

The Namibian laws relating to strikes and lockouts are principally derived from the Labour Act No 11 of 2007.

Strikes and Lock-Outs

- The law encourages, recognises and provides for peaceful, amicable and lawful means of resolution of industrial disputes, which means disputes that may arise between employers, employees and indeed, the Government.
- In order for the dispute resolution process to be effective and not individualised, the law encourages and provides for collective dispute resolution processes. These include collective bargaining, conciliation, arbitration and finally judicial adjudication or hearings before the Courts.
- In situations where the parties to the industrial disputes, the employees or workers, trade unions, employers and employers' organisations fail to settle their disputes amicably either through conciliation or arbitration, in terms of the law, they have the right to resort to less amicable means of resolving their disputes through either strikes or pickets by the employees or lockouts by the employers.

What is a strike?

- The Labour Act 2007 (Act 11 of 2007) defines a strike as a total or partial stoppage, disruption or retardation of work by employees if the stoppage, disruption or retardation is to compel their employer, any other employer or an employers' organisation to which the employer belongs, to accept, modify or abandon any demand that may form the subject matter of a dispute of interest.
- A strike may be simply defined as a joint action of a group of employees, whereby they withdraw their labour totally or partially, with the aim of inducing an employer to accept their joint demands¹.
- The definition implies the following that:
 - a single employee cannot engage in a strike action;
 - the action may not amount to a complete withdrawal of work;
 - the action must be taken for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee.
- the matter of mutual interest or dispute must be between the employer and employees. A dispute between two trade unions or between a trade union and its members or among employees, is not a strikeable dispute; and
- once the grievance or dispute is resolved, the strike terminates.
- Strikes are prohibited in essential services, where for instance the interruption of that service would endanger the life, personal safety or health of the whole or part of the population of Namibia.
- Disputes in essential services must be referred to the Labour Commissioner for arbitration.

Immunity from civil liability

- Participation in the strike is deemed not to constitute breach of contract. A person who participates in a strike action does not commit a delict or a breach of contract.
- Therefore, an employer must not institute civil legal proceedings against any other person for participating in a strike or a lockout in compliance unless those proceedings concern an act that constitutes defamation or a criminal offence.
- However, an employer is not obliged to remunerate an employee for services that the employee does not render during a strike.

Unlawful acts

- Conduct that constitutes a criminal offence is expressly excluded from protection, thus trespass, assault, intimidation, vandalism and the like will attract both civil and criminal liability.

Picketing

- Picketing is a loose term used to describe various kinds of activities, designed to gain publicity and support for the worker's cause.
- The aim is to persuade the fellow workers to join their strike;
 - to prevent the employer taking on substitute workers; and
 - to cause suppliers and customers to boycott the employer in dispute.
- In order to enjoy the protection of the Labour Act (Act 11 of 2007), a picket must be peaceful.
- Violence and intimidation on the picket line will result in forfeiture of protection and expose perpetrators to civil and criminal liability.

What is a lock-out?

- In terms of the Labour Act (Act 11 of 2007) "lockout" means a total or partial refusal by one or more employers to allow their employees to work, if the refusal is to compel those employees or employees of any other employer to accept, modify or abandon any demand that may form the subject matter of a dispute of interest.
- By taking part in a lockout in compliance with the law, a person does not commit a delict or a breach of contract, but an employer is not obliged to remunerate an employee for services that the employee does not render during a lockout.
- Therefore, an employer must not institute civil legal proceedings against any other person for participating in a lockout in compliance with the law, unless those proceedings concern an act that constitutes defamation or a criminal offence.

Matters in respect of which a strike or lockout is permissible.

- The subject matter of a protected strike or lockout is limited to disputes of interest only. Disputes in respect of essential service must be referred to arbitration.

When can employees strike and an employer lock-out?

- When the employees and employer fail to resolve a dispute in the workplace, they have to follow a lawful procedure before they can strike or lockout.
- Protected strikes and lock-outs must comply with the procedural requirements provided for by the Labour Act (Act 11 of 2007).
- The procedural requirements specify the procedures to be followed prior to the protected strike or lock-out. In order to enjoy protection of the Act, the strike or lockout must comply with prescribed procedure.
- The procedure is as follows:
 - there must be an industrial dispute of interest to which the parties are desirous of going on strike;
 - the dispute ought to have been referred to the Labour Commissioner for conciliation;
 - the Labour Commissioner will appoint a conciliator and determine the date, time and place for the first conciliation meeting as soon as possible but within 30 days of the referral;
 - a party may only strike or lockout if the party attended a conciliation meeting by the conciliator appointed by the Labour Commissioner;
 - if there are no prospects of settlement, the conciliator will seek to reach agreement on rules to regulate the strike or lockout;
 - a certificate stating that the dispute remains unresolved must be issued after the expiry of the 30-day period or any longer and /or period agreed upon;
 - the other party or parties must be given at least 48 hours written notice of the commencement of the strike or lock-out in a prescribed form after receiving a certificate from the Labour Commissioner stating that the dispute remains unresolved after the lapse of the 30-day conciliation period from the date of referral;

- the strike or lockout must comply with rules governing the conduct of that strike or lockout determined by the conciliator.

Procedure to follow if a dispute is not resolved at workplace

Step 1: Conciliation - the dispute must be referred to the Labour Commissioner for resolution.

Step 2: Certificate of outcome - if the dispute remains unresolved or a 30-day period has expired since it has referred to the Labour Commissioner a certificate of the outcome must be obtained.

Step 3: Notice of Commencement - at least 48 hours prior to the strike or lock-out a written notice of the commencement must be given.

What are the consequences of a protected strike?

- The right to withhold work is a constitutional right provided for by Article 21(f) of the Namibian Constitution which stipulates that all persons shall have the right to withhold their labour without being exposed to criminal penalties.
- The Act gives strong protection to strikes and lockout that comply with its provisions.
- Firstly, it guarantees immunity from civil claims. It provides that by participating in a protected strike, a person does not commit a delict or a breach of contract.
- Secondly, an employer must not institute civil legal proceedings against any other person for participating in a protected strike or a lockout, unless those proceedings concern an act that constitutes defamation or a criminal offence.
- However, an employer is not obliged to remunerate an employee for services that the employee does not render during a strike or lockout.
- An employee or member or official of a registered trade union may, in furtherance of a strike in compliance with the law, hold a picket at or near the place of employment for the purpose of peacefully communicating information and persuading any individual not to work.
- Despite the provisions of any contract of employment or collective agreement, an employer must not require an employee who is not participating in a protected strike or whom the employer has not locked-out, to do the work of a striking or locked-out employee, unless the work is necessary to prevent any danger to the life, personal safety or health of any individual.
- The employer must not hire any individual, for the purpose, in whole or in part, of performing the work of a striking or locked-out employee.
- An employee is entitled to resume employment within three days of the date that the strike or lockout ended or that the employee became aware or could reasonably have become aware of the end of the strike or lockout, unless the employee has been dismissed for a valid and fair reason.

When does a strike end?

- To qualify as strike, the action must be taken for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee.
- Since the continuation of a strike is dependent on the existence of the grievance or dispute, once the essential cause of the dispute is removed and there is an agreement and therefore the core of the strike has disappeared, the strike terminates.

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¹C. Parker, *Labour Law in Namibia* (2012) UNAM PRESS p223

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Glossary of terms:

DISPUTE OF INTEREST: The Labour Act (Act 11 of 2007) defines a dispute of interest as a dispute between an employer or an employers' organisation on the one hand and an employee or trade union on the other hand concerning a proposal for new or changed conditions of employment but does not include a dispute that the Act or any other Act requires to be resolved by adjudication in the Labour Court or other court of law or arbitration.

DISPUTE OF MUTUAL INTEREST: when a dispute is not regulated by any law, but it is relevant to the workplace and the employment relationship.

IMMUNITY FROM CIVIL LIABILITY: an employer is prevented by the law from bringing an action against an employee for participating in either a protected strike or lockout. In this sense, it is said that the employee is not liable for any wrongful act so long as the employee acts lawfully. Consequently, he or she is deemed to be immune from civil liability such as legal obligations arising from private wrongs such as a delict or a breach of contract.

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