

Unlocking labour laws

LRA Amendment Bill on pickets



There have been relatively few decisions on picketing and there is only one case which was decided in 2006 that raises significant issues for the trade union movement.

LEGISLATIVE PROVISIONS

- Pickets that comply with section 69 of the Act have been protected and enjoy the same protections as strikes that conform to the Act.
- A picket can occur in any place near the employer's premises to which the public has access, but can only be staged on or within the employer's premises if the employer agrees to this.
- The Act does not regulate in any detail how a picket must be conducted and it is in the main left to the parties to fashion rules to cater for such an eventuality.
- Generally speaking such an agreement should set out when the picket will take place, where it will take place, how many persons will participate in it and all additional matters.

WHERE TO PICKET

The place of the picket remains a difficult and contentious issue. For picketers, the main consideration is to make the greatest possible

impact in communicating their demands and persuading other employees to join the strike. For the employer the primary concern is to ensure that the picket is conducted peacefully, that it does not obstruct entrances, or hamper deliveries or turn away customers. It is in the end about achieving a balance between the two competing interests.

In *Shoprite Checkers (Pty) Limited v CCMA and Others* (2006) 27 (ILJ) 2781 (LC), the court dealt with the circumstances in which a commissioner may make rules in relation to in-store picketing. In that case the provisions of section 69 were relevant. This provision provides as follows:

- '(2) Despite any law regulating the right of assembly, a picket authorised in terms of sub-section (1), may be held-
- (a) in any place to which the public has access but outside the premises of an employer; or
 - (b) with the permission of the employer, inside the employer's premises.

- (3) The permission referred to in sub-section 2(b) may not be unreasonably withheld.
- (4) If requested to do so by the registered trade union or the employer, the Commissioner 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 lockout.
- (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;
 - (b) any relevant code of good practice.
- (6) The rules established by the Commission may provide for picketing by employees on the employer's premises if the Commission is satisfied that the employer's permission has been unreasonably withheld.'

The issue in this case was the union's demand that it be permitted in-store picketing. The union wanted 20 such pickets and the employer refused. This dispute had to be considered by the Commission for Conciliation, Mediation and Arbitration (CCMA) in terms of section 69, and the commissioner decided to permit a maximum of six in-store picketers. The employer took this decision for review to the Labour Court.

The Labour Court held that the section 69 procedure commences with a consensus-seeking exercise. It also said that rules can be made only if this process fails, and any such rules entail a rational decision made by a CCMA commissioner, which must be based on relevant and reliable information placed before the commissioner.

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.

Furthermore, the decision of the CCMA commissioner cannot be taken from thin air and the submissions of the parties must be weighed and evaluated.

In respect of where the picket should be held, the court agreed that the union bore the onus of proving that the employer's refusal to grant in-store picketing by 20 workers was unreasonable.

Before a commissioner makes a decision permitting picketers on the employer's premises, the commissioner must undertake an enquiry into the reasonableness (and the finding of unreasonableness) of the employer's refusal to permit picketing on its premises.

In this case the court held that the commissioner's failure to determine the reasonableness of the employer's refusal to permit picketing in-store was held to be fatal to the commissioner's decision. In other words, the commissioner could only exercise its discretion to allow picketing on Shoprite Checkers premises if it was found that the employer's refusal was unreasonable.

The decision shows that trade unions who attempt to obtain picketing rights on the employer's premises must demonstrate that the employer's refusal is unreasonable. It is important in light of this decision and the proposed amendments to the Labour Relations Act that trade unions should attempt to negotiate and conclude agreements on picketing well in advance of any proposed strike.

PROPOSED AMENDMENTS TO THE LRA

Section 69(1)

This provision currently provides that a registered trade union may authorise a picket by its members and supporters for the purposes of peacefully demonstrating in support of a protected strike. This provision will be amended so that pickets will include members of trade unions only and not supporters.

This proposed amendment is extremely restrictive given that the Constitutional Court decision in the *South African Transport and Allied Workers Union and Equity Aviation* matter indicated that a strike notice by a trade union covers all members and non-members at a particular workplace. This provision, unlike the effect of the Constitutional Court judgment, restricts picketing to trade union members and does not include any non-members or employees employed by the same employer.

Sections 69(2)(b) and 69(6)

The LRA allows for picketing rules established by the Commission to provide for employees picketing at the premises of an employer who unreasonably withholds permission.

This provision remains unchanged but has been amended to allow for picketing to take place on property controlled by a third party if that party had the opportunity to make representations to the Commission before the rules were made. This amendment therefore allows for picketing to be held on the premises of the employer's landlord.

It is unclear from this proposed amendment whether any agreement reached in advance between the employer and the trade union for picketing to take place on the landlord's property is permissible.

Section 69(8)

The LRA currently allows parties to the dispute to refer matters listed in section 69(8) to the Commission. The proposed amendment now extends that right of referral to the third party on whose premises the picket will be taking place.

INTERIM RELIEF

The proposed amendments allow for access to the Labour Court as well as interim relief for disgruntled parties. The amendment will extend parties' access to the Labour Court in respect of disputes over compliance with picketing agreement rules. The proposed amendments set out various forms of interim relief including a suspension of the picket or the strike. ¹⁸

This article, written by Shamima Gaibie, a senior director of Cheadle Thompson and Haysom, is taken from a presentation made at Congress of South African Trade Unions Collective Bargaining, Organising and Campaigns Conference in March.