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STRIKE OUT ON THE BALLOT

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Section 23(2) of the Constitution of the Republic of South Africa, 1996 provides that every worker has the right to strike. However, much like other rights, the right to strike is subject to section 36 of the Constitution, which provides that rights in the Bill of Rights may be limited.

Whilst the right to strike has its own internal limitations, borne from the definition of the term '*strike*', the right also has procedural limitations borne from section 64 of the Labour Relations Act. This is because the right to strike is not absolute.

The advent of the Labour Relations Amendment Act No. 8 of 2018 ("**Amendment Act**"), which came into effect on 1 January 2019, has created a further limitation to the right to strike by the addition of the requirement for trade unions to conduct a secret ballot vote of its members prior to engaging in strike action. Consequently, this has meant that trade unions would have to amend, to the extent that they don't already provide, their respective constitution to comply with this new requirement.

Recognising the lull in time until the constitutions of the respective trade unions are amended, the Amendment Act provides for transitional provisions. However, the transitional provisions have begged the question, whether or not they apply as at 1 January 2019 or are only triggered after the registrar has issued a directive for the trade union to amend its constitution.

WHAT IS THE EFFECT OF THESE PROVISIONS?

In effect, until such time as a directive is issued, directing trade unions to amend their respective constitutions to comply with section 95 as amended, all unions [which do not comply with section 95(5)(p) and (q)] must conduct a secret ballot prior to embarking on strike action.

The Labour Court in *Mahle BEHR SA (Pty) Ltd v NUMSA and Others (2019) 40 ILJ 1814 (LC)* has pronounced on this issue. The question before the Court in this case was whether or not the transitional provisions of section 19 of the Amendment Act only apply in the instance where the registrar has issued the directive, but before there has been compliance with such directive.

The Labour Court held that the purpose of the legislation is clear in that its purpose *inter alia* is to provide that before a union may engage in a strike it should conduct a secret ballot of its members. In addition to this provision and to regulate the interim position, the transitional provisions require the holding of a secret ballot by a union (and employers organisation in respect of a lock out) prior to engaging in a strike. The requirement is peremptory and applies only to registered unions that do not include in their constitution the requirement of a ballot.

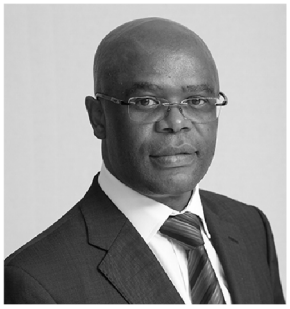
The Labour Court went further to state that to interpret the section to mean that it only applies after a directive has been issued is not acceptable as it negates any suggestion that the transitional provisions will apply in the interim pending compliance.

To this end, the Court held that in the absence of a union having conducted a secret ballot as required by section 19 of the Amendment Act, unions are precluded from embarking on strike action.

Section 19(2) of the Amendment Act effectively creates a situation, where unions are treated as though their constitutions make provision for a strike ballot.

This position was confirmed by the Labour Court more recently in *Johannesburg Metropolitan Bus Service (SOC) Ltd v Democratic Municipal Workers Union of South Africa [J1799/19 (30 August 2019)]*. In this matter, the court further clarified that a union's failure to amend its

constitution to provide for balloting may not necessarily render the strike unprotected, however, the union would still not be able to embark on a strike without conducting a ballot in terms of section 19(2) of the Amendment Act.



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