

BALLOTING OF MEMBERS – REGISTERED TRADE UNIONS AND EMPLOYER’S ORGANISATIONS



INTRODUCTION

Section 95(5)(p) of the Labour Relations Act (the LRA) has always included in the requirements for the registration of trade unions or employers' organisations a provision in their constitutions that before calling a strike or lock-out a ballot must be conducted of members in respect of whom they intend to call a strike or lock-out.

However, there was no clear interpretation of the meaning of the ballot, which meant that even a show of hands at a mass meeting might be enough to meet the requirement. This posed potential problems such as a lack of clarity on what the vote was in favour of, whether the attendance at the meeting in question was fully representative of those affected, whether a show of hands was free from the possibility of intimidating behaviour, and whether the outcome was accurately recorded.

A BALLOT MUST BE RECORDED AND IN SECRET

The 2017 amendments to the LRA include the addition of section 95(9) which reads-

“(9) For the purpose of subsection (5), “Ballot” includes any system of voting by members that is recorded and in secret.”
This insertion clarifies that a ballot means any system of voting by members that is recorded and secret. The clarification is to provide for new technologies of balloting while at the same time ensuring good governance and secrecy.

DUTY TO KEEP RECORDS OF THE BALLOT

Section 99 of the LRA is amended with the introduction of new paragraphs (b) and (c) which require every registered trade union and every registered employer's organisation must keep a record of -

“(b) the attendance register, minutes or other prescribed record of its meetings, in an original or reproduced form, for a period of three years from the end of the financial year to which they relate; and

(c) the ballot papers or any documentary or electronic record of the ballot for a period of three years from the date of every ballot.”

Thereby providing for documentary or electronic records of ballots rather than just ballot papers.

THE ROLE OF THE CCMA

Section 115(2)(f) of the LRA remains in place which means that the CCMA may, if asked to do so by a registered trade union or registered employers' organisation, conduct, oversee or scrutinise any election or ballot of that trade union or employers' organisation.

DOES THE ABSENCE OF A BALLOT INVALIDATE A PROTECTED STRIKE OR LOCK-OUT?

Section 67(7) of the LRA remains in place, which means that the LRA does not require the conduct of a ballot as a pre-requisite for a protected strike or lock-out.

The obligation of the ballot flows instead from the constitution of a registered trade union or employer's organisation. Registered trade unions and employer's organisations are obliged to comply with their constitutions even though failure to do so will not have the consequence of invalidating the protected nature of the strike or lock-out.

TRANSITIONAL PROVISIONS

In the past, many trade union and employer organisation constitutions did not include strike/lock-out ballot requirements. Transitional provisions are introduced to provide for the Registrar of Labour Relations to consult with the national office bearers of those unions and employer organisations on the most appropriate means to amend their constitutions to comply with the requirements of section 95(5)(p). The Registrar of Labour Relations shall issue a directive on the period within which each registered trade union or employer's organisation must amend its constitution in accordance with the amendment procedures set out in their respective constitutions.

DEPARTMENT OF EMPLOYMENT AND LABOUR: GUIDELINES FOR STRIKES OR LOCK-OUTS

On 9 December 2018 and in *Government Notice 1397, Government Gazette No. 42121*, the then Minister of Labour (as it was known at the time), the Honourable Minister Oliphant, issued the Guidelines on Balloting for Strikes or Lockouts. In terms of section 95(8) of the LRA, the guidelines are intended to serve as guidelines for the system of voting as contemplated in subsection (9) of the LRA. Subsection (9), in turn, states that: “For the purpose of subsection (5), “ballot” includes any system of voting by members that is recorded and in secret.”
However, in the judgment of *AMCU v Minister of Employment and Labour (Case No 78915/2019) ZAGPPHC215* (date of issue 6 April

2021), the High Court (Gauteng Region, Pretoria) set aside the Guidelines.

The High Court held that the guidelines were incorrectly issued in terms of section 95(9) of the LRA and should have been issued in terms of section 95 (8) of the Act. Furthermore, the High Court held that section 95(8) does not empower the Minister to impose mandatory obligations on a trade union (or inscriptive on how the system of voting that is recorded and in secret is undertaken by a trade union), which is what the guidelines, by reference on a number of occasions to the word “must”, was doing.

The setting aside of the Guidelines for Balloting for Strikes or Lockouts does not set aside the requirement for a union or employers' organisation to ballot its members before calling out a strike or lockout (respectively) and which must be in compliance with the union or employers' organisation's constitution as per provisions of section 95(5)(p) and the provisions of the LRA.

The core principle still needs to be adhered to, namely that a ballot must be conducted, be held in secret, and be recorded (section 95(9) of the LRA). Section 12(3) of the LRA entitles members of a representative trade union to vote at the employer's premises in any election or ballot contemplated in that trade union's constitution. Nothing prevents a trade union, contemplating strike action, but not enjoying section 12 organisational rights, from applying for a ballot to be conducted at the employer's premises.

SOURCE OF REFERENCE

- Guidelines for balloting for strikes or lockouts issued in terms of section 95(9) of the LRA. (Government Notice 1397, Government Gazette No. 42121)
- AMCU v Minister of Employment and Labour (Case No 78915/2019) ZAGPPHC215* (date of issue 6 April 2021), the High Court (Gauteng Region, Pretoria)