



21 November 2012

LABOUR UNREST: MEMO FOR FARMERS

1. Introduction and background

Unprotected strikes, protest action, arson and intimidation on farms and in towns in the Western Cape have been making the headlines over the past two weeks. A number of grievances are mooted as the reason for the protests. It is, therefore, not nearly a wage issue. The problem started in the De Doorns area and spread from there to some 16 municipal districts in the Western Cape. There are concerns that it may also spread to other provinces.

Agri SA is engaging at the highest level with government. A letter was sent to President Zuma and there have been engagements with the Minister of Agriculture, Forestry and Fisheries. Agri SA also participates in the investigations into the possible amendment to the sectoral determination and will engage with the Minister of Labour and ECC (Employment Conditions Commission) in line with the legal framework governing such reviews, starting on 22 November 2012, in Cape Town.

The minimum wage is determined by the Minister of Labour after a process of investigation and consultation by the ECC. The current minimum wage was determined in March 2012 and is supposed to be applicable for at least 12 months.

This memorandum is meant to set out the legal position regarding strikes, protest action, gatherings and the rights of landowners to protect their lives and property. More information on each of these subjects is attached to this memo.

2. Strikes

A strike is a refusal to work or slowing down of work by employees for the purpose of remedying a grievance or highlighting a dispute. The Labour Relations Act also provides for sympathy strikes, which is where there are no specific grievances in the workplace, but workers decide to strike in support of demands of fellow workers employed elsewhere. All employees have a constitutional right to strike, even if they do not belong to a trade union.

The Labour Relations Act however distinguishes between protected- and unprotected strikes

For a strike to be protected the dispute must first be referred to the CCMA and a certificate must have been issued that the CCMA was unable to resolve the matter. In addition, the

striking workers must give 48 hours advance notice to the employer of their intention to strike.

Workers, who participate in an unprotected strike, may be dismissed. In such cases employers need to issue a dismissal ultimatum before dismissing workers. Employers must be absolutely certain that the strike is unprotected before taking steps to dismiss workers. It is also advisable to try to hold disciplinary hearings before dismissing, although it is likely that workers will refuse to attend such hearings. Employers faced with unprotected strikes may also consider applying to court for an urgent interdict prohibiting the strike.

Even workers taking part in a protected strike may be dismissed if they participate in violent and criminal acts. Farmers need to try and gather evidence such as photographs and video footage of incidents of violence and damage to property.

3. Protest action and public gatherings

The Constitution protects the right of any person or group to assemble, demonstrate, picket and present petitions peacefully and unarmed. The Dangerous Weapons Act is of relevance here. It defines a dangerous weapon as any object which is likely to cause serious bodily injury if it were used to commit an assault.

Section 2 of the Act provides that: “(1) Any person who is in possession of any dangerous weapon, or of any object which so resembles a firearm that, under circumstances such as those under which such person is in possession thereof, it is likely to be mistaken for a real firearm, shall be guilty of an offence, unless he is able to prove that he at no time had any intention of using such weapon or object for any unlawful purpose, and shall on conviction be liable to a fine or to imprisonment for a period not exceeding two years. “ This Act is currently before Parliament, but the proposed amended wording of this section is similar to the present wording.

The Regulations of Public Gatherings Act of 1993 sets out the way by which this right may be exercised and the procedures to be complied with. The Act also applies to labour-related protests, including any gathering of more than 15 people in any public place or open space or a road.

The Act requires that notice be given to the relevant municipality 7 days before the intended gathering. In urgent cases this may be reduced to 48 hours. Such notice should indicate who the organisers are and should also state the intended time, place, duration and number of people expected to participate. The municipality must then consult with the Police and decide whether or not to give permission for the protest action to go ahead.

It is important to note that municipalities may only prevent gatherings to take place if they are presented with credible information on oath that the gathering poses a threat of serious disruption to traffic, injury to participants and others or extensive damage to property which the Police cannot contain or prevent.

The municipality may set conditions for a gathering which must be adhered to. Marshalls wearing clearly distinguishable clothing should be appointed and must ensure that the

gathering is peaceful. The Police also have a duty to ensure that the conditions of the notice are complied with and may use force to protect persons and property.

4. Protection of property and damage to property

The Constitutional Court held on 13 June 2012, in the case of South African Allied and Transport Workers' Union (SATAWU) and COSATU v Garvas, Naidoo and others and the City of Cape Town and the Freedom of Expression Institute, that section 11(2) of the Regulations of Gatherings Act, is indeed constitutionally valid. This section provides that if riot damage occurs as a result of a public gathering, the organisation on behalf of or under whose auspices it was held, will be liable for the damage. Consequently, SATAWU was held liable for damages amounting to R1.5 million to property following a gathering organised by it in the City of Cape Town. Proof of who is behind the strike will be required in order to claim damage, e.g. video-footage and photographs.

The other question is: how should property owners act to protect their property?

The safe approach is not to use force at all in order to protect property. Although there are older court decisions which indicate that the use of force may sometimes be warranted to protect property, the law is not clear in this regard. While the law remains unclear, the constitutional right to life is likely to be given precedence over the right to protect property. Farmers are therefore advised only to use force if absolutely and objectively necessary to protect a human life.

5. Way forward:

Agri SA met with the Department of Labour on 16 November 2012 to seek clarity on the process to be followed for the review of the current sectoral determination. It was agreed that such process would be in line with the legal framework of the Basic Conditions of Employment Act (BCEA).

The Department of Labour has published a notice of intention to cancel sectoral determination 13 for farm workers. This means that if it is found that the current sectoral determination has to be adjusted, it would be cancelled to do so. Interested parties were invited to comment on this notice of intent within 15 working days.

The Department of Labour has also published a notice of the Minister of Labour's intention to launch an investigation into minimum wages in the farm worker sector. In terms of the notice, interested parties have 15 days to make submissions on possible aspects that they believe the Employment Conditions Commission (ECC) should consider before recommending a possible amendment, if needed, to the Minister.

Criteria that need to be taken into consideration by the ECC that could be included in a submission are prescribed by the BCEA. These include:

- The ability of employers to carry on their business successfully.
- The operation of small, medium or micro-enterprises and new enterprises.
- The cost of living.
- The alleviation of poverty.
- Conditions of employment.
- Wage differentials and inequality.
- The likely impact of any proposed condition of employment on current employment or the creation of employment.
- The possible impact of any proposed conditions of employment on the health, safety or welfare of employees.
- Any other relevant information made available to the Commission.

The Department of Labour will also conduct public hearings in the various provinces to obtain input from the relevant role players in this sector. There will be separate hearings for farm workers and for employers. Farmers are requested to participate in these events and also to release their workers to participate at the hearings. The first public hearings will be convened in Worcester, Western Cape on Friday 23 November 2012. Details of other public hearings are **attached**.

As a parallel processes, a national committee, in which Agri SA participate, will engage with other relevant role players on the review of the sectoral determination.

6. Practical advice:

- Farmer associations should:
 - Be proactive and ensure good working relations are established with the South African Police Service (SAPS), local municipalities and relevant stakeholders in the community. Where good relationships exist, ensure that the municipal manager and the police station commander are informed about the provisions of the Regulation of Gatherings Act and the Constitutional Court judgement as in the SADTAWU case.
 - Ensure that a communication network is established.
 - Achieve a united position amongst producers/farmers, for example endorse and adhere to the principle of “no work, no pay”, that wages must be negotiated on an enterprise to enterprise level, and that those responsible for illegal or criminal behaviour should be prosecuted and held accountable before the law.
 - Not enter into any form of collective bargaining. Farmers can negotiate individually with their own workforce, but not on behalf of other farmers or for a region.
 - Refer all requests for negotiation on a general new minimum wage to their provincial structures, whether emanating from the Department of Labour or a trade union or any other grouping. Such requests must be in writing including the full detail of the party requesting such negotiation.
 - Any potential dangerous situation arise, it must immediately be reported to their provincial structures.

- Farmers should:
 - Remain calm and avoid confrontation.
 - Get advice from your provincial union, labour consultant or other reliable sources if in any doubt as to the correct action to take.
 - Fully comply with labour- and immigration legislation and the sectoral determination.
 - Engage with and attempt to get any grievances or demands from workers in writing on a pro-active basis.
 - Keep your workers informed. Get their cell phone numbers and forward relevant information to them. Request feedback/information from them – they may be part of the “early warning” system in your area should parties from outside start to organise chaos in your area.
 - Be circumspect when employing casual labour at present.
 - Gather evidence in the event of intimidation and damage to property occurring.
 - Do not use force to protect property. Take all possible steps to avoid and mitigate damage which may occur as a result of strike action and violent protest, such as additional fencing and barriers to prevent public access to property.
 - Access to farms should still be granted in terms of the protocol for access to farms and in accordance with legislation.
 - Consider making use of reputable, duly registered private security firms to protect your property. Keep in mind though that such firms act as your agent and that you may be liable should they act outside of the law.

7. Additional documentation:

Members should take note that the following additional documents are available on request:

- Protocol for access to farms.
- Guideline on unlawful occupation of land.
- Information document on how to deal with strikes.
- Information document on regulation of public gatherings.