

In the Nov/Dec issue of the *Bulletin* we looked at the obligations on bargaining parties during the course of industrial action. Here we discuss the balloting requirements of the LRA and how the SEIFSA judgment could affect future strike ballots.

striking out **irregularities** *in the* **ballot**

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The legal battle last year between the Steel and Engineering Industries Federation of South Africa (SEIFSA) and the National Union of Metalworkers of South Africa (NUMSA) has been widely reported.

SEIFSA challenged the lawfulness of a national strike called by NUMSA after the breakdown of negotiations in the metal industry. In the fourth week of the strike, the Supreme Court declared the strike unlawful on account of irregularities in the ballot.

The decision raises serious questions about how appropriate the balloting requirements contained in the Labour Relations Act (LRA) are. The unions will have to

motivate for these to be reformed. However, until that happens they will have to live with the SEIFSA judgment. This note considers how best unions can comply with the judgment, which deals with:

- who can vote in a ballot;
- what information the union must have about a ballot;
- how voting must be arranged so members can vote in secret and privately.

Who can vote?

Who can vote in a strike ballot? Only the members of the union in good standing employed in the area and "undertaking, industry, trade or occupation" in which the strike is to take place. In order to call a strike, a

majority of the members in good standing must vote in favour of the strike. It is not enough that a majority of those who vote support a strike, it must be a majority of the total membership concerned.

Which members are 'in good standing'? The LRA defines them as union members who are less than three months in arrears with their union dues. All members on stop-orders will be in good standing.

The LRA also authorises unions to exempt members from the payment of subscription fees. This can be done where the employer refuses to grant stop-orders and where hand-collections

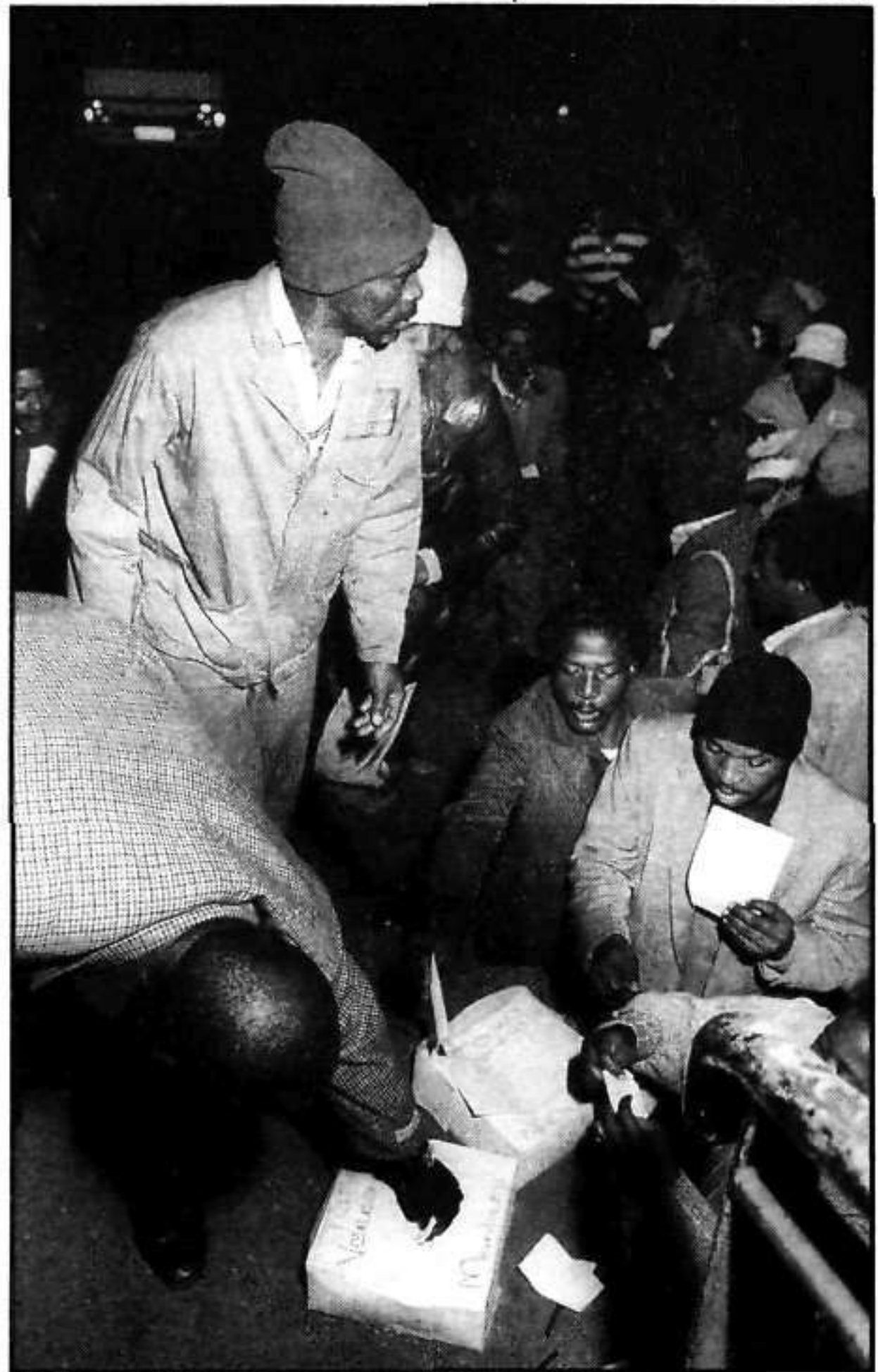
are not practical. These employees would also be in good standing. A union is not required to ballot non-members (or members who are not in good standing). If the union wishes for some reason to ballot non-members, an entirely separate ballot should be held.

Which members of the union are party to the dispute? Generally this is an easy issue. It is clear in what area, industry or occupation the dispute is called. If the National Union of Miners (NUM) calls a strike in the coal mining industry, it must not ballot its members in the gold mines.

There may be more difficult cases. Say the union represents A and B band employees in negotiations at a particular factory. The union also has a few C band employees as members but the negotiations do not determine their wages. In this case, a strike by the C band employees would be considered a sympathy strike. A separate dispute would have to be referred to either the conciliation board or industrial council. (The Supreme Court has recently held in the case of *NUMSA v Goodyear* that there must be a separate referral of the dispute in all sympathy strikes).

One member, one vote

One effect of the SEIFSA judgment is that many employers will challenge the correctness of strike ballots. If



Strike balloting: new problems for unions

Photo: Cedric Nunn

this happens, the union must show:

- the total number of members in good standing qualified to vote;
- the number of those who did vote;
- the number who voted in favour of, and who voted against, strike action.

How does a union go about proving this? It will need a

list of all its paid-up members in every plant involved in the dispute. The total number of employees on these lists is the total number of members entitled to vote.

When an employee comes to vote, her/his name must be clearly marked off on the list and s/he must be given one ballot form. This must be done to prevent members

from voting more than once. Members should present a satisfactory form of identification (preferably with a photograph).

The court said the union must be able to show that no member voted more than once. Thus piles of forms must not be handed out to a group of employees because then it will be impossible to *tell how often they voted and how many of them voted.*

There must be proper control of unused ballots. The stewards, or whoever conducts the ballot, must remove unused ballot forms. The union must be able to say how many ballot forms were handed out. This figure should be the same as the total number of votes counted. Some unions number each ballot and give each factory enough forms for paid-up members only. This system still requires a list to ensure each member can vote once only.

Finally, the ballot box must be properly sealed. The process of counting the votes must also be strictly supervised so management cannot claim the counting was used as an opportunity to add extra votes.

Secret, private voting

Each member must be able to vote privately and in secret.

The NUMSA ballot may have infringed this requirement at some factories. First, some workers may have marked their ballots while they were part of a group

crowded around a table, so the vote would not have been secret. Second, at some factories "YES" and "NO" ballot boxes may have been provided, enabling others to see how individual workers voted. (Using "YES" and "NO" boxes would not violate the LRA if the worker could put his or her ballot in the box without anybody else observing, but it is not a desirable way to conduct a ballot.) Third, shopstewards may have placed the ballots in the ballot boxes on behalf of voters. This could provide an opportunity to look at the ballot, so the vote would not have been secret.

Implications of the judgment

The approach of the court is that the employer need not prove the ballot actually broke the law to get an order against the strike. All the employer need show is that the balloting procedure could have resulted in:

- voting by non-members;
- voting more than once by a member;
- voting not being private and secret.

If the company alleges this, the union will have to prove it did not happen.

NUMSA was unable to prove this during the urgent interdict brought by SEIFSA and therefore the judge held that the strike was illegal and ordered the union to end it.

Most readers are probably now wondering whether it is possible for a union to

conduct a ballot that will meet this test, particularly in a national strike. All that can be said in response is that every ballot must be carefully planned to ensure it complies with LRA requirements.

This note has concentrated on how the SEIFSA judgment has changed the test for ballots. There are many other requirements. The most important concerns the wording of the ballot form. The dispute on which workers vote must be the same dispute that was referred to the industrial council or conciliation board. In addition, all ballot forms must be kept for at least three years.

Should unions involve management and independent scrutineers in the balloting process? The lesson of the SEIFSA judgment is that it is advisable, where possible, to involve management. This is to ensure the union has adequate time and facilities to conduct the ballot. Presently, employers are able to sit back, watch the ballot and then raise problems at whim. This is usually done by way of urgent interdict as the strike is about to start.

It is important for unions to try to force management to raise its objections at an earlier stage so that the union can address, and if necessary correct, these problems. The use of an independent scrutineer to supervise both the voting and counting may also reduce the prospect of management challenging the outcome. ☆