

EMPLOYMENT ALERT

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UNPROTECTED STRIKE ACTION AND THE EFFECT OF EMPLOYER-ISSUED ULTIMATA

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The recent Labour Appeal Court decision in *Ilembe Outsourcing and Recruitment CC and Others v Nosango* case (the Ilembe case) is an example of contempt orders used to ensure that court orders are complied with. Briefly, the facts of this case are that the employee was suspended and aggrieved by his suspension, he referred an unfair labour practice dispute to the CCMA, which directed the employer to uplift the suspension, reinstate the employee and pay him the arrear wages for the period of suspension. When he reported for duty, he was informed that there was no work for him.

Seeing that the employer did not intend to comply with the award, the employee instituted contempt proceedings at the Labour Court and the employer opposed this. The employer's case was that the order of reinstatement was not appropriate, as the employee was never dismissed. The Labour Court ordered the employer to reinstate the employee within four days and the employee to approach the Labour Court in the event of non-compliance,

on notice to the employer, for a directive for the employers' members' to be committed to prison for 15 days. The employer was a close corporation.

The employer appealed the Labour Court judgment on the basis that since its members would be the one who is committed to imprisonment, the employee must notify them when he approaches the Labour court for the directive. Although the Labour Appeal Court granted this order, it found that the employer's members did not discharge the onus to show that their non-compliance with the award was not wilful and *mala fide*. The Labour Appeal Court found the members to be in contempt of court and that they are to be committed to imprisonment for 15 days. The order of committal was suspended for 10 days in order to afford the members to comply.

It is clear contempt applications are an effective tool in ensuring compliance with court orders especially when the relief sought is that of committal to imprisonment.

Ndumiso Zwane and Bheki Nhlapho



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There was an extraordinary delay in the matter proceeding to trial. The delay was prolonged further due to issues relating to amendment of pleadings and the finalisation of the pre-trial minute. The trial eventually proceeded in July 2017. Due to the delay, five employees joined in the matter had passed away at the time of trial.

Factual matrix

IGT employed Mr KD Kutu and 352 other employees (the Employees), the Second to Further Applicants. The Employees were represented by NUMSA, the First Applicant. NUMSA was the majority trade union representing IGT employees in the workplace.

Between 2005 and 2006, IGT experienced various work stoppages owing to unprotected strike action by employees. In these instances, employees were not disciplined and/or dismissed for their participation. In order to curb unprotected strike action, IGT and NUMSA entered into an agreement (dated 5 April 2006) in terms of which all pending disciplinary action against employees would be waived in exchange for immediate discontinuation of unprotected strike action. The agreement

was an attempt by IGT to improve workplace conduct and to obtain 'buy-in' from employees.

Despite this agreement, the Employees embarked on unprotected strike action on 12 July 2006 after IGT management refused to adhere to various demands from NUMSA and the Employees.

IGT issued their first ultimatum on the morning of 12 July. After employees failed to return to work, IGT issued their second ultimatum in the afternoon of 12 July. After employees failed to return to work, IGT issued their third and final ultimatum on 13 July. The final ultimatum stated that if employees failed to return to work on 14 July, they would be summarily dismissed. The consequences of not returning to work were made clear to the Employees in the final ultimatum. The Employees failed to return to work on 14 July and IGT dismissed them in accordance with the final ultimatum.

Compared to previous strikes, this particular strike was one of the more serious ones. The impact of the unprotected strike was shown to be damaging. IGT incurred a loss of approximately R1.5 million.

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UNPROTECTED STRIKE ACTION AND THE EFFECT OF EMPLOYER-ISSUED ULTIMATA

CONTINUED

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Previous conduct by IGT

NUMSA argued that it did not take the ultimata (issued by IGT) seriously. This is because in previous strikes, IGT did not follow through on those ultimata and threats as no employees were dismissed.

The court considered the value of the ultimata (issued by IGT). The ultimata were held to be clear and unambiguous. NUMSA and the Employees were provided with sufficient copies of the documents and provided with enough time to consider the ultimata. It was also not disputed that the employees had never received an ultimatum like the third and final ultimatum in previous strikes.

In the end, the court distinguished this particular strike (from previous strikes) by referring to the following:

1. At the time of the strikes preceding the strike in question, no agreement had been concluded between the parties.
2. NUMSA and the Employees failed to honour the terms of the agreement concluded on 5 April 2006.

3. IGT had, at all material times, condemned unprotected strike action.
4. The impact of this particular strike was more serious and detrimental to IGT than previous strikes.
5. The ultimata were clear and unambiguous. The third and final ultimatum informed employees of the serious consequences of not returning to work. The employees nevertheless proceeded to continue striking. This was a 'reckless gamble' as they knew the risk of doing so.

Therefore, NUMSA could not rely on previous conduct by IGT to substantiate a claim of substantive unfairness.

This case illustrates that, during unprotected strike action, employees may not necessarily rely on previous conduct of an employer as a basis to continue striking. Further, the substantive fairness of dismissals during unprotected strike action may turn on the wording and timing of the ultimata issued by the employer.

Thabang Rapuleng and Zama Madungandaba





Employment Strike Guideline

Find out what steps an employer can take when a strike is unprotected.

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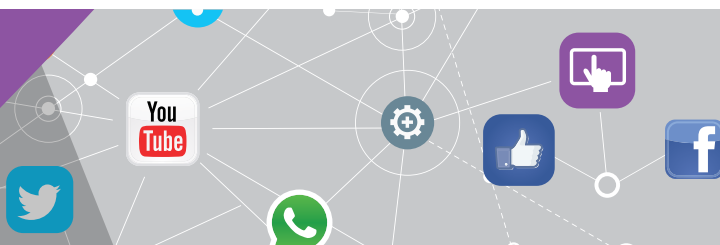
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