

NUMSA

THE LABOUR RELATIONS AMENDMENT ACT (LRAA) AND STRIKE ACTION GENERALLY

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2. SECTION 135 AS AMENDED

- 2.1 Strike notices may be issued 30 days after the referral to conciliation or immediately after the issue of a certificate of outcome (stating that dispute is unresolved).
- 2.2 The parties may agree to an extension of the abovementioned 30-day period.
- 2.3 The LRAA now allows the CCMA director to extend the 30-day period by 5 days to ensure the meaningful conciliation of the dispute.
- 2.4 The CCMA director cannot extend to allow the CCMA to determine jurisdictional points.

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- 2.5 See *City of Johannesburg v SAMWU 2011 (32) ILJ 1909* at paras 12 and 15:
 - 2.5.1 Three categories of strikes: demands, grievance, dispute (para 12);
 - 2.5.2 Jurisdictional points (para 15).

3. STRIKES

- 3.1 Procedural limitations:
 - 3.1.1 Section 64 (1);
 - 3.1.2 Section 64(3)(a) and (b);
 - 3.1.3 Internal dispute procedures – *BMW v NUMSA (2012) 33 ILJ 140 (LAC)*.

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- 3.2 Substantive limitations:
 - 3.2.1 Section 65(1) & 65(3);
 - 3.2.2 Issue in dispute is regulated by collective agreement – this includes procedure to resolve dispute – see *Fidelity Guards Holdings (Pty) Ltd v PTWU & others [1997] 11 BLLR 1425 (LC) at 1433F-H*;
 - 3.2.3 Where a collective agreement refers an ongoing dispute to a task team, ensure that the duration of the task team is clearly stated in the agreement;
 - 3.2.4 Section 65(1)(c) read with definition of “any other employment law” in section 213 – prohibits strikes on BCEA and EEA issues (beware of press releases and correspondence).

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- 3.3 Matters of mutual interest:-
 - 3.3.1 Includes so-called “rights disputes” and “interest disputes” - *Department of Home Affairs & another v Public Servants Association (2017) 38 ILJ 1555 (CC)* at para 7;
 - 3.3.2 Excludes protest action - see definition of protest action in section 213 and see *Pikitup* judgment below;
 - 3.3.3 *Pikitup v SAMWU (2014) 35 ILJ 983 (LAC)* at paras 54 – 57: “any matter which affects employees, however indirectly” but “not too far removed from the employment relationship”.

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- 3.4 Protest action – socio-economic interest of workers – see section 77.
- 3.4 Sympathy strikes – not permitted in LRA, only secondary strikes permitted (see section 66 – nature and extent of secondary strike must be proportional to the effect on the business of the primary employer).
- 3.6 Unilateral changes to terms and conditions of employment:
 - 3.6.1 Shorter procedural route to strike action;
 - 3.6.2 Does not include “work practices” – one machine or two machines – see *A Mauchle (Pty) Ltd v NUMSA* (1995) 16 ILJ 349 (LAC);
 - 3.6.3 Changes to shifts – courts have often found that this relates to a work practice and not a term and condition of employment;

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- 3.6.4 Changes to work practices remain matters of mutual interest;
- 3.6.5 Terms and conditions of employment – generally found in the employment contract or in collective agreement.
- 3.7 Demands –:
 - 3.7.1 Be clear, set out demands in full;
 - 3.7.2 Demands can be amended during strike, only to extent that the dispute has been conciliated – see *Edelweiss Glass v NUMSA* [2012] 1 BLLR 10 (LAC);
 - 3.7.3 Be creative (e.g. interest arbitration or concede that the dismissal is fair and then strike for reinstatement);

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- 3.7.4 Demand cannot be unlawful (example 1: cannot demand that a manager be suspended or dismissed no matter what but you can demand that a manager be investigated by external/agreed advocate and that an external/agreed advocate chair the disciplinary hearing; example 2: cannot require an employer to breach an outsourcing contract but you can demand that an employer lawfully terminate an outsourcing contract);
- 3.7.5 Include all your demands – see *TAWU v Unitrans* (2016) 37 ILJ 2485 (CC) at para 36 the court held: “The right to strike in pursuit of a permissible demand does not evaporate upon the addition of impermissible demands”.

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4. SECTION 150A - D

- 4.1 CCMA Director can establish advisory panel on own accord.
- 4.2 CCMA must establish on application by a party if: (a) the strike or lockout is no longer functional - protracted and no resolution imminent, (b) there is an imminent threat to constitutional rights - violence, or (c) the strike or lockout has the potential to cause an acute national or local crisis.
- 4.3 Parties may agree to advisory arbitration.
- 4.4 Labour Court may order the establishment of an advisory panel – if imminent threat to constitutional rights (violence) or potential to cause acute national or local crisis affecting normal functioning of community / society.

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- 4.5 Advisory panel – chairperson, union and employer assessors.
- 4.6 Section 142 applicable – discovery, subpoena etc.
- 4.7 Any party deemed to have accepted award if no objection within 7-day period (period set out in the award). Objection – must set out reasons for not accepting it.
- 4.8 Advisory award becomes binding if at least one of the union parties or the employer accepts it. Then the award has the force of a collective agreement.

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5. SECTION 95 AS AMENDED

- 5.1 Union constitution must provide for a ballot before a strike.
- 5.2 Union constitution must provide for a ballot that is secret and recorded (must keep record for 3 years).
- 5.3 However, if no ballot held, strike is not unprotected (section 67(7) of LRA).

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6. TRANSITIONAL PROVISIONS – S19 LRAA

- 6.1 The Registrar may issue directives to unions, after consultation, to amend their constitutions and provide for a secret ballot.
- 6.2 If union does not comply with Registrar’s directive, then a secret ballot must be held before a strike. Here, if there is no compliance, arguable that the strike would be unprotected.
- 6.3 But see FOSKOR and Mahle Behr v NUMSA (D439/19 and 448/19) – court held that a secret ballot must be held before a strike - even when Registrar has not issued directions. Judgment on appeal



THANK YOU

Setting the precedent

