are not employed by the employer who faces the secondary strike). A trade union cannot embark on a strike on behalf of employees where such employees are not its members unless in solidarity action.

If the employer utilizes the services of a TES, the employer should take into consideration legal developments which hold that once the deeming provision kicks in, the TES falls out of the picture and the client/employer is the sole employer. Once the deeming provision has kicked in, the employee's previously employed by the TES can potentially initiate strike action against the client/employer in the event of a future dispute.

## **LOCKOUT**

Lockout is an employer equivalent of a strike, and is defined as: "The exclusion by an employer of employees from the employer's workplace, for the purpose of compelling the employees to accept a demand in respect of any matter of mutual interest between employer and employee, whether or not the employer breaches those employees' contracts of employment in the course of or for the purpose of that exclusion." Employers may lockout employees in response to a strike called by the employees, and if it does so, it will retain the right to introduce replacement labour for the duration of the strike.

If the employer however initiates a lockout without a strike first being called (a so-called offensive lockout) the employer will not be entitled to employ replacement labour during the currency of the lockout.

The constitutionally protected right to strike is not equivalent to the statutory right to lock out as provided by the LRA. The statutory right of the employer to hire replacement labour is restricted to the period during which a protected strike pertains, and not after it has ceased.

## **PROTEST ACTION**

Protest action may occur when there is a concerted refusal to work, for the purpose of promoting or defending the socio-economic interests of workers, but not for a purpose referred to in the definition of a strike. Such protest action may also be protected, in that no employees participating in protected protest action may be adversely affected by their participation (other than "no work no pay" principle, which does apply).

## **NO STRIKES FOR RIGHTS DISPUTES**

The LRA distinguishes between disputes that are arbitrable or justiciable on the one hand and disputes that may be resolved by the exercise of economic power on the other hand. Arbitrable and justiciable disputes are where the LRA has determined that a dispute must be resolved by a process of conciliation, and if that fails, then by determination by an external party (ie the CCMA, a bargaining council, or the Labour Court, depending on the nature of the dispute).

Disputes that are arbitrable or justiciable are referred to as rights disputes.

Disputes that must be resolved by the exercise of economic power are often referred to as interest disputes.

Typically, if a dispute can be arbitrated or adjudicated, no strike or lockout is possible. This includes disputes that are arbitrable or justiciable in terms of other employment laws (ie strikes on such disputes will also be unprotected). There are very few exceptions to this general proposition, one of which is found in the context of large-scale retrenchments, where employees may have an election as to whether to embark upon strike action, or litigate, regarding a substantively unfair retrenchment.

Rights disputes may be the subject matter of either collective or individual disputes. Where more than one employee was dismissed, whether for operational reasons, or misconduct (eg for illegal behaviour during a strike, or for participation in an illegal strike), a single referral by all the affected employees is possible, but individual employees may also elect to litigate separately or in smaller groups.

Industrial action (interest disputes) can, however, only exist in the form of a collective dispute. A single employee cannot undertake protected strike action.

No person who is bound by a collective agreement that prohibits the industrial action, or which agreement already deals with the issue in dispute, can participate in a strike. Further, persons engaged in essential services or maintenance services may be excluded from protected industrial action, as are all parties that are subject to an agreement to refer the issue in dispute to arbitration.

## PROCEDURAL REQUIREMENTS FOR PROTECTION

Procedural requirements for protected strikes or lockouts include that the dispute must first have been referred for conciliation to the CCMA or bargaining council, and that a certificate of non-conciliation must have been issued, or 30 days have passed since the referral, before a notice of the impending strike or lockout may be issued. The notice must give the other party the requisite minimum number of days' notice of the impending industrial action. For primary strikes or lockouts, at least 48 hours' notice must be given. For secondary strikes, the notice period is at least seven days. Employees may commence strike action at a time later than the indicated commencement time, but not earlier. In terms of the Code, where the strike action did not commence on the date set out in the notice, a further notice must be given to the employer indicating when the strike will commence. Only in exceptional circumstances will no strike notice be required, for instance if the employees are embarking on strike in response to an unprotected lockout.

Refusal to bargain disputes must be referred to advisory arbitration by the CCMA, before a notice of intention to commence strike action is given.

Protest action must also comply with certain requirements of the LRA, such as the parties who called out the protest action must serve a notice on NEDLAC. This notice must state the reasons for the protest action as well as the nature that the protest action will assume. NEDLAC must have considered the matter that gave rise to the protest action, and the registered union(s) or federation(s) of unions must give at least 14 days' notice to NEDLAC of their intention to proceed with the protest action.

## EMPLOYER REMEDIES IN THE EVENT OF PROTECTED INDUSTRIAL ACTION

No adverse consequences may result for employees who participate in protected strike action, and the LRA indemnifies them against claims for breach of contract or delict, for damages suffered by the employer pursuant to a protected strike action. Compensation may only be claimed by employers insofar as the employees were involved in illegal action during the course of the protected strike.

Employees who embark upon protected strike action or protest action may not be dismissed, or discriminated against by reason of the protected strike action, unless they have committed acts of misconduct during the strike which justifies their dismissal. It is however possible that even a protected strike may result in such a deterioration in an employer's position that operational requirements dismissals may result.

The principle of "no work no pay" applies unless otherwise agreed. Employers may also engage the services of replacement labourers.

Employers will be able to obtain an interdict preventing unlawful behaviour (eg intimidation or violence) during the course of a protected strike, but cannot interdict the strike itself.

Amendments have been introduced to the LRA that permit an employer to apply to the director of the CCMA to establish an advisory arbitration panel. The panel will be established on application by the employer, if the director has grounds to believe the strike is no longer functional to collective bargaining, there is use or a threat of violence or damage to property by striking employees or the strike causes or can cause an acute national or local crisis impacting conditions for normal social and economic functioning of the community.

The circumstances of the strike will be considered by the panel and an advisory award will be established aimed at helping the parties resolve the dispute. The award will, among others, set out recommendations for the resolution of the dispute and the parties will have seven days to accept or reject the award. The award is binding on parties who accept it or persons to whom it has been extended to by the Minister.

The South African Police Service has undertaken to empower and staff their ranks so as to assist in monitoring and quelling violence that may erupt during industrial action. Subsequent to that, private security companies will have to upskill themselves so as to implement the Code in a manner which enhances the objectives of the Code and ensures the safety of the employer's property and the lives of the employees.

## EMPLOYER REMEDIES IN THE EVENT OF UNPROTECTED INDUSTRIAL ACTION

Unprotected strike action may be interdicted by the Labour Court, on application. The LRA provides for an expedited process in such an event. Employers will further have all of the remedies available to them in a protected strike environment as well, with the effect that illegal behaviour during the course of the strike can equally be interdicted, and the "no work no pay" principle also applies. Another remedy the employer can opt for is to exercise their right to lockout

Disciplinary action may further be taken against employees for participation in an unprotected strike. Dismissal may not necessarily be an appropriate remedy.

Disciplinary action taken must still pass the test for substantive and procedural fairness applicable to all employer dismissals.

It may be appropriate to conduct joint disciplinary hearings, and the form of the hearings will depend on the circumstances.

The indemnification against damages suffered in a protected strike do not apply to unprotected strike action, and striking employees and/or their trade union(s) may be held liable for damages incurred, although the LRA authorises the Labour Court to award less than the actual damages suffered. The court must decide what damages to award having regard to, among other things, whether any attempts were made to comply with the requirements for a protected strike, whether the strike was premeditated, whether it was in response to unjustified conduct by the employer, and whether there was compliance with an order of the Labour Court to restrain participation in the strike. Other considerations include the interests of collective bargaining and the financial position of the parties.

## SECONDARY STRIKES

A secondary strike is a strike held in support of a primary strike by other employees against their employer. It is used to place pressure on employers engaged in the primary strike to accede to the demands of the workers participating in the primary strike. The secondary strike draws employers and employees into the industrial action notwithstanding the fact that there is no dispute between these employees or their employers.

A secondary strike cannot be protected unless it is in support of a protected primary strike. In addition, more notice is required in respect of a secondary strike (seven days as opposed to 48 hours) and the secondary strike must meet a proportionality requirement. The secondary strike must not have a disproportionate impact on the business of the secondary employer, when having regard to the possible impact the secondary strike could have on the business of the primary employer.

The LRA states that the nature and extent of the secondary strike must be reasonable in relation to the possible direct or indirect effect that the secondary strike may have on the business of the primary employer.

In the recent constitutional court judgment of *Association of Mineworkers and Construction Union and Others v Anglo Gold Ashanti Limited t/a Anglo Gold Ashanti and Others* [2021] ZACC 42, the court held that in balancing the potential harm which may be caused to the secondary employer against the potential harm which may be caused to the primary employer relevant factors must be considered. Such factors would include *inter alia* the duration and form of the strike, the number of employees involved, the membership of trade unions, the conduct of the strikers, including whether the primary strike is peaceful or violent, and the sector involved in the primary and secondary strikes. The court further held that the prospects of violence during a secondary strike would be a factor to consider when assessing its reasonableness.

## ESSENTIAL/MAINTENANCE SERVICES

As a general principle employees cannot compel employers to improve terms and conditions of service in the absence of an agreement, and such agreement must be obtained in the bargaining arena, or if that fails, by the use of industrial action (strike). However, if the specific organisation falls

within an essential or maintenance service, strikes and lockouts are prohibited and the party to the employment relationship that seeks to compel the other to agree to amendments to terms and conditions of service, must refer the dispute to final and binding arbitration.

An essential service is:

- A service the interruption of which endangers the life, personal safety or health of the whole or any part of the population
- The parliamentary service
- The South African Police Service

A maintenance service is one whose interruption results in material physical destruction to any working area, plant or machinery.

The essential services commission must determine whether the whole or any part of a particular service is an essential service, or a maintenance service.

The LRA permits collective agreements that provide for the maintenance of minimum services in a service designated as an essential service. Such collective agreement must be ratified by the essential services committee, after which employees employed outside of the agreed minimum services are permitted to strike even though they are employed in a designated essential service, and the employer may lock out those employees. If no agreement is forthcoming, a determination of minimum services may in future be imposed upon the parties..

The legislative *quid pro quo* for designating part of the employer's operations as a maintenance service is that the employer is prohibited from employing replacement labour during a protected strike.

Pursuant to the recent amendments to the LRA, the composition and functions of the essential services committee have been expanded upon, and much of its work will in future be done by panels consisting of three to five persons assisting an assessor who has expertise within the relevant sector.

## PICKETING

Employees may participate in picketing lines in furtherance of a protected strike, or in opposition to any lockout. Such demonstrations must remain peaceful.

Picketing may take place outside the premises of the employer, unless the employer has agreed that it may take place

inside the premises. Employers may not unreasonably withhold such permission.

Picketing is now allowed at premises owned or controlled by persons other than the employer, provided that such picketing must take place in terms of CCMA-sanctioned picketing rules, with such interested parties being given an opportunity to be heard.

Picketing rules must be established before a picket may take place. If there is no collective agreement regulating picketing, the conciliating commissioner will try to get the parties to agree on picketing rules in the conciliation process. If no such agreement is concluded, the commissioner will determine the picketing rules using the default picketing rules as a basis at the same time as issuing the certificate of non-resolution.

The Minister of Labour also published Picketing Regulations that take effect on 1 January 2019 as well as default picketing rules. The default picketing rules are applicable if the parties fail to conclude a picketing rules agreement and the commissioner must impose the rules. The Code also deals with picketing.

The commissioner may also determine picketing rules on an urgent basis on application from a trade union if it referred a dispute about a unilateral change to the terms and conditions of employment and the employer has not restored the original terms and conditions or stopped the implementation of the change to terms and conditions of employment, or the employer has given notice to commence an unprotected lockout.

Third parties, who are not parties to the employment relationship, but are affected by the strike and picketing behaviour (such as the employer's landlord), may also approach the Labour Court to interdict behaviour during picketing.

Where a picket has resulted in damage, including damage to property, an employer is entitled to make an application to the Labour Court for an award of just and equitable compensation for the damage suffered as a result of a picket that turns violent. In addition, where said picket is authorised in terms of the LRA, the LRA takes preference over the Regulations of Gatherings Act 205 of 1993 and an aggrieved employer may only seek relief from the Labour Court.

## MARKET RECOGNITION

Our Employment Law team is externally praised for its depth of resources, capabilities and experience.

*Chambers Global 2014–2021* ranked our Employment Law practice in Band 2 for employment. *The Legal 500 EMEA 2020–2021* recommended us in Tier 1 for employment and in Tier 2 from 2009–2019.

The way we support and interact with our clients attracts significant external recognition.

**Aadil Patel** is the Practice Head of the Employment Law team, and the Joint Head of the Government & State-Owned Entities sector. *Chambers Global 2015–2021* ranked him in Band 2 for employment. *The Legal 500 EMEA 2021* recommended Aadil as a leading individual for employment and recommended him from 2012–2020.

*The Legal 500 EMEA 2021* recommended **Anli Bezuidenhout** for employment.

**Jose Jorge** is the Head of the Consumer Goods, Services & Retail sector, and a director in our Employment Law practice. *The Legal 500 EMEA 2020–2021* recommended Jose for employment.

**Fiona Leppan** is the Joint Head of the Mining & Minerals sector, and a director in our Employment Law practice. *Chambers Global 2018–2021* ranked her in Band 2 for employment. *Chambers Global 2016–2017* ranked her in Band 3 for employment. *The Legal 500 EMEA 2019–2021* recommended her as a leading individual for employment and recommended her from 2012–2018.

*Chambers Global 2020–2021* ranked **Gillian Lumb** in Band 3 for employment. *Chambers Global 2017–2019* ranked Gillian in Band 4 for employment. *The Legal 500 EMEA 2017–2018, 2020–2021* recommended her for employment.

*Chambers Global 2021* ranked **Imraan Mahomed** in Band 2 for employment and in Band 3 from 2014–2020. *The Legal 500 EMEA 2013–2018 and 2020–2021* recommended him for employment.

**Hugo Pienaar** is the Head of the Infrastructure, Logistics, and Transport sector, and a director in our Employment Law practice. *Chambers Global 2014–2021* ranked Hugo in Band 2 for employment. *The Legal 500 EMEA 2014–2021* recommended him for employment.

*Chambers Global 2020–2021* ranked **Michael Yeates** as an up and coming employment lawyer. *The Legal 500 EMEA 2020* recommended him for employment.



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### 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.

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