Can an employer use scab labour in response to a strike?

In an appeal, the Constitutional Court was asked to interpret Section 76(1)(b) of the Labour Relations Act, Act 66 of 1995 (the act).

Section 76(1)(b) reads as follows:

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

To continue or maintain production during a protected strike if the whole or part of the employer's service has been designated as a maintenance service, or

- For the purpose of performing of an employee who is located out unless the lock-out is in response to a strike."

The Constitutional Court unanimously ruled that the use of scab labour during the strike is prohibited.

FACTS

NUMSA engaged Trenstar and requested a payment of a once-off gratuity of R7,500.00 per employee in addition to their annual wage increase for the financial year of 2020.

NUMSA was acting on behalf of its members who were employees of Trenstar.

The parties were unable to reach an agreement. NUMSA referred the dispute to the CCMA for Conciliation, which also failed.

NUMSA gave Trenstar a notice that they would embark on a strike in support of their demand.

The strike lasted several weeks. On 20 November 2020, NUMSA notified Trenstar that it would end the strike and the members would return to work. In the same breath, NUMSA emphasized that its members would not abandon their gratuity demands.

On the same day, shortly after receiving the notice, Trenstar issued a notice that

it would impose a lock-out. The lock-out notice demanded that NUMSA's members abandon their gratuity demand. Trenstar invoked Section 76(1)(b) of the Act. The section permitted Trenstar to use replacement labour.

NUMSA disputed that Section 76(1)(b) was applicable on the basis that it had suspended the strike. Trenstar insisted that it would nevertheless continue.

NUMSA then approached the Labour Court for an order interdicting Trenstar from using replacement labour. The Labour Court dismissed the application.

Not satisfied with the decision, NUMSA then approached the Labour Appeal Court which also dismissed their application. The Labour Appeal Court contended that their case was moot.

NUMSA then referred the matter to the Constitutional Court arguing that the Constitutional Court had jurisdiction in that it raised the interpretation of Section 76(1)(b) of the Act and had an impact on Section 23 of the Constitution.

NUMSA based its appeal on the grounds that the strike ended when the members returned to work. Thus, there was no longer a strike and no need to respond by employing replacement labour. Effectively, the basis of their arguments was the interpretation of Section 76(1)(b).

Trenstar opposed the application and argued that it be dismissed as the matter was moot.

The Constitutional Court disagreed with the Labour Appeal Court. In its unanimous decision, the Constitutional Court based its decision on the fact that once the employees tendered their services, such conduct does not fall within the definition of a strike and there is no longer a withdrawal of labour.

The Court also considered the text, context, and purpose of Section 76(1)(b). A strike is a state of affairs occurring with a specified purpose. Thus, for a lock-out to be on purpose, the strike must still be underway at the relevant time.

Accordingly, the Constitutional Court reversed the decision of both the Labour Court and the Labour Appeal Court. The Court also ordered each party to pay its own costs.

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