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The bounds of the right to strike in support of organisational rights by way of Section 21 of the LRA

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Section 21 of the Labour Relations Act 66 of 1995 states that any registered trade union may notify an employer in writing that it seeks to exercise one or more of the organisational rights conferred on it by Chapter III of the Labour Relations Act, 66 of 1995 (as amended) ("the LRA") in a workplace. Within 30 days of receiving the notice, the employer must meet with the trade union and endeavour to enter into a collective agreement which regulates the trade union's exercise of organisational rights in the workplace.

INTRODUCTION

If a collective agreement is not concluded either party may refer the dispute in writing to the Commission for Conciliation, Mediation and Arbitration ("the CCMA") for it to be resolved through conciliation. If the dispute remains unresolved after conciliation then either party *may* refer the matter to arbitration. It must be noted that the term 'may' is not peremptory, and therefore the trade union is not obliged to refer the dispute to arbitration. Rather it is clear that the trade union may, at this juncture, make an election to either refer the dispute to arbitration, or to engage in strike action.

THE RIGHT TO STRIKE

Section 23(2)(c) of the Constitution guarantees the right to strike. A strike will be lawful if it pertains to a matter of mutual interests (i.e. is a not a dispute about a right to which a party is entitled) and complies with the procedural requisites of section 64. Section 64 provides for the following requirements:

- The issue in dispute must have been referred to the CCMA, and
    - A certificate stating that the dispute remains unresolved must have been issued; or
    - A period of 30 days, or any extension of that period agreed to between the parties to the dispute, must have elapsed since the referral. After that –
- 48 hours' written notice of the commencement of the strike must have been given to the employer.

Furthermore, section 65(2)(a) provides that a person may strike if the dispute is about matters dealt with in sections 12 to 15 of the LRA. This is an exception to the general position that employees may not strike on matters which are ordinarily able to be resolved by way of arbitration (which matters are generally disputes of right). These provisions set out the organisational rights afforded to trade unions. Section 12 of the LRA specifically deals with a trade union's right to have access to the workplace in order recruit and/or communicate with its members. Sections 13 to 15 deal with deductions of trade union levies, the right to trade union representatives and the right to leave for trade union activities.

One question which arises is whether a trade union may strike in support of a demand for organisational rights in circumstances where the demand, had the trade union elected to arbitrate the matter instead, would be unenforceable. The Labour Court had regard to this question in the case of *Bidvest Foods Services (Pty) Ltd v National Union of Metalworkers of SA & others* (2015) 36 ILJ 1292 (LC). Bidvest sought to interdict the members of National Union of Metalworkers of South Africa ('NUMSA') from embarking on a strike in pursuit of organisational rights. Bidvest argued that the strike action was unprotected because it was in pursuit of unlawful demands. In essence, Bidvest argued that the demands were unlawful because NUMSA was trying to obtain organisational rights in an industry that fell outside the scope of NUMSA's

constitution. Bidvest argued that NUMSA was only entitled to organise workers in the metal industry, as delineated by the terms of NUMSA's constitution. Bidvest however operated in the food services industry, which was outside the scope of NUMSA's constitution.

Had NUMSA elected to arbitrate the matter they would have been unsuccessful. For instance in the case of *SATAWU v Telekleen/Compukleen* (2010) 7 BALR 768 (CCMA), a trade union's application for organisational rights was found to be defective because the trade union sought to recruit members that fell outside the scope of its constitution. Similarly, in the case of *CEPPWAWU / Pop Snacks* (2009) 11 BALR 1156 (CCMA), it was held that a trade union may only operate in sectors which are delineated by the terms of their constitution.

THE COURT'S DECISION

Therefore, the fundamental question which the Court had to decide was whether the strike was in pursuit of an unlawful demand and therefore unprotected. In answering this question the Court held that strike action will be lawful if it complies with the requirements of section 64 of the LRA. In NUMSA's case, they had met all the requirements of section 64 in that they referred the dispute to the CCMA, and the Commissioner had issued a certificate of outcome stating that the dispute remained unresolved. Therefore NUMSA's strike was found to be lawful.

The Court held that the right to strike is limited by section 64 of the LRA, and should not be further limited by reading into section 64 and section 65(2) the additional requirement that workers may not embark on a strike in pursuit of organisational rights for a trade union that is restricted by the scope of its own constitution. An employer then who wishes to accede to the trade union's demands may enter into a collective agreement with the trade union in terms of section 20 of the LRA.

CONCLUSION

In summary, a trade union who is seeking organisational rights in terms of section 21 of the LRA has an election to refer a dispute regarding organisational rights to arbitration, or, alternatively, to embark upon strike action. If the trade union has elected to go on strike, the strike will only be lawful once it has met the criteria set out in section 64 of the LRA. Counterintuitively, the union is also entitled to elect to engage in strike action over some demands, even though they would be unsuccessful in enforcing such demands as a matter of rights by way of arbitration.

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