All employees (acting in concert with other employees) have the right to strike.
STRIKE GUIDELINE

Before a strike notice is issued:

A. 30 days must lapse from when the dispute was received by the CCMA or Bargaining Council; or

B. A certificate must be issued stating that the dispute remains unresolved (The first to occur of A or B)

The issue in dispute must be referred to the Commission for Conciliation, Mediation and Arbitration (CCMA) or Bargaining Council

Before a strike notice is issued:

A. 30 days must lapse from when the dispute was received by the CCMA or Bargaining Council; or

B. A certificate must be issued stating that the dispute remains unresolved (The first to occur of A or B)

A written notice stipulating the commencement of the strike must be issued to the employer at least 48 hours before the strike commences

WHAT PROCEDURAL REQUIREMENTS MUST BE COMPLIED WITH FOR A STRIKE TO BE PROTECTED?

A STRIKE CAN TAKE THE FORM OF

- A partial or complete refusal to work
- A ‘go slow’ where employees are working slowly to put pressure on an employer to comply with a demand
- A ‘grasshopper’ strike. This happens when the employees go on intermittent work stoppages about the same demand (ie strike, return to work, strike again)

but always in conjunction with the defined purpose of attempting to resolve a mutual interest issue existing between the parties. The disgruntled employees will normally express the purpose of a withholding of work in some form of a demand made to the employer.

DOES A WORK STOPPAGE CONSTITUTE A STRIKE?

A work stoppage is different to a strike.

The difference between a work stoppage and a strike is that there is no demand made by the participants in a work stoppage, the participants simply stop working.

NOTE: The distinction between a work stoppage and a strike is an important one as it has an impact on the types of remedies available to the employer when such conduct occurs.

WHO MAY GO ON STRIKE?

All employees (acting in concert with other employees) have the right to strike. An individual employee cannot strike on his or her own. The LRA, however, sets out certain limitations and requirements that must be complied with for a strike to be protected.

All employees of an employer may associate themselves with a protected strike, even if they are not members of the trade union initiating the dispute and declaring the strike.

NOTE: The employer must identify and record which employees are on strike as this information will become important if the employer approaches the Court to interdict an unprotected or violent strike.

WHAT IS A PROTECTED STRIKE?

A protected strike is a strike that complies with the requirements in the LRA, where the subject matter of the strike is legitimate and procedural requirements are complied with prior to the strike commencing.

If a strike is protected, no adverse consequences may result for employees who participate in protected strike action. Those employees are indemnified from claims for breach of contract or delict and for damages suffered by the employer pursuant to a protected strike. Importantly, employees are protected from dismissal for participating in a protected strike.

WHAT IS A STRIKE?

The Labour Relations Act, No 66 of 1995 (LRA) defines a strike 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 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”

DOES A WORK STOPPAGE CONSTITUTE A STRIKE?

A work stoppage is different to a strike.

The difference between a work stoppage and a strike is that there is no demand made by the participants in a work stoppage, the participants simply stop working.

NOTE: The distinction between a work stoppage and a strike is an important one as it has an impact on the types of remedies available to the employer when such conduct occurs.

WHO MAY GO ON STRIKE?

All employees (acting in concert with other employees) have the right to strike. An individual employee cannot strike on his or her own. The LRA, however, sets out certain limitations and requirements that must be complied with for a strike to be protected.
WHY MUST THE ISSUE IN DISPUTE BE REFERRED TO CONCILIATION BEFORE THE STRIKE?

A code of good practice on collective bargaining, industrial action and picketing (the Code) was issued in December 2018. The Code is aimed at promoting orderly collective bargaining, effective and speedy resolution of disputes, peaceful strikes and lockouts and the prevention of prolonged violent industrial action.

The Code sets out two reasons why issues in dispute must be referred to conciliation. Firstly to try and have the dispute resolved without resorting to industrial action and secondly, to record the demands and agree on picketing rules, lines of communication and the need for minimum services.

WHAT HAPPENS IF A STRIKE DOES NOT COMMENCE ON THE DATE AND TIME STIPULATED IN THE WRITTEN NOTICE?

The trade union should issue another notice stating the date and time of the strike if it intends to strike. If no such notice is issued it may lead to the inference that the trade union has waived or abandoned its right to strike.

WHAT DISPUTES CAN EMPLOYEES STRIKE OVER?

Although the right to strike is a constitutional right, section 65 of the LRA provides limitations on the right to strike. In terms of this section, employees are prohibited from striking if they are:

- “Bound by a collective agreement that prohibits a strike or lock-out in respect of the issue in dispute”
- “Bound by an agreement that requires the issue in dispute to be referred to arbitration”
- Engaged in an essential or maintenance service

In addition, section 65 prohibits employees from striking over an issue in dispute that can be referred to arbitration or the Labour Court in terms of the LRA or other employment law. The LRA distinguishes between disputes that can be resolved by arbitration or adjudication (rights disputes) and disputes that can be resolved by the exercise of economic power (interest disputes). Employees may not strike over rights disputes.

NOTE: The limitations in section 65 are equally applicable to lock-outs.

WHAT IS THE DIFFERENCE BETWEEN A RIGHTS DISPUTE AND INTEREST DISPUTES?

The Code identifies the differences and the importance of the differences between right disputes and interest disputes.

IN TERMS OF THE CODE:

A rights dispute is a dispute that relates to existing rights and that the LRA or other employment laws require be resolved by adjudication or arbitration. An example is a dispute relating to an unfair dismissal or where an employer pays an employee less than the amount set out in employment law or an employment contract.

An interest dispute is a dispute to create new rights and can form the subject of a protected strike or lockout. An example of such a dispute is a dispute about increase in wages or a change to working hours.

WHAT ARE EXAMPLES OF INTEREST DISPUTES?

The Code sets out the following examples of interest disputes:

- disputes about what the next year’s wages will be
- disputes about introducing new shift systems
- disputes about working hours or higher rates of overtime pay

CAN EMPLOYEES STRIKE OVER AN UNLAWFUL DEMAND?

No. An example of an unlawful demand is a demand that the employer dismiss a manager or that employees work more overtime than permitted in law.

WHAT STEPS CAN AN EMPLOYER TAKE IF THE PROTECTED STRIKE ACTION BECOMES VIOLENT?

Amendments have been introduced to the LRA to deal with lengthy violent strike action. The amendments permit the director of the CCMA to establish an advisory arbitration panel. Employers can apply to the director to establish an advisory arbitration panel. Employers can also approach the Labour Court to interdict unlawful behaviour.

The employer may also institute disciplinary action against the employees who are acting unlawfully. In terms of the amendments to the LRA, the Labour Court may also order the director of the CCMA to establish an advisory arbitration panel.

WHEN DOES A PROTECTED STRIKE BECOME AN UNPROTECTED STRIKE?

A protected strike can only become an unprotected strike if it continues beyond the point when the employer complies fully and unconditionally with the demand or the strikers alter their demands. (Transport and Allied Workers Union of South Africa obo Ngxide and others v Unitrans Fuel and Chemical (Pty)Ltd [2016] 11 BLLR 1059 (CC))

CAN AN EMPLOYER DISMISS EMPLOYEES FOR PARTICIPATING IN A PROTECTED STRIKE?

No. A dismissal in such circumstances would constitute an automatically unfair dismissal. However, misconduct during a protected strike may be the subject of appropriate disciplinary action.
WHAT ARE THE ESSENCE OF THE AMENDMENTS TO THE LRA RELATING TO THE ESTABLISHMENT OF AN ADVISORY ARBITRATION PANEL?

The amendments permit the director of the CCMA to establish an advisory arbitration panel. The circumstances of the strike or lockout 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.

WHEN WILL AN ADVISORY ARBITRATION PANEL BE ESTABLISHED?

The director must appoint an advisory arbitration panel if ordered to do so by the Labour Court or if the parties to the dispute agree to the panel being established.

The director may also appoint an advisory arbitration panel on his/her own accord or on application by a party to the dispute. If a party to the dispute applies for an advisory arbitration panel to be established or the Minister directs that a panel be established, before establishing the panel, the director must have grounds to believe one or more of the listed circumstances exist:

(i) “The strike or lockout is no longer functional to collective bargaining in that it has continued for a protracted period of time and no resolution of the dispute appears to be imminent;”

(ii) “There is an imminent threat that constitutional rights may be or are being violated by persons participating in or supporting the strike or lockout through the threat or use of violence or the threat of or damage to property; or”

(iii) “The strike or lockout causes or has the imminent potential to cause or exacerbate an acute national or local crisis affecting the conditions for the normal social and economic functioning of the community or society.”

WHEN WILL THE LABOUR COURT ORDER THE DIRECTOR TO ESTABLISH AN ADVISORY ARBITRATION PANEL?

The Labour Court will order the director to establish a panel if there is an application to the Labour Court by a person or association materially affected by the circumstances in (ii) or (iii) above and the Labour Court considers that the circumstances in (ii) and (iii) exist.

WHO IS APPOINTED TO SIT ON THE ADVISORY ARBITRATION PANEL?

A senior commissioner will be appointed as the chairperson, and two assessors (one appointed by the employer and the other by the trade union).

WHAT HAPPENS IF THE EMPLOYER OR THE TRADE UNION DOES NOT APPOINT AN ASSESSOR?

The director must appoint an assessor from lists provided by NEDLAC.

WHAT IF THE EMPLOYER OR TRADE UNION REFUSES TO PARTICIPATE IN THE PROCEEDINGS OF THE PANEL?

The director is required to appoint a person with the requisite expertise to represent the interests of that party refusing or failing to participate in the proceedings.

DOES THE APPOINTMENT OF THE PANEL INTERRUPT OR SUSPEND THE RIGHT TO STRIKE OR LOCKOUT?

No.

WHAT WILL AN AWARD SET OUT?

A report on factual findings, recommendations to resolve the dispute, motivations as to why the recommendations should be accepted, the seven-day period within which the parties must either accept or reject the award.

CAN A PARTY REJECT THE AWARD?

Yes, but before doing so the trade union or employer’s organisation must in accordance with its constitution, consult with its members. Any rejection is required to be motivated.

WHAT IF A PARTY DOES NOT ACCEPT OR REJECT THE AWARD WITHIN THE PRESCRIBED TIME PERIOD?

If a party fails to accept or reject the award within seven days, the party is deemed to have accepted the award.

IS THE AWARD BINDING AND WHO DOES IT BIND?

The award will be binding on the party and its members who accepted the award or who are deemed to have accepted the award. If the award is extended by the Minister in terms of s32 of the LRA it will be binding on persons who are not members of the parties to the council or on persons who have rejected the award.
QUESTIONS FOR CONSIDERATION:

CAN A PROTECTED STRIKE LOSE THAT STATUS WHERE THE VIOLENCE IS EXTREME AND UNCONTROLLABLE?

Despite attempts to interdict a protected strike on account of violence and declare the strike unprotected, the Labour Court is yet to make such a ruling. In previous judgements, the Labour Court has stated that it is possible to obtain this form of relief, but that the court should not easily adopt an approach which so severely limits the constitutional right to strike.

The test currently suggested by the Labour Court in order to successfully declare a protected strike as unprotected, is that the nature and degree of the strike violence must be such that the strike is no longer functional to collective bargaining and that it no longer supports the legitimate purpose of collective bargaining.

While this relief has in theory been mentioned by the Labour Court as being possible, it is yet to grant such an order and/or set out guidelines as to what degree of violence it considers sufficient for such an order.

CAN AN EMPLOYER DISMISS EMPLOYEES AS A RESULT OF OPERATIONAL REQUIREMENTS FLOWING FROM A PROTECTED STRIKE?

Although employees are protected from dismissal for participating in protected strike action, the LRA does not preclude employers from dismissing employees based on operational requirements. However, in circumstances where the intention of a strike is to put financial pressure on an employer’s business, an employer will have to prove that the main reason for the dismissal was the operational requirements of the employer and did not relate to employees’ participation in the protected strike and that the reason for the dismissal and procedure followed was fair. The employer will also have to show that it considered alternatives to retrenchment and paid attention to letting the outcome of the strike be determined by the normal exercise of economic power.

WHAT REMEDIES ARE AVAILABLE TO AN EMPLOYER IF STRIKE ACTION IS UNPROTECTED?

The Labour Court may also order the payment of compensation for loss arising from the unprotected strike after having regard to a number of factors, including the “financial position of the employer, trade union or employees”.

In addition, in the recent decision of Numsa and Others v Dunlop Mixing and Technical Services (Pty) Ltd 2021 (4) SA 144 (SCA), the nSCA concurred with the decisions of the LAC which stated that where a picket is authorised in terms of the LRA and damage is suffered as a result of said picket, 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.

Accordingly, where a strike or 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 strike or picket that turns violent.

IF A BALLOT IS NOT CONDUCTED WILL THE STRIKE BE UNPROTECTED?

Trade unions and employer organisations who apply for registration must have adopted a constitution meeting the requirements in LRA. One of the requirements is that the constitution must provide that before calling a strike or lock-out, the trade union or employer’s organisation must conduct a ballot of members in respect of whom it intends to call the strike or lock-out. The LRA has been amended to clarify that a ballot means any system of voting by members that is recorded and secret. The LRA now also requires every registered trade union and employer’s organisation to keep the ballot papers or any documentary or electronic record of the ballot for a period of three years from the date of every ballot.

In Mahle BEHR SA (Pty) Ltd v NUMSA and Others; FOSKOR (Pty) Ltd v NUMSA and Others (2019) 40 ILJ 1814 (LC), the Labour Court held that the language of the amendments to s95(5)(p) of the Labour Relations Act are peremptory and accordingly, trade unions and employer organisations must engage in a secret ballot prior to embarking on strike action or a lock-out.

Therefore trade unions and employer organisations must comply with the balloting provisions of their respective constitutions in order to engage in a protected strike.

Accordingly a strike or lock-out may be interdicted on the basis that a trade union or employer organisation has failed to conduct and record a secret ballot.

Section 19 of the Amendment Act that came into operation on 1 January 2019 provides that if there is non-compliance with the requirement to have a provision in its constitution to hold a ballot, it must nevertheless hold a secret ballot. In the absence of a secret ballot under those circumstances, the strike may be interdicted.

CAN AN EMPLOYER DISMISS AN EMPLOYEE FOR PARTICIPATING IN UNPROTECTED STRIKE ACTION?

Although participation in an unprotected strike constitutes misconduct, dismissal may not necessarily be the appropriate remedy. The Code of Good Practice: Dismissal sets out various considerations when determining the fairness of the dismissals. These considerations include whether “the strike was in response to unjustified conduct by the employer.”

TIPS ON EVIDENCE IN SUPPORT OF AN INTERDICT OR DISCIPLINARY ACTION RELATING TO VIOLENCE, INTIMIDATION OR DAMAGE TO PROPERTY:

Keep a strike diary detailing all incidents relating to the strike including incidents of violence, intimidation and damage to property

Obtain written and signed statements of witnesses detailing violence, intimidation and damage to property

Obtain clear photographic and video evidence

Keep evidence where the trade union was informed of the violence, intimidation and/or damage to property

Unprotected strike action may be interdicted by the Labour Court on application. The LRA provides for an expedited process in such an event. Employers may also take disciplinary action against employees for participating in unprotected strike action.
WHAT IS THE CORRECT TEST WHEN ASSESSING THE MISCONDUCT OF AN EMPLOYEE?

In Pailpac (Pty) Ltd v De Beer N.O and Others (DA 12/2018) [2021] ZALAC 3 (1 March 2021), the employees were dismissed for misconduct namely – carrying weapons (such as sticks) during their strike action. The Labour Appeal Court confirmed that the correct test entails, amongst others, determining whether, on the evidence presented, the dismissed employees were aware of the specific rule prohibiting the misconduct or could have reasonably been expected to have been aware of such a rule. The Labour Appeal Court further stated that courts have consistently cautioned against an overly technical and formulaic approach to interpretation of a rule, for example, distinguishing between ‘brandishing’ and ‘carrying’ a weapon during a strike.

WHAT IS THE CONCEPT OF DERIVATIVE MISCONDUCT?

In National Union of Metalworkers of South Africa obo Nganezi and Others v Dunlop Mixing and Technical Services (Pty) Ltd and Others [2019] ZACC 25 (a case dealing with violence during strike action), the Constitutional Court confirmed that derivative misconduct may be described as a form of misconduct that arises through the failure of an employee to offer reasonable assistance in the finding and identifying of fellow employees who are actually responsible for some form of misconduct. Simply put, those employees who are aware of an act of misconduct but choose to remain silent make themselves guilty of a derivative violation of the trust relationship.

The Constitutional Court also found that where the employer seeks to impose a duty on its employees to disclose information about their fellow striking employees, the reciprocal nature of the trust relationship between them requires the employer to guarantee the safety of the disclosing employees.

CAN EMPLOYEES STRIKE IN RESPECT OF HEALTH AND SAFETY MEASURES?

In De Heus (Pty) Ltd v South African Commercial and Catering Workers Union (SACCAWU) and Others (J 685/20) [2020] ZALCJHB 149 (7 September 2020) the Labour Court confirmed that the employees embarked on industrial action within the strike definition as envisaged in the LRA, but held that even though health and safety issues in the light of COVID-19 are paramount and that the safety of employees at all workplaces should not be compromised, this does not warrant employees the right to embark upon industrial action at a whim, without first engaging with their employers on issues, or the department of labour, where the regulations are not complied with, or without first complying with the provisions of section 64 of the LRA.

CAN EMPLOYERS REWARD NON-STRIKING EMPLOYEES FOR WORK DONE DURING A PROTECTED STRIKE?

The general principle remains that it constitutes unfair discrimination to pay or remunerate non-striking employees for not participating in a strike. Payments for other purposes must be seen for what they are. The Labour Appeal Court in National Union of Mineworkers v Cullinan Mine (Pty) Ltd (2021) 42 ILJ 785 (LAC) held that whilst trade unions may have recourse to engage in industrial action in response to unilateral changes to the contract of employment, so too may employers, respond to their strike action with a unilateral exercise of managerial prerogatives to temporarily alter the terms of the employment contract.

A secondary strike is a strike held in support of a primary strike by other employees against their employer.
contract. The Labour Appeal Court held that a decision to make payment of an exceptional bonus to non-striking employees was not objectionable provided that the measure was suitable and proportional. In this case the employer’s conduct had not unfairly discriminated against striking employees, as the non-striking employees had not been advantaged for not exercising their right to strike but for their attendance and outstanding performance during the strike action.

**IS AN EMPLOYER REQUIRED TO PAY EMPLOYEES DURING A STRIKE?**

No. The principle of “no work no pay” applies.

Should an employer provide accommodation or meals to employees in the ordinary course of employment, the employer is entitled to suspend such services at the commencement of the strike. However, if the employees or their trade union specifically request a continuation thereof, these services should be continued, with the proviso that the employer can make the appropriate deductions, if it has consent, once the strike is over, or it would have to sue for such amounts.

**CAN EMPLOYEES BE HELD IN CONTEMPT OF COURT FOR DISOBEYING A LABOUR COURT INTERDICT ORDER?**

Yes. If the employer has approached the Labour Court to interdict an unprotected strike, or a protected strike which has turned violent, and the striking employees continue to disobey the interim court order after it has been granted, the employer may approach the Labour Court on application to hold the employees in contempt of court.

Contempt applications are generally done on an ex parte basis. Employers are required to approach the court without the union or its members being present, in order to convince the court that it has grounds for contempt. The court will then make an order calling on the relevant employees accused of acting in breach of the interim order to convince the court that they are not in contempt.

The requirements that must be satisfied by an employer in a contempt application are

1. A court order must have been obtained
2. The order must be served on each employee subject to contempt proceedings (in some circumstances actual service is not necessary and notification of order may be sufficient)
3. Non-compliance with the order
4. Non-compliance must be perpetrated in a wilful and *malicious* manner

It must be borne in mind that contempt applications require proof of beyond reasonable doubt and carries the onus required in criminal proceedings.
CAN TES EMPLOYEES STRIKE AT THE CLIENT’S PREMISES?

Yes, the CCMA may establish picketing rules that provide that temporary employment service (TES) employees can picket at the client’s premises.

WHERE THERE IS NO BARGAINING COUNCIL AND THE PARTIES BARGAIN AT PLANT LEVEL, IF THE EMPLOYER AND MAJORITY TRADE UNION CONCLUDE A COLLECTIVE AGREEMENT, WILL THAT AGREEMENT BIND THE EMPLOYEES WHO ARE NOT MEMBERS OF THAT TRADE UNION?

Yes. In terms of the LRA a collective agreement will bind employees who are not members of a trade union, if those “employees are identified in the agreement; the agreement expressly binds the employees and the trade union has as its members the majority of employees employed by the employer in the workplace.” It calls into debate what constitutes ‘a workplace’ for the purpose of such extension. Recently the Constitutional Court held that the term “workplace”, for the purposes of the LRA, has a ‘special statutory meaning’ that focuses on “workers as a collectivity rather than as isolated individuals” and where geographical location is de-emphasised. The Constitutional Court held that the determination is whether the employer conducts two or more operations “that are independent of one another by reason of their size, function or organisation.”

NOTE: The LRA prohibits a person from striking if that person is bound by a collective agreement that prohibits a strike in respect of the issue in dispute.

WHAT IS A SECONDARY STRIKE?

A secondary strike is a strike held in support of a primary strike by other employees against their employer.

WHEN WILL A SECONDARY STRIKE BE PROTECTED?

A secondary strike cannot be protected unless it is in support of a protected primary strike. In addition, more notice (seven days) is required in respect of a secondary strike and 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.

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.

ULTIMATUM FAQS

WHAT IS AN ULTIMATUM?

An ultimatum is a warning from an employer, informing its employees, that it intends to dismiss striking employees if they do not return to work within a specified time.

WHAT IS THE OBJECT OF AN ULTIMATUM?

The object of an ultimatum is to give striking employees the opportunity to reconsider their action. AMCU obo Rantho and Others v SAMANCOR Western Chrome Mines (J462/19) (2020) ZALAC 46; (2020) 41 ILJ 2771 (LAC) (1 October 2020) (Samancor).

WHAT SHOULD AN ULTIMATUM CONTAIN?

The Labour Appeal Court in Samancor emphasised that Item 6(2) of the Dismissal Code of Good Practice of Schedule 8 of the LRA (Item 6(2)) provides that, prior to a dismissal of employees for their participation in unprotected strike action, the employer should issue an ultimatum in clear and unambiguous terms that should state what is required of the employees and what sanction will be imposed if they do not comply with the ultimatum. The employees should be allowed sufficient time to reflect on the ultimatum and to respond to it, either by complying with it or rejecting it.

CAN AN EMPLOYER DISMISS AN EMPLOYEE WHO HAS COMPLIED WITH AN ULTIMATUM?

In Samancor, the Labour Appeal Court, held that where illegally striking employees obey an ultimatum and return to work within the stipulated time, the employer will not be entitled to dismiss them. To hold otherwise would render the purpose of an ultimatum nugatory. An ultimatum (by the employer) is a waiver of the right to dismiss for the period of its duration. Therefore, where there is compliance with the ultimatum, the threatened dismissal cannot follow.

CAN AN EMPLOYER DISMISS STRIKING EMPLOYEES WITHOUT HEARING THE STRIKING EMPLOYEES?

In Modise & others v Steve’s Spar Blackheath [2000] 5 BLLR 496 (LAC) -prior to dismissing its striking employees, the employer issued an ultimatum giving its striking employees a chance to halt the strike as a means of avoiding dismissal. Despite this the Labour Appeal Court found the dismissal was unfair because there had been no hearings. The Labour Appeal Court said that, irrespective of an ultimatum, no employee should be fired before he has had a chance to be heard in terms of the universal principle of audi alteram partem.

WHAT IS A REASONABLE TIME TO RETURN TO WORK?

It is unreasonable to expect striking employees to resume work in too short a time. A reasonable time ultimately will depend on the circumstances, but an ultimatum should afford the striking employees “a proper opportunity for obtaining advice and taking a rational decision as to what course of action to follow” (Transport and Allied Workers Union of South Africa obo Ngedle and others v Unitrans Fuel and Chemical (Pty) Ltd [2016] 11 BLLR 1059 (CC)).

WHAT IS AN ADEQUATE COOLING-OFF PERIOD?

In Transport and Allied Workers Union of South Africa obo Ngedle and others v Unitrans Fuel and Chemical (Pty) Ltd [2016] 11 BLLR 1059 (CC), the Constitutional Court held that the period of time (period) conferred by the ultimatum must be considered in light of the conditions prevailing at the time it was issued. The period conferred by an ultimatum must be viewed in the context of whether the ultimatum provided an adequate opportunity for employees involved to engage with its contents and to respond accordingly.

This is in line with Item 6(2) encompassing the audi alteram partem principle, which extends into the terrain of unprotected strike action. The importance of conferring an adequate “cooling-off” period must be emphasised. An adequate cooling off period ensures that an employer does not act in anger or with undue haste and that in turn the striking employees act rationally having been given the time and opportunity to reflect.
WHAT IS THE “WORKER SOLIDARITY PRINCIPLE?”

The “worker solidarity principle” allows employees to join a strike even if they are not directly involved in the dispute (Transport and Allied Workers Union of South Africa obo Ngedle and others v Unitrans Fuel and Chemical (Pty) Ltd [2016] 11 BLLR 1059 (CC)).

LOCK-OUT FAQs

WHAT IS A LOCK-OUT?

A lock-out is a mechanism available to an employer to exclude employees from the workplace, in order to compel them to accept a demand of the employer relating to a matter of mutual interest.

WHAT IS THE DIFFERENCE BETWEEN A DEFENSIVE LOCK-OUT AND AN OFFENSIVE LOCK-OUT?

A defensive lock-out is where employers lockout the employees in response to a strike called by the employees and if it does so the employer may use replacement labour for the duration of the strike.

An offensive lock-out is initiated by an employer, without a strike first being called. The employer may not employ replacement labour for the duration of the lock-out.

NOTE: These terms are not used in the LRA but it has become common to distinguish a defensive lock-out from an offensive lock-out.

WHEN WILL A LOCK-OUT BE PROTECTED?

As with strikes, an employer’s recourse to lock-out is subject to limitations and requirements.

A lock-out will be protected if:

• A demand has been made of employees who are to be excluded from the employer’s workplace
• The dispute relates to a matter of mutual interest
• Employees are excluded from the employer’s workplace
• The following procedural requirements are complied with:

1. The issue in dispute must be referred to CCMA or Bargaining Council
2. Before a lock-out notice is issued:
   A. 30 days must lapse from when the dispute was received by the CCMA or Bargaining Council; or
   B. A certificate must be issued stating that the dispute remains unresolved
      (The first to occur of A or B)
3. A written notice stipulating the commencement of the lock-out must be issued at least 48 hours before the lock-out commences

WHO CAN AN EMPLOYER LAWFULLY LOCK-OUT OF THE WORKPLACE?

An employer may only lock-out employees who are party to a dispute and with whom the employer has attempted to conciliate.

NOTE: The Constitutional Court confirmed that an employer cannot lock-out members of a trade union that were not a party to a bargaining council where the dispute arose and who were not part of the conciliation process.

WHEN CAN AN EMPLOYER USE REPLACEMENT LABOUR?

An employer may use replacement labour except in the following circumstances:

• Where there is “a protected strike and the whole or a part of the employer’s service has been designated a maintenance service”
• To perform the work of an employee who is locked out of the employer’s workplace due to an offensive lock-out

NOTE: Replacement labour is permissible when the lock-out is in response to a strike.

PICKETING FAQS

The Code issued by the Minister must be taken into account when interpreting or applying the LRA in respect of any picket. The Picketing Regulations, effective 1 January 2019 are also applicable.

WHAT IS THE PURPOSE OF A PICKET?

In terms of the Code, the purpose of a picket is “to peacefully encourage non-striking employees and members of the public to oppose a lock-out or to support strikers involved in a protected strike...

MAY A PICKET TAKE PLACE IF THERE ARE NO PICKETING RULES?

No. The trade union and employer or employer’s organisation must conclude a collective agreement regulating picketing.

WHAT IF THE PARTIES HAVE NOT CONCLUDED A COLLECTIVE AGREEMENT REGULATING PICKETING?

No picket may take place. The parties must try to agree picketing rules before the protected strike or lockout.

AGREEMENT REGULATING PICKETING?

No picket may take place. The parties must try to agree picketing rules before the protected strike or lockout.

WHAT IF THE PARTIES CANNOT AGREE PICKETING RULES?

The commissioner conciliating the dispute will try to get the parties to conclude a collective agreement regulating picketing before issuing a certificate of non-resolution. If no such agreement is reached the commissioner must determine the rules in accordance with published default rules at the same time as issuing the certificate of non-resolution.
WHAT WILL THE COMMISSIONER TAKE ACCOUNT OF WHEN DETERMINING PICKETING RULES?

The commissioner must take account of any relevant code of good practice, the particular circumstances of the workplace or premises where it is intended that the right to picket will be exercised and representations made by the parties at conciliation.

WHERE CAN A PICKET BE HELD?

Picketing may take place outside the employer’s premises, unless the employer has agreed that it may take place inside the employer’s premises (the employer may not unreasonably withhold permission to picket inside its premises).

The rules established by the commissioner may provide for picketing on the employer’s premises if the commissioner is satisfied that employer’s permission was unreasonably withheld.

The CCMA may establish picketing rules that provide for employees to picket in a place which “is owned or controlled by a person other than the employer” (e shopping centre owner). However, that other person must have an opportunity to make representations to the CCMA before picketing rules were established. How will a commissioner determine if the employer’s permission was unreasonably withheld?

In terms of the Code, the factors that will be taken into account include:

- The nature of the workplace
- The situation of the workplace
- Number of employee partaking in the picket inside the employer’s premises
- Potential for violence
- Areas designated for the picket
- Time and length of the picket
- Proposed movement of those participating in the picket
- The trade unions proposals to control the picket
- The picketers’ conduct

HOW MUST PICKETING RULES BE DISSEMINATED?

Employers and trade unions must take measures to circulate the rules. Those measures may include placing the rules on notice boards and giving copies to employees.

Employers must give copies of the picketing rules to appointed representatives and managers on duty during the strike or lockout and to its private security company it contracted with.

Trade unions must give copies of the picketing rules to its covenors and marshalls and make sure that they understand the rules. The trade unions must also ensure the picketers understand the rules.

HOW IS A PICKETING AGREEMENT CONCLUDED?

Parties are encouraged to enter into a picketing agreement before a strike or picket commences. However, if no such agreement can be reached, the trade union or the employer can request that the CCMA assist in negotiating an agreement on the rules that should apply to the picket. If the parties still cannot reach agreement the CCMA must establish picketing rules.

MAY PICKETERS PREVENT CUSTOMERS FROM GAINING ACCESS TO THE EMPLOYER’S PREMISES?

No, picketers may also not commit unlawful acts during the picket.

Picketers may also not intimidate any person or threaten to cause damage to any property. Picketers may not incite violence, wear masks nor have in their possession any dangerous weapons.

WHAT IS THE ROLE OF POLICE DURING A PICKET?

The police have the power to take measures to ensure the picket remains peaceful, unarmed and orderly. However, the Code indicates that the police may only interfere with picketers in certain circumstances. Such circumstances include when the police believe a person is in possession of a firearm or dangerous weapon or where picketers prevent the employer from conducting its business or working. The police can also interfere where picketers threaten or commit assault or damage to property.

ARE POLICE RESPONSIBLE FOR ENFORCING PICKETING RULES?

No. Police are not responsible for enforcing a court order interdicting a strike or picket unless the court orders them to do so.

ESSENTIAL/MAINTENANCE SERVICES FAQS

WHAT ARE ESSENTIAL AND MAINTENANCE SERVICES?

An essential service is:

- A service the interruption of which endangers 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.

WHAT IS THE SIGNIFICANCE OF A SERVICE BEING DESIGNATED AN ESSENTIAL OR MAINTENANCE SERVICE?

Parties engaged in essential or maintenance services are precluded from participating in a strike or a lock-out.

WHAT IS A MINIMUM SERVICE AGREEMENT?

A minimum service agreement is an agreement relating to the minimum services that must be maintained in a strike or lock-out. The effect of the agreement is that employees who are 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.

A panel of the essential services committee may direct parties to negotiate such agreement. If parties do not conclude a minimum services agreement or the agreement is not ratified by the essential services committee, the minimum services required to be maintained may be determined by a panel appointed by the essential services committee.
MARKET RECOGNITION

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


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


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.


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

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

Aadil Patel
Practice Head
Director
T +27 (0)11 562 1107
E aadil.patel@cdhlegal.com

Anli Bezuidenhout
Director
T +27 (0)11 562 1107
E anli.bezuidenhout@cdhlegal.com

Jose Jorge
Director
T +27 (0)11 562 1152
E jose.jorge@cdhlegal.com

Fiona Leppan
Director
T +27 (0)11 562 1152
E fiona.leppan@cdhlegal.com

Gillian Lumb
Director
T +27 (0)11 562 1152
E gillian.lumb@cdhlegal.com

Imraan Mahomed
Director
T +27 (0)11 562 1107
E imraan.mahomed@cdhlegal.com

Bongani Masuku
Director
T +27 (0)11 562 1496
E bongani.masuku@cdhlegal.com

Phetheni Nikuna
Director
T +27 (0)11 562 1478
E phetheni.nikuna@cdhlegal.com

Desmond Odhiambo
Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E desmond.odhiambo@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
T +27 (0)11 562 1184
E michael.yeates@cdhlegal.com

Hugo Pienaar
Director
T +27 (0)11 562 1350
E hugo.pienaar@cdhlegal.com

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

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

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

Hedda Schensema
Director
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
T +27 (0)11 562 1184
E michael.yeates@cdhlegal.com

Hugo Pienaar
Director
T +27 (0)11 562 1350
E hugo.pienaar@cdhlegal.com

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

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

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

Hedda Schensema
Director
T +27 (0)11 562 1487
E hedda.schensema@cdhlegal.com
OUR TEAM
For more information about our Employment Law practice and services in South Africa and Kenya, please contact:

Amy King
Professional Support Lawyer
T +27 (0)11 562 1744
E amy.king@cdhlegal.com

Asma Cachalia
Associate
T +27 (0)11 562 1333
E asma.cachalia@cdhlegal.com

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

Riola Kok
Professional Support Lawyer
T +27 (0)11 562 1748
E riola.kok@cdhlegal.com

Jaden Cramer
Associate
T +27 (0)11 562 1260
E jaden.cramer@cdhlegal.com

Mayson Petla
Associate
T +27 (0)11 562 1114
E mayson.petla@cdhlegal.com

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

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

Asma Cachalia
Associate
T +27 (0)11 562 1333
E asma.cachalia@cdhlegal.com

Jaden Cramer
Associate
T +27 (0)11 562 1260
E jaden.cramer@cdhlegal.com

Mayson Petla
Associate
T +27 (0)11 562 1114
E mayson.petla@cdhlegal.com

Dylan Boucher
Associate
T +27 (0)11 562 1045
E dylan.boucher@cdhlegal.com

Jordyne Löser
Associate
T +27 (0)11 562 1479
E jordyne.loser@cdhlegal.com

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

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

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

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

Taryn York
Associate
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. PO. 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

©2022 1107/JAN