

Strikes - post Metrorail v SATAWU

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Section 64 of the Labour Relations Act 66 of 1995 (as amended) regulates the procedures which must be followed in order for a strike to be protected. One of the requirements is that the Commission for Conciliation, Mediation and Arbitration (CCMA) or a relevant bargaining or statutory council must have issued a certificate stating that the dispute - which forms the basis for the strike action - remains unresolved.



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What happens if there has been an unreasonably long delay between the issuing of such a certificate and the start of the strike action? Does the certificate expire or can the strike start at any time of it has been issued if the dispute remains unresolved?

Labour Court pronouncements

In the recent decision of PRASA t/a Metrorail v SATAWU and Others (C190/2016), a decision handed down by the Labour Court on 12 May 2016, the Court made two pronouncements which will have a bearing on the collective bargaining arena, particularly on the issue of the longevity of the certificate of outcome. First, the Court considered whether a strike is protected in circumstances where there has been an unreasonably long delay between the issuing of a certificate of outcome and the subsequent strike action. Secondly, as an aside, the Court considered the appropriateness (or otherwise) of approaching the Court on an urgent basis seeking interim relief to declare a strike unlawful.

During September 2014 the South African Transport and Allied Workers Union (SATAWU) referred a dispute of mutual interest to the CCMA. SATAWU demanded that the Passenger Rail Agency of South Africa (PRASA), in the Western Cape, absorb all fixed term employees into permanent positions and ensure salary parity in all departments in the region. The dispute remained unresolved. On 21 October 2014 the CCMA issued a certificate of outcome confirming this. At this juncture SATAWU could have issued a notice to commence strike action.

SATAWU and its members did not embark on strike action in 2014. Instead, there was a resumption of negotiations and dispute resolution steps between the bargaining parties. On 4 April 2016, some 18 months later, SATAWU gave notice of its intention to embark on strike action on 6 April 2016 in the Western Cape. SATAWU relied on the certificate issued by the CCMA on 21 October 2014.

PRASA regarded the planned strike action as unlawful and approached the Labour Court on an urgent basis. PRASA asked the Labour Court to declare the strike unlawful for a number of reasons, including that some of the matters forming the basis of the planned strike were still the subject of ongoing bargaining on a national level. Therefore, argued PRASA, the parties had not reached a deadlock. In addition, PRASA stated that a number of issues on which SATAWU intended to strike were not raised when the 2014 certificate 2014 had been issued.

The Court issued an interim order declaring the strike unlawful. Despite this some of SATAWU's members embarked on strike action on 13 April 2016. The strike was characterised by a number of instances of intimidation, violence and damage to property. PRASA again approach the Labour Court on an urgent basis for an order interdicting such unlawful action. The Labour Court granted PRASA such an order

On the return day of both orders, the Court was tasked with determining whether the strike was unprotected. The Court considered whether, by failing to embark upon strike action and by continuing negotiations, SATAWU could be said to have waived, estopped or abandoned their right to strike.

Court conclusion

The Court concluded that:

"[T]he inquiry should not centre on a waiver of the right to strike. Rather, it is a failure to rely on a specific certificate of outcome that is discernible in a case such as that before [the court]...the right to strike is retained, but after an unreasonable delay in acting on the issuing of a certificate, a union is required to go through the procedural steps set out in section 64 of the LRA once more. This approach accords with the speedy resolution of disputes on which the LRA is premised. It is also imminently sensible: over a period of 18 months there are likely to have been changes in the collective bargaining relationship. The procedural requirements clothing strike action with protection, which include the opportunity for parties to reach a settlement agreement through the conciliation process, may produce a different outcome, given the effluxion of time."

This decision reiterates the need for a speedy resolution to disputes in terms of the LRA. Each case will be considered on its facts to determine whether there has been an unreasonable delay between the issuing of a certificate of outcome and the embarking upon strike action. This is a factual question. Should this be found to be the case then the trade union concerned may be required to again follow the steps required by the law before embarking on strike action. This case also illustrates the risk for a trade union which fails to timeously act upon a certificate of outcome and fails to re-refer the dispute in terms of section 64 of the LRA. Failure to do so may render the proposed strike action unlawful.

The Court in this case also considered the route followed by the employer in dealing with the threatened strike action. Having reference to the case of *National Union of Food Beverage Wine Spirits & Allied Workers & others v Universal Product Network (Pty) Ltd: In re Universal Product Network (Pty) Ltd v National Union of Food Beverage Wine Spirits & Allied Workers & others* (2016) 37 ILJ 476 (LC) to Court cautioned that approaching the court on an urgent basis, on short notice, to declare a strike unlawful on an interim basis is not always acceptable.

The Court held that it must guard against parties seeking to use it to unfairly sway the dynamics of power play essential to collective bargaining in favour of one party. The Courts should guard against litigants seeking interim relief which is better categorised as relief of a final nature. The risk is that the relief, which is of a final nature and should be argued having full regard to the facts of the matter, is granted on an interim basis by satisfying a less onerous test.

Unlawful strike action

In the strike context the declaration of unlawfulness of a strike would fall into this category, though there are appropriate exceptions (where a respondent party is not present or some other imbalance or injustice would result from the granting of a final order). In such circumstances interim relief will obtain the same result, for all practical purposes, as a final order (i.e. quell any strike action). Rather, a party seeking to approach the court should present comprehensive papers seeking final relief.

An applicant party must be slow to approach the court on an urgent basis in the absence of presenting full papers clearly setting out all material facts and issues for the Courts consideration so that a final order may be granted (or denied as the case may be). In circumstances, however, where violence, intimidation and/or damage to property permeate then nothing bares a party from seeking interim relief on short notice.

The Court's ruling pertains to the interdicting of unlawful strike action. It does not discount the appropriateness of seeking such relief in the instance where the other party or its members are misconducting themselves or otherwise engaging in unlawful conduct.

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