SEIFSA

Steel and Engineering Industries Federation of Southern Africa

OUR PASSION, YOUR SUCCESS

MAIN AGREEMENT NEGOTIATIONS: 2017

STRIKE, PICKETING AND LOCK-OUT HANDLING GUIDELINES

MAIN AGREEMENT NEGOTIATIONS: 2017
STRIKE, PICKETING AND LOCK-OUT HANDLING GUIDELINES

Introduction

SEIFSA member companies will be aware that the Main Agreement Wages and Conditions of Employment Negotiations are currently under way. Two full-day sessions took place on 7 and 8 June 2017.

It is anticipated that the trade unions will declare a dispute against the employer parties on 15 June 2017. Should this occur, the employer parties will counter with the declaration of a dispute against all the trade union parties, triggering the dispute resolution provisions contained in the Bargaining Council's Constitution and those set out in Section 64 of the Labour Relations Act.

Traditionally the unions have orchestrated the declaration of their disputes 30 days prior to the expiry of the current Main Agreement on 30 June (i.e. normally by the end of May or the beginning June), thereby allowing for a 30-day *window* to process the dispute both in terms of Section 64 of the LRA and the Bargaining Council's Constitution. This process has always been tightly managed by the trade unions in order for them to be able to proceed on protected industrial action from 1 July.

Before protected industrial action and the issuing of the requisite 48 hours' notice can take place, Section 64 of the LRA envisages a *cooling-off* period of 30 days to allow the disputing parties an opportunity to attempt to resolve the dispute, failing which any party to the dispute may call for the issuing of a certificate confirming that the dispute remains unresolved. This can take place once the 30-

day period has lapsed or during the 30-day period if any party to the dispute is of the view that the continuation of efforts to settle the dispute is futile.

The Bargaining Council's Constitution requires the disputing parties to *trigger* the dispute settlement procedures of the Council's Constitution (a legal requirement when it comes to industry collective bargaining) by the convening of a Management Committee Meeting within 14 days of the declaration of a dispute.

The Management Committee must attempt to resolve the dispute by:

- Appointing a sub-committee to meet and deal with the dispute;
- Referring the dispute to conciliation;
- Referring the dispute to arbitration; or
- Instructing the General Secretary to issue a certificate stating that the dispute remains unresolved.

The Bargaining Council's Constitution also refers to the issuing of a certificate confirming that the dispute remains unresolved either during or after the 30-day *window*.

Should a dispute be declared on the 15th June and a *process* be agreed upon to deal with the dispute (i.e. after the Management Committee has convened to agree upon which process to follow), it is again highly probable that a certificate confirming that the dispute remains unresolved will be requested and the requisite serving of the 48 hours' advance notice of intended strike action on SEIFSA will be done on time (i.e. on 30 June) to open the way for protected industrial action from 3 July 2017.

Should the trade unions declare a dispute on the 15th June, SEIFSA will, on behalf of all its member Associations, declare a counter-dispute, thereby

reserving the rights of the membership to implement company-level, lock-out action, should it become necessary to do so.

In the interim, working with all stakeholders, SEIFSA is doing everything reasonably possible to reach a settlement between the parties, in an endeavour to avoid the prospect of industrial action.

However, this notwithstanding, SEIFSA believes that member companies should realistically anticipate that various forms of protest and industrial action, including strikes and production disruptions, may well be experienced during the course of late June and early July.

In order to assist member companies to understand all the legal implications of possible industrial action, SEIFSA's Industrial Relations and Legal Services Division has prepared this *Strikes, Picketing and Lock-Out Handling Guidelines* for use by the membership.

It is imperative that member companies keep fully abreast of all developments in the negotiations. This is easily achieved by accessing the regular reports and updates posted on the SEIFSA website (www.seifsa.co.za).

The staff of the SEIFSA Industrial Relations and Legal Services Division should also be contacted for any advice or assistance in this regard on (011) 298-9400.

Kaizer Nyatsumba
Chief Executive Officer

MAIN AGREEMENT NEGOTIATIONS: 2017
STRIKE, PICKETING AND LOCK-OUT HANDLING GUIDELINES

1 GENERAL INTRODUCTION

1.1 One of the important objectives of the Labour Relations Act, 66 of 1995, as amended ("the LRA") is to "*regulate the right to strike … in conformity with the Constitution*".

1.2 Strikes are no longer distinguished as being "*illegal*" or "*legal*" because the LRA, when it was introduced in 1996, sought to de-criminalize participation in strike action.

1.3 The purpose of these strike handling guidelines is to distinguish a strike from a work stoppage, unprotected strike action from protected strike action, and to provide a strike plan in order to deal with misconduct during a strike, sympathy strike action, picketing and when it is appropriate to approach the Labour Court for urgent relief.

1.4 These guidelines are intended to provide employers with a practical strategy which is sufficiently flexible to allow them to achieve their primary objective of persuading employees to remain at work and not participate in the industrial action, alternatively to achieve the earliest possible return to normal work.

1.5 Industrial action can take a number of different forms and it is essential that employers identify whether the industrial action constitutes a strike or whether the action is a work stoppage only. This is important in assisting employers to co-ordinate proper responses to the industrial action in conjunction with the SEIFSA Industrial Relations and Legal Services Team.

1.6 Members of management *("designated officials"),* who are tasked with various duties in handling the industrial action, need to be familiar with this plan as it saves valuable time and assists the employer effectively to decide its best course of action in response to a strike or work stoppage.

1.7 The aim of the strike plan is to identify –

1.7.1 the nature of the possible industrial action;

1.7.2 establish managerial objectives;

1.7.3 establish a strike handling committee and a command centre, together with report line structures, roles and responsibilities;

1.7.4 implement techniques to gather precise information and the articulation of grievances;

1.7.5 tips on how to maintain a strike diary;

1.7.6 dealing with the SA Police Services;

1.7.7 dealing with the media, communicating information to the relevant trade unions and the strikers, which includes keeping precise contact details of relevant parties.

2 INDUSTRIAL ACTION STRIKE vs. WORK STOPPAGE

2.1 The starting point is to understand what constitutes a strike. Section 213 of the LRA defines a strike to mean:

> "*the partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee …*"

2.2 Importantly, what distinguishes a strike from a work stoppage is that a demand is made by strikers which is rejected by the employer associations. A demand which is not met gives rise to a dispute between the parties. Where the industrial action takes the form of a work stoppage only, the distinguishing factor is that no demand is made by the participants. For example, a work stoppage in response to an employer's breach of contract does not constitute a strike as contemplated by the LRA. The work stoppage must be for the purpose of remedying a grievance or resolving a dispute if it is to conform to the definition of a strike contained in Section 213 of the LRA. If no evidence of the purpose of the work stoppage is tendered then the employer associations may not be able to claim that it constitutes a strike.[1] It may amount to nothing more than a breach of contractual obligations, unless indirectly the industrial action aims to exert pressure on an employer to perform a particular act or refrain therefrom.

2.3 This distinction is relevant if employer associations intend to pursue an interdict in the Labour Court to declare a strike unprotected and to force a return to work by obtaining an appropriate Order of Court. If the work stoppage does not constitute a strike, it means that such an interdict could fail. This places a direct obligation on any strike handling team to ensure that they gather sufficient information to prove the existence of the grievance or dispute giving rise to the industrial action.

3 PROTECTED vs. UNPROTECTED STRIKE ACTION

3.1 For a strike to be protected in terms of Section 64 of the LRA, the dispute must have been referred to the MEIBC for conciliation. Where a certificate, confirming that the dispute remains unresolved, has been issued by the MEIBC, alternatively 30 days has lapsed since the dispute was first referred to it (or such longer period as has been agreed upon by

[1] ***Floraline vs. SASTAWU*** (1997) 9 B

the parties), the relevant trade unions and their members can give 48 hours' notice to commence a protected strike.

3.2 There are limitations placed on the right to participate in a protected strike. If the strike does not comply with Section 64 it will be an unlawful strike. If the strike contravenes a collective agreement that limits the opportunity to strike on the issue in dispute, the strike will be unprotected. Likewise where the strike concerns a rights dispute (e.g. an unfair labour practice or unfair dismissal) and the LRA prescribes that the dispute is capable of arbitration or adjudication, such a strike about a rights issue will be unprotected.

3.3 These distinctions are important in order to understand when an employer is entitled to opt for an urgent interdict to prevent a threatened strike or to put an end to a strike that is in progress.

3.4 If a strike is protected, then participation in the strike does not in itself constitute misconduct. However, unacceptable behaviour during the course of a protected strike should obviously be the subject of appropriate discipline. Please bear in mind that an employer's disciplinary code and procedure is not suspended during a protected strike.

3.5 A strike may not necessarily take the form of an entire withdrawal of labour by the workforce. The definition of *"strike"* in the LRA also covers partial strikes, overtime bans or go slows in which only a section of the workforce might participate.

3.6 Under the old LRA, the question whether, and in what circumstances, strikers could be fairly dismissed spawned a wealth of complex and frequently inconsistent jurisprudence. The current LRA has attempted to codify what is regarded as best practice contained in the Code of Good Practice: Dismissal ("The Code") and, in particular, Item 6 thereof which

deals with dismissals for participation in industrial action:

"*Item 6: Dismissals and Industrial Action*

(1) Participation in a strike that does not comply with the provisions of Chapter IV (of the LRA) is misconduct. However, like any other act of misconduct, it does not always deserve dismissal. The substantive fairness of dismissal in these circumstances must be determined in the light of the facts of the case, including -

(a) the seriousness of the contravention of this Act;

(b) attempts to comply with this Act; and

(c) whether or not the strike was in response to unjustified conduct by the employer."

3.7 Item 6 of the Code constitutes a guideline that presents some of the key considerations that should be taken into account in respect of dismissals due to unprotected strike action. The Code endorses that dismissals generally can be challenged on both substantive and procedural grounds.

3.8 In past mutual interest disputes before the MEIBC, about substantive issues at a central industry level, have been conducted on a lawful basis and strike action has been of a protected nature.

3.9 The substantive negotiations in 2017 will not be an easy ride. The trade unions are demanding above inflation wage increases and the propensity for strike action is evident, which could result in sporadic unprocedural strikes which are of necessity unprotected. SEIFSA does not advocate that its employer members embark upon any dismissal in terms of the

LRA. Employers may not be able to dismiss where the strike is in fact lawful, procedural and protected, because a dismissal in those circumstances would constitute automatically unfair dismissals in terms of the LRA.

3.10 Appropriate responses to these types of industrial action will be debated in these guidelines, as well as by the employer associations, their strike management teams in conjunction with SEIFSA.

4 WHEN DOES A STRIKE QUALIFY AS A PROTECTED STRIKE?

4.1 There must be an issue or issues in dispute. The Labour Court has recently accepted that the CCMA, or Bargaining Council, cannot consider a matter if the parties are not in dispute. This would also extend to the argument that there could never be a strike where there is no dispute.

See: **Contemporary Labour Law (CLL) Vol 20 No. 8 at page 77**

4.2 In the case of **City of Johannesburg Metropolitan Municipality vs. SAMWU and Others** (2007) JOL 20883 (LC), the Judge of the Labour Court said the following at paragraph 18;

> *"I am of the view that, although it is not a pre-requisite that one of the disputing parties must formally or even expressly declare a dispute (as was the case under the previous Labour Relations Act), then at the very least the issue referred to conciliation must be an issue over which the parties have reached a "stalemate" in the sense that the employer has had the opportunity to reject or accept a demand put forward by the employees or their representatives."*
>
> and
>
> *"To hold otherwise may, in my view, give rise to a situation where employees may refer any issue to conciliation without first having afforded the employer an opportunity to formulate a negative*

response or to reject a demand or grievance put forward by the employees …. At the very least, the employer should know what the dispute is about and what is required to resolve the demand or dispute. I am of the view that this is in accordance with the purpose of the LRA which is to promote orderly collective bargaining and is in accordance with the spirit of the LRA which is to promote the effective resolution of disputes. Once the employer has rejected or indicated through its conduct that it is not willing, for whatever reason, to accede to a demand then the parties will have reached a stalemate to the extent that it may be concluded that there is now "an issue in dispute"… which is capable of being conciliated … and, if unsuccessful, be the subject matter of strike action."

4.3 Once such stalemate is reached, a party may refer the dispute to conciliation by the MEIBC. If such a mutual interest dispute, regarding wages and other substantive conditions of employment, is referred to the MEIBC, the LRA does not require that the dispute be conciliated, as a pre-requisite before a certificate of non resolution of the dispute can be issued. Nor does the LRA require that such a certificate be issued prior to a party giving 48 hours' notice to strike to the other party / parties to the dispute.

4.4 All that Section 64 of the LRA requires is that 30 days must have lapsed since the date of the referral, at which point a party can elect to give 48 hours' notice of an intention to strike or to impose a lock-out (where the party making the referral is the employer).

4.5 The giving of such 48 hours' notice by one party to the other is often regarded as "the strike notice". Recent case law has turned on the inadequacy of the wording of a strike notice, based on an employer's submission that it is entitled to know what the employees are going to strike about and who will be involved.

4.6 In the dissenting judgment of Zondo JP in **Equity Aviation Services (Pty) Ltd vs. SATAWU and Others** (2009) 10 BLLR 933 (LAC), it was said that -

> *"… whatever the union issuing the strike notice chooses, it must make the notice sufficiently clear to enable the employer to know which employees are covered by the strike, which notice will, therefore, also advise of the commencement a strike on a given date. This does not necessarily mean that the union should furnish the employer with the names of the workers who will take part in the strike …"*

4.7 Obviously, if short notice is provided, the strike will not be protected until that notice period has expired and then the strike must commence again at the correct time.

> See: **City of Matlosana vs. SALGBC and Others** (2009) JOL 23154 (LC)

4.8 In the early case of **Ceramic Industries Ltd t/a Betta Sanitaryware vs. NCBAWU (2)** (1997) 18 ILJ 671 (LAC), the Labour Appeal Court supported the view that the purpose of giving proper and timeous notice of a strike was to "warn" the employer of pending collective (strike) action and when it is going to happen so that the employer has a fair and proper opportunity to deal with it and plan for it.

5 LOCK-OUTS

5.1 The concept of a protected lock-out is provided for in Section 64 of the LRA.

5.2 A lock-out is the employer's equivalent of a strike. In particular, the lock-out provides a mechanism for an employer to refuse to accept the tender of services by its employees, and thus effectively exclude them from the

workplace, in order to compel them to accept a demand of the employer relating to a mutual interest issue.

5.3 For a lock-out to be protected, four conditions precedent are required. These are –

5.3.1 an exclusion of employees from the workplace;

5.3.2 the dispute in question must relate to a matter of mutual interest;

5.3.3 the statutory requirements prescribed in Section 64 of the LRA must have been complied with;

5.3.4 a demand must exist.

5.4 These aspects shall be dealt with in turn below.

5.5 Exclusion from the workplace

This is a factual issue. The employer, in imposing a lock-out, may physically refuse employees access to the workplace, unless there is a collective agreement, such as a picketing agreement to the contrary. This exclusion may remain in place for the duration of the lock-out.

5.6 Mutual interest dispute

The issue in dispute giving rise to the lock-out must be a matter of mutual interest. Usually the dispute is one of mutual interest, being an amendment to terms and conditions of employment.

5.7 Compliance with statutory requirements

Section 64 of the LRA provides that a lock-out will be protected if –

"(1)(a) the issue in dispute has been referred to the Commission, and

(i) a certificate stating that the dispute remains unresolved has been issued; or

(ii) a period of 30 days or any extension to that period agreed to between the parties has elapsed since the referral was received by the Commission.

(b) in the case of a proposed lock-out, at least 48 hours notice of the commencement of the lock-out, in writing, has been given to any trade union that is a party to that dispute."

5.8 Should the employer seek to follow the route of a protected lock-out, it is crucial that the dispute of the employer is limited to the ambit of the dispute originally referred by the employees. Usually the issue under consideration, i.e. the issue in dispute declared by the union, is about terms and conditions of employment. An employer seeking to commence a protected lock-out would be required to issue a 48 hour notice and piggy back on the dispute already referred to the CCMA or MEIBC by the union(s). The timing of the issue of this notice is relevant. There is no need for the employer to declare a separate dispute over any substantive items which are already the subject of dispute.

5.9 An employer may institute a protected lock-out, provided that the demand of the employer (discussed below) does not go beyond those issues declared by the Union in its dispute and which were the subject of conciliation. If the employer wishes to introduce further demands on issues of dispute not referred to the CCMA by the union, then the employer must comply with the provisions of Section 64(1)(a) of the LRA, i.e. a new dispute referral for conciliation must be made.

5.10 <u>Demands</u>

5.11 A lock-out, to enjoy legal protection, must be accompanied by a demand. This demand must be related to an issue of mutual interest between the

parties.

5.12 A lock-out will stipulate that the employer shall lock-out, and exclude employees from the workplace, until such time as the demand of the employer has been acceded to by the employees.

6 LOCK-OUT: DEFENSIVE OR OFFENSIVE

6.1 The LRA does not create the distinction between an "offensive and a defensive lock-out". However, informal practice has evolved to describe a defensive lock-out as a situation where the lock-out is effected in response to a strike notice, where the "offensive lock-out" predates any declaration of a dispute by the employees.

6.2 The distinction between these concepts is vital, in that an employer can utilize replacement labour in a situation where the lock-out is imposed in response to a strike. Where the lock-out is used as an offensive tool, this right is not afforded to employers.

6.3 Section 76 of the LRA, dealing with this issue, stipulates as follows –

"(1) An employer may not take into employment any person –

(a) to continue or maintain production during a protected strike if the whole or part of the employer's service has been designated a maintenance service; or

(b) for the purpose of performing the work of any employee who is locked out, unless the lock-out is in response to a strike.

(2) For the purpose of this section 'take into employment' includes engaging the services of a temporary employment service, or an independent contractor."

6.4 It is obviously vital to obtain clarity on when a lock-out will be imposed "in response to a strike". The Labour Appeal Court, in the judgment on point of **Technicon SA vs. NUTESA** [2001]1 BLLR 58 (LAC) states that the lock-out notice must be done in response to the strike notice of the union. Accordingly, it is irrelevant whether the actual strike action contemplated by the employees in their Section 64 notice has commenced. The moment that the strike notice is issued, the employer can issue a defensive lock-out notice. The lock-out may thus commence before, simultaneously with, or after the commencement of the strike. The employer should take care to ensure that it complies with the provisions of Section 64(1)(b) i.e. the employer must in any event give 48 hours' notice.

6.5 The Labour Appeal Court issued a warning to employees in the NUTESA judgment; if the employees embark on power play, they must be prepared to bear the consequences of their decision.

7 DURATION OF LOCK-OUTS

7.1 A lock-out, if legal, will continue until such time as an agreement on the issue or issues in dispute has been reached, alternatively until the lock-out is terminated by the employer.

7.2 Accordingly, and even if the lock-out is declared in response to a strike notice by the employees, and the employees subsequently abandon their strike action and tender their services to the employer, the employer is not obliged to accept that tender. It can do so for the duration that the employer's demands have not been met by the employees. Also, the nature of the lock-out does not change from **"defensive"** to **"offensive"** if the primary strike of the employees has been abandoned. The right to utilize replacement labour will be determined at the time that the lock-out notice is issued. If the employer has the right to utilize replacement labour at that time, the employer will remain entitled to that right,

notwithstanding the abandonment of the strike action by the employees.

8 PARTIAL TENDER OF SERVICE

8.1 Instances occur where a strike has been called by the union, but the employees indicate that they are willing to tender partial, but not complete services to their employer.

8.2 The definition of strike action in the LRA includes **"the partial or complete concerted refusal to work, or the retardation or obstruction of work …"**

8.3 The Labour Appeal Court, in the matter of **3M (Pty) Limited vs. SACCAWU** [2001]5 BLLR 483 (LAC) has endorsed the right of the employer to refuse to accept a partial tender of services. The employer has the right to refuse a partial tender, and not pay the striking employees any remuneration, in accordance with the principle of ***"no work, no pay"***. Significantly, however, the employer may refuse only for so long as the tender is partial. Once a total tender of services has been made, and the employer rejects that tender in the absence of a legally protected lock-out, the employer becomes liable to remunerate the employees from the time that the tender is made.

9 SHUT-OUTS

9.1 A shut-out can be effected by an employer without relying on any of the provisions of the LRA. In essence, a shut-out amounts to no more than an employer refusing the right of access to those employees who have indicated, through strike action, an intention not to tender their services in accordance with their contracts of service.

9.2 This position will be altered if there is a valid picketing agreement (either agreed to collectively between the employer and its employees, or imposed by the CCMA). Should the picketing agreement provide that

employees are entitled access to the premises (albeit on a limited basis) such agreement must be adhered to.

9.3 The shut-out is reactive in nature and application. The shut-out can only be implemented when it is clear that the employees will not tender their services. As soon as the employees tender services (even if there is no undertaking to discontinue the strike action totally), the employer must accept that tender, alternatively pay employees for the period from which the tender was made.

9.4 Critically, no demand may accompany this shut-out procedure. The moment the employer issues a demand (I will not allow you access, until you accept an X% wage increase and unconditionally call off the strike), the nature of the action of the employer changes from a shut-out to a lock-out. If the employer has not complied with all the statutory requirements, alternatively if the demand is different to that raised by the union initially, the lock-out will be unlawful. In such event, the lock-out can be interdicted, alternatively the employees are entitled to claim from the employer the wages they would have earned from the time their services were tendered.

9.5 The utilization of a shut-out also makes the employer vulnerable to the concept of “grasshopper” strikes, alternatively the consequences of “go slow” action. Grasshopper action is where the strike will run for a certain number of days, employees will then return to work for a number of days without terminating the strike itself, and later continue with the strike action. This process can be repeated until such time as the employees’ demands are met. The advantage for the employees is that they could earn some income, but severely affect the economic viability of the employer. The possibility of sabotage in these circumstances is also enhanced.

9.6 Go slow action is similarly problematic as the employer will be unable to

accurately gauge whether employees are on the premises to work in accordance with their employment contract, or whether they intend to participate in the industrial action.

9.7 For the reasons stated above, the “shut-out” should be used as a short term reactive measure, primarily in a situation where there is a full strike, and the employer wishes to prevent access to its premises because of fear of violence or damage to property.

10 SECONDARY STRIKE ACTION

10.1 Secondary strikes are often referred to as sympathy strikes, but what does this mean? Section 66(1) of the LRA defines a secondary strike as:

> "*a strike, or conduct in contemplation or furtherance of a strike, that is in support of a strike by other employees against their employer but does not include a strike in pursuit of a demand that has been referred to a council if the striking employees, employed within the registered scope of that council, have a material interest in that demand*".

10.2 In the Contemporary Labour Law (Vol 18 No 3 of October 2008), such action is defined as:

> "*… a secondary strike is a strike in which the employees of one employer (the secondary employer) express their support for the striking workers of another employer (the primary employer) in circumstances where they have no mutual interest in the issue giving rise to the primary strike and do not bear the consequences, or enjoy the benefits, of the outcome of the primary strike*".

10.3 There are three elements that need to be satisfied first before a secondary strike is protected:

10.3.1 the primary strike must be a protected strike;

10.3.2 there must be seven days' notice given to the secondary strike employer: and

10.3.3 the "*nature and extent*" of the secondary strike must be reasonable in relation to the effect that it has or would have on the primary employer.

10.4 A secondary strike would fail to be a protected strike if, in fact, its effect on the primary employer was tenuous. This could occur where the secondary employer's influence on the primary employer is of little significance.

10.5 In the case of **Samancor Ltd and another vs. NUMSA** (1999) 20 ILJ 2941 (LC), the Labour Court found that if the relationship between the primary and secondary employers is merely a nexus, but that "*a mere nexus does not have an effect on the primary employer's business, (this) is insufficient to permit a secondary strike*". In that matter the sympathy strike was successfully interdicted.

11 FREQUENTLY ASKED QUESTIONS IN RELATION TO STRIKES AND LOCK-OUTS

Q: <u>What is a strike?</u>

A: A strike is the refusal to work pursuant to a legitimate demand.

Q: <u>What form can a strike take?</u>

A: A strike can take the form of a total, or partial, refusal or retardation of work. A strike can thus be a complete withdrawal of labour, or can also take the form of a go-slow where employees are at work, but are deliberately working slowly (below their normal production levels) in order to place pressure upon the employer to comply with a demand.

The strike can also be continuous, or can take the form of *"grasshopper"* action, whereby employees strike for a certain number of days, then return to work, and then resume the strike thereafter.

Q: <u>When is a strike protected?</u>

A: To be protected, a strike must comply with two principle provisions, namely that the subject matter of the strike is legitimate, and that the proper procedures have been followed.

For a lawful strike, the strike must relate to a dispute that is not capable of being adjudicated by either the CCMA or the Labour Court. Accordingly, a party cannot strike on a rights dispute. The dispute must relate to an interest dispute, whereby one party cannot enforce its will on another through operation of law, and must thus resort to power play. The classic disputes of interest are demands for increases to terms and conditions of employment.

To be procedurally fair, the issue in dispute must have been referred to conciliation, a period of 30 days must have elapsed or a strike certificate must have been issued, and a notice stipulating the commencement of the strike must been issued at least 48 hours before the commencement of the strike.

Q: **<u>If there is a strike, is the employer required to pay the employees?</u>**

A: No. The principle of *"no work no pay"* has been established in section 67(3) of the Labour Relations Act. For that reason, an employee is not entitled to receive any remuneration for the duration that such employee is on strike.

This principle applies not only to monthly remuneration but also to other benefits and for the currency of the strike action. For that reason, and should an employer provide housing or food to employees in the ordinary course of employment, the employer is entitled to suspend such services at the commencement of the strike. However, should the employees (or their union) specifically request a continuation thereof, these services should be continued, with the proviso that the employer can deduct, at the end of the strike, the value of the benefits so provided to employees during the currency of the strike.

Q: **<u>Can the trade union call a strike during the currency of a valid collective agreement?</u>**

A: In principle not. If there is a valid collective agreement governing the issue in dispute and preventing a strike thereon, then no lawful strike action that may take place on such issue.

A trade union is however entitled to bargain and strike on other issues of dispute outside of the terms of the collective agreement, such as new demands for the next round of industry wide bargaining in preparation for the conclusion of a new substantive Main Agreement.

Q: **What is a work to rule?**

A: A work to rule can constitute a form of strike, if the work to rule is done in support of a demand. Work to rule implies that the employees provide their services strictly in accordance with the terms and conditions of their employment. They refuse to perform any duties that are not strictly encapsulated within the terms of their agreement, and refuse to work overtime.

A work to rule can constitute a type of strike action, if the employees have historically in the past, and as a matter of practice, worked beyond the strict confines of their employment contracts, and have in the past worked additional hours.

Q: **What is an overtime ban?**

A: An overtime ban is a form of work to rule, where employees act in concert to refuse to work any voluntary or compulsory overtime. This is also done in support of a demand.

Q: **What if there is no clear demand coupled to the strike action?**

A: A strike is defined to include a demand or unresolved grievance. If there is no clear demand, then such action is not strike action as contemplated by section 64 of the Act, but is in fact collective misconduct, being the collective refusal to work. Such should be treated in terms of ordinary principles of misconduct.

Q: **Does the settling of one of the issues in dispute settle the strike as a whole?**

A: No. A union is entitled to strike on individual issues in dispute, or on a basket of issues. Accordingly, and if one of the issues in the basket is resolved, the strike as a whole can continue, until such time as the basket of issues has been resolved.

Q: **Does the fact that one of the issues raised by a trade union in its dispute referral is a rights dispute, make the entire underlying strike unlawful?**

A: No. If within the basket of disputes referred to conciliation there is one dispute relating to a dispute of right (e.g. a claim that the dismissal of a particular person was unfair, and that such would be withdrawn) the strike as a whole is not rendered unfair. This is an issue that can be withdrawn from the dispute by the union and if withdrawn, the strike would remain lawful and protected, provided that the other issues in the basket are in fact interest issues, and that the proper procedures have been followed.

Q: **Does the failure of the union to issue a 48-hour strike notice immediately upon the strike certificate being issued mean that the strike has been abandoned?**

A: No. Our Courts have consistently held that the failure to immediately commence strike action upon the issue of a certificate of outcome does not preclude the trade union from engaging in strike action in due course.

It has been held that this position would only be different, if the union, through its conduct, has expressly waived the right to rely on this issue as a strikeable issue.

Care should be taken by employers to know what are the issues giving rise to the dispute which has been referred to the CCMA Bargaining Council in order that the employer can be aware of the potential issues upon which a strike may take place.

Q: **If the 48-hour strike notice stipulates only that the strike will commence *"in due course"*, would the strike be lawful?**

A: In all likelihood the strike would not be protected. The Courts have held that the 48-hour notice provision is designed to enable the employer to prepare itself for the strike action. Accordingly, the notice should stipulate, with sufficient particularity, the commencement date and time of the strike. A strike that stipulates that the strike will commence *"48-hours after issue of this strike notice"* would be protected, as this provides sufficient clarity to the employer.

Q: **<u>If the employees do not commence the strike on the time stipulated in the 48-hour strike notice, have they waived or lost their right to strike?</u>**

A: No. The Labour Court has held that this would be an overly formalistic and legalistic manner of approaching dynamic industrial relations. Again, the courts have held that the entitlement to strike would be waived only upon proper waiver principles being applied e.g. if the union has indicated that it no longer intends to strike, or if it can be established that the union has waived its right to commence with strike action through the passing of an extensive period of time. The courts have in fact held that a delay of almost 12 months, in one particular case, constituted a waiver of a right to strike.

Q: **<u>If the strike runs for three days, and is then abandoned without agreement on the issues that formed the subject matter of the strike, can the union re-initiate its strike?</u>**

A: Yes. Accordingly, it is in the interests of all parties to ensure that, when employees tender to return to work, an agreement has been concluded so that the strike is declared to be at an end. Failing such agreement, the union can thereafter call its members out on strike again, without having to follow the procedure stipulated in section 64 (i.e. - the waiting of 30 days and a further issue of a 48-hour notice).

Q: **<u>Can union members from one bargaining unit strike in support of demands related only to employees in another bargaining unit?</u>**

A: Yes. It has been held by our Courts that the mere fact that the striking employees do not have a direct monetary or financial benefit in the issue in dispute is not relevant to determine the validity of the strike. All employees who are members of the trade union that called the strike, regardless of the bargaining unit within which they are situated, are entitled to commence strike action.

Q: **<u>Once a strike has been called by one union, are members of another union entitled to go out on strike in support of the same issue in dispute?</u>**

A: It is a well established principle that all the employees of an employer may participate in a strike against that employer once all the procedural requirements (Section 64(1) of the LRA) have been met. It does not matter whether the employees are inside or outside the bargaining unit. It would not matter if the employees work in a different division of the same employer. It would not matter if the strikers were not affected by the outcome of the dispute. A recent decision of the Labour Court has found that it matters not if some of the strikers are members of a different trade union that is not even a party to the dispute.

Q: **<u>Does the resignation of an employee from a union impact upon the position of the employer?</u>**

A: No, Section 64(1) of the LRA (as endorsed by the Constitution) provides that "*every employee has a right to strike*". This means that as long as a mutual interest dispute has been referred, in compliance with Section 64(1) of the LRA, every employee (regardless of union membership) can join the strike unless that employee's participation is limited on another basis in terms of Section 65 of the LRA.

Q: **Can a trade union discipline its members if they do not support a strike?**

A: Yes, if the strike was preceded by a ballot, supported by at least a majority vote of the members.

Q: **Can the employer *"reward"* employees for not participating in strike action?**

A: No. The employer is not entitled to grant *"no strike"* bonuses, or rewards to employees who do not strike. Non-striking employees are however entitled to their ordinary terms and conditions of employment, such as remuneration. If these employees, in the ordinary course, are entitled to incentive or production bonuses, such bonuses can continue, provided that the value is not more advantageous during the strike.

Q: **Can the Company give *"interim increases"* and await the conclusion of final centralised wage negotiation, as a means of avoiding strike action?**

A: In law, this may be possible. However, this is governed by the provisions of the bargaining council itself. If the bargaining council has adopted a centralised bargaining position, no such interim increases are to be awarded by any members.

Q: **What is the provision regarding *"backdating"* of increases?**

A: In certain cases, and during the negotiating process, employees may seek to couple the substantive demand, with a demand that such increase be *"backdated"* to the date of the expiry of the previous agreement.

Q: **Is this lawful?**

A: In principle, there is nothing to preclude this demand being made. However, and from a practical perspective, this may result in the negotiations being extended. Accordingly, it is preferable that no retrospective application of the agreement be imposed, in order to ensure that greater focus is achieved on a speedy resolution of the issue in dispute.

Q: **What steps can an employer take if there is misconduct during the course of a strike?**

A: Any acts of misconduct during the course of a strike can be dealt with in terms of the ordinary disciplinary code.

Accordingly, acts of violence or sabotage can be strictly dealt with if they took place during the course of the strike. This is exacerbated if it is done in support of the strike action, or is geared at intimidating non striking employees.

The timing of the disciplinary action is naturally contentious. It is naturally difficult to formally *"suspend"* employees during the course of a strike. It is even more difficult to attempt to schedule disciplinary hearings during the course of the strike action, and this is strongly discouraged. The court has ruled that disciplinary action should be taken as soon as possible after the strike has ended.

It is however good industrial relations practice to notify the union as soon as acts of misconduct have taken place and further notify the employee that the Company has noted these acts, and that it shall take disciplinary action upon the termination of the strike action.

The objectives sought to be promoted during strike action are separate and distinct from misconduct that took place during the strike action. As

such, discipline should not be used as a power play instrument to obtain a settlement of the issues in dispute.

Q: **When is it appropriate to issue an ultimatum?**

A: Ultimatums are used when unprotected strike action has occurred. An employer cannot issue an ultimatum if the strike is protected, because participation in a lawful strike does not amount to misconduct.

The purpose of an ultimatum is to make employees aware of the fact that they are committing misconduct, and to stipulate time periods when the Company demands that the employees return to work.

The ultimatum should be clear and unambiguous, and should properly inform employees of their position and their rights. Should employers begin to experience strike action related to the industry negotiations SEIFSA will inform members if and when the issuing of an ultimatum is appropriate.

The notice provided in the ultimatum should further be of a sufficient nature to enable the employees to properly consider their position, take advice, and then make a structured return to work, should they choose to do so.

If the ultimatum stipulates that no action shall be taken against employees if they return to work by the time specified in the ultimatum, the Company cannot thereafter seek to take disciplinary action.

The expiry of the period in the ultimatum does not immediately entitle the Company to discipline and dismiss employees, without further notice.

The Labour Appeal Court has ruled that the principles of procedural fairness apply to strike action, as well as individualised action. As such, and notwithstanding the issue of an ultimatum, the employer should nevertheless inform employees that certain disciplinary action may be

taken that could result in dismissal, and invite representations from employees or organised labour, prior to effecting a dismissal (unprotected strikes only)

Q: **What steps can be taken by an employer if the strike action has the effect of crippling the employer financially?**

A: Strike action is a form of power play. The intention of strike action is to inflict financial damage upon the employer in order to coerce the employer to exceed to the demands put forward by the strikers. In turn, the employer inflicts financial pressure on the employees to ensure that the demands made by employees are reduced.

Mere financial inconvenience, or even pain, is not sufficient reason to stop a strike.

Further, the fact that a strike is no longer functional (e.g. that the demand is not one that the employer can realistically meet) is also not sufficient to render the strike unlawful or unprotected.

There are certain remedies that employers can utilise where dismissals become necessary based on operational requirements as a result of the currency of strike action. The exact steps, and the nuances associated therewith, are however exceptionally complicated, and advice should be sought by any employer prior to embarking on action of this nature.

Q: **What is the position if the trade union calling the strike is not the majority trade union at the employer's premises?**

A: The fact that the trade union calling the strike may not be in the majority does not affect the legality of the strike action. At best, the effectiveness of the strike could be reduced.

As recorded above, once a strike has been called by a trade union, all the members of that trade union who are employees of the employer and

all other employees (whether unionised or not) are entitled to embark upon legitimate strike action.

Q: **What is the position of employees who were, at the time of the protected strike, not members of the union who had called the strike?**

A: The purpose of the notice of the commencement of a strike is to inform the employer of the timing of the strike. The union has no obligation to indicate the number of employees involved, nor does it have to indicate on whose behalf the notice is given.

Once the procedures laid down in Section 64 of the LRA have been complied with and the employer knows of the impending strike, the employer is not entitled to anything else: it is not necessary for employees who do not belong to the union or who belong to other unions who are not recognised or who fall outside the bargaining unit to refer their own dispute.

Q: **What is a lock out?**

A: A lock out is action taken by an employer to deny employees the right to work, coupled with a demand from the employer.

In this event, and if the lock out is protected, the employer is not required to pay employees for the duration that they are locked out, until such time as the matter is resolved, or the demand of the employer is met.

Q: **How does a lock out differ from a shut out?**

A: A shut out is action on the part of the employer where it denies employees access to its premises, for a specific reason other than a demand. For the duration of a shut out (if the employees are not participating in strike action) the employer remains liable to pay employees their wages.

A shutout can be imposed if the employer is concerned that employees may gain access to the premises to commit acts of misconduct or sabotage.

Q: **<u>What is the difference between an *"offensive"* and a *"defensive"* lock out?</u>**

A: These terms are not utilised or defined in the Labour Relations Act. They have however become common usage to distinguish lock outs where the employer is the initiator of the action and initiates the demand (offensive lock out), and the action where the employer reacts to a strike by initiating a lock out in response to the strike by employees (defensive lock out). The material difference between the two concepts is that an employer is denied the opportunity of using replacement labour for the duration of an offensive lock out. In a defensive lock out, the employer is entitled to use replacement labour for the duration of the industrial action. The employer is entitled to lock out on the back of the unions' dispute, providing it does not introduce demands which were not the subject of conciliation at the bargaining council.

Q: **<u>Does a lock out, which started as a defensive lock out, become offensive when the initial strike action by the union is withdrawn or suspended?</u>**

A: No. Provided that the lock out is in response to strike action called by the employees, the employer retains the right to keep the lock out in place, and utilise replacement labour, for the duration of the lock out. Care should however be taken to ensure that the demands associated with the lock out are identical to the demands associated with the strike, and that new or different demands are not introduced.

12 PICKETING

12.1 First and foremost, the issue of where the picket takes place is

something that may be agreed on by the employer and the union in picketing rules. The LRA unequivocally places this responsibility for drawing up picketing rules on the employer and the union. But given the fact that the parties are locked in conflict, reaching consensus on where and how the picket will be conducted may be easier said than done.

12.2 If no consensus can be reached, Section 69(4) and (5) of the LRA provides that either the employer or the union may then approach the CCMA for assistance, the CCMA must attempt to secure an agreement between the parties on the picketing rules.

12.3 The relevant provisions of Section 69 of the LRA read as follows:

"***(2) Despite any law regulating the right of assembly, a picket authorised in terms of subsection (1), may be held –***

in any place to which the public has access but outside the premises of an employer; or

with the permission of the employer, inside the employer's premises.

(3) The permission referred to in subsection (2) (b) may not be unreasonably withheld.

(4) If requested to do so by the registered trade union or the employer, the Commission must attempt to secure an agreement between the parties to the dispute on rules that should apply to any picket in relation to that strike or lock-out.

(5) If there is no agreement, the Commission must establish picketing rules, and in doing so must take account of-

(a) the particular circumstances of the workplace or other

premises where it is intended that the right to picket is to be exercised; and

(b) any relevant code of good practice.

(6) The rules established by the Commission may provide for picketing by employees on their employer's premises if the Commission is satisfied that the employer's permission has been unreasonably witheld."

12.4 The Labour Court has indicated that the processes described in these provisions does not amount to conciliation and arbitration. The Section 69 procedure commences with a consensus-seeking exercise. Rules can be made only if this process fails, but this rule-making is also a flexible process of decision making. It entails a rational decision being made by a CCMA commissioner, a decision based on relevant and reliable information placed before the commissioner.

12.5 Evidence may be led to ensure that the information is reliable. The rule-making process flows from the consensus-seeking process and the deliberations during the first process are not automatically confidential or without prejudice. Parties should know that the information disclosed during the first stage of the process may be taken into account to reach a decision in the rule-making stage.

12.6 In respect of where the picket should be held, the Labour Court has indicated that the union bears the onus of proving that the employer's refusal to grant permission to picket inside the employers premises is unreasonable. Before a commissioner can make a decision permitting picketing on the employers premises, there must be an enquiry into the reasonableness (and a finding of unreasonableness) of the employer's refusal to permit picketing on its premises.

12.7 In the interests of all parties concerned, it is suggested that prior to the

commencement of a protected strike, a picketing agreement should be reached with the affected union/s. It is in the employer's interests that it is not prevented from carrying on its business, and that non striking employees, the production process and customers are not interfered with. It is in the interests of picketing strikers, however, to get as much exposure in terms of support for the strike, as possible.

12.8 An agreement dealing with picketing at the company should cover:

12.8.1 Specific provisions for authorisation, notice and control;

12.8.2 What is acceptable behaviour;

12.8.3 Numbers of pickets and their location; and

12.8.4 Communication between marshals, employers and police.

12.9 Strikes are by their nature unique and can be highly unpredictable. The time, rate, scale and sequence of events are infinitely variable. It is impossible to develop rigid guidelines for handling these events and there is no replacing the sensitive and sensible judgement of managers actually in the situation.

12.10 Strikes are fundamentally emotional events. Workers often initiate a strike in a mood of high emotion. This tends to elicit an emotional response from management. A strike is an expression of power; hence the parties act and react under pressure. It is often difficult to retain a rational perspective under these circumstances, and for this reason it is vital that strike guidelines are discussed, adjusted to an employer's situation and internalised by management before a strike takes place.

12.11 Ultimately the objectives in handling a strike are to:

12.11.1 arrive at a settlement acceptable to both the industry and the striking employees in the shortest possible time;

12.11.2 restore order in production;

12.11.3 prevent injury to persons and damage to property;

12.11.4 diffuse management/employee tensions; and

12.11.5 emerge from the strike better equipped to handle similar future disputes.

13 DRAFT PICKETING / STRIKE RULES

The following is an example of a set of strike rules and a picketing agreement:

"*PROPOSED PROTECTED STRIKE RULES*

- *Only those employees of the company who are members of …… (insert the name of the union) ("the union"), who are in good standing, and who wish voluntarily to participate in such action, may do so.*

- *Those taking part in the strike will not be paid for any period or periods that they are not working properly or at all. They will also not receive pay for partial performance during the course of the industrial action as the company will not accept a tender of part performance.*

- *Employees participating in the strike, subject to their compliance with these rules, are not permitted access to any non prescribed areas of the company's premises.*

- *Union members taking part in the protected strike shall at all times during the course of that strike conduct themselves in a peaceful and orderly manner.*

- *Such striking union members shall at all times observe and comply with the company's normal security and all health and safety regulations.*

- *Striking workers shall not block entrances and/or exits to the company premises.*

- *No liquor or drugs must be in the possession of any striker whilst on company premises.*

- *There will be no littering of the prescribed areas.*

- *The union officials, its shop stewards and members agree to observe the following picketing procedure*

    - *Not more than …… (insert number) placard bearers or picketers may stand closer than twenty (20) meters from any entrance to the Company's premises, and shall not prevent entry to or exit from the premises by positioning themselves in the thoroughfare.*

    - *The placards will not reflect insulting language or defamatory remarks directed at the Company or any of its employees.*

- *Striking Union members shall not -*

    - *threaten, intimidate or assault any employee whatsoever who is not participating in the strike, whether that employee is in the full-time or temporary employ of the Company ;*

    - *enter the Company's work area where equipment and dangerous inflammable products and chemicals are situated ;*

    - *engage in any form of violence, intimidation, or damage to Company property or property of personnel or customers or*

suppliers to the Company ;

- *disobey any lawful instruction which has been given by the Union's Officials or Shop Stewards in terms of the strike rules ;*
- *wear masks or be in possession of any offensive weapon or dangerous implements and no striking employee shall be in possession of any inflammable materials on the Company's premises ;*
- *hinder in any manner access to or exit from the Company's premises by any vehicle or person ;*
- *interfere unlawfully with the conduct of the business, or any person, or body involved in the conduct of the Company's business."*

_____ _____

Date"

DRAFT AGREEMENT IN RESPECT OF PICKETING RULES

entered into between

_____
"The Union"

and

_____
"The Company"
Address

1. ***AUTHORISATION***

- *Any picketing must be authorised in accordance with the union's constitution. This authorisation must be in writing, a copy of which must be served on the company at least 48 hours before the commencement of any picket.*

- *The union shall appoint a convenor to oversee the picket. The convenor's name shall be submitted to the company at least 12 hours before commencement of the picket.*

- *The union shall appoint two marshals from the picketers in paragraph 5*

- *The union shall instruct its marshals, whilst overseeing and controlling the picket, to wear armbands that are clearly visible to identify them. The union shall also notify the employer every 6 hours before the picketing starts of the names of the designated Marshall's each day.*

- *The union shall further instruct and explain to the convenor and marshal's the law and the code of good practice on picketing issued by NEDLAC in terms of the LRA.*

2. ***PURPOSE OF THE PICKET***

- *A picket is a form of public demonstration for the purpose of demonstration peacefully in support of any protected strike or in opposition to any lock-out.*

3. ***CONDUCT OF PARTIES***

- *Picketing shall be carried out in a lawful manner.*

- *Employees participating in the industrial action and picketing agree not to intimidate non-striking employees or any other person who may enter upon the company's premises for the purpose of carrying out the business of the company. In particular, they may not require people to stop or compel them to listen to their demands.*

- *Picketers will not obstruct vehicles or traffic entering or leaving company premises although they may hold discussions with or distribute pamphlets to drivers and passengers for the purpose as described under paragraph 2 above.*

- *Those taking part in the picket, under the leadership of their shop stewards, shall ensure that they yield right of way promptly and courteously to any traffic moving on roads which may wish to pass whilst those participants dancing along such a road.*

- *Until an appropriate arrangement has been made with the Police or other local authorities to ensure no interference with the traffic, a picket should not be conducted on a public road, unless the participants are so few that there can absolutely be no material interference with the traffic.*

- *Management of the company and picketers will refrain from behaviour which is provocative or which could incite violence or intimidation.*

- *No weapons including but not limited to iron bars, knives, pangas, sticks, knob kerries, stones and firearms may be carried by a person who is picketing, or by any member of management who has contact with them.*

- *The Union must ensure that shop stewards are present at the picket from the start to the end of the picket each day.*

- *If picketers are picketing at different locations, a sufficient number of shop stewards (no less than two) must be present at each location.*

- *The shop stewards must ensure that the behaviour and conduct of the picketers are acceptable.*

- *The shop stewards must wear an armband or vest showing clearly that they are the picket leaders.*

- *Participation in a protected picket does not exempt picketers from their obligation not to commit and criminal offences. Accordingly any picketers who intimidate any person or who damage property or who assault any person or who engage in any criminal act may be liable to arrest and criminal prosecution.*

- *Picket organisers or their representatives, i.e. shop stewards, must ensure that the language which is used during a strike/picket is not insulting or defaming of any person.*

- *Pickets will not damage or threaten to damage the Company property or property of personnel or the property of customers or suppliers.*

4. ***WHO MAY PICKET***

Employees of the Company in the bargaining unit and union officials.

5. ***WHERE CAN THE PICKETING TAKE PLACE?***

- *The picketers may gather in_____ (insert designated area)*

- *The picketers may not have access to the rest of the premises other than the designated area.*

- *The following number of picketers may gather at the entrance gate for the purpose of peacefully communicating with anybody seeking to enter or leave the premises, subject to paragraph 3 above:*

    - *entrance* ____ *picketers (insert number)*

    - *exit* ____ *picketers (insert number)*

6. ***FACILITIES AVAILABLE TO PICKETERS***

- *Union officials and shop stewards may utilise the telephone in the guard house for their business use.*

- *The company will arrange for toilet facilities, running water and shelter to be available in the designated area.*

7. ***GENERAL***

The Union undertakes that its members will not interfere with other employees including temporary replacement labour, production processes and customers, at anytime during the course of the industrial action.

8. ***DISPUTES***

It is recorded that the parties agreed that any alleged infringement of these rules would be referred to the CCMA under section 69(8) of the LRA.

SIGNED AT _____ on this day of _____2017

_____ _____

The Company *The Union*

14 **THE STRIKE PLAN**

14.1 Company objectives

14.1.1 The following objectives underpin a successful strategy in dealing with industrial action –

14.1.1.1 to ensure that the employees remain at work or return to work at the earliest opportunity in order to restore production;

14.1.1.2 to ensure that Management retains effective control of the situation at all times;

14.1.1.3 to ensure that Management communicates effectively with Head Office as well as with the relevant stakeholders, such as the trade union parties;

14.1.1.4 to prevent injury to persons and damage to property;

14.1.1.5 to reach a resolution of the issue giving rise to the industrial action in the most expeditious manner;

14.1.1.6 to maintain and if necessary restore good employee relations.

14.2 The command team and strike handling team

The command centre, during the industrial action, will be a facility designated for this purpose at or closest to the Company's central administration offices from where the Business Manager can exercise overall control of the situation, the Company property, its employees and those third parties that are given legitimate access to its premises..

14.3 Purpose of the command centre

14.3.1 It is manned by the Command Team, Strike Handling Team and Support Services.

14.3.2 The Command Centre is established to ensure that the Company liaises from a central point to Head Office. This assists both the Company in conjunction with Head Office to -

14.3.2.1 liaise and instruct the legal team on what legal steps may need to be taken to bring the dispute to an end;

14.3.2.2 devise a uniform response to the relevant trade unions/employee representatives in relation to communications received from them;

14.3.2.3 devise a uniform and common approach in dealing with the dispute.

14.3.3 The Command Centre cannot liaise effectively with Head Office and take decisions in the absence of accurate, factual information which needs to be properly obtained.

14.4 Obtaining the information

14.4.1 A crucial element in preparing for a threatened strike, is to gather all accurate and relevant information. It places the Company in a position to properly brief its team on all developments as well as to determine which is the best option to adopt in bringing the strike to an end.

14.4.2 Senior managerial employees need to appreciate that their role is to assist in gathering proper and reliable factual information. Reliance on opinions and reviews may be unhelpful and misleading. One is seeking out hard core facts. At the outset the following information is critical -

14.4.2.1 who is involved in the strike. It is important to find out where they are located and what they are doing;

14.4.2.2 information regarding when the threatened action will occur;

14.4.2.3 who are the persons co-ordinating the industrial action, i.e.

encouraging it and/or forcing it;

14.4.2.4 identifying the access points to the relevant work places affected by or likely to be affected by the industrial action;

14.4.2.5 identifying what is the issue in dispute or demand or underlying grievance giving rise to the industrial action.

14.4.3 It would be a specific function of the Finance Manager to obtain and calculate what are the economic losses sustained during the strike. This would be vital evidence in any interdict proceedings in the Labour Court as well as in respect of any compensation claim where the strike is unprotected. It is evidence of irreparable harm and satisfies one of the crucial elements for an interdict.

14.5 Strike Diary

14.5.1 The Employer must maintain a strike diary from the moment the strike is threatened or occurs. Minutes of meetings with trade unions/employee representatives form annexures to the strike diary.

14.5.2 The strike diary is important not only for the purposes of legal action contemplated in response to a strike, but also as relevant evidence that can be used in a disciplinary enquiry where misconduct has occurred and action needs to be taken against the perpetrators.

14.5.3 It is important that the strike diary records events fully and that the Human Resources who is responsible for preparing the strike diary, provides accurate, factual details of each incident and event that takes place, for example –

14.5.3.1 when did the incident take place?

14.5.3.2 who was involved?

14.5.3.3 who are the eye witnesses?

14.5.3.4 where did the incident occur?

14.5.3.5 take written statements from the witnesses describing in logical chronological order how the incident occurred. Avoid vagueness in the statements by referring to “they saw the vehicle being damaged”. Put in the details of who saw the vehicle being damaged, when and by whom.

14.5.4 It is important to remember that the Company’s disciplinary code and procedure is not suspended during a strike. Although for practical reasons disciplinary action may only be taken or finalised after the strike is resolved, the Company has the right to take appropriate disciplinary steps at any appropriate time.

14.6 Information sharing

14.6.1 Appropriate management briefs must be prepared so that they are ready to be distributed when required. These briefs are a critical management tool in achieving the Company’s primary objective to encourage employees not to strike or to achieve an early return to work.

14.6.2 Management briefs should aim to advise employees if their conduct or participation in the strike is unprotected. The briefs should also make it clear that –

14.6.2.1 the principle of no work no pay will apply;

14.6.2.2 the principle of partial work no pay will apply;

14.6.2.3 their conduct is a breach of their contracts of employment;

14.6.2.4 their conduct contravenes the relevant provisions of the LRA;

14.6.2.5 disciplinary action may be taken which could result in dismissal;

14.6.2.6 the Company intends to launch urgent interdict proceedings in the Labour Court restraining them from continuing with the unprotected strike action;

14.6.2.7 the Company reserves its right to bring an application for compensation against each member and the union for losses sustained during the strike.

14.7 It is very important that management briefs are also communicated to the relevant trade unions/employee representatives and that at the earliest opportunity they are advised of their strike or pending strike. This would become vital evidence if the Company were to contemplate a dismissal of the strikers. In this regard Part 6 of Schedule 8 of the Code of Good Practice: Dismissals, contains important obligations on an employer, for example –

14.7.1 Part 6(2) of Schedule 8 requires the employer to contact the trade union official at the earliest opportunity to discuss the course of action it intends to take as a consequence of an unprotected strike;

14.7.2 the employer would be under an obligation to issue a clear ultimatum in unambiguous terms that would state what is required of the employees and what the sanction will be if they fail to comply with the ultimatum;

14.7.3 the employees must be given sufficient time to reflect on the ultimatum and be allowed to respond to it and make representations in response thereto prior to any decision to dismiss being taken.

14.8 The above highlights the need for proper discussions and communication with such trade union officials/employee representatives. Obviously, no decision should be taken by the Company to dismiss striking employees

in the absence of careful consideration and debate with Head Office and advice sought from legal advisors.

14.9 Communicating information dealing with violence, damage to property and other misconduct

14.9.1 If violence occurs during any strike action, the following are recommendations –

14.9.1.1 Informing the trade union/employee representatives thereof.

14.9.1.2 It should be written communication to the union as soon as possible if violence and/or intimidation occurred. The union should be requested to intervene, and address the situation.

14.9.2 Calling in support

The SAPS should be called in if the situation cannot be treated in any other appropriate way. Other options are extra security officers, third party mediators or peace-keeping officials and installation of physical barriers (wooden hoarding, razor wire etc.). The Company's attention should also focus on the route (especially the bus route) that workers and customers/ suppliers use to travel to and from the Company.

14.9.3 Photographic evidence

Cameras and video recorders are the best source of evidence. Photos and video recordings are admissible as evidence in disciplinary hearings and in the courts if the persons and the place where the violence took place can be identified positively on the photos or recordings. Ensure that the recording of the events on video recorder or camera is included in the record of the strike diary. This should include details such as –

14.9.3.1 who was doing the filming;

14.9.3.2 who was being filmed (if possible two people should do this identification);

14.9.3.3 what act of violence/intimidation was being filmed;

14.9.3.4 where it was taking place;

14.9.3.5 the time, date, venue, etc.

14.10 Media / press relations

When dealing with the media/press, the Company should not attempt to do so without first liaising with Head Office and more particularly, its Human Resources Manager communicating directly with the Group Public Affairs Department.

15 LABOUR COURT INTERDICTS TO STOP UNPROTECTED STRIKES OR UNLAWFUL CONDUCT DURING A PROTECTED STRIKE

15.1 What needs to be done once the strike is threatened or has commenced

15.1.1 HR must report to Management that the strike is threatened or has just begun. The strike team members must assemble.

15.1.2 An assessment must be done to establish which operations are affected and how many employees are involved.

15.1.3 All relevant trade unions ("*the union(s)*") whose members are participating in the strike, must be notified and called upon to meet urgently with the Company's Management.

15.2 Steps to be taken in preparing for a possible interdict

15.2.1 If the reasons for the industrial action are not clear, then this must be thoroughly investigated by the Company and meetings with relevant trade union parties should be used to identify the cause of the

industrial action.

15.2.2 HR must start keeping its strike diary which must record in chronological order all the events as they occur, and must include any relevant prior events.

15.2.3 All minutes of meetings with the trade unions must be kept and be available at very short notice.

15.2.4 The Company must communicate with the striking employees once the nature of the industrial action and the reasons for it are known. All managerial briefs should be distributed to the shop stewards and the union(s).

15.2.5 A list of names of all the employees participating in the industrial action must be prepared. It must exclude the names of persons known to be on authorised annual leave, family responsibility leave, unpaid leave or sick leave. The list will form an important annexure to the Court papers and must be as accurate as possible. The list must contain the names of the affected employees. If it lists only the company numbers this will be rejected by the Court.

15.2.6 Once a decision is taken by the Manager to obtain a Court interdict, then the Company's attorneys will immediately require the strike diary, minutes of meetings with the unions (if any) and any management briefs communicated to the employees participating in the industrial action. A complete breakdown of the severe economic harm which the Company is exposed to as a result of the strike must be prepared by the Financial Manager as well as any further information which may assist the Company's attorneys in determining further irreparable harm.

15.3 <u>Evidence of violence / intimidation / damage to property or threats thereof</u>

15.3.1 Written statements must be obtained from the persons who are witnesses to these incidents or who are the victims of it.

15.3.2 These statements must be sufficiently detailed for the Court to understand when the incident happened, how it occurred and what precisely the eye witness observed.

15.3.3 Reference to "*they*" or "*he*" or "*she*" or "*them*" should be avoided. A proper account of the detail must be recorded.

15.3.4 These statements must be read back to the witness and the witness must be given the opportunity to make any necessary changes.

15.3.5 Each statement must be dated and signed by the witness concerned.

15.3.6 These statements need not take the form of an affidavit, but if they do then this is an advantage. However, the accuracy of the content of an affidavit must be checked prior to signature otherwise the deponent can risk perjury in any subsequent legal proceedings where the content of the affidavit might be challenged.

15.3.7 It must be borne in mind that statements or affidavits of witnesses might be relied upon in subsequent proceedings, for example a disciplinary enquiry or unfair dismissal dispute that might proceed to arbitration.

15.4 <u>Service procedures / obtaining the Court Order</u>

15.4.1 Service of the urgent application is a separate two step process as required in terms of the LRA –

15.4.1.1 service of the Section 68(2) notice;

15.4.1.2 service of the actual urgent application.

15.4.2 Service is a critical aspect of the urgent application. If the service is

not done properly, the Court can dismiss the application with costs.

15.5 The Section 68(2) notice in terms of the LRA

15.5.1 This notice warns the strikers that their employer intends to bring the application upon notice. Where the strike is unprotected a minimum period of 48 hours' notice is necessary unless there are good reasons why a shorter period of notice would be justifiable.

15.5.2 Once the Section 68(2) notice has been prepared, the Company must ensure that –

15.5.2.1 the relevant trade unions are given a copy. This is usually done per telefax so that there is proof of service. The notice is usually served in this manner on the union's head office and regional office;

15.5.2.2 copies of the notice should be served by hand on so many of the union's branch committee members as are available on the Company's premises at the relevant time;

15.5.2.3 copies of the notice must be placed on all those notice boards on the Company's premises which are used for communicating information to employees. Copies should also be placed at the entrances to the hostel accommodation and at the security offices;

15.5.2.4 copies of the notice should be made available for distribution to employees at the hostel and at security;

15.5.2.5 the content of the notice should be read over the loudspeaker/pa systems at regular intervals so that the employees are made aware of the Company's intention to proceed to Court.

15.6 The personnel who are appointed to carry out service of the Section 68(2) notice must be available (at short notice) to sign detailed affidavits of service. These affidavits must set out when the Section 68(2) notice

was placed on the notice boards on the Company's premises and detail the manner of service. These affidavits will be prepared by the Company's attorneys. They must be signed before a Commissioner of Oaths. Copies of these affidavits must be telefaxed to the Company's attorneys without delay. A suitable arrangement must be made for the originals to be brought to Court at the hearing of the urgent application.

15.7 The urgent application

15.7.1 Once the urgent application, which consists of the notice of motion and founding affidavit plus annexures has been completed and signed by the relevant deponent (i.e. usually the Human Resources Manager or IR Officer) before a Commissioner of Oaths, service of the application must be done properly, as follows –

15.7.1.1 a copy of the entire application must be served on the relevant unions' head office and regional office, by telefax or by hand;

15.7.1.2 copies of the complete application must be served on the branch committee members, or at least as many of them as are available when service is attempted;

15.7.1.3 copies of the notice of motion must be placed on all notice boards on the Company's premises which are used to convey important information to employees. Copies should also be placed at the entrances to the hostel accommodation and at the security offices. A covering note should be placed on the notice boards to state that if any employee wishes to receive or obtain a full copy of the application same can be obtained from the Company's HR and/or security offices;

15.7.1.4 The content of the notice of motion should be read out over the loudspeaker/pa systems at regular intervals so that employees are made aware of the relief which the Company seeks from Court.

15.7.2 Likewise, the personnel who are appointed to carry out service of the notice of motion and complete application must be available at short intervals to sign detailed affidavits of service that will explain when these documents were served, upon whom they were served and manner of service. These affidavits will be prepared by the Company's attorneys. They must be signed before a Commissioner of Oaths. Copies must be telefaxed to the attorneys immediately once they have been signed. A suitable arrangement must be made for the originals to be made available at the Court for the hearing of the application.

15.8 Steps to be taken once the Court Order is obtained

15.8.1 The Court Order will set out how it is to be served in accordance with the requirements of the Judge that granted the Order.

15.8.2 Service must be done on an urgent basis. The Court Order must be served. It is not a negotiation document i.e. do this or the Order will apply. The Court Order is an important directive from the Court. If the Order is not observed, or it is not served properly, then it will have no force and effect and cannot be enforced.

15.8.3 Upon service of the Court Order, the functionary that undertook the task must be available to sign a necessary affidavit of service to prove that the requirements of the Court Order, on the issue of service, have been met.

15.8.4 Service of the court order, if done properly, secures the company's right to have the order confirmed by the court on what is called "the return day", which is the date on which the order is made final by the court.

15.9 Actions to avoid

15.9.1 Actions by Management that could escalate any violence during a strike include –

15.9.1.1 badly timed applications for an interdict, unless the application is urgent it can be refused;

15.9.1.2 confrontational or abusive faxes to the union;

15.9.1.3 ill-timed or inflammatory press releases;

15.9.1.4 ill-timed calling in of the police or security officials;

15.9.1.5 issuing confrontational instructions, or taking unprocedural disciplinary action, against those involved in the conflict.

15.10 Conclusion

These aspects are of extreme importance particularly if the Order is not adhered to by the affected employees. The Company may wish to proceed with disciplinary action, which could result in dismissal. It is critical that what you do throughout the process could become evidence down the line. The Company will rely on its functionaries to undertake their responsibilities efficiently and expeditiously.