

# STRIKES ACTION IN SOUTH AFRICA: THE EFFECTIVENESS OF THE LRA IN SOUTH AFRICA'S SOCIO-ECONOMIC STATE

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## INTRODUCTION

Chapter IV of the Labour Relations Act, No. 66 of 1995 (“**the LRA**”) regulates the right to strike. While it is built on the pre-1995 law it has also been transformed in certain fundamental respects to bring it in line with the Constitution<sup>[1]</sup> and the relevant standards of the International Labour Organisation (“**ILO**”).<sup>[2]</sup> Massive strike action took place by the Congress of South African Trade Unions (“**COSATU**”) and the South African Federation of Trade Unions (“**SAFTU**”) to voice their anger and frustration over the rising cost of living and a lack of action from the government in addressing the issues raised by the population. The employees and their trade union representatives argued that there is a lack of will or capacity on government level and urged the government, through the right to strike, to act.

The purpose of this article is to briefly analyse the LRA’s statutory dispute resolution system as a means of preventing, where possible, the need for industrial action and to analyse the LRA’s introduction of the right to strike, accompanied by protection against dismissal or legal and/or civil liability for engaging in strike action in compliance with the LRA’s procedures.

## DEFINITION OF A STRIKE

The question whether industrial action falls within the definition of a strike is important for two reasons. First, only strikes as defined in the LRA are subject to the procedural and substantive requirements set out in the LRA; and secondly, only strikes as defined can enjoy the immunities and protection afforded by the LRA, subject to compliance with statutory requirements.

A strike takes place to resolve a dispute between the employees and their employer. The dispute must be about something in the employer's control, for example, wages, improved working conditions and other disputes of mutual interest. The LRA has a relatively flexible approach. It 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’.*<sup>[3]</sup>

A strike can take the form by way of:

1. a partial or complete refusal to work;
2. a ‘go slow’ where employees are working slowly to put pressure on an employer to comply with their demand; and
3. a ‘grasshopper’ strike, when employees go on intermittent work stoppages about the same demand (i.e.: strike, return to work, and strike again).

In *Transport and Allied Workers Union of SA obo Ngedle and Others v Unitrans Fuel and Chemical (Pty) Ltd*<sup>[4]</sup> the Constitutional Court summed up the definition as follows:

*‘There are four elements or components that make up a strike under the LRA. In everyday parlance people call every collective stay-away from work or work-stoppage a strike. Under the LRA a strike must have the four elements. These are: (a) a partial or complete concerted refusal to work or retardation or obstruction of work, (b) by persons who are or have been employed by the same employer or by different employers, (c) for the purpose of remedying a grievance or resolving a dispute, (d) in respect of a matter of mutual interest between employer and employee.’*

## PROCEDURAL REQUIREMENTS TO BE COMPLIED WITH FOR A STRIKE TO BE PROTECTED

The primary requirement for a protected strike is that it must relate to a permissible demand and not be subject to the limitations contained in section 65 of the LRA. Secondary to this, are procedural requirements that must also be complied with. The requirements for a strike to be protected are set out in section 64 of the LRA -

1. The issue in dispute<sup>[5]</sup> must be referred to the Commission for Conciliation, Mediation, and Arbitration (“**CCMA**”) or Bargaining Council;<sup>[6]</sup> and
2. The 30 days/certificate: before a strike notice is issued –
  1. 30 days must lapse from when the dispute was received by the CCMA, or Bargaining Council: or
  2. A certificate must be issued stating that the dispute remains unresolved.
3. A written notice stipulating the commencement of the strike must be issued to the employer at least 48 hours before the strike commences.<sup>[7]</sup> Where the state is the employer, the notice period is seven days.<sup>[8]</sup>

## CONSEQUENCES OF A PROTECTED STRIKE

There are three consequences of a protected strike that will be set out in more detail below:

### **1. Protection against dismissal and other disciplinary measures**

The most important protection afforded to employees participating in a protected strike is protection against dismissal. The LRA does however 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 the procedure followed was fair.

### **2. Exclusion of civil liability and liability for breach of contract**

The LRA guarantees immunity from civil claims. Specifically, it provides that participation in a protected strike or any conduct in contemplation or furtherance of a protected strike is not a delict or breach of contract.<sup>[9]</sup> For obvious reasons, unlawful conduct is not included. Conduct that constitutes a criminal offence is expressly excluded from protection.

### **3. Non-payment of remuneration**

An employer is not required to pay employees during a strike, as the principle of '*no work, no pay*' applies. Since participation in a protected strike does not constitute breach of contract,<sup>[10]</sup> the employer's obligations under the employment contract continue to exist during the strike. Should an employer provide accommodation or meals to employees in the ordinary course of employment, the employer is entitled to suspend such services at 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.

## **REMEDIES AVAILABLE TO EMPLOYERS IF THE STRIKE ACTION IS UNPROTECTED**

Unprotected strike action may be interdicted by the Labour Court on application. The LRA provides for an expedited process in such an event. In addition, employers may also take disciplinary action against employees for participating in unprotected strike action.

## **ARE THE CURRENT STRIKE PROVISIONS EFFECTIVE?**

Has our strike law lived up to what it promised some 20 years after its introduction? The reality is that unprotected strike action and acts of violence, continue at high levels. The driving forces are not seen in the LRA but in South Africa's extreme degree of socio-economic inequality. Financial pressures remain a huge issue for most workers, especially low-paid workers who receive the lowest non-wage benefits at their workplaces. Furthermore, the absence of adequate social protection for unemployed persons places the economic burden of maintaining these persons on generally low-paid workers, aggravated by the rising cost of electricity, water, and food.

It is understandable that workers will look to their employers to assist with obtaining these benefits either directly or indirectly through increased wages. As a result, workers and unions raise issues that fall outside the normal ambit of collective bargaining, demanding that employers take responsibility for service delivery they believe is not coming from government.

## **WHAT IS THE WAY FORWARD?**

Much has been said on this topic, but the focus here is on the narrower question of what the law can achieve and how it may be interpreted or developed. Even within the framework of the LRA, certain conclusions can be drawn, which includes, amongst others -

1. The purpose of the LRA implies that more time and effort must be focused on ensuring that proper negotiations take place. Negotiating parties should be capacitated to fully understand the parameters of a sustainable settlement prior to formulating demand or responding to demands and must improve their negotiating skills.
2. Employers should be called to develop the necessary understanding of workers' circumstances, and for unions to develop sufficient understanding of an employer's business, to assist in reaching agreements that are mutually considered reasonable.
3. The CCMA could contribute by providing expert assistance to unions and employers, involving training and accrediting facilitators who can assist the parties at the level of workplace negotiations and even after deadlock to guide the parties towards agreement where this is possible.
4. Greater workplace democracy and dialogue between management and genuine worker representatives would assist in building mutual trust and understanding of other parties' circumstances.
5. Before declaring a dispute, senior management and senior union officials should meet to break the deadlock.
6. To develop more openness to the possibility of referring a dispute to advisory arbitration.

Although the proposals do not require that the strike provisions in the LRA be amended, their effect would, for reasons already given, ultimately depend on change in the surrounding socio-economic climate, on a perceived narrowing of social inequality and consequent reduction of tension between employers and employees to the point where rational negotiations are possible.

<sup>[1]</sup> Section 23(2) of the Constitution of the Republic of South Africa, 1996.

[2] Conventions 87 and 98 of the ILO.

[3] S. 213 of the LRA.

[4] 2016 (11) BCLR 1440 (CC) para. 105.

[5] ‘Issue in dispute’ is defined, in relation to a strike or lock-out, as ‘the demand, the grievance or the dispute the subject matter of the strike or lock-out’ (s. 213 of the LRA).

[6] S. 64(1)(a).

[7] S. 64(1)(b).

[8] S. 64(1)(d).

[9] S. 67(2).

[10] S. 67(2).