

February 9, 2017

3 Most Important Elements Of Strikes And Lock-outs For Employers



Are employee strikes and lock-outs legal at all?

Talking about strikes and lock-outs are often like entering a somewhat heated arena. This is mostly ascribed to the fact that such action is not taken by employers or employees who are happy with the status quo, but is more likely to be taken by a group of disgruntled employees or employers losing valuable business hours, which does not result in constructive circumstances for the employer. These disgruntled employees may embark on a strike to try and force the employer to agree to their terms, whilst an employer may exclude employees from the workplace by means of a lock-out. Section 68(5) of the Labour Relations Act (LRA) confirms that participation in a strike that does not comply with the provisions of the LRA, or conduct in contemplation or in furtherance of a strike, may constitute a fair reason for dismissal of an employee. Therefore, ***whilst employees have the right to strike, it needs to be lawful and controlled***. It goes without saying that it is important for an employer to know what constitutes a protected strike.

What is a protected strike?

Section 64 of the LRA affords every worker the right to strike, and every employer the right to lock workers out, if –

- the dispute has been referred to a council or the *Commission for Conciliation, Mediation and Arbitration (CCMA) (speak to us about Labour Pro)*;
- a certificate stating that the dispute remains unresolved has been issued;
- 30 days have elapsed since the referral; and
- 48 hours' written notice of a strike was given to: the employer; or

a council (if the dispute relates to a collective agreement to be concluded in a council); or an employer organisation (if the employer is a member of an organisation that is a party to the dispute); or

- 48 hours' written notice of a lockout is given to the trade union; or

the workers (if they are not trade union members); or a council (if the dispute relates to a collective agreement to be concluded in a council).

What are the limitations to a strike?

In terms of Section 67 of the LRA, a person does not commit a defect or breach of contract by taking part in a protected strike or protected lock-out or any action in contemplation of the furtherance thereof. Section 65 deals with the limitations to strike or to lock out. No employer/employee may take part in a strike or lock-out, or in any conduct in contemplation or furtherance of a strike or a lock-out if-

- they are bound by a collective agreement that prohibits a strike or lock-out,
- they are bound by an agreement that requires the dispute to be referred for arbitration
- the issue in dispute may be referred for arbitration or the Labour Court in terms of the LRA
- they are engaged in essential services or maintenance services
- they are bound by any arbitration award or collective agreement that regulates the issue in dispute
- they are bound by any determination made in terms of section 44 by the minister that regulates the issue in dispute or any determination in terms of the Wage Act which regulates the issues in dispute, during the first year of that determination.

What if an employee participates in a strike?

If it is a protected strike, the employer may not dismiss the employees who participate in the strike; however, the principle of “no work, no pay” would apply and the employer would not be obliged to pay the employee, except if accommodation and food form part of payment in kind for that employee. Payment in kind must be paid to the employee at his/her request during the time of a strike. The employer shall have right of recourse to claim the monetary value of such payment in kind from the employee through civil proceedings instituted in the Labour Court. Although the employee may not be dismissed because of his/her participation in the protected strike, he/she might still face dismissal for any misconduct during the strike or dismissal based on operational requirements. In the case of strikes that do not comply with the act, the employer may approach the Labour Court (exclusive jurisdiction) to grant an order or interdict to restrain any employee from participating in that strike or any conduct in contemplation or furtherance of the strike. The Labour Court may also order payment of just and equitable compensation for any loss attributed to the strike.

The Labour Court may not grant such an order unless 48 hours’ notice of the application had been given to the employee, provided that the Court may permit a shorter notice period under certain circumstances, which includes good cause shown as to why a shorter time should be permitted. An important factor to bear in mind is the right of a registered trade union to organise a picket in support of a strike or against a lock-out. Section 69 of the LRA deals with picketing.

About the author: Audrey Cloete obtained her LLB degree from the North-West University Potchefstroom in 2003. She completed her articles with the main focus on Criminal Law, however broadened her horizons after being admitted as attorney to take on other legal disciplines. She is also an admitted Conveyancer. Audrey joined SERR Synergy in 2015 where she currently works as a Legal Compliance Advisor.

