WERKSMANS
ATTORNEYS

EMPLOYMENT

Entitlement to embark on strike action when there is an unreasonable delay

9 November 2021 *5 min read*

Entitlement to embark on strike action – Issue

Whether intended strike action can be embarked upon where there has been a 10-month delay between the issuing of the certificate of outcome and the notice of intention to embark on strike action ("**strike notice"**).

Summary

Where there had been an unreasonable delay between the issuing of a certificate of outcome and the strike notice, and where the strike notice contains demands that were unclear and which had not been referred to conciliation, the trade union was not entitled to embark on intended strike action and was obliged go through the procedure for strikes and lockouts in terms of section 64 of the LRA once more.

Unreasonable delay between the issuing of a certificate of outcome and the strike notice

The above issued was considered, among others, by the LC in the case of *Gibela Rail Transport Consortium (Pty) Ltd v National Transport Movement obo members (Case no. J1180/21)*. On 21 September 2021 National Transport Movement ("**NTM**") issued a strike notice on behalf of its members notifying the applicant of its intention to embark on strike action within 48 hours. The demands in the notice related to the alleged refusal of the applicant to suspend and investigate its senior employees, Ms Modiba and Mr Mashiane. The demands also related to alleged harassment of employees who had lodged grievances against various managers as well as the applicants alleged failure to resolve other outstanding matters.

It was alleged that Modiba had assaulted a NTM member in the workplace ("**Modiba dispute**") and Mashiane had intimidated and coerced that same member to withdraw the grievance lodged against Modiba ("**Mashiane dispute**").

NTM referred a dispute to the Metal and Engineering Industries Bargaining Council ("**MEIBC**") on or about 30 August 2020 wherein they demanded that Mashiane be suspended for his conduct which had allegedly occurred on 3 March 2020. A further dispute was referred to the MEIBC on 19 October 2020 in relation to the employer's alleged refusal to suspend and investigate Modiba.

The employer submitted that since the issuing of the ruling in December 2020, NTM did nothing in respect of the dispute surrounding Mashiane until 14 September 2021 when it sought a meeting with the employer. The employer contended that the Modiba dispute was sufficiently dealt with in the form of a disciplinary hearing in October 2019.

No certificate of outcome was issued

The employer further submitted that no certificate of outcome was issued in relation to the Mashiane dispute and that, in fact, NTM had withdrawn the dispute. In summary, the employer contended that NTM sought to use a certificate of outcome issued on 23 November 2020 to revive matters pertaining Modiba that were addressed in September 2019.

NTM submitted that the disputes relating to Modiba and Mashiane remained unresolved. NTM confirmed that their strike notice relied on the on the certificate of outcome issued on 23 November 2020. NTM submitted that the employees were entitled to embark on strike action

regardless of the date on which the certificate of outcome was issued, as there was no provision in the LRA that regulated the validity of the period of a certificate of outcome.

The court found that the certificate of outcome of 23 November 2020 relied upon by NTM did not cover all the demands set out in the strike notice. Furthermore, the strike notice contained demands that were either vague or not referred for conciliation.

In relation to the delay between the issuing the certificate and the strike notice, the court referred to the case of *Passenger Rail Agency of SA t/a Metrorail v SA Transport & Allied Workers Union and Others*[1] wherein Rabkin-Naiker J held that "*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 s 64 of the LRA once more. This approach accords with the principle of speedy resolution of disputes on which the LRA is premised.*"

The court held that the fact that NTM sought to embark on a strike regarding matters that originated in 2019, matters that were not referred for conciliation and, further, utilise a certificate of outcome issued in November 2020 could not be in the interests of expeditious resolution of any disputes between the parties. The LC concluded that while NTM's right to strike in relation to the alleged conduct of Modiba and Mashiane remained intact, it could not strike until once again complying with section 64 of the LRA, given, among other reasons, the unreasonable passage of time since obtaining the certificate of outcome.

The LC held that the fact that the LRA does not make provision for the invalidation of the certificate of outcome through the passage of time did not entitle NTM to suddenly revive matters that had been dormant for numerous months. As such, NTM was required to go through the procedural steps of section 64 of the LRA once more.

In the circumstances, NTM and its members were interdicted from embarking on the intended strike action.

Importance of the case

Even though the LRA does provide for the invalidation of a certificate of outcome due to the passage of time, trade unions and employees are not entitled to place employers in limbo and then suddenly revive the matter when it suits them. Where there has been an unreasonable delay between obtaining the certificate of outcome and giving notice of intention to embark upon a strike the union must again comply with Section 64 of the LRA failing which the strike may be interdicted accordingly.

by Jacques van Wyk, Director; Andre van Heerden, Senior Associate; and Lukrisha Ramadu, Candidate Attorney

---

[1] (2018) 39 ILJ 2733 (LC)



Andre van Heerden

Director

View Profile



Jacques van Wyk

Director

View Profile

Keep us close