

NEWSLETTER

The Official Newsletter of SEENA Legal
Consult.



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Voorwoord

Ons het die halfpadmerk van 2021 bereik. Dit is ook geen verrassing dat besigheid steeds onder druk is nie.

We are hopeful that all our clients receiving our newsletter are in good health and that your businesses are performing as well as possible under the current circumstances.

Read more in this newsletter about the basic principles pertaining to strikes, the VET Levy as well as SEENA's plan to postpone our annual premium increase.

Ons gebede is met almal wat in hierdie tyd geliefdes aan die dood afgestaan het en wat by die siekbed van'n geliefde moet staan.

Die somer is egter op pad en daarmee saam nuwe hoop.

SEENA groete,

Koos Barkhuizen

NS: Onthou dat ons boekhoubesigheid, Odula Bookkeeping and Office Solutions (Pty) Ltd regstaan om jou boeke en Payroll te doen. Kontak die kantoor by 064 416 600.

First strike?

1. Introduction

For small business owners the idea of being confronted with an imminent strike is an unnerving prospect. Images of large scale demonstrations and violent clashes with the law, as is usually showed in the media, are often their only point of reference, whilst in reality, the process mostly unfolds very differently.

2. When do Strikes Take Place?

Generally speaking, you will be faced with a strike under two likely sets of circumstances:

- i. employees collectively, mostly with little or no warning, decide to stop working, or to engage in some form of work retardation (generally referred to as a go-slow) on account of some or other grievance.

This may relate to grievances or injustices (real or perceived) such as:

- Dissatisfaction with disciplinary sanctions meted out against co-employees
- Pay irregularities; and
- Discontent with wages and/or working conditions.

These strikes are often, although not always, illegal in nature because of the fact that the employees have adequate legal avenues at their disposal by means of which their concerns can be addressed, without the need to resort to such drastic action as bringing its employers business to a halt.

In the majority of instances these strikes are short in duration and are mostly resolved through dialogue and disciplinary action, which mostly falls short of dismissal.

In extreme circumstances the Employer may resort to the issuing of ultimatums, which may ultimately lead to large scale dismissals for the participation in illegal and unprotected industrial action, which will be discussed later on.

- ii. At the end of a lengthy process of negotiation predominantly related to annual wage increments and enhanced employment conditions and benefits.

These strikes come with the protection of our law and its participants cannot be dismissed simply for partaking in the strike. Before being legally entitled

to embark on a protected strike, the Union and/or employees:

- Must firstly engage the employer in negotiations;
- After failing to reach an agreement with the Employer, must seek the assistance of the Labour Commissioner by referring the matter as a dispute of interest;
- Must attend conciliation meetings convened by the Office of the Labour Commissioner; and
- Must serve the employer with a forty-eight hour notification of their intention to commence with the strike.

3. The Mechanics of a Strike

Given the inequality in power between and employer and its employees, an employee's right to join a trade union and to bargain collectively with the employer would be of little value if the employer could simply say no to all of their demands without fear or consequence. A strike is the mechanism devised in order to apply pressure on an employer to give in to the demands of employees. In essence it is a power play. Who needs whom the most?

As an Employer is not required to remunerate participants in the strike, striking employees must make do without their wages for as long as the strike continues. At the same time the Employer has to carry on with business, with the limited workforce at its disposal. As the employer may not employ new employees to perform the work of striking employees (so-called scab labourers) it goes without saying that the more employees partake in the strike, the more devastating the impact of the strike will be on the Employer.

Given the negative effects of strikes on both parties, a negotiated settlement, often with further compromise from both parties, is the ultimate end to the majority of legal strikes.

4. Are there Rules to a Legal Strike?

The Labour Commissioner tasked with the conciliation of a dispute of interest will, once it is clear that the dispute cannot be resolved through further mediation, determine a set of rules that shall apply to both parties for the duration of the strike.

The rules are aimed at ensuring that:

- i. The Employer is permitted to continue with its business operations unhindered whilst the strike is ongoing;

- ii. The Employees and the Union be permitted to petition/demonstrate in order to bring public attention to their cause, but in a manner so as not to disrupt access to and from the Employer's premises for staff and customers alike;
- iii. The Employees/Union be permitted periodic access to the Employer's premises in order to monitor and ensure compliance with the strike rules; and
- iv. Representatives from both sides remain available throughout, to negotiate or to deal with violations of the rules as and when they arise.

5. May Non-Striking Staff Perform the Work of Striking Staff?

As an employer is not permitted to employ additional staff to perform the work of non-striking staff, the question arises as to whether or not non-striking staff members are permitted to perform the work of striking staff members.

In short, the answer is yes, provided the staff members doing so, fulfil such duties out of their own volition and have not been enticed to do so for promises of reward, whether during or after the strike.

This subject enjoyed the attention of the court in the recent case of *The Namibian Food and Allied Workers Union v Luderitz Spar*¹. Following the unsuccessful resolution of a wage dispute, the Union and its members embarked on a legally protected strike in order to compel the employer to give in to their demands. The strike proved to be ineffective, as a large percentage of the workforce chose not to partake, essentially enabling the Employer to carry on its business relatively unhindered, although inconvenienced. The Union did however, manage to get all nine of the employer's cashiers to partake in the strike, a move which could have essentially blocked all trade if members of supervisory and managerial staff did not volunteer to take up the work of the striking cashiers.

Aggrieved by the fact that the strike was ineffective, and more specifically, the fact that supervisory and managerial staff was performing the work of the striking cashiers, the Union sought to interdict the Employer from continuing with what they perceived to be a violation of the strike rules.

Ultimately the court determined that although an employer may not require a non-striking employee to perform the work of a striking employee, non-striking employees may volunteer for such work. It is important in such situations that the employees are true volunteers in every sense of the word. Employers should be cautious

not to entice non-striking employees to volunteer for fear of retribution or for the allure of some immediate or future benefit.

6. Misconduct During Legally Protected Strikes

Although participants in legally protected strikes cannot be disciplined for failing to tender their services for the duration of the strike, the protection offered does not include cases of misconduct. An employer may therefore still take disciplinary action against employees who misconducted themselves during the strike, with offences such as assault, intimidation and malicious damage to property being commonplace.

Disciplinary action, for reasons of practicality, is normally reserved until after the strike has ended, although there is nothing in our law that prevents an employer from taking action whilst the strike is ongoing.

7. Payment During a Strike

Striking employees are not remunerated during a strike. The term remuneration is a wide concept and includes additional benefits such as housing subsidies as well as medical and pension fund contributions.

8. Can I Reward my Non-Striking Employees for Their Hard Work During a Strike

Preferably not. There is a strong argument to be made that incentives, rewards and bonuses for non-striking employees undermines the collective bargaining process and is to be avoided.

9. What About Unprotected or Illegal Strikes?

Participation in an unprotected or illegal strike is a form of misconduct. As with any form of misconduct, a dismissal will only be fair if it is both substantively and procedurally fair.

On substantive fairness, factors such as:

- the duration of the strike;
 - any unjust or unjustifiable conduct on the part of the Employer that gave rise to the strike; and
 - the level of attempts made by the employees or the union to comply with the provisions of the Labour Act, prior to embarking on the strike,
- will help to determine if there is a substantively fair reason to dismiss striking employees.

Procedurally speaking, when confronted with an unprotected strike:

i. Involve the Union at the Earliest Possible Time

On the procedural side, engaging with a recognized union early on is of paramount importance. As relations are normally severely strained at this juncture, and productive dialogue with striking employees often impossible, the Union acts as the voice of the workers and is pivotal in observing the duty to listen or to hear the other side (the *audi et alteram partem*-rule).

ii. Issue an Ultimatum

Often, through the involvement of the Union, illegal strikes can be brought to a speedy close, as Unions are generally well aware of the dire consequences attached to such illegal action. Where illegal strikers however, persist in their unlawful action, the next step would be to communicate to them a clear ultimatum which should state:

- A clear time frame by which they are to resume their duties. The time frame should allow adequate time for the Employees to reflect on the content of the ultimatum and must allow adequate time for the Union to engage with its members in an attempt to dissuade them from continuing with their chosen course of action; and
- the consequences of non-compliance with the ultimatum in no uncertain terms.

iii. Conduct a Hearing

The form of the hearing may vary depending on the circumstances of the matter and the events leading up to, and subsequent to the issuing of the ultimatum. Although the hearing does not necessarily have to be formal in nature, the other side has to be given the opportunity to be heard prior to an Employer taking the final decision to dismiss the striking employees.

10. In Conclusion

As a business owner, it is important to understand the basics mechanics of a strike. There is some comfort to be had in the fact that legally protected strikes do not pop out of the blue and that it can be planned for to some extent. Planning however, is not a substitute for prevention. Fostering sound employee relations and effectively communicating with your workforce is key. Reward them when the business is doing well, but more importantly, keep them informed when things are not going as good. In the end, it is a game of percentages and even if you cannot avoid a strike entirely, you can tip the scales in your favour.

[1] *The Namibian Food and Allied Workers Union v Ludertiz Spar and Another* HC-MD-LAB-MOT-GEN-2021/0071 [2021] NALCMD 20 (30 April 2021)

Annual increase

Increases in SEENA’s monthly premium have in the past been effected annually to take effect on 1 September. We have not increased our rates in 2020, because so many of our clients experienced, and continues to experience, enormous financial challenges in the current economic climate.

Although we may likely be compelled to increase our rates for 2021/2022 financial year, we have not taken a final decision on the matter at this juncture. In light there-of we wish to inform you that our rates will not increase on 1 September 2021 as is custom and will remain as is until further notice. Once a final decision has been taken and should it prove unavoidable to increase our rates, it will be done on 30 days written notice as agreed.

VET Levy

On account of the fact that we continue to encounter businesses that still have not registered with the Vocational and Educational Training Authority again a reminder to do so.

All businesses with an annual payroll in excess of one million Namibian dollars are compelled to register and must, deduct and pay over to them, a monthly levy equal to 1% of their payroll. Failure to register will result in unnecessary penalties and expense. If you still have not registered please do so without delay. You can visit their website and register at <https://veterp.nta.com.na/>

