

# Court rules replacement labour may be used only for duration of strike

By [Jacques v Wyk](#), [Andre v Heerden](#) & [Brittany Feldman](#)

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The issue of whether an employer may continue to use replacement labour, which was employed during a lock out in response to a strike, after such strike has ended has been decided in a recent case, departing from a 1999 judgement of the same nature.



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The current decision is that an employer may use temporary replacement labour whilst implementing a defensive lockout in response to a protected strike but only for as long as the strike subsists.

## Court's decision

In *SACCAWU v Sun International*, the union issued a notice to the employer that it intended on embarking upon a limited duration strike from 25 September 2015 to 28 September 2015. The union demanded increased wages, minimum working hours and a housing subsidy. In response to the union's actions, the employer issued a notice of lockout. The notice of lockout stated that the lockout would continue until the union accepted the employer's counter-offer.

The union argued that although the employer's lockout was lawful, its right to use replacement labour must be 'in response to a strike' and that this right lapsed as soon as the lockout was no longer in response to a strike. The union argued that a defensive lockout becomes an offensive lockout, as soon as the strike ends. Consequently, once the strike has ended, the employer may no longer use replacement labour.

The employer, on the other hand, argued that it was entitled to use replacement labour even after the strike ends as a means of 'counter-attack' to the union's strike. Therefore, it submitted that an employer's right to employ replacement labour commences when the employer acts in reply to a strike and lasts until the protected lockout ceases.

## LRA interpretation

Section 76(1)(b) of the Labour Relations Act 66 of 1995, as amended ('LRA') provides:

'An employer may not take into employment any person -

...

b. for the purpose of performing the work of any employee who is locked out, unless the lock-out is in response to a strike.'

The court held that on a proper interpretation of section 76, the right to strike is not equivalent to the right to resort to a lockout. Thus, the employer's argument that it would be anomalous 'that an employer is entitled to meet a union's 'attack' (in the form of strike action) by way of 'counter-attack' (in the form of a lock-out)' was limited to the period during which the strike persists and not after the strike ceased.

In coming to this conclusion, the court looked at the purposes of the LRA in light of the Constitution. The court had regard to the case of *Ex parte Chairman of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996 1996 (4) SA 744 (CC)* in which the Constitutional Court held that the right of an employer to lock out is not necessarily equivalent of the right of workers to strike.

The court in *SACCAWU* reasoned further that to interpret section 76 as giving an employer the right to lock out employees beyond the currency of the strike would be an impermissible limitation on the right to strike.

Consequently, the court ordered that the employer be interdicted from utilising replacement labour for performing the work of employees who were locked out from the time that the strike ended.

## **Importance of this case**

This case is significant in that it departs from the judgment of *Ntimane & others v Agrinet t/a Vetsak (Pty) Ltd (1999) 20 ILJ 896 ((LC)* which dealt with the same issue and in which the court held that right to employ replacement labour endures until the protected lockout ceases. Because of the court's departure in the present instance, an employer may no longer use replacement labour beyond the currency of strike.

## **ABOUT THE AUTHOR**

Jacques van Wyk, Director, Andre van Heerden, Associate and Brittany Feldman, Candidate Attorney Werksmans Attorneys.

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