

Does employer lockout enjoy the same legal protection as the employee's right to strike?

To answer this question, one needs to identify what collective bargaining is.

Collective bargaining is defined as a process where parties with conflicting interests enter into negotiations with the aim of seeking mutually acceptable resolutions.

Central to collective bargaining is the ***employee's right to strike (s23(2)(c) of the Constitution)*** versus the ***employer's recourse to lock-out (s64 of the LRA)***.

Do employees have the right to strike?

This was not allowed under the Common Law. However, this right is now firmly entrenched in the Bill of Rights (Chapter 2) of the Constitution. Due to the unequal relationship that exists between employer and employee, the Constitutional Court needed to address this imbalance. The Constitutional Court emphasised that “workers need to work in concert to provide them collectively with sufficient power to bargain effectively with employers. The right to strike is essential to the process of collective bargaining; it makes collective bargaining work.” ***(NUMSA v Bader Bop (Pty) Ltd (2003) 24 ILJ 305 (CC) para 67)***

What is the definition of a strike?

A strike is defined in section 213 of the Labour Relations Act (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 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.”

It is important to note that despite this right being protected by the Constitution, the right is not absolute due to the limitation clause as provided for by section 36 of the Constitution and *the limitations as regulated by the LRA* below. The reasoning is to balance the interests of employers and employees vs the broader public interest to curb violence that occurs during strikes.

What are the different types of strikes?

There are 3 types of strikes, namely:

Protected strike – defined as a strike that complies with the following statutory requirements:

- Referral of the issue in dispute for conciliation to a Bargaining Council or the CCMA;
- Obtaining a certificate of outcome from the Bargaining Council or CCMA stating that the dispute remains unresolved; and
- Written Notice to the employer 48 hours before the proposed strike or, alternatively, 7 days’ notice if the government is involved.

Unprotected strike – does not meet the above requirements; and

Secondary strike – defined as a “strike or conduct in contemplation or furtherance of a strike...” as per section 66 of the LRA. This has 3 requirements, namely:

- Primary strike must meet substantive & procedural requirements (s64 & s65);
- Employer must receive 7 days’ notice prior to the start thereof; and
- The nature & extent of the secondary strike must be reasonable in relation to its possible direct or indirect effect on the business of the primary employer.

What is an employer’s recourse to a strike?

An employer is not without remedy or recourse in the event of a strike by employees. The employer can lock workers out of the workplace. Section 213 of the LRA defines a lockout as follows: “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 the employer and employee, whether or not the employer breaches those employees’ contract of employment in the course of or for the purpose of that exclusion.”

What are the types of lockouts?

There are 2 types of lockouts, namely:

- **Offensive lockouts** – initiated by an employer without a strike first being called.
- **Defensive lockouts** – response to a strike called by the employees.

From the above, one can see that the employer’s right to lock out is omitted from the Constitution, which has caused much controversy.

- There are some arguments *in favour* of incorporating the employer’s right to lock out into the Constitution, as evident in the Constitutional Principle XXVII ((1996) Contemporary Labour Law 96) which states: “..the right of employers and employees to join and form employers’ organisations and trade unions and to engage in collective bargaining shall be recognised and protected..” Counsel for Business South Africa (BSA) argued that failure to include this provision therefore infringes on the Constitutional Principle. The BSA also confirmed that there should be a balance of power.
- There are some arguments that are *against* incorporating the right, which was evident during the case of *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of SA 1996*. It stated that employers enjoy greater social and economic power than workers and that employers exercise power through a range of mechanisms such as dismissal, replacement labour and lockouts. Workers only have 1 mechanism, namely a strike. It is important to note that despite this omission, employers are still able to claim under their rights of collective bargaining, which are protected by the Constitution as explained by Sachs.

In conclusion

To answer the question posed at the beginning, employer lockout does not have the same legal protection as the employee's right to strike. This is because the right to strike is not only a statutory right but also a Constitutional Right as per the Constitution and the LRA, respectively. The LRA and Constitution, however, do not provide for the right to lock out as it is merely a recourse that employers have at their disposal and does not have the same status as rights.

SERR Synergy seeks to assist employers with their employment-related responsibilities during a strike and to discuss the procedure that needs to be followed when it comes to implementing the relevant lockout in response to a strike.

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