Short notes on:

**THE RIGHT TO STRIKE: BALANCING CONFLICTING RIGHTS**

**Introduction**

The right to strike has been contentious for many years. Many argue that it gives Employees too much power over their Employers. Many Employers succumb to the pressure placed upon them by their striking Employees by agreeing to demands that are not sustainable. How would one then go about balancing the rights of Employees with that of Employers?

**Where does the right to strike come from?**

The International Labour Organisation Conventions 87 of 1948 and 98 of 1949, introduced the right of Employees to strike. South Africa ratified both Conventions. South Africa has entrenched the right to strike as a fundamental right in accordance with the provisions of Section 23(2)(c) of the Constitution of the Republic of South Africa, 108 of 1996.

**Provisions of the Labour Relations Act**

Section 64(1) of the Labour Relations Act, 66 of 1995,(hereinafter referred to as the “LRA”) as amended, states the following:

“*Every employee has the right to strike and every employer has the right to lock-out…*”

This however does not automatically entitle every aggrieved Employee to down tools. Certain procedures must be followed before an Employee can exercise his or her right to strike. The issue(s) in dispute must be referred to a Bargaining Council or the Commission for Conciliation, Mediation and Arbitration (hereinafter the “CCMA”). The Commissioner at the CCMA or Bargaining Council will attempt to resolve the issue(s) in dispute. Should that be unsuccessful, the Commissioner will issue a Certificate indicating that the issue(s) remains unresolved and the Employee’s recourse is to strike.

The Parties to the dispute (Employee and/or Trade Union and the Employer) could have agreed to a 30 day’s extension to attempt to resolve the dispute. However, should the dispute remain...
unresolved after the 30 day’s extension, the Commissioner would then issue a Certificate whereby the Employee may strike.

The Employee or Trade Union must give the Employer 48 hours’ notice of their intention to strike. If the State is the Employer, the Employee and/or Trade Union must give the State 7 days’ notice of their intention to strike. Should the procedures as outlined above, have been followed, the strike would then be deemed to be a protected strike.

**What are the challenges?**

Section 65 of the LRA places certain limitations on strikes by introducing provisions where no person may take part in a strike or a lock-out. However, no time limit is placed on protected strikes. We have seen many times throughout the years that some strikes have lasted for months on end, to the detriment not only of the Employees not being paid for the duration of the strike, but also the dire consequences it has had on the South African Economy. Furthermore, there has also been a trend for strikes to become violent which in turn has led to the destruction of not only the Employer’s property but also to surrounding businesses and Employers not directly linked to the strike.

This has had far-reaching consequences on the Employers, members of the public and even on non-striking Employees. Some Employers have had to close down their businesses because of these types of long-drawn-out strikes and thus many of the striking Employees have been left unemployed.

**Proposed amendments to the LRA**

The Labour Relations Amendment Bill (hereafter the “Bill”) was introduced on the 24th of November 2017. A proposed amendment is whereby strikes could be resolved through utilisation of an Advisory Arbitration Panel, which would be conducted by a Director of the CCMA. The Director may then appoint a Panel when the strike has become drawn-out and/or has become violent. This Panel may be appointed on the Director’s own accord, when one of the Parties to the dispute applies for it or when the Minister of Labour instructs the Director to do so. The Labour Court could also make an Order to this effect or when the Parties to the dispute have agreed to the appointment of the Panel.

The conditions under which such an Advisory Arbitration Panel can be constituted are very broad. Employers will have the right to request it, which means that Employers can utilise this as a strategic tool to resolve strikes without even having to engage with their Employees and/or Trade Unions. They would therefore also not necessarily have to agree to the demands made by their Employees.
It is however important to take note of the fact that an Arbitration must first be conducted before any relief can potentially be granted by the issuing of an Advisory Award. This may not be the urgent relief that the Employer had initially sought. Once the Advisory Award has been issued, the Parties have seven days (which can be extend by a maximum of 5 days) to accept or reject the Award. The Award will only be binding on the Party that has accepted or deemed to have accepted the Award (when a Party had failed to accept or to reject the Award) and on condition that at least one other Party to the dispute has accepted the Award. If the Party to the dispute rejects the Award because it is not favouring them, then the Panel’s Award would have no impact on resolving the dispute.

**Conclusion**

The Bill has not been made an Act of Parliament yet. Even though it may become an Act of Parliament, it will still not be able to assist in balancing the conflicting rights experienced by Employers and Employees during strikes. The Legislature must come up with more practical solutions that will protect Employees as well as Employers. This is much needed in a country where unemployment is rife.

Contact SchoemanLaw Inc for expert advice on strikes, lock-outs and all other Employment-related matters.