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SASBO STRIKES & LOCKOUT POLICIES

JUNE 2000

STRIKES AND LOCK-OUTS

INTRODUCTION

This information and policy document has been produced in response to a resolution adopted by the SASBO National Congress in October 1998. The information provided is a summary of the rights of employees with regard to strike and other industrial actions, and of their employers' recourse to lock-out. SASBO members wishing to acquire a more detailed knowledge of strikes and lock-outs should refer to Chapter IV of the Labour Relations Act of 1995 for the full text of the relevant legislation.

STRIKES AND LOCK-OUTS

Chapter IV of the Labour Relations Act of 1995 deals with strikes and lock-outs. The Act gives all SASBO members the right to strike, and their employers the recourse to lock-out. However, in both forms of industrial action, certain provisions have to be met. These will be explored later in the information and policy document.

The Labour Relations Act defines a strike as:

"the partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute of any matter of mutual interest between employer and employee, and every reference to "work" in this definition includes overtime work, whether it is voluntary or compulsory".

Lock-out is defined in the Act as:

"the exclusion by an employer of employees from the employer's workplace for the purpose of compelling the employees to accept a demand in respect of any matter of mutual interest between employer and employee, whether or not the employer breaches those employees' contracts of employment in the course of or for the purpose of that exclusion".

Strikes and lock-outs, then, are all about power. A strike by employees seeks to disrupt production or service, causing the employer to lose business and income, and thus concede to the employees' or union's demands. The lock-out, on the other hand, is a weapon that is used by employers to coerce unions and their members, through the loss of earning capacity, to agree to detrimental changes to employment conditions proposed by management.

THE RIGHT TO STRIKE

The right of employees to strike has been embodied in the constitution of South Africa. The right to strike is also entrenched in the Labour Relations Act of 1995. With the Act, employees made significant advances in winning the right to strike with the full protection of the law. Labour also won the right to strike in sympathy with employees in other companies, as well as the right to strike on issues affecting

working people in general.

The right to strike, however, is not an absolute one and the Labour Relations Act places specific limitations on trade unions and their rank and file members. SASBO members have the right to strike only if, after negotiation, the parties have failed to reach agreement and the issue in dispute has been referred to the Commission for Conciliation, Mediation and Arbitration (CCMA) and a certificate stating that the dispute remains unresolved has been issued. SASBO members will also have the right to strike if a period of 30 days, or any extension of that period agreed to between the parties to the dispute, has elapsed since the referral was received by the CCMA and, after that, at least 48 hours notice of the commencement of the proposed strike has been given by SASBO, in writing, to the affected employer.

However, the above requirements for SASBO members to embark on a protected strike will not apply if the proposed strike conforms with the procedures in a collective agreement, or if the employees strike in response to a lock-out by their employer that does not comply with the provisions of the Act.

The requirements for a protected strike, in a dispute about a unilateral change to terms and conditions of employment, will also not apply in the event that the union, in its referral to the CCMA, has required the employer not to implement, unilaterally, the change to terms and conditions of employment. Similarly, the requirements for a protected strike will not apply where the employer has already implemented the change unilaterally and the union has required, in its referral to the CCMA, that the employer restore the terms and conditions that applied before the change. In both instances, employees may embark on protected strike action if the employer does not comply with the union's requirements within 48 hours of service of the CCMA referral on the employer.

Should the issue in dispute concern a refusal by an employer to bargain, then employees may not resort to strike action until a recommendation to the parties to the dispute, which may be in the form of an advisory arbitration award, has been made by the CCMA. A refusal to bargain would include the refusal by an employer to recognise SASBO as a collective bargaining agent, or to establish a bargaining council. A refusal to bargain would also include the withdrawal by an employer of its recognition of SASBO as a collective bargaining agent, the resignation of an employer from a bargaining council, and a dispute concerning appropriate bargaining units, bargaining levels, or bargaining subjects.

LIMITATIONS ON THE RIGHT TO STRIKE

No SASBO member may take part in a strike, or in any conduct in contemplation or furtherance of a strike, if the employee is bound by a collective agreement that prohibits a strike in respect of the issue in dispute. SASBO members may also not take protected strike action where they are bound by a collective agreement that requires the issue in dispute to be referred to arbitration, or where the dispute is one that the employee or union has the right to refer to arbitration or to the Labour Court.

Despite the prohibition on strike action where the party has a right to refer the dispute to arbitration, SASBO members may take part in a strike, or in any conduct in contemplation or in furtherance of a strike, if the dispute is about SASBO access to the workplace, the deduction of trade union subscriptions or levies, or about the rights of SASBO representatives and their leave for trade union activities. It should be noted, however, that if SASBO has given notice to an employer of a proposed strike in respect of a dispute concerning access to the workplace, the deduction of trade union subscriptions or levies, or of

SASBO representatives and their leave for trade union activities, then, the union may not exercise the right to refer the dispute to arbitration for a period of 12 months from the date of the notice.

SECONDARY (OR SYMPATHY) STRIKES

A secondary strike refers to a strike or conduct that furthers a strike by employees of another employer. The Labour Relations Act defines a secondary strike as;

"a strike, or conduct in contemplation or furtherance of a strike, that is in support of a strike by other employees against their employer but does not include a strike in pursuit of a demand that has been referred to a council if the striking employees, employed within the registered scope of that council, have a material interest in that demand".

SASBO members may not take part in a secondary strike, unless the strike that is to be supported complies with the provisions of the Act, and unless the employer of the employees taking part in the secondary strike or, where appropriate, the employers' organisation of which that employer is a member, has received written notice of the proposed secondary strike at least seven days prior to its commencement. SASBO members may not take part in a secondary strike unless the nature and extent of the secondary strike is reasonable in relation to the possible direct or indirect effect that the secondary strike may have on the business of the primary employer.

Notwithstanding the rights of SASBO members to take part in secondary strike actions, a secondary employer may apply to the Labour Court for an interdict to prohibit or limit a secondary strike that is not reasonable in relation to the possible direct or indirect effect that the secondary strike may have on the business of the primary employer.

PROTECTED STRIKES

In order for a strike to be protected, the strike must take place after all dispute settlement procedures detailed in the Labour Relations Act, or in any bargaining council or recognition/collective agreement which may exist between the parties, have been exhausted. Should SASBO or its members fail to follow the relevant dispute settlement procedures, the strike will not be protected, and the employer can seek certain remedies through the Act. These remedies include the employer applying to the Labour Court for an interdict in order to restrain the union and its members, and applying to the Labour Court to award the payment of just and equitable compensation in respect of the strike. Should SASBO members not follow the required procedures in exercising their right to strike, this may constitute a fair reason for dismissal.

SASBO members participating in protected strikes do not commit a delict or breach of contract by their actions, and an employer may not dismiss an employee for participating in a protected strike, unless the conduct of that person is in question, or for a reason based on the operational requirements of the employer.

Employers are not obliged to remunerate an employee for services that the employee does not render during a protected strike. However, if the employee's remuneration includes payment in kind in respect of accommodation, the provision of food and other basic amenities of life, the employer, at the request

of the employee, must not discontinue payment in kind during the strike. After the end of the strike, the employer may recover the monetary value of the payment in kind, made during the strike, from the employee by way of civil proceedings instituted in the Labour Court.

UNPROTECTED STRIKES

Unprotected strikes occur in the absence of, or prior to, the exhausting of agreed dispute settlement procedures, or those contemplated in the Labour Relations Act. Previously such strikes were referred to as illegal or unprocedural.

Unprotected strikes are usually spontaneous in nature, and often take place without the sanction of union officials. They are frequently used to apply pressure during delicate negotiations, or when management actions are perceived as illegitimate.

Unprotected strikes should be brought to an end as soon as possible. It is important, however, that management actions are focussed on resolving the conflict through dialogue with the Union. Management should show a willingness to negotiate and give a clear ultimatum before the dismissal of illegal strikers would be regarded as fair.

ALTERNATIVE FORMS OF INDUSTRIAL ACTION

Whilst the strike is the most obvious and frequently used form of industrial action, it is important to recognise that it is only one of a range of activities that may be classified as industrial action. It is also important to recognise that industrial action is not the exclusive option of employers and unions, but may also be instigated by management.

Go-slops

Go-slops are a method of bringing demands to the attention of management by disrupting production without bringing the operation to a halt. Go-slops have often been unprocedural in the past (unprotected, in terms of the current Labour Relations Act definition). Employees taking part in a go-slow, feel less vulnerable to management action than if they embark on a full unprotected, or even protected, strike. Go-slops are often very difficult to prove conclusively. As a result, go-slops sometimes occur while a dispute is being dealt with to add pressure to the negotiations.

There are a number of advantages of this type of action from the employees' point of view. Firstly, as they are still at work, it is very difficult for management to take control of the production process (i.e., use non-strikers to maintain production). Secondly, they do not lose pay, unless they are paid according to output.

Work-to-rule

Work-to-rule action is an effective form of industrial action, particularly where employees work on their own initiative, or generally perform tasks, or take actions outside of work rules or not

specifically defined in their job descriptions or skills categories. It entails performing only those functions strictly required, or permitted, in terms of their employment contracts and job limitations.

Overtime bans

As the term suggests, an overtime ban involves a collective refusal from the workforce to work after hours and is accompanied by a demand that the employer change/restore certain working practices and /or working conditions. The banning of overtime is an effective form of industrial action where overtime is voluntary but often required to complete normal work schedules.

Should overtime be a regular and general requirement, this must be included in letters of appointment as a contracted condition, and referred to in collective agreements with trade unions.

STAYAWAYS

Stayaways are generally a response to socio-political or socio-economic issues, including the demonstration of solidarity with a political cause, or drawing public attention to a political event or grievance. Stayaways do not constitute a strike as defined in the Labour Relations Act since such action is not being used by employees to pressurise the employer to agree to work related demands.

The Labour Relations Act allows registered trade unions, or federations of trade unions, to serve notice on Nedlac of their intention to participate in protest action to promote or defend the socio-economic interests of workers. Seven days notice must be given to Nedlac of the union's intention to exercise this right.

Because of the likelihood of intimidation of workers in the townships to participate in stayaways, it is essential for management and unions to handle the situation with sensitivity. Rules to cater for stayaways should be negotiated with employees in advance. The generally accepted approach on the part of management is one of "no work, no pay."

SASBO members participating in a stayaway do not commit a delict or breach of contract by their actions, and an employer may not dismiss an employee for participating in a protected stayaway unless for a reason based on the operational requirements of the employer, and after a clear ultimatum has been given.

PICKETING

A registered trade union may authorise a picket by its members and supporters for the purposes of peacefully demonstrating in support of any protected strike or in opposition to any lock-out. Despite any law regulating the right of assembly, a picket may be held in any place to which the public has access, but outside the premises of an employer unless the employer permits the employees to picket inside the premises. An employer may not unreasonably prevent employees from picketing on the premises.

If an agreement regarding the rules for a picket cannot be agreed between a union and an affected employer, the CCMA, if requested to do so by the registered trade union or the employer, must attempt

to secure an agreement between the parties to ~~the~~ dispute, on rules that should apply to any picket in relation to a strike or lock-out. If there is no agreement reached, the Commission must establish picketing rules, and in so doing must take account of the particular circumstances of the workplace, or other premises where it is intended that the right to picket is to be exercised. The CCMA must also take account of any relevant code of practice. The rules established by the CCMA may provide for picketing by the employees on their employers' premises if the CCMA is satisfied that the employer's permission has been unreasonably withheld.

Any party to a dispute about any of the following issues may refer the dispute in writing to the CCMA –

- an allegation that the effective use of the right to picket is being undermined;
- an alleged material contravention of the requirement that pickets should be peaceful, or that the picket is taking place on the premises of the employer without permission, or without being authorised by the CCMA;
- an alleged material contravention of an agreement between the parties to the dispute on rules that should apply to the picket;
- an alleged material breach of a rule established by the CCMA.

The Commission must then attempt to resolve the dispute through conciliation, but if the dispute remains unresolved, any party to the dispute may refer it to the Labour Court for adjudication.

PROTEST ACTION TO PROMOTE OR DEFEND SOCIO-ECONOMIC INTERESTS OF WORKERS

Every employee who is not engaged in an essential service or a maintenance service has the right to take part in protest action if the protest action has been called by a registered trade union or federation of trade unions, provided that the registered trade union or federation of trade unions has served a notice on Nedlac stating the reasons for the protest action and the nature of the protest action and, if the matter giving rise to the intended protest action has been considered by Nedlac, or any other appropriate forum in which the parties concerned are able to participate in order to resolve the matter, and at least 14 days before the commencement of the protest action, the registered trade union or federation of trade unions has served a notice on Nedlac of its intention to proceed with the protest action.

The term "protest action" is defined in the Labour Relations Act as:

"the partial or complete concerted refusal to work, or the retardation or obstruction of work, for the purpose of promoting or defending the socio-economic interests of workers, but not for a purpose referred to in the definition of strike."

RE COURSE TO LOCK-OUT

The Labour Relations Act of 1995 gives every employer resource to lock-out provided certain requirements are met. For a lock-out to be protected, the issue in dispute must have been referred to the CCMA and a certificate stating that the dispute remains unresolved has been issued. Employers will also have

recourse to lock-out if a period of 30 days has elapsed since the receipt of the referral by the CCMA, or after any extension of that period agreed to between the parties to the dispute. However, these provisions need not be adhered to should the lock-out be in accordance with an applicable collective agreement, or if the employer locks out the employees in response to their taking part in a strike which fails to conform to the provisions of the Act.

An employer is required to give at least 48 hours written notice of the commencement of the lock-out to the Union.

The definition of lock-out is narrower than that of a strike, in that the purpose of a lock-out is limited to enforcing the acceptance of a demand. Should the employer exclude employees for any other reason, the action would not be regarded as a lock-out.

LIMITATIONS OF THE RE COURSE TO LOCK-OUT

The Labour Relations Act stipulates that no employer may take part in a lock-out, or in any conduct in furtherance of a lock-out, if a collective agreement which prohibits such lock-out binds that employer, or if a binding agreement requires the employer to refer the dispute to arbitration, or if the issue in dispute is one that an employer has the right to refer to arbitration.

An employer may not make use of replacement labour to perform the work of locked out employees, unless the lock-out is in response to a strike.

LOCK-OUTS IN COMPLIANCE WITH THE LABOUR RELATIONS ACT

A lock-out which is in compliance with the LRA can be described as 'protected' with the effect that the employer will not commit a delict or breach of contract by conducting such lock-out, or taking part in any conduct in contemplation or furtherance of a lock-out. The term 'protected' also implies that the various procedural requirements have been complied with.

An employer is not obliged to remunerate an employee for services which the employee is unable to provide during a protected lock-out. However, should the employee's remuneration include payment in kind, such as for accommodation, the provision of food and other basic amenities, the employee may request the employer not to discontinue such payment. After the end of the lock-out, the employer may recover the monetary value of the payment in kind, made during the lock-out, from the employee by way of civil proceedings instituted in the Labour Court. Civil proceedings, however, may not be instituted against any employer for participating in a protected lock-out.

UNPROTECTED LOCK-OUTS

Should a lock-out not comply with the provisions of the Act, the Labour Court has exclusive jurisdiction to grant an interdict which would restrain any employer from participating in a lock-out, or conduct in contemplation or furtherance of a lock-out. The Labour Court may order just and equitable compensation to be paid for loss sustained due to the lock-out, this after examining whether attempts were made to comply with the provisions of the Act, whether the lock-out was pre-meditated and, whether there was compliance with any restraining interdict.

The Labour Court will also have regard to the interest of orderly collective bargaining, the duration of the lock-out, and the financial position of the respective parties, i.e., the employer, the union and the employees.

The Labour Court may not grant an order to restrain an employer from locking out employees, or the payment of just and equitable compensation for any loss attributable to the lock-out, unless 48 hours' notice of the application to grant such interdict, or to order such payment, has been given to the respondent, and the respondent has been allowed a reasonable opportunity to be heard before a decision concerning the application is taken, and the applicant has shown good cause why a period shorter than 48 hours should be permitted.

SASBO'S STRIKE POLICY

PREAMBLE

SASBO supports the notion that strike action is a union's most powerful and effective counter to employer intransigence and exploitation of employees. SASBO believes that, ultimately, it is only the threat of strike action that prevents even employers who profess enlightenment, from being or becoming merely paternalistic in their approach to labour relations.

SASBO further believes that there would be little purpose or meaning to the collective bargaining process were it not for the possibility of strike or lock-out action, with attendant financial losses to both employer and employee, since there would be little pressure on the negotiating parties to modify their positions and reach agreements at the bargaining table.

SASBO, therefore, welcomes the embodiment in the constitution of South Africa of the right of employees to strike, and the entrenchment of the right to strike in the Labour Relations Act of 1995. SASBO also takes note of employers' recourse to lock-out as a further pressure on the negotiating parties to reach settlements.

POLICY STATEMENT

Strikes

SASBO identifies with the approach that a strike or lock-out action should be a "measure of last resort", and that the preferred approach to dispute resolution should be negotiation, followed, in need, by other dispute resolution mechanisms such as conciliation, mediation and, where appropriate, arbitration.

Insofar as disputes of interest are concerned, SASBO will not resort to protected strike action until the procedures contained in any agreement, and the requirements of the Labour Relations Act, have been exhausted. SASBO will similarly not resort to strike action on any issue that is the subject of an agreement, during the period of such agreement, or during any process of conciliation, mediation or arbitration. Furthermore, SASBO will not resort to strike action on any matter arising out of an arbitral award.

Before engaging in any strike action, SASBO will refer the issue under dispute to its appropriate structure

to consider the seriousness of the dispute and decide whether a strike ballot should be taken over the issue. In the event that a decision is taken to conduct a strike ballot, such ballot will be undertaken in terms of the Union's Constitution.

If a majority of the members balloted has cast a vote, and the majority of votes cast is in favour of taking strike action, whether partial or complete, or for the retardation or obstruction of work, SASBO will give the affected employer at least 48 hours written notice of the date of the commencement of the proposed strike. SASBO will make itself available prior to and during the period of the industrial action in order to meet and consult with the affected employer for the purpose of attempting to resolve the dispute.

Where a majority of the affected members has cast a vote, and the majority of votes cast is in favour of taking strike action, SASBO will expect its members who voted in favour of the proposed strike to take such action when called upon to do so by the Union. Should the dispute be resolved, SASBO will inform striking members of the settlement.

SASBO will not promote or engage in any strike action in response to a dispute of right.

Secondary Strikes

Insofar as secondary strikes are concerned, SASBO recognises that such 'sympathy' strikes have a place in equalising the balance of power between labour and management, and may be appropriate where the secondary strike is reasonable in relation to the possible direct or indirect effect that the secondary strike may have on the business of the primary employer. SASBO, however, will only consider resorting to a secondary strike action if the Union has a material interest in the demand made to the primary employer. SASBO will give employers affected by the secondary strike at least seven days notice in writing of the commencement of the secondary strike action.

Unprotected Strikes

SASBO recognises that unprotected strikes are strikes that occur in the absence of, or prior to, the exhausting of agreed dispute settlement procedures, or those dispute settlement procedures that are contemplated by the Labour Relations Act. SASBO is aware that unprotected strikes are usually spontaneous in nature, and take place without the consent of the Union. SASBO will not sanction unprotected strike action by its members and, through dialogue with the affected employer and the striking members, will take all necessary steps to ensure that any unprotected strike is brought to an end as soon as possible.

Picketing

SASBO may, in appropriate circumstances, authorise a picket by its members for the purpose of peacefully demonstrating in support of a protected strike or in opposition to a lock-out. SASBO, in such instances, will endeavour to negotiate the rules for a picket with the affected employer or, where no agreement can be reached, request the CCMA to establish picketing rules. SASBO will take cognisance of the "Code of Good Practice on Picketing" which guidelines were prepared by Nedlac and are included in the schedules to the Labour Relations Act.

Stayaways

SASBO acknowledges that stayaways are generally a response to socio-political and socio-economic issues, including the demonstration of solidarity with a political cause, or drawing attention to a political event or grievance. Whilst SASBO may, in certain circumstances, sanction its members' support of a serious socio-economic issue, the Union's constitution prohibits the support of any party political cause. SASBO, therefore, will not endeavour to rally its members around a political cause, event or grievance.

STRIKE PROCEDURE

Whenever the possibility of strike action is contemplated, the issue under dispute will be referred to the appropriate SASBO structure. If the structure concerned is satisfied that the dispute is of a serious nature, and cannot be resolved in any other way, the Union will, before calling a strike, conduct a ballot of its members who are affected by the dispute. A valid decision will be regarded as having been obtained if a majority of the members balloted has cast a vote, and the majority of votes cast is in favour of or against taking strike action.

In the event of a decision being taken to conduct a strike ballot, notice of the ballot, together with full particulars of the dispute, and of the prevailing social and economic factors that need to be considered before deciding whether to vote in favour or against a strike, will be sent to each affected member at his last registered address, together with a ballot paper, at least seven days before the ballot is to be taken.

Ballot papers shall be returned to the Headquarters of the Union for the purpose of being counted by scrutineers appointed by the appropriate structure to ascertain the result of the ballot. The result of the ballot shall then be made known to the SASBO structure concerned, after which the General Secretary shall inform the members of the result of the ballot.

If the result of the ballot is in favour of strike action, members will be advised of the date that the strike is to commence. If the result of the ballot is against strike action, the proposed strike action will be abandoned by the Union.

DEFINITIONS

Conciliation

Conciliation involves attempts by the parties to a dispute to settle their differences prior to industrial action. Conciliation is an extension of the negotiation process and is an integral part of the dispute-settlement procedure. The aim of the conciliation process is to allow the parties to settle the dispute between themselves without the direct intervention of external agents.

Mediation

Mediation involves the active intervention of a third party or parties for the purpose of achieving settlement of a dispute between the parties. The role of the mediator is to negotiate, advise, act as intermediary and suggest possible solutions to both parties. A mediator has no decision-making power and cannot impose a settlement on either party.

Arbitration

Arbitration involves third party adjudication in a dispute. The arbitrator actively intervenes in the dispute and makes a decision on the terms of settlement of the dispute. The arbitrator's decision is final and binding on the parties concerned.

Dispute of Interest

A dispute of interest involves a dispute in which a party has a distinct interest but no clear right, such as the allocation of an interest related resource, i.e., improved wages and conditions of employment. Disputes of interest are most often resolved through mediation or, ultimately, a trial of strength such as strike or lock-out action aimed at inducing the other party to moderate its position to achieve agreement.

Dispute of Right

A dispute of right involves a dispute in which established or existing rights of either party are interfered with or ignored. Such rights may accrue through a contract of employment, legally determined conditions of employment, and procedures, i.e., industrial legislation, and unilateral changes to accepted or customary practices. Disputes of rights, therefore, are suitable for third party adjudication.

Picket

A picket is a peaceful method by which striking workers publicise their action and encourage others to join them through the medium of moral persuasion, e.g., the display of placards. A picket-line refers to a formation of picketers which may be designed to prevent the passage of persons to or from a particular location, e.g., the entrance or exit of a factory. The purpose of a picket-line is to promote the effectiveness of a strike action.

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A Guide to Fair Labour Practices – FSA Contact
IR Handbook – Andrew Pons
Labour Relations Act No.66 of 1995