

EMPLOYMENT

An employer's right to use replacement labour where a lockout has been instituted

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and Nyeleti Baloyi, Candidate Attorney

On 18 April 2023, the Constitutional Court delivered a judgment on the interpretation of section 76(1)(b) of the Labour Relations Act 66 of 1995 ("**LRA**") in *NUMSA v Trenstar (Pty) Ltd* [2023] ZACC 11.

NUMSA's members embarked on a strike in the form of a total withdrawal of labour that continued for several weeks. On Friday, 20 November 2020, NUMSA notified Trenstar that it decided to suspend its strike and their members will return to work on Monday, 23 November 2020, but indicated that it does not withdraw its demand (which was the cause of the strike). Shortly after receipt of this notification Trenstar gave 48 hours' notice of its intention to lock out all NUMSA members. On Monday 23 October 2020, Trenstar proceeded to lockout NUMSA's members and made use of replacement labour.

The issue to be decided was whether an employer may institute a lockout when at the time it was instituted, employees had already suspended their strike. The Labour Court and the Labour Appeal Court both held that an employer may do so and the lockout would be regarded as a defensive lockout entitling the employer to make use of temporary labour.

The Constitutional Court differed in its approach and upheld NUMSA's appeal by finding that Trenstar could not lawfully make use of temporary labour as at the time that the lockout actually began, NUMSA's members were not on strike. The Court reasoned that suspending a strike merely means that the employees do not waive their unconditional right to strike which previously accrued to them, it does not mean that they continue to strike.

The right to make use of temporary labour as provided for in the LRA applies only when the use of temporary labour is in response to a strike (defensive lockout). If employees have suspended their strike, no strike action takes place, and no temporary labour may be used.

The *NUMSA* decision was simply an issue of timeline. The decision does not detract from employer's ability to make use of temporary labour. The judgment should thus not cause any concern to employers who seek to exercise their collective bargaining power by locking-out. It merely confirms that the decision to lock-out and use temporary labour should flow as a consequence of an ongoing strike (defensive lockout).

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Head of Employment

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