JUDGMENT RESERVED ON THE CONSTITUTIONAL COURT CASE INVOLVING NUMSA AND TRENSTAR
3 February 2023
Press Statement

The Constitutional court has reserved judgment in the matter involving the National Union of Metalworkers of South Africa (NUMSA) and Trenstar. NUMSA is seeking leave to appeal against judgments of the Labour Court and the Labour Appeals Court. At the heart of the application is for constitutional court to set aside the judgments of these courts, and confirm the interpretation advanced by NUMSA regarding the meaning of the section in the Labour Relations (LRA) that deals with the circumstances under which an employer who engages in a lockout, may utilise the services of replacement labour in response to a strike. Section 76 (1)(b) of the LRA provides that replacement labour is permitted in a lockout in response to a strike. NUMSA seeks clarification on the interpretation of section 76(1)(b) of the Labour relations Act on the question of whether an employer can implement a lockout when a strike has been suspended by the trade union.

Background:

Trenstar, a logistics company based in Durban, instituted a lockout onto NUMSA members after they had suspended their strike. The strike was over a demand, by NUMSA, for R7500 once-off taxable gratuity to be given to workers as part of wage negotiations. The strike commenced on 26 October 2020. Initially, the employer approached the CCMA and argued that the CCMA did not have jurisdiction. Thereafter, the employer approached the Labour Court to interdict the strike. The interdict was dismissed and the strike was protected. A counter-application with costs was granted against the employer and the CCMA for failing to conclude picketing rules with NUMSA.

On the 20th of November 2020. NUMSA notified Trenstar that the strike action would be suspended with effect from close of business on that day, Friday, 20 November 2020 and that its members would return to work at on Monday, 23 November 2020. Shortly afterwards, on the same day, Trenstar notified NUMSA that it would lock out its members from Monday, 23 November 2020. The lock-out notice demanded that NUMSA's members drop and waive their demand for payment of the once-off taxable gratuity of R7500. The lock-out notice further recorded that section 76(1)(b) of the |Labour Relations Act (LRA) was applicable as the lock-out was in response to NUMSA's strike action. Section 76(1)(b) permits the use of replacement labour during a lock-out when the lock-out is "in response to a strike". NUMSA contended that the use of replacement labour was impermissible as the strike had been suspended, thus the lock-out was not in response to a strike. The bosses decision to lock out NUMSA was clearly a bitter response to us whipping them twice before that. They were dead against a strike as if it is something illegal.

NUMSA took the matter to the Labour court, but the Labour Court dismissed NUMSA's application, on the basis that the judge found that NUMSA had suspended, not abandoned, the strike. The lock-out was, according to the Labour Court, in response to a strike and therefore the use of replacement labour was lawful under section 76(1)(b). We disagreed with this judgment which is why we appealed to the Labour Appeals Court (LAC) since we regarded the legal question as being of ongoing importance. However, the LAC also dismissed the appeal, on the basis that NUMSA members had, by that stage given into the demands of the employer, therefore the lockout had ended, and the judgment would be moot.

We argued in the constitutional court that Trenstar should not have used replacement labour after implementing the lockout, because our members had suspended the strike. They were preparing to go back to work therefore there was no reason for the employer to deploy replacement labour.

In our heads of argument we said, the one line of cases (and the interpretation adopted by the Labour Court), is that the phrase only defines the nature of the lockout, and once the lockout falls into that category, its nature does not change and so, even if the employees decide to end their strike, the exemption of the prohibition to employ replacement labour continues to have application for so long as the employer persists in the lockout or the employees capitulate to the employer's demand. On this interpretation, once the strike stops, the collective bargaining balance swings overwhelmingly and disproportionally in favour of the employer, making capitulation to its demands by the employees highly likely if not inevitable.

The other line of cases holds that the exception to the prohibition of employing replacement labour ceases to apply once the employees tender to return to work and are no longer on strike. Their refusal to work has ceased so there is no longer a strike as defined in section 213 of the LRA. Therefore, the employer should not be allowed to implement a lockout because workers are back at work. This interpretation maintains the balance of bargaining power, and ensures that employers do not abuse their power.

It is also important for the constitutional court to defend the right to strike because it is a right enshrined in the constitution. The interpretation of the right should go as far as possible in enabling that right, and it should not give employers the power to limit that right. Otherwise, the tool of the lockout will have the effect of giving employers disproportionate and unfair power at their disposal. NUMSA will always defend the right to strike and it has participated in numerous court cases to defend this hard won right. We hope that the court will find in our favour.

We are waiting for the courts to hand down a decision and when they do, we shall communicate accordingly.
ENDS.

For more information, please contact:
Phakamile Hlubi-Majola
NUMSA National Spokesperson
0833767725
phakamileh@numsa.org.za

NUMSA Head Office number: 0116891700
NUMSA Facebook page: https://www.facebook.com/NumsaSocial
NUMSA Twitter account: @Numsa_Media
NUMSA Website: https://numsa.org.za/