How new code can bring order to strikes

By Johan Olivier and Lizle Louw

15 Feb 2019

A new code of good practice governing various aspects of strike action came into effect on 1 January 2019. It is a welcome step towards eliminating violent and damaging strikes but its effectiveness remains to be seen in practice.

© _fla – 123RF.com

In the past five years, SA's mining industry has faced some of the country's most prolonged and violent strikes over wages. For example, in the five-month strike in the platinum industry in 2014, nine people were killed. So far, in the strike at the Sibanye-Stillwater gold mines, which began in late November, three people have been killed.

Yet wage increases won after such confrontations are often followed by job losses. Between 2007 and 2017, SA's mining output fell 8% and mining employment dropped 6%. In contrast, Australia's output grew 70% and its mining employment rose 34%. Chile's output grew 2% in the same period with a 42% increase in mining employment.

In an effort to curb the loss of lives, injury and damage to property arising from violent strikes, a declaration was signed by parties to Nedlac in Ekurhuleni in 2014, which has given rise to the *Code of Good Practice: Collective Bargaining, Industrial Action and Picketing*. The code was signed by the minister of labour on 12 December and came into effect on 1 January 2019.

This is a positive sign that SA's labour law is becoming more balanced, despite unions' resistance at Nedlac to any watering down of their "unfettered" right to strike.

While we welcome the code, it remains to be seen whether it will have any effect on violent strikes. It commits all parties to good faith in collective bargaining, appropriate conduct during negotiations, timeously submitting demands, not to engage in any violence during a strike and to enter into appropriate picketing arrangements before embarking on strike action. Although the code is not law, the Labour Court hearing an application for a strike interdict must take it into account.

The code introduces three critical new elements, relating to balloting, picketing and advisory arbitration.

Balloting

Instead of an absolute requirement that unions hold a secret ballot before embarking on a strike, the code offers a watered-down version. It requires unions to include in their constitutions a provision for a strike ballot, but if they do not hold the ballot it cannot be used as a reason for an employer to secure an interdict against the strike. Employers have no right to monitor the ballot process.

This is problematic. We often hear union leaders calling for a strike but it is hard to know if union members support it because they agree or because they are intimidated.

Pickets

According to the code, no picketing may occur without a prior agreement on it. If a picket is formed, and there are no picketing rules in place, the employer may apply to the Labour Court to interdict the strike for this reason.

We believe this is a positive step because the first few days of strikes are often chaotic and picketing rules may help to apply restraint.

The code also provides more guidelines for the SA Police and private security companies in relation to picketing. It requires unions to appoint a strike convenor, to set up their pickets only at designated locations and not to interfere with the access of suppliers or clients, or to engage in intimidation or carry dangerous weapons. Contravention of any of these provisions would allow the employer to apply for an interdict to stop the picket.

Advisory arbitration

The LRA now provides that the director of the CCMA may appoint an advisory arbitration panel in certain circumstances. For example, when the strike has become protracted and violent, the director can appoint the panel either on his own accord or on application by one of the parties to the dispute or, interestingly, on application by anyone who is affected by the strike. That could include communities or members of the public.

The advisory arbitration award will not be binding on any party to it unless the party accepts the award. It seems unlikely that any party whose interests are not served by the award would accept it. The award may however be published, which could reduce public sympathy, or the support of union members, for a party who rejects a reasonable award that could end the strike.

Use of facilitators for wage negotiations

The code encourages parties to collective bargaining to make use of facilitators for this process. This is not a novel concept and many employers have made use of facilitators agreed between the collective bargaining parties. It would, however, be valuable if the CCMA could establish a panel of specially trained commissioners who could fulfil this role, much like those provided by the CCMA to facilitate large scale retrenchment consultations.

Conclusion

The code is a welcome development and a valiant attempt to establish more balanced strike law. Unfortunately, it is toothless when it comes to the key issue of interdicting violent and protracted strikes. It does, however, set SA strike law on the right path and provides employers with more legal options to counter strike action.

ABOUT THE AUTHOR

Johan Olivier and Lizle Louw are partners at Webber Wentzel and specialists in employment law.