
LEGAL CONSEQUENCES OF AN UNPROTECTED STRIKE

Introduction

In my previous article the requirements of a strike notice before employees can embark on a strike, were discussed. This article will focus on the legal consequences if such requirements are not met.

Where a strike does not comply with the provisions of section 64 of the Labour Relations Act, it will be unprotected and the following legal consequences will apply:

1) **Interdict:**

The Labour Relations Act “LRA” also empowers the Labour Court to grant an interdict or order to restrain any person from participating in a strike or any conduct in contemplation or in furtherance of a strike if the strike does not comply with the provisions of the LRA. Failure to comply with such an interdict or order is a factor which the Labour Court may take into account in ordering just and equitable compensation.

2) **Compensation:**

In addition to granting of an interdict, section 68(1)(b) of the LRA, grants the Labour Court the jurisdiction to order the payment of just and equitable compensation for any loss attributable to the strike.

In deciding whether the order of the payment of compensation is just and equitable the Labour Court must have regard to the following:

- ▶ whether attempts were made to comply with section 64 of the LRA;
- ▶ whether the strike was premeditated;
- ▶ whether the strike was in response to an unjustified conduct by the other party to the dispute;
- ▶ the duration of the strike;
- ▶ the financial position of the employer, trade union, or employees.

3) **The dismissal of strikers:**

Participation in an unprotected strike may in terms of section 68 (5) of the LRA constitute a fair reason for dismissal. In deciding whether a dismissal was fair the provisions of the Code of Good Practice dealing with dismissals, as contained in schedule 8 of the LRA, must be taken into account. Item 6 of the Code of Good Practice states that participation in an unprotected strike constitutes misconduct. However the Code also states that as in the case with any other act of misconduct participation in an unprotected strike does not necessarily justify dismissal. For a dismissal to be fair, such dismissal must be substantively and procedurally fair.

■ **Substantive fairness:**

It does not follow as a matter of course that the dismissal of strikers who participated in an unprotected strike is fair. The substantive fairness of such a dismissal depends on all the circumstances surrounding the strike. Item 6 of the Code of Good Practice requires that the substantive fairness of the dismissal of strikers who participated in an unprotected strike must be evaluated in the light of the facts of the case. Factors that must be taken into account include the following:

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- The seriousness of the failure to comply with the provisions of the LRA;
 - The attempts the employees had made to comply with the LRA;
 - Whether or not the strike was in response to unjustified conduct on the part of the employer.

■ **Procedural fairness:**

The dismissal of strikers who have embarked on an unprotected strike will also have to procedurally fair. Procedural fairness rests on the following three pillars:

- Contact with the union;
- Issuing of an ultimatum;
- A hearing.

Conclusion:

Employers in terms of the Labour Relations Act have remedies with regards to an unprotected strike. However before rushing into dismissal, employers should always make sure that such a dismissal is both procedurally and substantively fair.

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