

ConCourt rules: When the strike ends, so does the lockout

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South African employers and the general public are no strangers to strikes. The LRA makes it very easy to embark on a strike - once a dispute is declared by employees and it cannot be resolved, either through conciliation or within 30 days, the strike may commence after issuing a strike notice.



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One of the options open to an employer when responding to a strike is a lockout. The LRA permits an employer to engage replacement labour during a lockout which is implemented *'in response to a strike'*. This is often referred to as a 'defensive' lockout.

Recently in *National Union of Metalworkers of South Africa v Trenstar (Pty) Ltd* (18 April 2023), the Constitutional Court was required to determine what *'in response to a strike'* means.

The National Union of Metalworkers of South Africa (Numsa) demanded the payment of a once-off gratuity to its members at Trenstar (Pty) Ltd ('the Company'). The Company did not accede to this demand, which resulted in a strike that commenced on 26 October 2020. Almost a month later, on 20 November 2020, after the strike had petered out, Numsa wrote to the Company and advised it that it would 'suspend the strike'.

In response, the Company gave notice of what it described as a 'defensive lockout'. A dispute then arose as to whether the Company could engage replacement labour in these circumstances and Numsa approached the Labour Court on an urgent basis to determine this issue.



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Labour Court and Labour Appeal Court

The Labour Court found that a suspension of a strike [does not disqualify the employer from using replacement labour](#). Numsa appealed this judgment, but the appeal was refused because the strike and lockout had since ceased and the issue was moot.

Constitutional Court

The Constitutional Court firstly considered the distinction between the 'suspension' and 'termination of a strike'. The Court found that a strike cannot be suspended. A strike either exists; or it does not. The test to determine whether a strike exists is whether there is a withdrawal of labour coupled with a demand.

The Court did, however, find that what is colloquially referred to the suspension of a strike is actually an indication from employees or a union that they are not on strike and they do not waive their unconditional *right* to strike which has accrued to them. The Court left open the question of whether a fresh strike notice would have to be issued should the employees or union seek to revive the strike.



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The Court also found that, for a lockout to be 'in response to a strike', the strike had to be underway at the time when the employees were locked-out from the workplace. Thus, in the present matter, where the strike had ended on 20 November 2020, the ensuing lockout implemented three days later could not have been 'in response to' the strike.

Importantly, the Constitutional Court found:-

“ [41] An employer who decides to persist with an exclusion of employees from the workplace after they have ended their strike and tendered their services is no longer responding to the strike, but is choosing to use the lock-out offensively in a way that is indistinguishable from the employer who, in the complete absence of a strike, embarks on a lock-out to compel compliance with its demand. To say that the ongoing lock-out is still responding to the strike is to treat the ongoing lock-out almost as some form of punishment because the employees chose to embark on a protected strike. The lawmaker could not have intended to reward retribution of that kind. ”

On this basis, the Court found that an employer may only use replacement labour during an active strike. Once the strike comes to an end, the employer is no longer permitted to engage replacement labour.

The judgment provides final clarity on the issue of the use of replacement labour in the context of so-called defensive lockouts. While lockouts are not often utilised by employers, for a variety of reasons, they should nevertheless take note of these developments.

The area of strike law is fraught with complexity and employers should ensure that they obtain specialist advice on these issues. A wrong step may result in severe consequences and risk for employers, and the necessity for proper strategic planning cannot be overstated.

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