COLLECTIVE LABOUR LANDSCAPE

An Employer's Guide to Collective Labour Law

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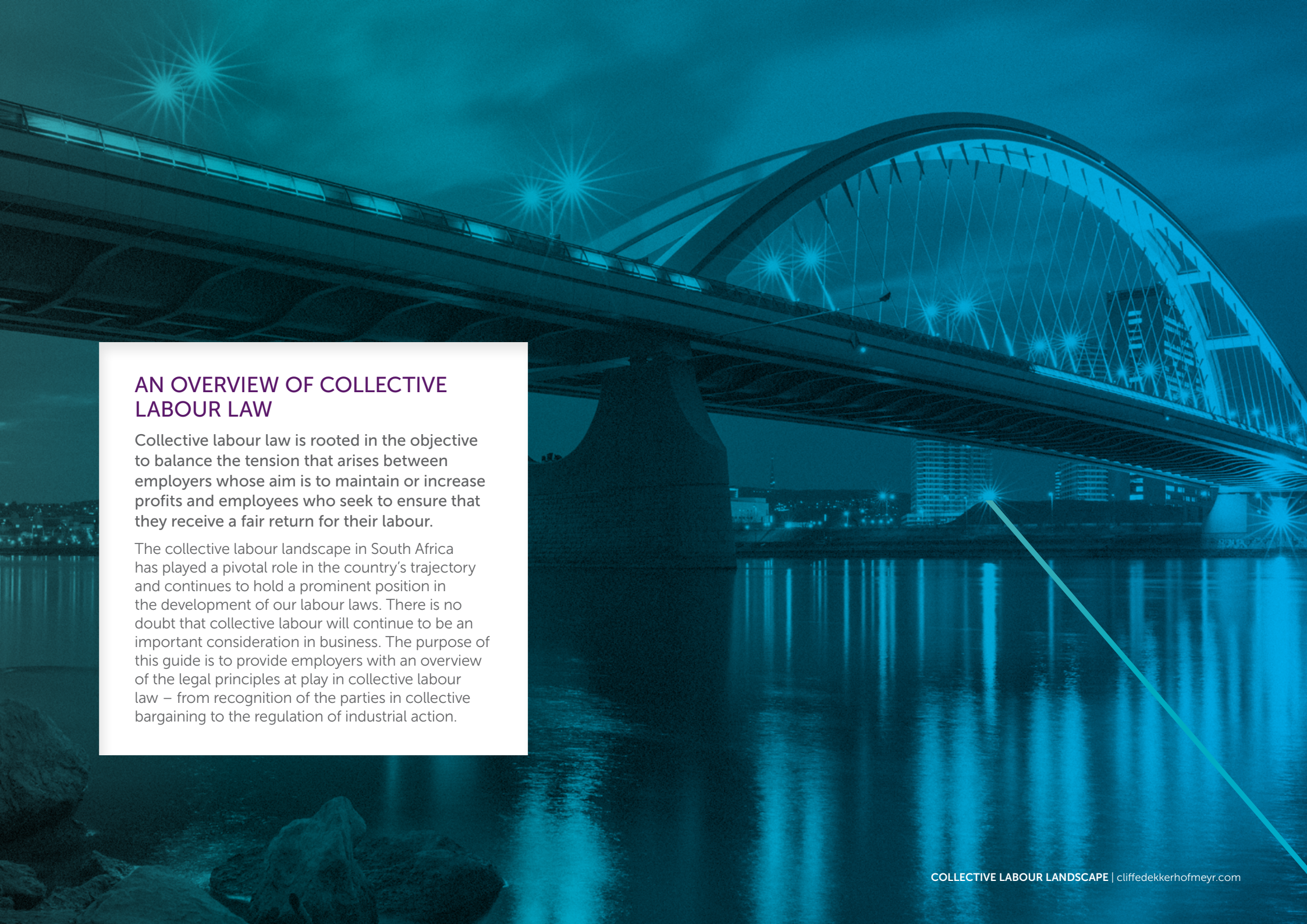


AN OVERVIEW OF COLLECTIVE LABOUR LAW

Collective labour law is rooted in the objective to balance the tension that arises between employers whose aim is to maintain or increase profits and employees who seek to ensure that they receive a fair return for their labour.

The collective labour landscape in South Africa has played a pivotal role in the country's trajectory and continues to hold a prominent position in the development of our labour laws. There is no doubt that collective labour will continue to be an important consideration in business. The purpose of this guide is to provide employers with an overview of the legal principles at play in collective labour law – from recognition of the parties in collective bargaining to the regulation of industrial action.

A BRIEF HISTORY OF COLLECTIVE LABOUR LEGISLATION IN SOUTH AFRICA

1881

First trade union in South Africa is established.

1883

First recorded mineworkers strike in response to regulations allowing employers to strip and search workers in the diamond mines of Kimberley.

1888-1924

Collective labour activity steadily increases, remaining largely unregulated by legislation in the second industrial revolution.

1924

Introduction of the Industrial Conciliation Act of 1924 recognising and regulating the formation of trade unions by Coloured, Indian and White workers.

1953

Native Labour Settlement of Disputes Act 48 of 1953 allows workplace committees to represent Black employees, however full collective bargaining rights remain inaccessible to Black workers.

1956

Introduction of the Labour Relations Act 28 of 1956.

1963

South Africa is expelled from the International Labour Organization (ILO) due to its unacceptable labour practices toward Black workers.

1979-1981

First recorded mineworkers strike in response to regulations allowing employers to strip and search workers in the diamond mines of Kimberley.

1994

South Africa re-joins the ILO.

1996

The Labour Relations Act 66 of 1995 comes into force.

1997

The Constitution of South Africa, 1996, entrenches labour rights in the Bill of Rights.

2012-2014

Violence and intimidation in strike action reaches a climax in democratic South Africa.

2014

The National Economic Development and Labour Council (Nedlac) Ekurhuleni Declaration commences a process of engagement to address untenable labour relations that give rise to wage inequality and prolonged violent strikes.

2017

Nedlac Accord on Collective Bargaining and Industrial Action is agreed.

2018

Code of Good Practice: Collective bargaining, Industrial Action and Picketing (the Code) issued by Nedlac.

1. COLLECTIVE LABOUR RIGHTS

What are the overarching protections afforded to parties who fall under the umbrella of collective labour in South Africa?

The Bill of Rights contained in the Constitution entrenches certain rights that guide collective labour.

Everyone has the right to:

- Assemble, demonstrate, picket and present petitions provided that it is done peacefully and unarmed.
- Freedom of association.
- Fair labour practices.

Every worker has the right to:

- Form and join a trade union, participate in the activities of a trade union, and strike.

Every employer has the right to:

- Form and join an employers' organisation and participate in the activities of that organisation.
- There is no constitutional equivalent to the right to strike for employers. They do, however, enjoy the right to embark on a lock-out in terms of subordinate legislation.
- Every trade union and every employers' organisation has the right to determine its own administration, to organise, and to form and join a federation.
- Every trade union, employers' organisation and employer has the right to engage in collective bargaining.

What legislation gives effect to collective bargaining rights?

The Labour Relations Act 66 of 1995 (LRA) gives effect to the constitutionally protected collective labour rights and gives voice to the ILO Conventions, to which South Africa is a signatory.

What does the LRA regulate in terms of the collective labour landscape?

The LRA regulates the formation and continued operation of trade unions and employers' organisations, workplace forums and bargaining councils; regulates the nature and validity of collective agreements; and sets out the parameters for lawful strike action and lock-outs.

Can the right to freedom of association be limited?

The right to freedom of association may be subject to limitations as employers or employers' organisations may conclude closed shop or agency shop agreements with majority trade unions and in either instance any subscriptions and levies to be paid may be used exclusively for the protection or advancement of the workers' socio-economic interests.

2. COLLECTIVE BARGAINING

Is there a statutory duty on the employer to bargain?

There is no duty to bargain on any party to the employment relationship in terms of the Constitution or any subordinate legislation. Parties are encouraged to resolve matters of mutual interest between them on a voluntary basis through bargaining (and preferably on a collective basis).

Can the courts nevertheless impose a duty to bargain on an employer?

Courts will not compel a party to bargain on any specific topic, or indeed reach any specific outcome, save for issues related to essential or maintenance services.

The general view is that any dispute that is not resolved by collective bargaining ought to be determined between the parties, without outside interference. A party cannot approach a court to compel the other party to bargain with it or reach an agreement.

What option does a party have to encourage bargaining?

If either party refuses to participate in the bargaining process, or if no agreement is forthcoming, the disaffected bargaining party may resort to industrial action.

The right to organise and the right to freedom of association

The general right to freedom of association which entitles employees to belong to trade unions is also extended to employers, who may join employer organisations.

3. WHO ARE THE PARTIES IN COLLECTIVE LABOUR LAW?

- Employers
- Employees
- Trade unions
- Employers' organisations
- Bargaining councils
- Statutory councils such as the Commission for Conciliation, Mediation and Arbitration (CCMA).

TRADE UNIONS

What is a trade union?

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

What is required of an employee who joins a trade union?

Employees who join a trade union are bound by the union's constitution and must contribute union subscriptions.

What is required to form a trade union?

The registration of a trade union involves, among other things, an application for registration which 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.

Is the Registrar obliged to register a trade union upon receipt of an application?

The Registrar may refuse to register a union (or employers' organisation) if it is not genuine. The Minister of Employment and Labour issued guidelines establishing the criteria for a genuine trade union or employer's organisation in Government Gazette No 23611 on 25 July 2002 (Registration Guidelines).

Can the Registrar's decision be challenged?

A refusal of an application may be taken on appeal to the Labour Court.

EMPLOYERS' ORGANISATIONS

What is an employers' organisation?

An employers' organisation is any number of employers associated together for the purpose of regulating relations between employers and employees or trade unions.

What is required to form an employers' organisation?

The registration of an employers' organisation is also regulated by the Registration Guidelines and is required in terms of the LRA for an employers' organisation to be formally recognised. However, nothing prevents two or more employers from grouping together informally for the purposes of collective bargaining.

What functions does an employers' organisation serve?

Employers' organisations may form federations, which have *locus standi* to bring legal actions in their own names. Officials of employers' organisations are entitled to represent their members in the CCMA, bargaining councils and the Labour Court, provided that the employers' organisations are *bona fide*.

4. WORKPLACE FORUMS

The objective of centralised collective bargaining may result in a lack of specific workplace issues being addressed, the LRA therefore allows workplace forums to be formed to address the possible gap.

What is a workplace forum?

A workplace forum may be formed to provide non-adversarial opportunities for employers and employees to consult and engage in joint decision making on workplace issues, excluding wage negotiations.

What is the difference between a trade union and a workplace forum?

The workplace forum draws its members only from the employees of that workplace. The purpose of the workplace forum is to move away from adversarial collective bargaining to joint problem solving where employees can become involved in certain aspects of the day-to-day management of the business and share the burden of managerial decision making.

What is required to form a workplace forum?

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.

What if an employer refuses to recognise the workplace forum?

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.

What matters are subject to consultation once a workplace forum is established?

Consultation between management and employees will be mandatory consultation for certain topics such as plans to restructure the workplace, or the introduction of new technology and work methods.

What matters are subject to joint decision making once a workplace forum is established?

The concept of joint decision making goes further than consultation and collective bargaining and includes topics such as disciplinary codes and procedures, rules relating to the 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.

5. ORGANISATIONAL RIGHTS AND REPRESENTITIVITY

Are all organisational rights available to all trade unions?

Not all trade unions enjoy the full extent of the collective labour entitlements set out in the LRA. Trade unions must be "*representative*" in terms of section 14 of the LRA and must be registered to qualify for these rights.

How does the concept of representivity impact organisational rights?

Certain rights are reserved for majority trade unions, as opposed to those that are merely sufficiently representative.

What does majority representation mean?

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 a majority representative.

What organisational rights does a trade union enjoy if it has majority representation?

The organisational rights which majority trade unions may exercise are:

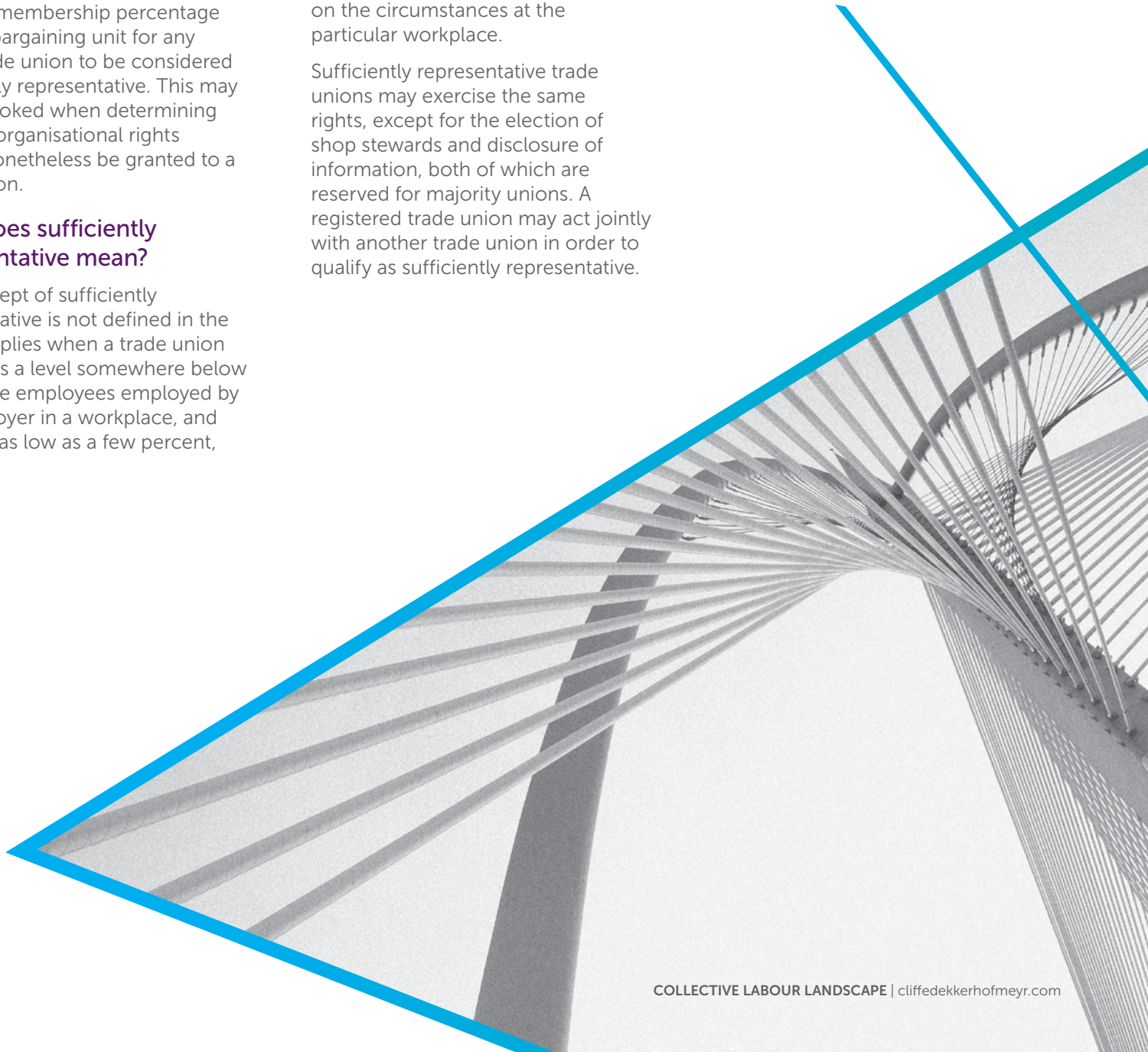
- Access to the workplace
- Deduction of subscriptions
- Election of shop stewards
- Leave for union activities
- Disclosure of information
- Establishing thresholds of representivity by agreement with the employer

An agreement may be reached with a majority trade union regarding the required membership percentage within a bargaining unit for any other trade union to be considered sufficiently representative. This may be overlooked when determining whether organisational rights should nonetheless be granted to a trade union.

What does sufficiently representative mean?

The concept of sufficiently representative is not defined in the LRA. It applies when a trade union represents 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.

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



THE 2015 AMENDMENTS TO THE LRA EXTENDED ORGANISATIONAL RIGHTS

Amendments to the LRA effected in 2015 extended the scope of who may enjoy organisational rights. Instances of such extended organisational rights include:

1

Trade unions representing temporary employment service (TES) employees may elect whether they will seek to exercise organisational rights at the workplace of the TES or of the client where the trade union has rights in respect of the client's workplace.

2

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.

3

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.

How does a trade union exercise its organisational rights?

When a registered trade union believes that it qualifies as either sufficiently or majority representative, it must provide written notice to an employer regarding its intention to exercise any organisational rights within a given workplace.

What must be included with the written notice to the employer?

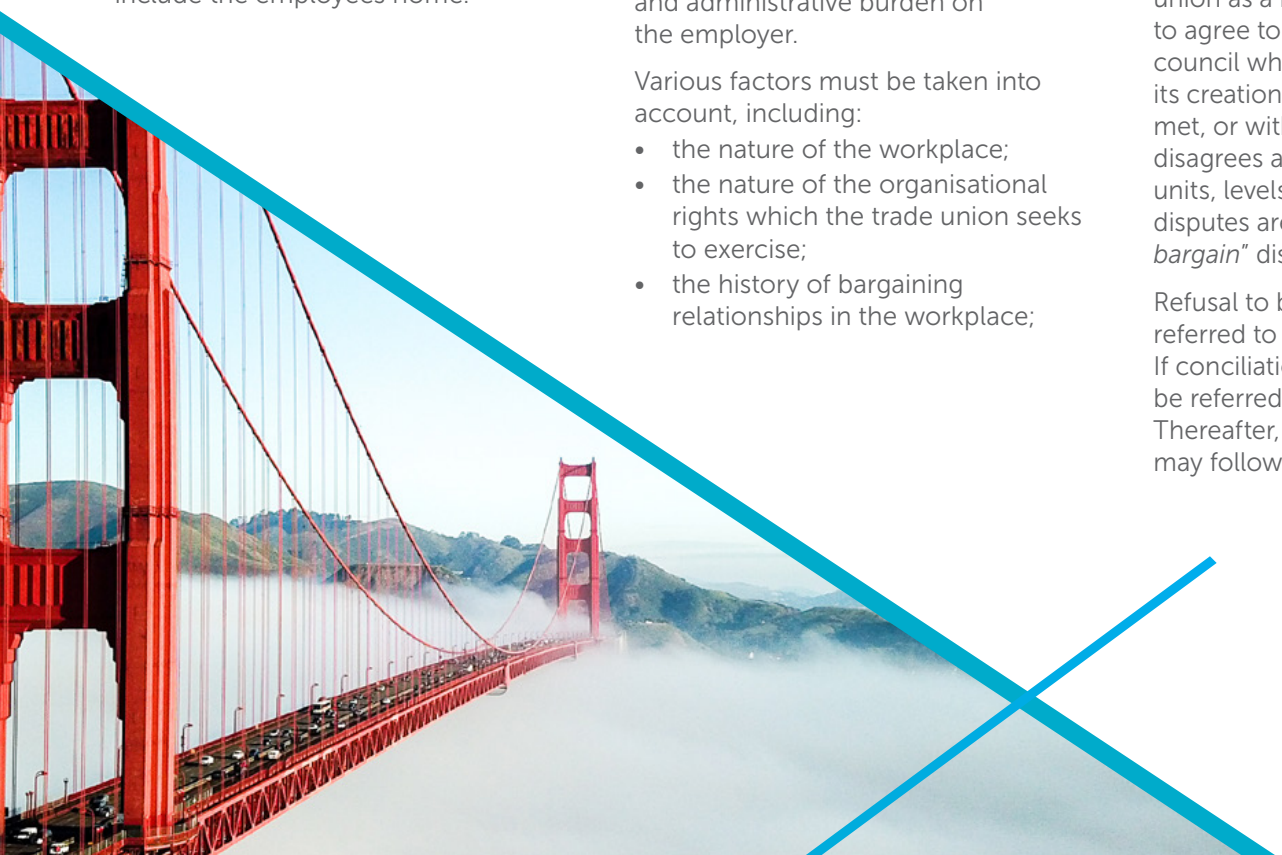
The submission must be accompanied by proof of the union's contention, such as a copy of its certificate of registration and a submission that it is representative.

What is the next step after written notice of a trade union's intention to exercise organisational rights in its workplace is received?

The employer must 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 how such rights will be exercised. This agreement is referred to as a recognition agreement.

What constitutes a workplace?

The determination of a workplace 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 in connection with each independent operation, constitutes the workplace of that operation."* With the introduction of remote working as a standard operating procedure, the definition of the workplace has expanded to even include the employees home.



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.

What factors will a commissioner consider when deciding on the representivity of a trade union?

The 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, including employees in all the categories of non-standard employment (e.g. TES or fixed-term employees).

Can parties embark on strike action in respect of recognition disputes?

Recognition disputes include instances where a party refuses to recognise a registered and representative trade union as a bargaining agent or refuses to agree to the creation of a bargaining council where the conditions for its creation have otherwise been met, or withdraws recognition or disagrees about appropriate bargaining units, levels and topics. These disputes are referred to as *"refusal to bargain"* disputes.

Refusal to bargain disputes must be referred to conciliation at the CCMA. If conciliation fails, the dispute must be referred for advisory arbitration. Thereafter, however, industrial action may follow to compel bargaining.

6. COLLECTIVE BARGAINING FORUMS

The LRA encourages collective bargaining at a centralised level as much as possible and bargaining councils and statutory councils may exist to facilitate this.

BARGAINING COUNCILS

What is a bargaining council?

A bargaining council is a voluntary body, established by registered trade unions and registered employers' organisations that have achieved a threshold of representivity in a defined sector.

What functions does a bargaining council have?

The primary function of a bargaining council is to conclude and enforce collective agreements between its members, and upon application, extend collective agreements to non-members within the registered scope or sector of the bargaining council.

Secondary but equally important functions include to resolve disputes; administer and promote employee benefit funds such as pension funds and training schemes; and develop proposals for Nedlac relating to applicable legislation and policies for the sector.

Which bodies must a bargaining council be registered with?

To exercise the centralised bargaining function, the bargaining council must be registered by the Registrar of Labour.

To exercise the dispute resolution function, the bargaining council 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 within its scope.

Is an employer obliged to register with a bargaining council?

An employer is legally required to register with a bargaining council if the business of the employer falls within the registered scope of that bargaining council. Fines can be imposed if an employer fails to comply with the collective agreement of the bargaining council governing the sector within which the employer's business falls.

How does a bargaining council enforce collective agreements?

Designated agents of bargaining councils can monitor and enforce compliance with any collective agreement concluded in the bargaining council by issuing compliance orders; publishing the contents of collective agreements; and following up complaints and conducting investigations.

If a dispute about compliance remains unresolved, a council may refer the dispute to final and binding arbitration. An arbitrator may order the person to pay the amount owing; impose a fine; or confirm, vary, or set aside the compliance order.

There are approximately 55 bargaining councils in the private sector and five covering public servants.

STATUTORY COUNCILS

What is a statutory council?

A statutory council is a weaker version of a bargaining council and can be introduced only if no bargaining council has jurisdiction over that sector.

Any agreements concluded by an statutory council cannot be extended to employers and employees outside the statutory council. However, agreements on training schemes, provident or pension funds, medical schemes and similar benefit schemes can be extended by the minister to cover all employers and employees in that sector.

What functions does an statutory council have?

It has a limited set of powers and functions so that it may gradually become 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.

Unions that are members of a statutory council will enjoy the advantage of acquiring organisational rights of access, meetings, ballots and stop-order facilities for all workplaces in that sector even in a workplace in the sector where the union has no members.

7. 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.

Does a collective agreement need to be signed in order to be binding?

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.

Can a collective agreement be extended to third parties?

Insofar as collective agreements are concluded at the bargaining council level, their effect may be extended to non-parties to the agreement.

How is a collective agreement concluded at a bargaining council level extended to non-parties?

The bargaining council may request the Minister of Labour to extend a collective agreement to non-parties whose business activities fall within the registered scope of the bargaining council and are located in the geographical jurisdiction of the bargaining council.

What protections are afforded to non-parties who are nevertheless bound by such collective agreements?

The LRA provides that any non-parties to a collective agreement may apply for exemption from the provisions of that collective agreement.

There are strict time limits and efficiency requirements to allow for fast and effective consideration of requests for exemption.

How can a party or a non-party dispute the application or interpretation of a collective agreement?

The LRA requires that each collective agreement 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.

TYPES OF COLLECTIVE AGREEMENTS

What is a closed shop agreement?

A closed shop agreement is a type of collective agreement that requires non-union workers to join a particular trade union. The support of 66% of the employer's workers is required for the agreement to be legally binding.

Employees of an employer that is party to such an agreement must join the trade union or face dismissal. However, workers cannot be required to be a trade union member to be considered for employment.

If the trade union expels a member or refuses to allow a new worker to join the union then the employer will have to dismiss the worker, provided that the expulsion or refusal is in accordance with the trade union's constitution or is for a fair reason or in circumstances where the employee is a conscientious objector. A dismissal of this nature is not considered unfair.

What is an agency shop agreement?

This form of collective agreement requires employers to deduct an agency fee from the wages of non-union employees and to pay the money into a special fund administered by the union. This ensures that the non-union employees who benefit from the bargaining efforts of the union contribute toward those efforts. The agency fee cannot exceed the value of the trade union subscriptions.

An agency shop agreement 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.

What is a conscientious objector and what effect does this principle have on these collective agreements?

An employee who refuses to become a member of a trade union on the grounds of conscience is referred to as a conscientious objector. A conscientious objector cannot be dismissed for failure to join a trade union in terms of a closed shop agreement and may request that any deductions required in terms of an agency shop agreement be administered by the Department of Employment and Labour.

What is a recognition agreement?

A recognition agreement may regulate the manner in which organisational rights will be exercised by a trade union in a particular workplace, and the circumstances in which those organisational rights may be withdrawn.

8. INDUSTRIAL ACTION

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

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

What is primary strike action?

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."*

What is secondary strike action?

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.

Can employees of a TES initiate strike action against the client?

If an employer utilizes the services of a TES, the employer should be aware that once the deeming provisions of section 198A of the LRA are triggered, the TES falls away and the client/employer is deemed to be the sole employer. Once the deeming provision has kicked in, the employees previously employed by the TES can potentially initiate strike action against the client/employer in the event of a future dispute.

LOCK-OUT

What is a lock-out?

A lock-out is an employer's 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."*

If an employer exercises its right to lock-out can replacement labour be employed?

If employers lock out employees in response to a strike called by those employees, it may introduce replacement labour for the duration of the strike. The statutory right of the employer to hire replacement labour is limited to the duration of the strike, and not after it has ceased.

If the employer, however, initiates a lock-out without a strike first being called (an offensive lock-out) the employer will not be entitled to employ replacement labour during the lock-out.

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. Protest action may be protected in that no employees participating in protected protest action may be adversely affected by their participation (other than the "*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. 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.

What does "*arbitrable or justiciable*" mean?

Arbitrable and justiciable disputes are disputes that must be resolved through a process in terms of the LRA such as conciliation, or by determination by an external party such as the CCMA, a bargaining council, or the Labour Court, depending on the nature of the dispute.

The general rule is that if a dispute can be arbitrated or adjudicated, no strike or lock-out is permitted. This includes disputes that are arbitrable or justiciable in terms of other employment laws.

Are there any exceptions to the general rule?

There are very few exceptions to the general proposition. One exception arises in the context of large-scale retrenchments, where employees may elect to embark upon strike action or litigate regarding a substantively unfair retrenchment.

Is the concept of "*rights issues*" limited to collective labour law?

Rights disputes may be the subject of either collective or individual disputes. Where more than one employee was dismissed, whether for operational reason or misconduct, a single referral by all the affected employees is possible, but individual employees may also elect to litigate separately or in smaller groups.

What are some examples of collective dismissal for misconduct?

Employees may be collectively dismissed for illegal behaviour during a strike or for participation in an illegal strike, provided the dismissals are substantively and procedurally fair.

Is the concept of "*interest disputes*" limited to collective labour law?

Interest disputes that are resolved through industrial action can only exist in the form of a collective dispute. A single employee cannot undertake protected strike action.

Can a collective agreement prohibit strike action?

A collective agreement can prohibit industrial action or regulate the process for dispute resolution for interest disputes, in which event those bound by the collective agreement may not participate in a strike on those issues that are dealt with in the collective agreement.

Are there any other prohibitions to strike action?

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.

9. PROCEDURAL REQUIREMENTS FOR PROTECTED ACTION

Can parties resort to industrial action as a starting point for the resolution of an interests dispute?

No, a dispute must be referred for conciliation at the CCMA or relevant bargaining council, and a certificate of non-resolution must have been issued, or 30 days must have passed since the referral, before a notice of a strike or lock-out may be issued.

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

How many days warning must a party provide in a notice of a strike or lock-out?

The notice must give the other party the requisite minimum number of days' notice of the impending industrial action. For primary strikes or lock-outs, 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, but not earlier.

What happens if a strike commences after the date set out in the notice?

In terms of the Code, 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 lock-out.

How does this process differ in respect of protest action?

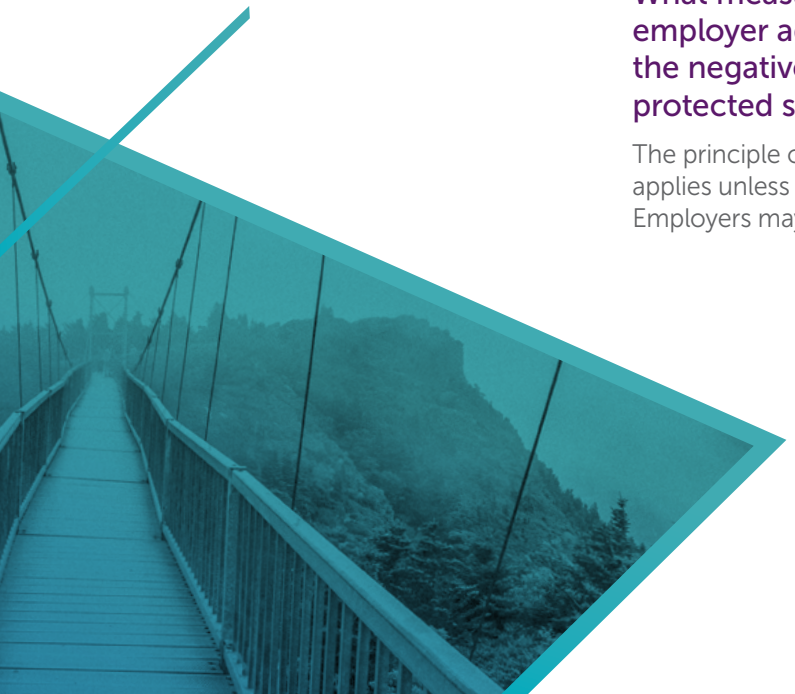
Parties who initiate the protest action must serve a notice on Nedlac. This notice must state the reasons for the protest action as well as the nature of the anticipated protest action.

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.

10. EMPLOYER REMEDIES

What consequences can an employer impose on employees who participate in protected strike action?

Employees who embark upon protected strike action or protest action may not be dismissed or discriminated against by reason of the protected strike action. The LRA indemnifies employees against claims for breach of contract or delict for damages suffered by the employer pursuant to a protected strike action.



What if the striking employees caused damage to property during protected strike action?

Employees who committed acts of misconduct during the strike which justifies their dismissal may face disciplinary action and compensation may be claimed by employers insofar as employees were involved in illegal action during a protected strike.

Are there any circumstances where protected strike action may nevertheless result in dismissal?

It is possible that even a protected strike may result in such a deterioration in an employer's operational position that operational requirements dismissals may result.

What measures can an employer adopt to mitigate the negative impact of a protected strike?

The principle of *"no work no pay"* applies unless otherwise agreed. Employers may also engage the services of replacement labourers. Employers may obtain an interdict preventing unlawful behaviour such as intimidation or violence during a protected strike but cannot interdict the strike itself.

Must an employer identify each employee who participates in conduct amounting to intimidation, damage to property, or unlawful interference in an employer's business during a protected strike, in order to interdict the employees?

An employer will need to demonstrate that based on the facts of the circumstances, an inference may be drawn that it is more probable than not that each individual employee cited in the interdict, engaged in the unlawful conduct, or associated with it. It falls to the protestors or strikers engaged in ongoing unlawful conduct as a cohesive group, to disassociate themselves from the unlawful conduct to escape being implicated.

In what circumstances may an employer apply for advisory arbitration?

Employers may apply to the director of the CCMA to establish an advisory arbitration panel which may be granted if the director of the CCMA.

On what grounds will the director of the CCMA grant an advisory arbitration?

The director of the CCMA will grant an advisory arbitration if there are 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.

How does an advisory arbitration work?

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.

Do employers receive support from the South African Police Service when illegal conduct takes place in a protected strike?

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

What remedies are available to employers 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 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 its right to lock-out.

Can an employer implement a sanction of dismissal in every case of unprotected strike action?

Disciplinary action may be taken against employees for participation in an unprotected strike. Dismissal may not necessarily be an appropriate remedy in every case, this must be determined on the merits of each matter.

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

How does an employer proceed with disciplinary action when multiple employees are implicated?

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

While employees may be indemnified against damages suffered by an employer in a protected strike, does this principle apply in unprotected strikes?

No, striking employees and/or their trade union(s) may be held liable for damages incurred as a result of unprotected strike action, although the LRA authorises the Labour Court to award less than the actual damages suffered.

What will a court consider when awarding damages?

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.

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, a secondary strike must meet a proportionality requirement.

What is the proportionality requirement?

A 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.

What factors does the AMCU V Anglo Ashanti Limited case consider?

Some factors would include 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.

11. PICKETING

Employees may participate in picketing lines in furtherance of a protected strike, or in opposition to a lock-out, but these 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 permission.

What about employers who rent business premises?

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

Is picketing regulated?

As of 1 January 2019, the Picketing Regulations published by the Minister of Labour took effect, and are designed to assist parties to come to an agreement, or in the absence of an agreement, to assist commissioners and bargaining council panellists to determine the rules pertaining to the dispute that they are conciliating.

When are picketing agreements or rules established?

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.

What if the parties cannot agree picketing rules?

If no such agreement is concluded, the conciliating commissioner will determine the picketing rules using the default picketing rules as a basis. The rules will be issued at the same time as the certificate of non-resolution.

When will the need to establish picketing rules through the CCMA be treated as urgent?

The commissioner may determine picketing rules on urgent application from a trade union if the dispute is 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 lock-out.

Can an employer recover damages it suffered as a result of 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.

What if other parties are adversely affected by the picketing?

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.

12. 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. However, if the specific organisation falls within an essential or maintenance service, strikes and lock-outs are prohibited and the frustrated party must refer the dispute to final and binding arbitration. The essential services commission determines whether the whole or any part of a particular service is an essential service, or a maintenance service.

What is the essential services committee comprised of?

The composition of the essential services committee takes the form of panels consisting of three to five persons assisting an assessor who has expertise within the relevant sector.

What is an essential service?

- If the interruption of the service endangers the life, personal safety or health of the whole or any part of the population, the service is an essential service
- The parliamentary service
- The South African Police Service

What is a maintenance service?

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

How do employees in essential services or maintenance services participate in industrial action?

The LRA permits collective agreements to provide for *"minimum services"* demarcating the agreed minimum level of services required. Such collective agreements 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 be imposed on the parties in future.

How does the LRA limit the potential of essential services employers to exploit employee's limited right to industrial action?

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.

MARKET RECOGNITION

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

Chambers Global 2014–2024 ranked our Employment Law practice in Band 2 for employment. *The Legal 500 EMEA 2020–2024* recommended the South African practice in Tier 1. *The Legal 500 EMEA 2023–2024* recommended the Kenyan practice in Tier 3 for employment.

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

Aadil Patel is the Practice Head of our Employment Law team, and the Head of our Government & State-Owned Entities sector. *Chambers Global 2024* ranked Aadil in Band 1 for employment. *Chambers Global 2015–2023* ranked him in Band 2 for employment. *The Legal 500 EMEA 2021–2024* recommended Aadil as a 'Leading Individual' for employment and recommended him from *2012–2020.*

The Legal 500 EMEA 2021–2024 recommended Anli Bezuidenhout for employment.

The Legal 500 EMEA 2020–2023 recommended Jose Jorge for employment.

Chambers Global 2018–2024 ranked Fiona Leppan in Band 2 for employment. *The Legal 500 EMEA 2022–2024* recommend Fiona for mining. *The Legal 500 EMEA 2019–2024* recommended her as a 'Leading Individual' for employment, and recommended her from *2012–2018.*

Chambers Global 2021–2024 ranked Imraan Mahomed in Band 2 for employment and in Band 3 from *2014–2020. The Legal 500 EMEA 2020–2024* recommended him for employment.

The Legal 500 EMEA 2023–2024 recommended Phetheni Nkuna for employment.

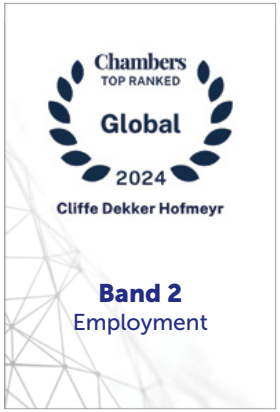
The Legal 500 EMEA 2022–2024 recommended Desmond Odhiambo for dispute resolution.

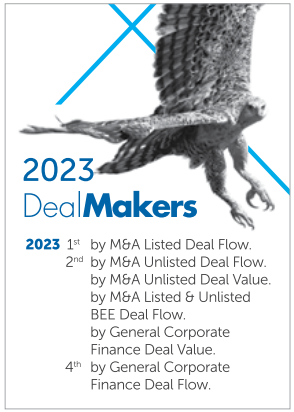
Hugo Pienaar is the Head of our Infrastructure, Logistics, and Transport sector, and a director in our Employment Law practice. *Chambers Global 2014–2024* ranked Hugo in Band 2 for employment. *The Legal 500 EMEA 2014–2024* recommended him for employment.

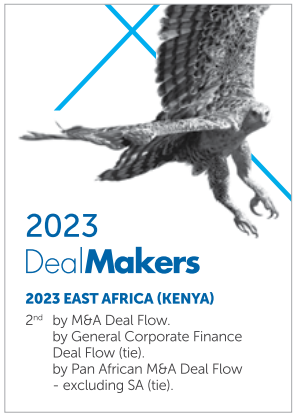
The Legal 500 EMEA 2023 recommended Thabang Rapuleng for employment.

Chambers Global 2024 ranked Njeri Wagacha in Band 3 for FinTech. *The Legal 500 EMEA 2022–2024* recommended Njeri for employment. *The Legal 500 EMEA 2023–2024* recommends her for corporate, commercial/M&A.

The Legal 500 EMEA 2023–2024 recommends Rizichi Kashero-Ondego for employment.







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.

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