Constitutional Court Clarifies the use of Replacement Labour in Lockouts: Lessons for Employers

The recent judgment of the Constitutional Court in ***National Union of Metalworkers of South Africa (NUMSA) v Trenstar (Pty) Ltd*** **[2023] ZACC 11** delivered on 18 April 2023 clarifies the interpretation of section 76(1)(b) of the Labour Relations Act (LRA) on replacement labour in the context of a lockout. The case dealt with the question of whether an employer who embarks on a lockout may use replacement labour to perform the work of the locked-out employees, considering the general rule that employers should not be entitled to use replacement labour during strikes except in certain circumstances.

Section 76 of the LRA allows an employer, in certain instances, to use replacement labour during a strike, thereby significantly weakening the efficacy of strikes. The proper interpretation of section 76(1)(b) of the LRA has been the subject of conflicting judgments in the Labour Court. The Labour Appeal Court has twice declined, on grounds of mootness, to address the issue.

The Constitutional Court held that an employer who embarks on a lockout may not, as a general rule, use replacement labour to perform the work of the locked-out employees. There is one exception: if the lockout "is in response to a strike". Section 76(1)(b) of the LRA states that: (b) for the purpose of performing the work of any employee who is locked unless the lockout is in response to a strike.

The brief facts of the case are that, after a failed conciliation on demand by NUMSA for the payment of once-off gratuity employees, NUMSA gave Trenstar notice that its members would embark on a strike and would take the form of withdrawal of labour. The strike began as notified and continued for several weeks. As a result of an urgent application by Trenstar to have the strike action declared unlawful and unprotected, the application failed. After several weeks of striking, NUMSA wrote a letter through its attorney stating that its members had

suspended the unprotected strike action which commenced on 26 October 2020. The letter further stated that this should not be construed as a withdrawal of the demand for the gratuity payment.

Trenstar responded that it was giving 48 hours' notice that it was intending on locking out all NUMSA members with effect from 07h00 on Monday the 23rd of November 2020. The company demanded that the NUMSA members would waive their demand to be paid by the company a once-off taxable gratuity in an amount of R7500 to be paid in addition to the ATB. NUMSA responded and contended that a lockout is in response to a strike and denied that Trenstar was entitled to replacement labour during the lockout and demanded an undertaking that Trenstar would not use temporary labour. Trenstar stated in response that the lockout notice was served before the strike was suspended. On the Monday, Trenstar in fact implemented the lock-out as notified. As from the Monday morning, the employees' absence from work was due to a lock-out, not a strike.

NUMSA brought an urgent interdict application to the Labour Court requesting that the court interdict Trenstar from using replacement labour during the lockout. NUMSA did not challenge the lawfulness of the lockout but alleged that it was not in response to a strike. This was so because the strike action had ended. The lockout was thus offensive. Trenstar alleged that NUMSA and its members had not "withdrawn the strike or the demand", they had merely "suspended it" and they could at any time reinstate it. The court dismissed the interdict application. The LAC dismissed the appeal on the matter as it had become moot. The matter was referred to the Constitutional Court.

In its ruling, the Constitutional Court found that the distinction between a terminated strike and a suspended strike is not relevant to the interpretation of section 76(1)(b) of the LRA. The court held that the purpose of the provision is to prevent employers from using replacement labour during a lockout, except where the lockout is in response to a strike. The court emphasized the importance of protecting the right to strike, which is guaranteed under

section 23(2)(c) of the Constitution. The court also stressed the need for proportionality and balance in the power dynamics between employers and employees in labour disputes. Ultimately, the court ruled in favour of NUMSA and held that Trenstar was not entitled to use replacement labour during the lockout. The ruling provides much-needed clarity on the interpretation of section 76(1)(b) of the LRA and affirms the importance of protecting the right to strike in labour disputes.

The judgment clarifies the interpretation of section 76(1)(b) of the Labour Relations Act (LRA) on the use of replacement labour in the context of a lockout. Employers should be mindful that, as a general rule, they cannot use replacement labour to perform the work of locked-out employees unless the lockout is in response to a strike. This means that employers need to carefully consider their use of replacement labour and ensure that it is in line with the provisions of the LRA.

Furthermore, employers should be cautious about using replacement labour during a strike or a lockout. This can significantly weaken the efficacy of strikes and damage the relationship between employers and employees. Employers should be aware that the right to strike is protected under section 23(2)(c) of the Constitution and should respect this right. Employers should strive for a balanced power dynamic with employees during labour disputes by utilizing proper communication channels, negotiating in good faith, and refraining from using replacement labour unless allowed by the LRA, which has now been clarified to only apply during an active strike. If a trade union provides a letter stating its intent to suspend a strike, the employer must allow workers to return to work.

However, there is a risk that unions may act in bad faith by suspending a strike in writing but proceeding with the strike. This possibility has not yet been legally tested. In such an instance, we believe it would be justified for the employer to consider proceeding with a lockout notice if they have reason to believe that the union has acted in bad faith by sending a letter to suspend the strike while intending to continue with the strike. However, it's important to note that such a situation has not been tested in court and employers should always act in accordance with the law and seek legal advice if unsure. Ultimately, it is crucial for employers

to strive for a fair and balanced approach to labour disputes, which includes good faith negotiations, proper communication channels, and the avoidance of replacement labour except in certain circumstances as clarified by the recent judgment in the NUMSA v Trenstar case.