

Nehawu healthcare strike

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In the light of the recent illegal Nehawu strike – which led to the deaths of four hospital patients – KUDZAI MPOFU and SIMBARASHE TAVUYANAGO propose amending the law to criminalise such actions, which could well result in the Nehawu leadership going to jail.

INTRODUCTION

The right to strike is one of the most fundamental tools available to workers and their organisations for advancing their economic and social interests. It is the most visible and contentious form of collective action in the event of a labour dispute. Thus it is frequently seen as the last resort for workers when negotiations concerning matters of mutual interest have reached a deadlock.

However, strikes should not be viewed in isolation from other aspects of industrial relations. They are expensive and disruptive for workers, employers and society, and when they occur, it is because efforts to improve working conditions through collective bargaining have failed. In

fact, more than any other aspect of labour relations, strikes are frequently a symptom of wider, more complex problems. As a result, even if a strike is forbidden by national law or a court order, it may still take place if the economic and social pressures are great enough.

Section 23(2)(c) of the Constitution of South Africa guarantees every worker the right to strike. However, this right is not absolute and is subject to reasonable limitations as provided for under section 36 of the Constitution. It may be subject to certain legal conditions or restrictions and may even be prohibited in exceptional circumstances.

Section 65 of the Labour Relations Act 66 of 1995 (LRA) prohibits strikes by workers in the essential and maintenance services labour force. Sections 70 to 75 regulate essential and maintenance services, which include workers in the healthcare sector, parliamentary services and the South African Police Services (Section 213, LRA).

The primary justification for limiting the right to strike in essential services is that these are services which, if interrupted, can endanger the life, personal safety or health of the whole population. Basically, essential services are indispensable to the realisation of other rights in the Constitution, such as healthcare, water, food, education and social security. Therefore, it is necessary

to balance the workers' right to strike against the general public's right to access and enjoy other constitutionally protected rights.

This article analyses the right to strike in essential services in light of the National Education, Health and Allied Workers' Union's (Nehawu's) action in March 2023. It assesses whether statutory prohibition of engaging in industrial action alone is enough to deter employees in essential services from striking. It concludes by proffering recommendations on the best practices to adopt to advance essential services workers' rights while ensuring that access to essential services by the public is not jeopardised.

NEHAWU V MINISTER FOR THE PUBLIC SERVICE AND ADMINISTRATION & OTHERS 2023

On 23 February 2023, Nehawu issued a strike notice in terms of section 64(1) (d) of the LRA. The notice was directed to all Directors-General (DGs) and heads of departments across all departments and provinces, including the South African Social Security Agency (Sassa), the Special Investigating Unit (SIU) and the South African National Biodiversity Institute (Sanbi). This effectively meant that public services, including education, health, police services, home affairs, social development and ►►

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correctional services, would cease operations indefinitely.

The main demands set out in the notice included a 10% increment and R2,500 housing allowance increase. The DG of the Department of Public Service and Administration informed Nehawu that the strike notice included essential services workers in the public service who were prohibited from striking as well as those working in entities outside of the public service, ie Sassa, SIU and Sanbi, who were not covered by the Public Service Co-ordinating Bargaining Council (PSCBC). Despite the DG's reservations, Nehawu persisted in carrying out the strike.

The Minister for Public Service and Administration and the DG then launched an urgent application in the Labour Court seeking that the strike notice be set aside. The Minister argued that the notice is irregular and illegitimate because it includes employees of Sassa, SIU and Sanbi, who are not in the bargaining unit, and essential services employees who are in the bargaining unit but were prohibited from striking. The court held that the notice to strike was not only defective but was also unlawful because it included essential services which are prohibited from striking under section 65 of the LRA

The Labour Appeal Court ruled that there could be no doubt that the strike notice given by Nehawu was intentionally broad and recklessly so. It gave notice of the strike across all departments and provinces and in all workplaces in the public service. Nehawu issued this notice knowing that hundreds of thousands of its members were employed in essential services and that it was impermissible in terms of section 65(1)(d)(i) for them to strike. The only conclusion which could be drawn from Nehawu's conduct in this regard was that it was well aware that the strike notice did not expressly exclude essential services and that a strike by such employees was in breach of the law.

The union nevertheless simply allowed the situation to unfold and made limited efforts, if any, to halt a strike by essential services workers by taking immediate, drastic and unequivocal action. Because it failed to do so, the union and its members working in essential services must ultimately bear responsibility. There can be little doubt that this breach of the law, which was known by the union, provided exceptional circumstances and irreparable harm to the employer (Paras 42 & 43).

In light of the above, and given

the fact that the strike had become violent and littered with elements of criminality, the court made an order that the strike action, picket or any other form of industrial action by Nehawu, its members and employees employed in an essential service, as defined in section 65(1)(d) of the LRA, which commenced on 6 March 2023, were interdicted with immediate effect and Nehawu and all these essential service employees were restrained and prevented from continuing with or participating in any such strike, picket or any other form of industrial action.

BALANCING THE RIGHT TO STRIKE AGAINST THE PUBLIC'S RIGHT TO ESSENTIAL SERVICES

Essential services and the Essential Services Committee

The International Labour Organisation has taken the position that where the right to strike is subject to restrictions or a prohibition, the workers concerned should be afforded compensatory guarantees, such as conciliation and mediation procedures leading, in the event of deadlock, to arbitration machinery regarded as reliable by the parties concerned. In such



cases, it is essential that the parties are able to participate in determining and implementing the procedure to ensure impartiality and a rapid conclusion. Moreover, arbitration awards should be binding on both parties and once issued should be implemented rapidly and completely (General Survey, para 164).

In South Africa, section 70B of the LRA requires the Minister to establish an Essential Services Committee (ESC) under the auspices of the Commission for Conciliation, Mediation and Arbitration (CCMA). The functions of the ESC include determining whether a service should be designated an essential service, developing guidelines and assisting in the negotiation of minimum service agreements, monitoring the implementation and observance of essential service determinations and minimum service agreements, and promotion of effective dispute resolution in essential services.

The ESC published guidelines on the negotiation of minimum services agreements (the Guide). The Guide's main aim is to give effect to the right to strike without interfering with other rights by providing a mechanism for concluding minimum service agreements. A minimum service agreement is a collective agreement in terms of which the employer and its employees or their trade union identify and agree on providing a minimum quantity and quality of essential services during industrial action that is sufficient to avoid endangering of life, personal safety or health of the whole or any part of the population (Section 72 of the LRA).

The purpose of these agreements is to attempt to balance the right to strike with the public's right to receive essential services during labour disputes. It is important to note that where parties have failed to reach an agreement on minimum services, the ESC has the power to determine the minimum services to be maintained during a strike in the service that is designated as essential (Section 70D(f) of the LRA).

Nehawu did not dispute the fact that some workers in the public service provided essential services. Through its attorneys the union admitted that some of its members were precluded from striking under section 65(1)(d) of the LRA (Para 6). Despite Nehawu's acknowledgment, and the strike being interdicted by the Labour Court in an order on 4 March 2023, Nehawu went ahead with the strike from 6 March 2023. The challenge arose when health workers also participated in the strike, whether willingly or under compulsion by Nehawu office bearers, cutting off essential medical care to the public.

The Western Cape Department of Health noted that there was no minimum service agreement in the health sector and as a result, there was no regulation determining the minimum services that had to be maintained during the strike (Paras 25 and 26). Be that as it may, we note that in terms of section 70D, the ESC could have, of its own volition, determined the minimum services that had to be maintained during the strike, but it failed or neglected to do so. The fact that not only were essential medical personnel unavailable to render essential services, but also that the strike degenerated into chaos and violence, highlights the need to perhaps reconsider the regulation of essential services.

The need for effective enforcement mechanisms

A strike, whether protected or not, will have legal ramifications. Although the right to strike is protected under South African law and employees are free to strike once the prescribed requirements are met, it is trite to point out that employees should not commit crimes during their strike action.

Unfortunately, violence and other criminal conduct during both protected and unprotected strikes has become a serious concern in the South African labour relation arena.

Some commentators have described

South Africa as the "protest capital of the world" and the annual mid-year period of wage negotiations as "strike season" (Nhlope, 2014). In fact, the right to strike has developed into a licence for violence, littering, rampaging and uncontrollable looting. While the striking workers' grievances may be legitimate, their conduct during the strikes is usually criminal and infringes on the rights of others, making it inexcusable.

When workers who provide essential services go on strike, the situation is even worse. Farham reports that in 2018 headlines such as "Striking Nehawu workers scatter rubbish in hospital foyer" and "Hospital chaos: Charlotte Maxeke workers claim victory ahead of meeting," appeared in the mainstream media. These articles were authenticated by photographs of toyi-toying protestors in hospital corridors strewn with rubbish, with frightened patients attempting to navigate the mess. In some instances, hospitals were effectively closed, with no emergency access, doctors were prevented from reporting for work, nurses were absent from their stations, and patients could not receive any care to which they were (and still are) entitled (Farham, 2018). This poses the question: where are the police?

In the Nehawu court ruling (Para 53), the Labour Appeal Court held that "it is perhaps appropriate to note that the inaction of the SAPS in the face of criminal behaviour is extraordinary. It has become commonplace for the SAPS to walk away from scenes of criminal behaviour in a strike context, calling it a private or civil matter."

Criminal conduct is neither private nor a civil matter and the SAPS are obliged to maintain law and order. It is their duty to act to enforce the law and not to wait for a court to order them to act. In the event of a "peaceful" but unlawful strike, the SAPS would not have any reason nor jurisdiction to act against striking employees. This means that apart from a court order interdicting employees from carrying >>

on an unlawful strike, there is no real disincentive or deterrent to give the striking employees pause.

Often the interdict to stop ongoing unlawful and destructive strike action comes too late and after the damage has been done, as was the case in March 2023. By the time the Labour Court's interdict was confirmed by the Labour Appeal Court, irreparable harm had already been inflicted on employers, fellow employees and society at large. The most harrowing result of the Nehawu strike was the loss of human lives due to the lack or unavailability of essential workers, with at least four deaths being attributed to the health workers' strike.¹ Considering such dire consequences, we ask is it time to criminalise prohibited strikes?

The decision of the court in this case basically calls for the criminalisation of prohibited strikes, especially where the striking workers commit crimes. Du Plessis and Fouche argue that if it is accepted that collective bargaining is the best way to resolve disputes and that the right to withhold one's labour is part and parcel of the process, then the law's aim should not be to criminalise striking but to regulate it (2019). Although this view is noble, it fails to account for criminal behaviour characterising strikes in South Africa.

Further, the mechanisms that have been put in place through the LRA such as the designation of essential services, conclusion of minimum service agreements and recourse through the Labour Court have thus far proven ineffective. The Nehawu strike demonstrated there can be no guarantees of strict adherence to the rules governing industrial action where there is no suitable deterrent.

To this end, we are of the view that where union representatives who issue defective and unlawful strike notices, encourage their members, including essential service workers, to embark on so-called "total shutdowns", or at

least fail to reign in their members from committing acts of violence or crime, as was the case in the Nehawu strike, such representatives should be held criminally liable. The LRA already makes provision for punitive costs and civil liability of unions where its members conduct themselves unlawfully.²

As noted by Tlhotlhamajane in *Xstrata SA (Pty) Ltd v AMCU & Others* (2014), "It has become noticeable that unions are readily and easily prepared to lead employees out on any form of industrial action, whether lawful or not" (Para 35). If the premise that a union is under an obligation to police its members is irrefutable, then union officials must face liability in terms of criminal law where they encourage, incite or fail to prevent criminal conduct by union members. Considering that the representatives' freedom would be on the line, criminal sanctions may act as a deterrent to the flagrant disregard of the provisions in section 65 of the LRA.

CONCLUSION

At the heart of the Nehawu action was the constant tug-of-war between two competing interests concerning health employees as essential service workers. On the one hand there was the constitutional right of employees to exercise their economic power by withholding their labour as a negotiating tool and on the other hand there was the fulfilment of their legal and moral obligation to being available to assist those in need of health care. The judgment served two purposes. First, and through its order to interdict the striking health workers, it reaffirmed the law that states essential service workers are barred from striking (Order 2.1). Second, and perhaps the more important of the two purposes, it highlighted the need for stricter enforcement mechanisms.

It was noted that while the Labour Court had issued an interdict against the impending strike, the court order

was of no practical use when it came to physically barring employees from embarking on the prohibited strike. This was not the first nor will it be the last case of this nature. There have been numerous cases before where unions and their members disregard not only the LRA but orders of court as well. In such instances, stricter enforcement tools are necessary.

This contribution has mooted criminalisation of prohibited or unlawful strikes as a potential solution.

Criminal sanctions are deliberately harsh and provide deprivation of certain freedoms to impart an efficacious deterrent against undesirable conduct. Perhaps an amendment to current legislation to provide for criminal sanctions in exceptional cases, such as the Nehawu strike, is not all that preposterous.

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ENDNOTES

- 1 See <https://www.news24.com/news24/southafrica/news/nehawu-strike-four-deaths-directly-linked-to-health-workers-protest-says-phaaahla-20230309>.
- 2 *Tsogo Sun Casinos (Pty) Ltd v Future of SA Workers Union & others* (2012) para 14. **NA**