STRIKING A BALANCE

WILL THE COURTS STRIKE EVER STRIKE A BALANCE ON THE RIGHT TO STRIKE?

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Every worker has the Constitutionally entrenched right to strike in terms of section 23(2)(c) of the Bill of Rights.

The notion of a requirement in law for unions to conduct a ballot of its members, before embarking on strike action, has always been contentious.

On 19 March 2019, the Labour Court (per Gush J) handed employers at large a godsend judgment in the case of Mahle Behr SA (Pty) Ltd v NUMSA; and Foskor (Pty) Ltd v NUMSA (D448/19 & D439/19) [2019] ZALCD 2 (20 March 2019). The upshot of this Labour Court judgment was that:

"*[16]* That being so I am satisfied that the transitional requirements apply to those unions whose constitutions do not provide for a "recorded and secret ballot" and that in the interim prior to complying with the requirements relating to a secret ballot they "must conduct a secret ballot of members" before engaging in a strike.

[17] This is a peremptory provision and until the respondents comply they may not engage in a strike.

[18] That being so and for the reasons set out above I am satisfied that in the absence of a secret ballot the respondents are not entitled to engage in the strike and I grant the following order:

a) In the absence of the first respondent having conducted a secret ballot as required by section 19 of the Labour Relations Amendment Act 8 of 2018, in both matters, the respondents are interdicted from engaging in the current strikes."

On 4 June 2020, the Labour Appeal Court (LAC) in NUMSA v Mahle Behr SA (Pty) Ltd and the Association of Mineworkers and Construction Union (AMCU) (DA08/2019) found that it was not necessary for a union to conduct a secret and recorded ballot before calling its members out on strike.

Why was this godsend judgment of the Labour Court reversed?

In order to delve into the technicalities, firstly, one must understand that since its inception, the Labour Relations Act 66 of 1995 (effective 11 November 1996) (LRA) has always required that, in terms of section 95(5)(p), a registered trade union must have a provision in its constitution requiring the conducting of a strike ballot before calling its members out on strike.

The Labour Relations Amendment Act 8 of 2018 (effective 1 January 2019) (the LRAA) amended the longstanding LRA by adding a secret and recorded ballot as follows:

"Amendment of section 95 of Act 66 of 1995, as amended by section 18 of Act 12 of 2002

Section 95 of the principal Act is hereby amended—

b) by the addition of the following subsection:

"(9) For the purpose of subsection (5), "ballot" includes any system of voting by members that is recorded and in secret..

Amendment of section 99 of Act 66 of 1995

Section 99 of the principal Act is hereby amended by the substitution for paragraphs (b) and (c) of the following paragraphs respectively:

"(b) … and

(c) the ballot papers or any documentary or electronic record of the ballot for a period of three years from the date of every ballot.".

Transitional provisions

(1) The registrar must, within 180 days of the commencement of this Act, in respect of registered trade unions and employers' organisations that do not provide for a recorded and secret ballot in their constitutions—

a) consult with the national office bearers of those unions or employers' organisations on the most appropriate means to amend the constitution to comply with section 95; and

b) issue a directive to those unions and employers' organisations as to the period within which the amendment to their constitution is to be effected, in compliance with the procedures set out in the amended constitution.

(2) Until a registered trade union or employers' organisation complies with the directive made in terms of subsection (1)(b) and the requirements of section 95(5)(p) and (q) of the Act, the trade union or employer organisation, before engaging in a strike or lockout, must conduct a secret ballot of members.

The supremacy of the Constitution has long seen our courts reluctant to limit the Bill of Rights in the interpretation of the law, and where an interpretation that better promotes the preservation of the Bill of Rights exists, that interpretation will be preferred over one which derogates from a right enshrined in the Bill of Rights.

The LAC therefore held that:

"*[12]* The trigger for the application of section 39(2) of the Constitution is whether the provision in question implicates or affects a right in the Bill of Rights. The present matter implicates the right to strike entrenched in section 23(2)(c) of the Constitution. Hence, section 19 of the LRAA must be read purposively in the light of the relevant provisions of the Constitution, and if there is an interpretation of section 19 of the LRAA that better promotes the preservation of the right to strike, that interpretation ought to be preferred.

[23] The Labour Court thus erred in reaching the conclusion that NUMSA was legally obliged to conduct a secret ballot and accordingly there was no cause to interdict NUMSA and the individual appellants from engaging in the strike on that basis."

We do not expect this judgment of the LAC to be appealed to the Constitutional Court, and, for now, this decision on strike ballots is final. The LAC decision undoubtedly upholds "every workers' right to strike". Our view is that this is yet another employee-orientated and imbalanced decision dominated by the right to strike.

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