



**A TRADE UNION'S LIABILITY FOR DAMAGES CAUSED DURING A STRIKE: A
CRITICAL EVALUATION OF THE LABOUR RELATIONS ACT AND RECENT
JUDGMENTS**

BY

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DECLARATION

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TABLE OF CASES AND STATUTES

Statutes

The Constitution of the Republic of South Africa Act 108 of 1996.

The Labour Relations Act 66 of 1995.

The Regulation of Gatherings Act 205 of 1993.

Cases

Algoa Bus Company v SATAWU & others [2010] 2 BLLR 149 (LC).

FAWU v Ngcobo [2013] 7 BLLR 648 (SCA).

Garvis & Others v SATAWU & others (2011) 32 ILJ 2426 (SCA).

FAWU v Ngcobo [2013] 12 BLLR 1171 (CC).

Heatons Transport (St Helens) Ltd v Transport & General Workers Union [1972] 3 All ER 101 (HL).

In2FOOD (Pty) Ltd v FAWU, Madisha, RS and 470 others LC Case Number: J350/13, 1March 2013.

Jumbo Products v NUMSA 1996 ILJ 859 (W) 878.

Kroukam v SA Airlink (Pty) Ltd (2005) 26 ILJ 2153 (LAC).

Lillicrap Wassenaar & Partners v Pilkington Brothers (SA) (Pty) Ltd 1985 (1) SA 475 (A).

Lomati Mill Barberton v Paper Printing Wood and Allied Workers Union (1997) ILJ 178 (LC).

Mangaung Local Municipality v SAMWU [2003]3 BLR 268 (LC).

Manyele and others v Maizecor (Pty) Ltd and another (2002) 23 ILJ 1578 (LC).

Mhlongo and others v Food and Allied Workers Union and another (2007) 28 ILJ 397(LC).

Mokgata v FAWU (2007) 28 ILJ 2696 (T).

Mondi Ltd (Mondi Kraft Division) v Chemical Energy Paper Printing Wood & Allied Workers Union & Others (2005) ILJ 1458 (LC).

National Union of Metalworkers of SA v Jumbo Products CC (1997) 18 ILJ 107 (W).

National Union of Mineworkers v Black Mountain Mineral Development Co (Pty) Ltd (1997) 18 ILJ 439 (SCA).

NSCAWU & others v Coin Security Group t/a Coin Security [1997] 1 BLLR 85 (IC).

NUFAWU of SA v New Era Products (Pty) Ltd (1999) ILJ 869 (IC).

Post Office Ltd v TAS Appointment and Management Services CC & Others [2012] 6 BLLR 621 (LC).

Ram Transport (Pty) Ltd v SA Transport & Allied Workers Union & others (2011) 32 ILJ 1722 (LC).

Rustenburg Platinum Mines v Mouthpiece Workers Union [2002]1 BLLR 84 (LC).

SACCAWU v OK Bazaar 1995 (16) ILJ 1031 (A).

SAMWU v Jada (2003) 6 SA 294 (W).

SA Post Office Ltd v CWU [2010] 1 BLLR 84 (LC).

SATAWU v Garvas (2012) 33 ILJ 1593 (CC).

SATAWU and others v Moloto NO and Another (2012) 33 ILJ 2549 (CC).

SA Transport and Allied Workers Union v Maxi Strategic (Pty) Ltd (2009) ILJ 1358 (LC).

Security Services Employers' Organisation and Others v SA Transport and Allied Workers Union and Others (2007) 28 ILJ 1134 (LC).

Shoprite Checkers (Pty) Ltd v CCMA (2006) 27 ILJ 2681 (LC).

Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of South African Worker's Union and Others (2012) 33 ILJ 998 (LC).

VNR Steel (Pty) Ltd v NUMSA (1995) ILJ 1483 (LAC).

TABLE OF BOOKS AND ARTICLES

Books

Basson AC et al Essential Labour Law 5th Ed Labour Law Publications (2009).

Brand D *et al* South African Constitutional Law in Context Oxford University Press (2014).

Brassey MSM *et al*, Martin Brassey's Commentary on the Labour Relations Act Juta (1999).

Cohan T, Rycroft A & Whitcher B Trade Unions and the Law in South Africa Lexis Nexis Durban (2009).

Grogan J Collective Labour Law 2nd ed Juta (2011).

Grogan J Workplace Law 9th Ed Juta (2009). Thomson & Benjamin South African Labour Law loose-leaf (2001).

Journals

Gericke SB 'Revisiting the liability of trade unions and/or their members during strikes: Lessons to be learnt from case law' 2012 (75) THRHR 566.

Grogan J 'Riotous strikes. Unions liable to victims' (2012) 28:5 Employment Law Journal 11.

Landman AA 'No Place to Hide – 'A Trade Union's Liability for Riot Damage: A Note on Garvis & Others v SA Transport & Allied Workers Union (Minister for Safety & Security, Third Party)' (2010) 31 ILJ (WCC) 2521 (2011)' 32 *ILJ* 834.

Le Roux P.A.K 'Claims for compensation arising from strikes and lockouts' 2013 (23) 2 Contemporary Labour Law 11.

Le Roux PAK 'The rights and obligations of trade unions: Recent decisions clarify some limits to both' (2012) 22:4 Contemporary Labour Law 31.

Malcom W 'Now you see it, Now you don't- SATAWU v Garvas and others (2012) 33 *ILJ*

Manamela E & Budeli M 'Employee's right to strike and violence in South Africa' (2013) XLVI CILSA 308.

Rycroft A 'What can be done about strike- related violence?' (2014) 30:2 International Journal of Comparative Labour Law and Industrial Relations 199.

Smith N & Fourie E 'Equity Aviation v SATAWU' [2012] De Jure 27.

Vettori S 'The Labour Relations Act and the Protection of Trade Unions' (2005) 17 SA Merc LJ 304.

CHAPTER 1

1.1 Introduction

The South African labour law has significantly evolved from the past, since the early 1990s when the new political dispensation was introduced. At the heart of this change is the Constitution that came into force during 1996¹(hereafter the Constitution) and gave recognition to fundamental rights of employees, namely the right to unite in an organised manner, the right to engage in collective bargaining about conditions of employment; and the right to assemble, to demonstrate, to picket and to present petitions, peacefully and unarmed.² This evolvement of the law is further evidenced and entrenched by the enactment of the new Labour Relations Act³ (hereafter LRA), a well-intentioned piece of legislation that takes the above fundamental rights into account, seeks to protect and give them effect. The new LRA brought clarity by casting away the uncertainty created by the old LRA of 1956⁴ regarding collective bargaining.⁵

The new LRA reflects, and to some extent elaborates on, the most important constitutional rights relating to collective labour law.⁶ The above fundamental rights have given the workers the right to strike collectively if there is a deadlock between them and the employer. However, it is important to note that although the above fundamental rights are often widely formulated, they are not unlimited and may be limited in terms of public interest and also by the conflicting rights of others. Although the right to strike is fundamental and is recognised by the Constitution, this right is not absolute and can be limited in terms of section 36 of the constitution,⁷ thus there is a responsibility on the strikers and the organisers to exercise that right in conformity with labour law.

¹ The Constitution of the Republic of South Africa, Act 108 of 1996.

² A Basson *et al.* *Essential Labour Law* 5th Ed (2009) 303. See also sections 23 and 17 of the Constitution and Section 64 of the LRA.

³ The Labour Relations Act 66 of 1995.

⁴ The Labour Relation Act 28 of 1956.

⁵ There is also more clarity given that section 3 states that it must be interpreted in compliance with the constitutional provisions.

⁶ Sections 17 and 23 of the Constitution (note 1 above).

⁷ Section 36 of the Constitution (note 1 above).

1.2 Background

The Constitution provides for the right of every person to freedom of association, the right of every trade union to engage in collective bargaining, and the right of every trade union to organise.⁸ This fundamental principle is also found in section 4(1) of the Labour Relations Act.⁹ The right of workers to strike is a fundamental right in international law but also in the South African law.¹⁰ The Constitutional Court acknowledged the importance of this right for workers and unions as well as for successful collective bargaining.¹¹ Negotiations in collective bargaining often reach deadlocks that lead employees to resort to collective action to counterbalance the bargaining power of employers.¹² The right for workers to strike is a critical bargaining weapon used by employees in the exercise of collective power against employers who enjoy greater social and economic power.¹³ This right is viewed as an extension of the collective bargaining process. In South Africa the right to engage in collective bargaining and the right to strike are guaranteed by the Constitution¹⁴ and regulated by the Labour Relations Act (LRA).¹⁵

Trade unions have more powers than before and the right to strike continues to be used as a bargaining weapon by trade unions that often embark on a strike action to further their aims.¹⁶ However the damage caused by strikers in industrial actions, whether protected or unprotected, not only leads to financial harm to the employer but also to the non-striking employees, neighbouring businesses, innocent third parties and the striking employees themselves may also suffer the consequences of such damage. The question of liability upon

⁸ Section 23 of the constitution (note 1 above).

⁹ Section 4(1) of the LRA (note 3 above)

¹⁰ N Smith and E Fourie '*Equity Aviation v SATAWU (478/09) [2011] ZASCA 232*' (2012) 27 *De Jure* 426,430. In terms of the Right to Organise and Collective Bargaining Article 4, Convention 98 of 1949 provides that, 'measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilization of machinery for voluntary negotiation between employers or employers' organizations and workers' organizations, with a view to the regulation of terms and conditions of employment by means of collective agreements.' Potobsky opines that, even though article 4 states nothing about the right to strike, the International Labour Organisation has used the above right to lay down minimum standards relating to an employee's right to strike. G Potobsky *International Labour Law* 2nd Ed (1995) 98.

¹¹ SB Gericke 'Revisiting the liability of trade unions and or their members during strikes: Lessons to be learnt from case law' (2012) 75 *THRHR* 566, 580.

¹² *Ibid* 566.

¹³ *SATAWU v Moloto NO and Another* (2012) 33 *ILJ* 2549 (CC) 17, 29.

¹⁴ Section 23 of the Constitution (note 1 above).

¹⁵ Chapters II, III and IV of the Labour Relations Act 66 of 1995 (note 3 above).

¹⁶ AA Landman 'No Place to Hide – a Trade Union's Liability for Riot Damage: A Note on *Garvis & Others v SA Transport & Allied Workers Union (Minister for Safety & Security, Third Party)* (2010) 31 *ILJ* (WCC) 2521 (2011)' 32 *ILJ* 834-846.

trade unions has been scrutinised by courts over the years.¹⁷ Whilst the right of workers to strike is guaranteed by the Constitution and also found in the LRA, courts cannot allow trade unions and strikers to escape liability from unlawful conduct during strike actions. The court in *Garvis & Others v SATAWU & others*¹⁸ made a very important statement, where the court said, ‘in the past the majority of the population was subjected to the tyranny of the state. We cannot now be subjected to the tyranny of the mob.’¹⁹ This statement was made with reference to the damages that are often caused by the striking workers in the furtherance of their striking goals.

Before the introduction of the new LRA there was uncertainty in regards to the liability of trade unions for damages caused by workers during a strike action. In terms of the common law principles, an employer who suffers a loss as a result of a strike may have a delictual claim against the union or the employees concerned in order to recover any loss suffered.²⁰ However there is a difficulty in holding the union liable especially for actions committed by its members.²¹ In the case of *Mondi Ltd v Chemical Energy Paper Printing Wood & Allied Workers Union*,²² the court held that liability for damages during a protected strike cannot readily be attributed on the trade union but one has to prove the vicarious liability of the trade union. The Court had this to say:

The Labour Court first had to establish whether a relationship existed between the actual culprit and the trade union that Mondi alleged to be the liable party, to see if it falls within the class that the law regards as imposing liability upon an innocent party. The court excluded an employment relationship between a union and the persons who committed the delict. The only other basis for liability could be that of agency and Mondi failed to discharge the onus to prove

¹⁷ See the cases of *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of South African Worker's Union and Others* (2012) 33 ILJ 998 (LC); *SAMWU v Jada* 2003 (6) SA 294 (W); In *Mangaung Local Municipality v SAMWU* [2000] JOL 10582 (LC) the applicant claimed the amount of R272 541, as a result of loss suffered in the strike. The court awarded the applicant compensation in the sum of R25000.00. Also In *Rustenburg Platinum Mines Ltd v Mouthpiece Workers Union* [2002] 1 BLLR 84 (LC), the applicant claimed that it suffered losses of at least fifteen million rands as a result of a strike. However the applicant subsequently reduced its claim to R100 000.00 and the court granted it.

¹⁸ *Garvis and Others v South African Transport and Allied Workers Union* (2011) 32 ILJ 2426 (SCA).

¹⁹ *Ibid* 50.

²⁰ P. A. K Le Roux ‘Claims for compensation arising from strikes and lockouts’ (2013) 23 (2) *Contemporary Labour Law* 11.

²¹ See the case of *Mondi Ltd (Mondi Kraft Division) v Chemical Energy Paper Printing Wood & Allied Workers Union & Others* (2005) 26 ILJ 1458 (LC).

²² *Ibid* 20.

its allegations that the union as principal, authorised, instigated or ratified the commission of the delict.²³

The above case confirms the principles of vicarious liability in that, a principal cannot be held vicariously liable for the unauthorised acts of his agent even if the act was ancillary to carrying out the mandate.²⁴ Thus, the labour court concurred with the judgment in *Heatons Transport (St Helens) Ltd v Transport & General Workers Union*²⁵ which confirmed that the requirements for a union's liability as a principal, rests on proof that an agent acted within his authority on behalf of the principal.²⁶

The LRA in terms of section 68 also provides for claims for compensation where the strike is unprotected.²⁷ This section provides the labour court with exclusive jurisdiction to order compensation that is 'just and equitable' for any loss suffered as a result of an unprotected strike action. However the application of this section by courts has not been without some uncertainty.²⁸ The Regulation of Gatherings Act (hereafter RGA), in terms of section 11, also imposes liability on the organisers of a gathering were the riot has resulted in damage. The recent application of this section by the Constitutional Court in the *SATAWU and others v Garvas and others*²⁹ case has resulted in major implications on union liability.

²³ Ibid 37.

²⁴ Ibid.

²⁵ *Heatons Transport (St Helens) Ltd v Transport & General Workers Union* [1972] 3 All ER 101 (HL).

²⁶ *Mondi Ltd (Mondi Kraft Division)* (note 21 above).

²⁷ See section 68 (1) (b) (note 3 above).

²⁸ *Le Roux* (note 20 above) 12.

²⁹ *SATAWU and others v Garvas and others* 2012 (8) BCLR 840 (CC). In this case the Constitutional Court handed down judgment about the constitutionality of a law that makes organisers of gatherings liable for damages caused by the gathering unless they took all reasonable steps to avoid the damage and they did not reasonably foresee that damage. The facts of this case are that the South African Transport and Allied Workers Union (SATAWU) had organised a gathering of thousands of people through the City of Cape Town to register employment-related concerns. During the gathering, private property was damaged. In response to a claim for damages made by people who claimed that they suffered loss as a result of the gathering, SATAWU challenged the constitutional validity of the law that imposed liability on organisers. SATAWU contended that the defence allowed by the law is non-existent and unjustifiably limits the right to freedom of assembly in the Constitution. In a majority judgment, the court held that the law aims to afford victims effective recourse where a gathering becomes destructive and results in injury, loss of property or loss of life. The majority held that the defence provided for by the law is viable and that the limitation on the right to freedom of assembly in section 17 of the Constitution is reasonable and justifiable, because it serves an important purpose and reasonably balances the conflicting rights of organizers, potential participants and often vulnerable and helpless victims of a gathering or demonstration which degenerates into violence. The court emphasised that the reasonable steps taken on the one hand and reasonable foreseeability on the other hand were inter-related. Organisers are obliged at all times to take reasonable steps to prevent all reasonably foreseeable conduct that causes damage and the reasonable steps must be of the kind that render the conduct causing damage unforeseeable. For these reasons, the majority dismissed the appeal. In a concurring judgment, Jafta J reasoned that the appeal should be dismissed, on the basis that SATAWU had failed to prove that the law limits the right to freedom of assembly, or that the defence that it creates is irrational.

1.3 Structure

The study will be divided into six chapters. Chapter one will provide an overview of the study. Chapter two will discuss the remedies that parties may have against trade unions who have acted unlawfully. Chapter three will discuss the trade union's liability to the employer. Chapter four will discuss the trade union's liability to its members. Chapter five will consider the liability of trade unions to third parties in terms of the Regulation of Gatherings Act 205 of 1993. And finally, chapter six will comprise a concluding argument drawn from the preceding discussion.

1.4 The research question(s)

This dissertation will seek to answer the questions that arise in the investigation of the trade unions liability for damages caused during a strike action. The main research question is:

Can trade unions be held liable for damages or losses caused during strike action? If so, to what extent?

In the process of answering the main research question the following sub-questions will also be answered:

- a. What remedies are at the disposal of the employer, trade union members and innocent third parties who suffer some damages during a strike action?
- b. Can the trade union be liable for damages that arise from a protected strike action?
- c. Do claims for compensation and delictual claims amount to the same thing?
- d. Members of trade unions are sometimes abandoned by their unions and left without representation. Can a trade union be held liable by its members for breach of duty of care and failure to represent their members during such strike action?
- e. On what basis can a trade union be held liable in terms of the Regulation of Gatherings Act 205 of 1993?

1.5 Research Methodology

The study will take the form of a qualitative approach with reference to the Constitution and various pieces of legislation in evaluating the underlying issues regarding the liability of trade unions. This will be done by including a brief overview of the legal framework regarding protected and unprotected strikes, followed by the main discussion, namely the trade union's liability to the employer, innocent third parties, and the strikers themselves for damages caused during strike actions. The research in this study will comprise a review of the existing literature on this topic, legislation on the subject, and various court judgments.

1.6 Rationale for the study

Employees resort to strike action to inflict economic harm on their employers so that the latter will accede to their demands.³⁰ However the increase in the abuse of such power by trade union members has become rather disturbing not only to the employer but also to innocent third parties. This was the situation in the case of *SATAWU and others v Garvas and others*³¹ where there was damage of property belonging to both private persons and the local municipality during the course of the strike. To give effect to the right to strike, the courts are often reluctant to interfere with the process of industrial action.³² However, it has been held that courts should interfere especially when the union fails to show that it had any legitimate interest of its members in mind.³³ Our courts have, from time to time, awarded damages to employers and employees but the decision to take action against trade unions is not without practical problems.³⁴

The main objective of this study is to focus on the extent of liability of trade unions for damages caused by striking workers during a strike action. This is done to provide a clear understanding of the law on trade union liability. Thus, this study will examine the issue of union liability with reference to the provisions of the LRA and recent court decisions. Although trade unions and strikers are protected against liability from the consequences of

³⁰ Basson *et al* (note 2 above) 307.

³¹ *SATAWU and others v Garvas and others* (note 29 above).

³² Gericke (note 11 above) 570. See also *Jumbo Products v NUMSA* 1996 ILJ 859 (W) 878.

³³ *Jumbo Products v NUMSA* (note 32 above) 878.

³⁴ A Rycroft 'What Can Be Done about Strike-Related Violence?' (2014) 30 *IJCLLIR (International Journal of Comparative Labour Law and Industrial Relations)* (2)199, 7.

the strike misconduct in instances where they have adhered to the requirements required by law, the question that arises whether this protection can be lost or forfeited in certain circumstances.³⁵

1.7 Statement of purpose

Trade unions enjoy many rights under the LRA, including the rights to determine its own constitution and to engage in collective bargaining.³⁶ The LRA provides several measures for the protection and recognition of trade unions, however trade unions may not escape liability for damages arising from unlawful conduct during protected or unprotected strikes. The conduct of trade union members during strike action involves the duty to refrain from any unlawful conduct such as serious misconduct and various offences which are committed during strike action. Failure to adhere to these obligations would result in the union being liable for such unlawful conduct which is dealt with by courts in terms of the law of delict and/or prosecuted by the state, in terms of criminal law.³⁷ It is evident with the amount of rights and protection that trade unions enjoy, that they possess various degrees of power. The study will consider the extent of the trade union's liability for loss where the strike goes beyond the union's collective bargaining process and its liability for damages from unlawful acts. Furthermore, the purpose of the study is to evaluate the trade unions liability for its duty of care in circumstances where it has failed its members, as well as its liability under the Regulation of Gatherings Act.³⁸

1.8 Literature Review

The right to strike is made available to a trade union when the employer refuses to bargain collectively with the union or refuses to recognise the union, provided that the procedural requirements of a strike action were followed and the strike is in compliance with the Act in terms of section 67 of the Labour Relations Act.³⁹ In *VNR Steel (Pty) Ltd v NUMSA*,⁴⁰ it

³⁵ Ibid.

³⁶ Sections 213, 8(a)-(e) of the LRA (note 3 above).

³⁷ Gericke (note 11 above) 574-575.

³⁸ Regulation of Gatherings Act 205 of 1993.

³⁹ S Vettori 'The Labour Relations Act and the Protection of Trade Unions' (2005) 17 *SA Merc LJ* 304.

⁴⁰ *VNR Steel (Pty) Ltd v NUMSA* 1995 *ILJ* 1483 (LAC).

was stated that '[b]y withholding their labour, the employees hope to bring production to a halt, causing him (the employer) to lose business and to sustain overhead expenses without the prospect of income, in the expectation, that should the losses be sufficiently substantial, the employer will accede to their demands.'

The trade unions role is to serve the interests of their members in collective bargaining and collective actions and to regulate relations between employees and employers.⁴¹ Section 5 of the LRA grants protection to employees against prejudice and discrimination for exercising rights conferred by the LRA, including trade union membership or activity. These rights are recognised as a necessary part of collective bargaining. The dismissal of employees primarily for performing their mandate as trade union representatives is a direct violation of the constitutional duty of fair labour practices.⁴² The LRA clearly states that an employee does not commit a delict or a breach of contract by participation in the strike or by taking part in any conduct in contemplation or furtherance of, a protected strike.⁴³

Another right that a trade union enjoys is the right to determine its own constitution and rules, and to plan and organise its administration and lawful activities, including strike action.⁴⁴ Section 23(5) of the Constitution gives every trade union and every employer and employer's organisation the right to engage in collective bargaining.⁴⁵ Section 67 of the LRA prohibits any claims against the union or the employees if the strike complies with the provisions of the LRA, and is protected. It is therefore clear that an employer may not dismiss an employee who lawfully has exercised his or her right to participate in a protected strike or any lawful conduct in furtherance of a protected strike.⁴⁶ However courts have faced many issues regarding unlawful conduct which take place during strike actions. The damage caused as a result of misconduct does not only affect employers, but members of trade unions and innocent third parties are also affected. The court in the case of *Premier Foods Ltd t/a Ribbon Salt River*⁴⁷ expressed its views on the issue as follows:

It is certainly not acceptable to force an employer through violent and criminal conduct to accede to their demands. This type of vigilante conduct not only seriously undermines the

⁴¹ Gericke (note 11 above) 569-570.

⁴² T Cohen *et al* 'Trade Unions and the Law in South Africa (2009) 4.

⁴³ Section 67 (2) (a) (b) of the LRA (note 3 above).

⁴⁴ See section 23 of the Constitution (note 1 above).

⁴⁵ *Ibid*.

⁴⁶ Section 67(4) of the LRA (note 3 above), See also Gericke (note 11 above) 571.

⁴⁷ *FAWU obo Kapesi and Others v Premier Foods Ltd t/a Ribbon Salt River* (2010) 31 ILJ 1654 (LC) 4, 6.

fundamental values of our Constitution, but only serves to seriously and irreparably undermine future relations between strikers and their employer. Such conduct further completely negates the rights of non-strikers to continue working, to dignity, to safety and security and privacy and peace of mind.⁴⁸

The right to strike is not without consequences in situations where unlawful acts are committed. Common law principles provide that an employer may have a delictual claim against a trade union or the employees for damages caused during a strike action.⁴⁹ Furthermore a strike may lose its protection in instances where unlawful conduct takes place. This was the case in *Tsogo Sun Casinos (Pty) Ltd t/a Monte casino v Future of South African Worker's Union and Others*.⁵⁰ The strike had gone beyond control, resulting in violence and damage to property. The employer obtained an urgent interdict from the Labour Court. An order for costs was granted against the union and the strikers. The court held the following decision:

A court will always intervene to protect both the right to strike, and the right to peaceful picketing. This is an integral part of the court's mandate, conferred by the Constitution and the LRA. But the exercise of the right to strike is sullied and ultimately eclipsed when those who purport to exercise it engage in acts of gratuitous violence in order to achieve their ends. When the tyranny of the mob displaces the peaceful exercise of economic pressure as the means to the end of the resolution of a labour dispute, one must question whether a strike continues to serve its purpose and thus whether it continues to enjoy a protected status.⁵¹

In *Shoprite Checkers (Pty) Ltd v CCMA*⁵² the court held that, if the picket exceeds the bounds of peaceful persuasion or incitement to support the strike, to become coercive and disruptive of the business of third parties, the picket ceases to be reasonable and lawful. There is no provision in the Labour Relation Act that expressly provides that a strike will lose its protection if misconduct takes place, however this is implicit in the powers of the Labour Court.⁵³ Therefore, this would be a legitimate reason for an employer to dismiss employees in such circumstances. As to the conduct of trade unions, no civil legal proceedings may be instituted against any official of a registered trade union, on the ground of their participation

⁴⁸ Ibid 6.

⁴⁹ Le Roux (note 20 above) 11.

⁵⁰ *Tsogo Sun Casinos (Pty) Ltd t/a Monte casino v Future of South African Worker's Union and Others* (2012) 33 ILJ 998 (LC).

⁵¹ Ibid 13.

⁵² *Shoprite Checkers (Pty) Ltd v CCMA* (2006) 27 ILJ 2681 (LC) 30.

⁵³ Rycroft (note 34 above) 9.

in a protected strike in accordance with section 77 of the LRA, or in any lawful conduct which serves the purpose of advancing a protected strike action.⁵⁴

Section 67 (8) of the Labour Relation Act provides that the employer or third party has the right to institute civil action against any person involved in the strike if any act in furtherance of a strike constitutes a criminal offence.⁵⁵ Therefore an employer whose property is damaged as a result of the intentional actions of employees during a protected strike could recover this loss on the grounds that such action constitutes the criminal offence of malicious damage to property.⁵⁶ However a union cannot be prosecuted for criminal actions of its members.⁵⁷ The use of violence to achieve industrial aims is not recognised by our law. Therefore a person cannot be granted immunity in relation to their criminal conduct. However delictual and contractual claims are permitted where such conduct results in harm and damage.⁵⁸ The court in *Lomati Mill Barberton v Paper Printing Wood and Allied Workers Union*⁵⁹ held that the labour court has exclusive jurisdiction over every kind of unlawful act committed during a protected strike, constituting both criminal offences and delicts.

Section 68 of the LRA also provides for a claim for compensation when the strike is unprotected. The court will have exclusive jurisdiction to order the payment of compensation for any loss attributable to the strike in this regard.⁶⁰ However this section has not been without uncertainty as it confuses the distinction between claims for compensation and those for damages. Questions often arise as to whether claims for compensation and claims for damages are the same.⁶¹ Furthermore, if such claims are in fact different, does the LRA still provide for claims of damages?⁶² Some academics seem to argue for the view that these are two separate causes of actions.⁶³

To succeed in claim for damages against a trade union, arising from unlawful conduct during a protected or unprotected strike, the claimant must prove on a balance of probabilities that

⁵⁴ Gericke (note 11 above) 572, See also section 67 (6) of the LRA (note 3 above).

⁵⁵ Ibid, see also section 67(8) of the LRA (note 3 above).

⁵⁶ Le Roux (note 20 above) 12.

⁵⁷ Gericke (note 11 above) 572.

⁵⁸ Landman (note 16 above) 844-845.

⁵⁹ *Lomati Mill Barberton v Paper Printing Wood and Allied Workers Union* 1997 ILJ 178 (LC) 184.

⁶⁰ Section 68(1) (b) of the LRA (note 3 above).

⁶¹ Le Roux (note 20 above) 13.

⁶² Ibid.

⁶³ See Brassey MSM *Martin Brassey's Commentary on the Labour Relations Act* Vol 3 A4:51; Thomson and Benjamin, in *South African Labour Law* AAI-347; Grogan *Collective Labour Law* 208.

the union or its members involved in unlawful conduct are liable for delictual damages.⁶⁴ The unions liability for damage caused during an industrial action will therefore be determined by its wrongful commission or omission in its involvement during the strike action. The decision to sue trade unions has not been without practical problems. One of the considerations to take into account when suing a trade union is the relationship it has with the employees.⁶⁵ There has to be an on-going relationship between the union and its members.⁶⁶ Furthermore, claims against trade unions may sometimes be meaningless as they often do not have the money to compensate such victims for their losses.⁶⁷ However the decision to sue trade unions for damages has proven to be a success in some court decisions.⁶⁸

⁶⁴ Gericke (note 11 above) 572.

⁶⁵ Rycroft (note 34 above) 7.

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ In the recent case of *In2FOOD (Pty) Ltd v FAWU, Madisha, RS and 470 Others* (LC Case J350/13) the employer was faced with a situation where an interim order granted by the Johannesburg Labour Court preventing the unlawful strike action of its employees was ignored by both the Food and Allied Workers Union (FAWU) and its members who were employed by In2Foods and were on strike. When the striking employees refused to comply with the court order, a further interim order was obtained by the employer directing both the striking employees and FAWU to show cause why they should not be held in contempt. Upon the matter being heard Judge Steenkamp upheld the interim order, holding the employees (who could be identified as having committed acts of misconduct) as well as FAWU liable for contempt of court. In holding FAWU liable the court recognized that while employees had a right to engage in collective bargaining this right was dependent upon compliance with the provisions of the Labour Relations Act 66 of 1995 (as amended). There is no justification or place in collective bargaining for violent action. Nor is there place to allow trade unions and officials to abdicate their duty to take sufficient steps to dissuade and prevent their members from continuing with their violent and unlawful actions. FAWU was handed a fine of R500 000 (five hundred thousand rand) for being in contempt of court. See also the cases of *Mangaung Local Municipality v SAMWU* [2000] JOL 10582 (LC) and *Rustenburg Platinum Mines Ltd v Mouthpiece Workers Union* [2002] 1 BLLR 84 (LC).

CHAPTER 2

2.1 Introduction

Under the 1956 LRA, strikers who failed to comply with the requirements during strike actions faced criminal liability as well as possible dismissal. The current LRA discourages strikes that do not comply with the statutory requirements by giving remedies to the employer in three different ways. Firstly by giving the Labour Court jurisdiction to interdict strikes which do not comply with the statutory requirements, secondly by allowing employers to sue for compensation for losses which are a result of an unprotected strike, and lastly, by treating participation in an unprotected strike as a form of misconduct.⁶⁹

2.2 Remedies

2.2.1 Interdict

An interdict is one of the remedies available to an employer or any interested applicant who wishes to prevent any further damage caused by the wrongful activities of strikers.⁷⁰ The applicant applies *ex parte* to court, often on an urgent basis, to obtain a restraining order on the defendants to stop them from continuing their wrongful actions or misconduct.⁷¹ At least a 48-hour notice must be given to the employees or to the union specifying the employer's intention to interdict the strike, although courts may allow even a shorter period if the union has been given a reasonable opportunity to be heard after the notice of the application and the employer gives a reasonable justification why a court should allow a shorter period.⁷² Before a court decides whether to grant an interdict, the court will consider whether the employer has established a *prima facie* right to the relief sought (even though this may be open to some doubt), whether there is a well-founded fear of greater and irreparable harm to the applicant if the interdict is not granted, whether there are factors which favours the grant of relief, and

⁶⁹ Section 68(5) of the LRA (note 3 above), and item 6(1) of the Code of Good Conduct: Dismissal.

⁷⁰ Rycroft (note 34 above) 5.

⁷¹ *Ibid.*

⁷² J Grogan *Workplace Law* (2009)394.

whether the applicant has no other satisfactory remedy.⁷³ An interdict only applies to an unprotected strike and the union or striking employees or both, can be ordered to pay a just and equitable compensation to the employer in terms of section 68(1) (b) of the LRA.⁷⁴ An employer who suffers damage due to the unlawful conduct of strikers in a protected strike will not be able to apply for an order prohibiting the strike.

The labour court in *In2FOOD (Pty) Ltd v FAWU, Madisha, RS and 470 others*⁷⁵ fined a trade union up to five hundred thousand in terms of the ‘contempt doctrine’ for not doing more to prevent violence in an unprotected strike by its members.⁷⁶ The court in this case had initially made an interim order in terms of which the union and strikers were called upon to show cause why an interim order should not be made final holding them in contempt, committing the workers to prison for a term of 180 days for contempt of court, and for the union to be fined an amount of five hundred thousand rands.⁷⁷

The time has come in our labour relations history that trade unions should be held accountable for the actions of their members. For too long trade unions have glibly washed their hands of the violent actions of their members... These actions undermine the very essence of disciplined collective bargaining and the very substructure of our labour relations regime.⁷⁸

Where a party disobeys a court interdict they can be found in contempt of court. The seriousness of this matter was illustrated in the case of *Security Services Employers’ Organisation and Others v SA Transport and Allied Workers Union and Others*⁷⁹ where the court considered the legal principles applicable to contempt of court proceedings, and noted that the object of such proceedings is to compel compliance with an order of court in order to vindicate the court’s honour resulting from disregard of its order. The court ordered the union to pay a fine of five hundred thousand rands for contempt of the terms of the court orders that

⁷³ Ibid.

⁷⁴ Section 68 of the LRA (note 3 above).

⁷⁵ *In2FOOD (Pty) Ltd v FAWU, Madisha, RS and 470 others* (LC Case Number: J350/13, 1 March 2013).

⁷⁶ Rycroft (note 34 above) 7. See also *In2FOOD (Pty) Ltd v FAWU, Madisha, RS and 470 others* above.

⁷⁷ Ibid

⁷⁸ *In2FOOD (Pty) Ltd* (note 75 above). In this case the court fined FAWU half a million rand for contempt of court for not doing more to stop a violent and an unprotected strike by its members.

⁷⁹ *Security Services Employers’ Organisation and Others v SA Transport and Allied Workers Union and Others* (2007) 28 ILJ 1134 (LC).

were suspended for five years.⁸⁰ Eleven members of the trade union were sentenced to a period of six months' imprisonment, suspended for five years.⁸¹

The interdict order may only relate to the issues pertaining to the strike at hand, and to no other issues that are not connected to the strike as this would deprive the employees of their right to strike and would constitute an unreasonable limitation on their constitutional right to strike.⁸² If members of the public or businesses other than the employer suffer any loss or irreparable harm to property due to the strike, they may seek an interdict in the High Court.⁸³ The granting of interdicts by courts has been criticised on both procedural and substantive grounds. This is so because our law has adopted the *audi alteram partem* principle which is a cardinal principle that no man is to be judged without being heard, the right to personal appearance and the right to cross-examination. Also more often than not injunctions seem to favour employers over employees,

firstly, because the ordinary principles of civil procedure, ensuring that both parties have a full opportunity to present their case prior to the issue of an order, may be waived by the judge in injunction cases; and secondly, because the substantive law relevant to labour injunctions favours employers and gives little weight to the legitimacy of strike action in the collective bargaining process.⁸⁴

For employers, an interdict may be an advantage as it may prevent an employer from the likelihood of having to face a full trial, and the interdict in this case would serve as *prima facie* evidence which the union has to disprove.⁸⁵

2.2.2 Compensation

Section 68(1) (b) of the Labour Relations Act⁸⁶ 'grants the labour court the jurisdiction to order the payment of just and equitable compensation for any loss attributable to the strike in

⁸⁰ Ibid 15.

⁸¹ Ibid 87.

⁸² Grogan (note 73 above) 394.

⁸³ Grogan (note 73 above) 395.

⁸⁴ Rycroft (note 33 above) 5; see also C O'Regan 'Interdicts restraining strike action – implications of the Labour Amendment Act 83 of 1988' (1988) 9 *ILJ* 959 at 959.

⁸⁵ Rycroft (note 34 above) 5.

⁸⁶ Section 68(1) (b) of the LRA (note 3 above).

addition to granting an interdict⁸⁷ The court in *Platinum Mines Ltd v The Mouthpeace Workers Union*⁸⁸ held that the words ‘just and equitable’ mean no more than that compensation awarded must be fair. In *Mangaung Local Municipality v SAMWU*⁸⁹, the labour court held that removal of the words ‘*or conduct in furtherance of a strike or lock-out*’ from the original version of section 68(1) (b) means that only damages arising from the unprotected strike itself, as opposed to damages for the conduct of the strikers, could be claimed under the LRA. Before the court can order such compensation the employer has to prove that it has suffered loss, and that the loss was a result of the respondent’s participation in the unprotected strike.⁹⁰

In determining whether the court may grant such compensation and the amount to be awarded, the court must have regard to a lot of factors, namely whether the trade union made attempts to comply with the law and the extent of such attempts; if any, whether there was premeditation before the strike took place (if there is a premeditation then it means the strikers had an opportunity to comply with the requirements of the LRA in regards to a conduct of a strike action); whether the strike action by employees was a response to the employer’s unjustified conduct; and whether the trade union complied with an earlier interdict or a court order.⁹¹

The above-mentioned factors are not a closed list of factors that the court must have regard to when determining whether the order of the payment of compensation is just and equitable, the court will consider other factors which it deems necessary. In the few cases dealing with claims for compensation, the Labour court has awarded relatively small amounts as compensation.⁹² In *Algoa Bus Company v SATAWU & others*,⁹³ the company sued the union and employees for a financial loss of four hundred and sixty five thousand rands it incurred as a result of an unlawful strike. The court held that while employers are entitled to claim compensation for losses actually suffered during an unlawful strike, the amount awarded need not necessarily be full compensation for such loss.⁹⁴ The court then ordered the union and employees to pay the company only one hundred thousand rands in monthly instalments

⁸⁷ Grogan (note 73 above) 395.

⁸⁸ *Platinum Mines Ltd v The Mouthpeace Workers Union* (2001) 22 ILJ (2035) (LC).

⁸⁹ *Mangaung Local Municipality v SAMWU* (2003) 24 ILJ 405 (LC).

⁹⁰ Grogan (note 73 above) 395.

⁹¹ *Ibid.*

⁹² Le Roux (note 20 above) 11.

⁹³ *Algoa Bus Company v SATAWU & others* [2010] 2 BLLR 149 (LC).

⁹⁴ *Ibid.* 44.

of fifty rands.⁹⁵ It has been suggested that this finding illustrates how ineffective this remedy has been in the hands of the courts for the employers.⁹⁶ It is important to note that in a delictual claim, the full quantum of loss proved will be ordered for payment to the employer by the courts.

2.2.3 Discouragement

Apart from interdicts and compensation, discouragement is another remedy available to an employer. The employer may discourage the employees who have not followed the necessary strike procedures from participating in a strike or from continuing the strike.⁹⁷ In case of protected strikes, the employer may withhold wages during unprotected strikes; the employer can also consider other measures to persuade workers not to strike, like withholding bonuses, rewarding non-striking employees⁹⁸ with an additional bonus, refusing to back-date wages after a wage offer has been rejected. It is easier to discourage such workers from striking because they have not followed the provisions of the LRA and will therefore not be protected from liability of the damages caused during the strike action.

The trade union and the employer may conclude a collective agreement, that is a written agreement concerning terms and conditions of employment, or any other matter of mutual interest, concluded by one or more registered trade unions on the one hand, and one or more employers and/ or registered employers' organisations on the other hand. This is so because employers and unions are free to agree to choose other forms of dispute resolution, and to agree that strikes will not be permitted on certain issues or that the workers will follow the pre-strike procedures stipulated in the LRA.⁹⁹ If a collective agreement provides otherwise, the statutory strike provisions are generally inapplicable.¹⁰⁰ If a strike action is protected, the employer may withhold wages and may use other measures to persuade employees not to

⁹⁵ Ibid 3rd Order of the court.

⁹⁶ E Manamela, M Budeli 'Employee's right to strike and violence in South Africa' XLVI CILSA 2013.

⁹⁷ Grogan (note 72 above) 396.

⁹⁸ Basson (note 2 above) 330.

⁹⁹ Ibid.

¹⁰⁰ Ibid.

strike, provided that they do not unfairly discriminate against the strikers or amount to victimisation.¹⁰¹

The former Appellate Division of the Supreme Court in *SACCAWU v OK Bazaar*¹⁰² held that, in so far as it remains applicable, withholding bonuses granted for work done, or rewarding non-strikers with additional bonuses or benefits may be permissible in the case of unprotected strikes.

However, the courts will probably scrutinise such stratagems more strictly under the current LRA since these options must not unfairly discriminate against the strikers or amount to victimization.

2.2.4 Disciplinary action

The LRA, in terms of a general code pertaining to dismissals in Schedule 8 of the Code of Good Practice: Dismissal (hereafter The Code), in accordance with the relevant sections of the Act regulates the employees' conduct.¹⁰³ The Code provides that dismissal may be justified were unions or members instigate or participate in an unprotected strike as this may generally be regarded as a form of misconduct. Employers are therefore allowed to take disciplinary action short of dismissal against the workers who participate in unprotected strikes.¹⁰⁴ An unprotected strike took place in the case of *Mzeku v Volkswagen SA (Pty) Ltd*¹⁰⁵ where the strike resulted in the dismissal of the union's members for failing to comply with a fair ultimatum. The strikers persevered with their unprotected strike contrary to their union's advice. They breached a collective agreement and a court order and caused their employer financial damage of millions of rands. They jeopardised an international contract of immense value and endangered the employment security of many employees.

The unprotected strikers further displayed conduct that amounted to serious, deliberate and wilful misconduct without any justification that was reasonable or legitimate with regard to

¹⁰¹ Manamela, (note 96 above).

¹⁰² *SACCAWU v OK Bazaar* 1995 (16) ILJ 1031 (A).

¹⁰³ Section 187(1) of the LRA (note 3 above) and Schedule 8, Code of Good Practice: Dismissal section 2(2) and 3 regarding fair reasons for dismissal.

¹⁰⁴ Grogan (note 72 above) 397.

¹⁰⁵ *Mzeku v Volkswagen SA (Pty) Ltd* [2001] 8 BLLR 857 (LAC).

an employer's conduct.¹⁰⁶ The dismissal of 1 336 employees took place after all reasonable efforts had been exhausted by the union and the employer to persuade the unprotected strikers to return to work prior to the dismissal.¹⁰⁷ The union's attitude from a very early stage of the strike was that it regarded the strike as illegal, unprocedural and unjustified.¹⁰⁸ It tried to persuade the strikers to end the unprotected strike or face, not only their own dismissal, but also the possible cancellation of the employer's international export contract as well as the loss of thousands of jobs for employees not on strike at the plant and in the region.¹⁰⁹ The court found that the dismissal of the workers were substantively and procedurally fair. The employer had adhered to the *audi alteram partem* rule because it had given the dismissed workers a chance to be heard and defend their actions. The court found that the commissioner had misdirected himself in his finding that the dismissal of those workers who failed to resume their duties would have been fair, in every respect had the employer followed a fair procedure.¹¹⁰ Thus the court found that the reinstatement and re-employment of workers were not competent remedies in these circumstances. The Act provided the remedy of compensation so that the employer will be motivated to follow and comply with fair procedures.¹¹¹ No claim was instituted against the union for damages suffered. The court concluded that the relief of reinstatement was not competent in this case of a dismissal that was unfair only because the employer did not follow a fair procedure. Accordingly, the court did not order re-instatement of the workers.

Employees who are aggrieved by the employer's decision to dismiss them for taking part in an unprotected strike can challenge the employer's action in the appropriate bargaining council or the CCMA.¹¹² The employer may first issue warnings against the employees after their return to work before resorting to dismissal. Disciplinary action after the strike by the employer may sometimes be ineffective as it may be difficult for the employer to identify the individual culprits.¹¹³ In the case of *NSCAWU & Others v Coin Security Group (Pty) Ltd*¹¹⁴ there was a strike, and workers engaged in acts of misconduct. The employer dismissed all of them on the basis that the misconduct was committed in furtherance of a collective aim

¹⁰⁶ Ibid.

¹⁰⁷ Ibid 50.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid..

¹¹⁰ Ibid.

¹¹¹ Ibid.

¹¹² Grogan (note 73 above) 397.

¹¹³ J Grogan 'Reminder to Unions' (2011) Employment Law 26; See, for example, *FAWU obo Kapesi & others v Premier Foods Ltd t/a Blue Ribbon Salt River* [2010] 9 BLLR 903 (LC).

¹¹⁴ *NSCAWU & Others v Coin Security Group (Pty) Ltd* [1997] 1 BLLR 85 (LC).

(common purpose). The Industrial Court found that, while the workers engaged in a collective action, there was no indication that any of the employees were directly involved in the relevant misconducts. The Court also found that the employer relied on collective guilty more than on the doctrine of common purpose. The court concluded that in terms of our law there was no concept of collective guilty because this would violate the principle of natural justice that provides that everyone is innocent until proven guilty.

2.2.5 Lock-Out

Another action available to an employer against workers who take part in an unprotected strike action is a lock-out. The employer may utilise this option until they comply with the employer's proposal.¹¹⁵ Section 213 of the LRA, provides that a lock-out is 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 the employer and the employee. In terms of this definition the employer can only exclude the employees from the workplace.¹¹⁶ The exclusion of employees in the form of a lock-out is normally accompanied by the employer refusing to pay the employees, this is so because the mere exclusion by an employer of employees from its premises would have very little effect, if any, on its employees because the employees will still receive their remuneration.¹¹⁷ The refusal of the employer to pay the remuneration is supported by section 67 (3) of the LRA that provides that an employer is not obliged to remunerate an employee for services that the employee did not render during a lock-out.

¹¹⁵ Grogan (note 73 above) 397.

¹¹⁶ The definition of a lock-out found in earlier legislation described a range of employer actions that could constitute a lock-out, action such as the dismissal of employees, a breach of contract, and a refusal to rehire employees. This has since changed with the enactment of the new LRA. See Basson (note 2 above) 311.

¹¹⁷ Basson (note 2 above) 311.

CHAPTER 3

3.1 Introduction

In terms of South African labour law, there are basically two different kinds of strikes, those that comply with section 64 of the LRA,¹¹⁸ and those that do not comply with section 64 of the LRA. Those that do comply are known as protected strikes while those that do not comply are known as unprotected strikes. If a strike is protected (if it complies with the legislative requirements of a strike), strikers are protected from any civil action an employer may wish to institute,¹¹⁹ protected against discrimination,¹²⁰ and the strikers may not be dismissed for striking.¹²¹ The rationale for protecting strikers against dismissal was explained by the Labour Appeal Court in *Black Allied Workers Union and others v Prestige Hotels CC t/a Blue Waters Hotel*¹²² (1993) 14 ILJ 963 (LAC) at 972:

If an employer facing a strike could merely dismiss the strikers from employment by terminating their employment contracts then the strike would have little or no purpose. It would merely jeopardise the rights of the employment of the strikers. The strike would cease to be functional to collective bargaining and instead it would be an

¹¹⁸ Section 64(1) (a) of the LRA (note 3 above) provides that the dispute must be referred by the employees or union to the Commission for Conciliation, Mediation and Arbitration. A certificate of outcome must then be issued and provide that the dispute remains unresolved, or 30 days must have lapsed from the day on which the dispute was referred. The Labour Court is not bound by the CCMA's categorisation of the dispute on the certificate as one of right or interest. If the dispute is in fact one of mutual interest, the employees may go on strike. Whilst section 64(1) (b) provides that the union must give the employer at least 48 hours written notice of the commencement of the strike. The notice must specify the exact time of the commencement of the strike.

¹¹⁹ Section 67 of the LRA (note 3 above), provides that a person does not commit a delict or a breach of contract by taking part in a strike or any conduct in contemplation or in furtherance of a protected strike. Whilst section 67(6) is even more specific by providing that no civil legal proceedings may be instituted against any person because of that person's participation in a protected strike. See Basson (note 2 above) 327.

¹²⁰ Sometimes employers pay bonuses or allowances to employees who do not participate in a protected strike. Although this practice is not specifically prohibited by the LRA, it has been held to fall foul of section 5 of the LRA that prohibits discrimination against an employee for exercising any right conferred by the LRA, while the relevant part of section 5(3) provides that no person may advantage an employee in exchange for the employee's not exercising his or her rights in terms of the LRA. See Basson (note 2 above) 330.

¹²¹ Employees who strike will normally be guilty of a serious breach of contract in that they will be refusing to comply with their most basic contractual duty. In terms of the common law principles, an employer will therefore be entitled to summarily dismiss striking employees. However, permitting an employer to dismiss employees who embarked on a protected strike would undermine the role of strikes in the collective bargaining process. Section 67(4) therefore specifically provides that an employer may not dismiss an employee for participating in a protected strike. Whilst section 187(1) (a) of the LRA provides that if the reason for a dismissal is that the employee participated in or supported a protected strike, the dismissal will be automatically unfair.

¹²² *Black Allied Workers Union and others v Prestige Hotels CC t/a Blue Waters Hotel* (1993) 14 ILJ 963 (LAC).

opportunity for the employer to take punitive action against the employees concerned.¹²³

However, if a strike is unprotected, it will constitute a breach of contract, this may result in the workers facing dismissal, or being interdicted or sued for to compensate the employer for the loss suffered.

3.2 Liability to the employer

In general, the employer may not sue the union for any financial losses caused by a protected strike.¹²⁴ For a strike to be recognised under the provisions of the LRA, it has to be protected. Nevertheless where misconduct and various unlawful acts takes place in the course of a protected strike, the employer may apply to court, if necessary for a declaratory order in terms of section 158 (1) (a) (iv) of the LRA for the strike to be declared ‘unprotected’.¹²⁵ In this instance, the strike’s protection status would be lost. There are examples where South African courts declared that a strike’s protection was lost.¹²⁶ It can be argued that even though the LRA does not have provisions which expressly provide that a strike action may lose its protected status, this may be implicit in the powers of the labour court. In the recent case of *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of South African Workers’ Union & others* the court held that,

This court will always intervene to protect both the right to strike, and the right to peaceful picketing. This is an integral part of the court’s mandate, conferred by the Constitution and the LRA. But the exercise of the right to strike is sullied and ultimately eclipsed when those who purport to exercise it engage in acts of gratuitous violence in order to achieve their ends. When the tyranny of the mob displaces the peaceful exercise of economic pressure as the means to the end of the resolution of a labour dispute, one must question whether a strike continues to serve its purpose and thus whether it continues to enjoy protected status.¹²⁷

¹²³ Ibid 972.

¹²⁴ Cohan (note 42 above) 68.

¹²⁵ Rycroft (note 34 above) 9.

¹²⁶ *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of South African Workers’ Union & others* (note 49 above).

¹²⁷ Ibid 13. The picketing that occurred in this case was anything but peaceful. Rubbish bins were emptied onto the road outside the casino, tyres were burnt on the road, the road was blocked with 20-litre water bottles, packets of broken glass were thrown onto the road, bricks were thrown at members of the police services, vehicles were damaged, passengers were dragged from vehicles and assaulted, concrete dustbins were rolled into the road, patron’s vehicles were damaged, and persons in the vicinity of the casino were assaulted.

From the above one can conclude that a protected strike may lose its protected status and become unprotected. The employer would have to supply *prima facie* evidence in support of the allegations against the union. The question a court would face with such an issue, is to what extent does the strike no longer promotes functional collective bargaining, and is therefore no longer deserving of its protected status?¹²⁸ In addressing this question, the court would have to weigh the levels of violence which took place and the union's efforts to prevent such violence.¹²⁹

3.2.1 Compensation

Where a strike is unprotected, the Labour Court may, in addition to granting an interdict, order the payment of "just and equitable" compensation for any loss attributable to an unprotected strike. In the Labour Law – A Comprehensive Guide,¹³⁰ the authors submit that, 'the effect of section 68(1) is to create a *sui generis* cause of action. Unlike the position at common law, plaintiffs are not entitled to the full measure of their damages, subject to mitigation, but only to compensation that is 'just and equitable'.¹³¹

Section 68(1) (b) provides for payment of compensation, in respect of losses arising from an unprotected strike, to the employer by the trade union and or its members. The losses suffered must be attributable to the strike action. If the employer is not able to mitigate such losses,¹³² the court may order compensation for loss of profit and productivity, loss of income and overtime payments to non-striking employees.¹³³ In terms of section 68(1) (b) the labour court must consider a number of factors when exercising its jurisdiction to order the payment

¹²⁸ Rycroft (note 34 above) 9.

¹²⁹ Rycroft opines that, a balancing counter-measure can be imagined allowing unions to launch a similar court application for an order granting protected status to an otherwise unlawful strike if it was in response to unjustified conduct by the employer. This is, after all, a factor listed in Item 6 of the Code of Good Practice: Dismissal to be taken into account in the substantive fairness of a strike-related dismissal. A court would have to consider whether the unjustified conduct committed by the employer is sufficient to grant such an order if the grievances could reasonably have been addressed in other ways. But by enabling a union to challenge the unprotected nature of the strike whilst it is taking place will influence the power dynamic during the strike and strengthen the union's bargaining power to achieve its demands.

¹³⁰ Du Toit *et al Labour Relations Law: A Comprehensive Guide* 5th Ed.

¹³¹ *Ibid.*

¹³² The court will apply the mitigation principle that provides that a party who has suffered loss has to take reasonable action to minimise the amount of the loss suffered. As stated by the Canadian Federal Court of Appeal in *Red path Industries Ltd. v. Cisco (The 1993 CanLII 3025 (F.C.A.))* It is well established that a party who suffers damages as a result of a breach of contract has a duty to mitigate those damages, that is to say that the wrongdoer cannot be called upon to pay for avoidable losses which would result in an increase in the quantum of damages payable to the injured party.

¹³³ Cohan (note 42 above) 84.

of just and equitable compensation for any loss attributable to the strike.¹³⁴ These include the following:

- a) Whether attempts were made to comply with the provisions of the LRA and the extent of those attempts. In this regard the court will assess the good faith of the union and the employees in establishing whether *bona fide* attempts were made to comply with the provisions of the LRA if *bona fide* efforts were made to comply with the legislative provisions.¹³⁵
- b) Whether the strike, lock-out or conduct was premeditated. A premeditated strike, as opposed to an unplanned one, provides further evidence that the union wilfully disregarded the provisions of the LRA. Premeditated wrongful conduct will be viewed as more blameworthy when awarding compensation.
- c) Whether the strike, lock-out or conduct was in response to unjustified conduct by another party to the dispute. An illegal strike that is provoked by unjustified conduct by the employer may justify a reduced award of compensation.
- d) Whether there was compliance with an order of the Labour Court interdicting the employees from striking. A deliberate non-compliance with a court order is regarded as serious misconduct and indicates a total disregard for authority. Such conduct will count against the defaulting party when the court awards compensation.
- e) The interests of orderly collective bargaining. The collective bargaining relationship imposes a duty on both employers and unions to bargain in good faith and to comply with a collective agreement. The union is required to ensure that its members comply in this regard. This will help in convincing the striking workers to go back to work.
- f) The duration of the strike, lock-out or conduct. The duration of the strike will have an impact on the extent of the loss suffered and is therefore relevant in determining the amount of compensation to be awarded.¹³⁶
- g) The financial position of the employer, trade union or employees respectively. The financial position of both the employer and the union needs to be taken into consideration in this regard in order to award 'just and equitable' compensation. Grogan criticises this requirement on the ground that 'it would in effect indemnify virtually all employees and poor unions'.¹³⁷ He concedes however that it is clearly one factor to be weighed in relation to the others because there is no use in imposing a

¹³⁴ Section 68(1) (b) of the LRA (note 3 above).

¹³⁵ Ibid.

¹³⁶ Ibid.

¹³⁷ Grogan (note 73 above) 395.

substantial compensation on a poor trade union.¹³⁸ This means that this factor has to be weighed in relation to others.

The above-mentioned factors are neither a closed list nor are they conclusive on their own in determining an award for compensation.¹³⁹ The court will have to make a subjective assessment of all the relevant circumstances, factors and facts before deciding what is to be a just and equitable amount.¹⁴⁰ Grogan is of the view that the above factors are important in determining whether liability should be imposed on a trade union as well as the extent of any liability that is found to exist.¹⁴¹ Le Roux submits that the reason for this could be because the Labour Court has awarded relatively small amounts as compensation in the few cases dealing with claims for compensation.¹⁴² It has been suggested that labour court judges should be willing to award more substantial amounts as compensation when dealing with unprotected strikes because it is not cumbersome to comply with the legislative requirements of a protected strike and also, this is meant as a deterrent to trade unions and their members not to embark on an unprotected strike.¹⁴³

Section 68 does not apply to losses suffered as a result of unlawful conduct arising out of a protected strike and is only confined to unprotected strikes.¹⁴⁴ A trade union can therefore be held liable for losses resulting from an unprotected strike.¹⁴⁵ This was confirmed in the case of *In Rustenburg Platinum Mines v Mouthpiece Workers Union*¹⁴⁶ a minority trade union instigated an unprotected strike after the employer gave an interdict prohibiting the strike. The employer sustained a lot of damage and suffered a loss of at least fifteen million rands as a result of the unprotected strike. The employer initially sought to recover the full amount from the union concerned, but subsequently reduced its claim to one hundred thousand rands. The court in this case identified three requirements that must be met before liability could be established. Firstly it must be established that the strike does not comply with the provisions

¹³⁸ Ibid.

¹³⁹ Cohan (note 42 above) 85.

¹⁴⁰ Ibid.

¹⁴¹ J Grogan *Collective Labour Law* 2011. See also Le Roux (note 20 above) 17.

¹⁴² Le Roux (note 20 above) 11.

¹⁴³ A message needs to be sent to the trade unions that, given the ease with which a protected strike can be embarked upon, unprotected strikes will not be tolerated. At the same time, the court must have regard to the fact that the compensation payable will be paid from the respondent's coffers, and consequently, the funds of its other members who were not involved in the strike will probably be used to make such payment, to the latter's detriment. See also Le Roux (note 19 above) 11.

¹⁴⁴ Cohan (note 42 above) 83.

¹⁴⁵ Section 68(1) (b) of the LRA (note 3 above); See Manamela (note 97 above) 330.

¹⁴⁶ *Rustenburg Platinum Mines v Mouthpiece Workers Union* [2002]1 BLLR 84 (LC).

of the LRA. Secondly, it must be established that the applicant seeking compensation suffered loss as a result of the strike, and thirdly that the party against whom relief was sought participated in the strike or committed acts in furtherance thereof. It was common cause that the strike was unprotected and that the employer suffered losses of at least fifteen million rands.

In dispute was whether the union instigated the strike or committed acts in furtherance thereof. The court came to the conclusion that the union had instigated the strike. The union's failure to challenge this accusation was construed as an admission. The court found that the executive officer knew of the possibility of the strike, but failed to distance himself from the strike. The Court also took into account the fact that during the course of a mass meeting of union members, two members of the trade union's national executive committee urged the union members not to return to work until their demands had been met.¹⁴⁷ As to whether compensation should be awarded, the court noted that the words 'just and equitable' in the LRA meant 'no more than that compensation awarded must be fair.'¹⁴⁸ The section provides for compensation for unprotected industrial action to an aggrieved party for losses actually suffered, however compensation need not necessarily do so.¹⁴⁹ The court held the trade union liable and ordered it to pay compensation in the sum of one hundred thousand rands.

The court was faced with a similar issue in the case of *Mangaung Local Municipality v SAMWU*.¹⁵⁰ The employer sought compensation for losses incurred due to an unprotected strike by members of the union in the employer's electrical department. During the course of the strike, the striking employees also blockaded the entrance to and from the electrical department, and as a result non striking employees were unable to render electrical services to residents of the city.¹⁵¹ The employer instituted a claim against SAMWU for the losses it had suffered during the course of the strike. The employer first claimed for the loss of income that the striking employees would have generated had they worked during the period of the strike and for the additional costs suffered as a result of having to pay overtime to non-striking employees to do the work of the strikers.

¹⁴⁷ Le Roux (note 20 above) 15.

¹⁴⁸ *Algoa Bus Company v SATAWU & others* [2010] 2 BLLR 149 (LC).

¹⁴⁹ *Ibid.*

¹⁵⁰ *Mangaung Local Municipality* (note 89 above).

¹⁵¹ Le Roux (note 20 above) 16.

The employer also claimed income for the loss suffered as a result of the non-striking employees being unable to work because of the blockading of entrances. However the court was not prepared to compensate the employer for the latter claim. This was because the losses did not arise from the strike itself but from the actions committed in furtherance of the strike.¹⁵² The court found that the employer must show that it suffered some loss, that is attributable to an unprotected strike, and that the union is liable for such loss. It was held that the strike did not comply with the provisions of Chapter IV of the LRA and that it was thus unprotected. The court found that an actual loss was suffered when the services were not rendered by the striking employees. It was held that the employer could claim for the loss of income arising from the striking employees refusal to work and overtime payments to non-striking employees who worked overtime as a result of the strike. This is so because such a loss is attributable to the strike and the employer is entitled to claim compensation in respect thereof. Had the employees worked, they would have generated such income for the employer. Their refusal to work is thus the cause of the loss. Similarly, had the employees worked, it would not have been necessary for the applicant to require other employees to work overtime and consequently, no overtime payment would have been payable. The overtime portion of the loss is thus also attributable to the strike.

The court in *Mangaung Local Municipality*¹⁵³ case used the following reasoning in holding the union liable:

Where a trade union has a collective bargaining relationship with an employer, and its members embark on unprotected strike action and the trade union becomes aware of such unprotected strike and is requested to intervene but fails to do so without just cause, such trade union is liable in terms of section 68 (1) (b) of the Act to compensate the employer who suffers losses due to such an unprotected strike. Similarly, if a trade union elects to delegate the responsibility to resolve the strike to its shop stewards employed by the employer facing an unprotected strike, and such shop stewards fail to discharge the same obligation that the trade union has, the trade union is also liable to compensate the employer for any losses that it has suffered as a result of such strike.¹⁵⁴

¹⁵² Ibid.

¹⁵³ *Mangaung Local Municipality* (note 89 above)

¹⁵⁴ Ibid 47.

The above obligation arises due to the fact that there is usually a collective agreement relationship between the employer and the trade union, thus the trade union assumes a duty to ensure that its members abide by the collective agreement and comply with the provisions of the LRA. The trade union was therefore held liable to compensate the employer for the losses suffered as a result of the unprotected strike by its members. This was because the union had been aware of the strike and made demands in support of the strike when it was required to call off the strike.¹⁵⁵

3.2.2 Delictual liability

The law of delict plays a very fundamental role in protecting constitutional rights of victims of unlawful intentional and culpable actions.¹⁵⁶ In the *Law Society of South Africa and Others*¹⁵⁷ case, the court stated clearly that delictual remedies serve to protect and enforce the constitutionally protected rights of victims.¹⁵⁸ IM Rautenbach¹⁵⁹ submits that,

The law of delict is not only a useful instrument to protect the constitutional rights of victims, but its provisions and their application may also factually limit the rights of those who have allegedly committed delicts. The law of delict sets limits to actions and interests protected by the rights of defendants in various ways, for example, by usually obliging those who are delictual liable, to pay damages for the injury they have inflicted, or by factually inhibiting the performance of certain actions in ways which the law of delict proscribes.¹⁶⁰

Thus it is not in dispute that the law of delict can be used by the employer to claim for damages suffered. However for the employer to be able to claim, the employer must prove the principles of liability in delict. In order to successfully sue under the law of delict, the employer must prove either that (i) the trade union members committed a delict against the employer for which it was vicariously liable or (ii) the trade union itself committed a delict against the employer. To establish delictual liability, the employer must prove that (a) the

¹⁵⁵ Le Roux (note 20 above) 17.

¹⁵⁶ In the case of *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) at para 58, the court observed that the private law of delict was flexible and that in many cases the common law would be broad enough to provide all the relief that would be appropriate for a breach of constitutional rights.

¹⁵⁷ *Law Society of South Africa and Others v Minister for Transport and Another* 2011 (2) BCLR 150 (CC).

¹⁵⁸ *Ibid* 72-74

¹⁵⁹ IM Rautenbach 'The liability of organisers for damage caused in the course of violent demonstrations as a limitation of the right to freedom of assembly *SATAWU v Garvas* 2012 8 BCLR 840 (CC)' (2013) 1 *Tydskrif vir die Suid-Afrikaanse Reg* 151.

¹⁶⁰ Rautenbach 152.

defendant's culpable conduct caused the employer patrimonial loss (whether or not consequent on physical harm to person or property) which was not too remote, and (b) the defendant's conduct was, in the circumstances, 'wrongful' or 'unlawful', that is, it breached a 'legal duty' owed by the trade union to the employer.¹⁶¹

Trade union members and employees who embark on a protected strike are immune from civil liability and cannot be held liable in terms of delict nor breach of contract.¹⁶² An employer may not dismiss employees for participating in a protected strike and unions are immune from civil liability for their conduct in contemplation of, or furtherance of, a protected strike.¹⁶³ However this protection does not extend to unlawful actions arising out of a protected strike action, such as criminal offences.¹⁶⁴ A union can be held vicariously liable for the wrongful acts committed by its members if the employer can prove that such acts were committed by the members of the union and that the union was legally liable for the actions committed by its members.

In *Eskom Ltd v National Union of Mineworkers*¹⁶⁵ Eskom sued the union for more than six million rands in damages caused by union members who were part of a union-organised demonstration, during which they ran amok and vandalised the premises. It was Eskom's contention that the trade union was vicariously liable for the damages. The LRA does not mention, regulate or prohibit any specific unlawful conduct of members during a strike, whether protected or unprotected, which could harm employees, the employer or third parties.¹⁶⁶ However such conduct can be dealt with in terms of delict and/ or be prosecuted in terms of criminal law.¹⁶⁷ A trade union can be liable for damages in circumstances where it has failed to meet the prerequisites for a protected strike.¹⁶⁸

¹⁶¹ A Price 'The impact of the Bill of Rights on state delictual liability for negligence in South Africa' in *The Influence of Human Rights on State Liability for Negligence in England and South Africa*. (2010) 2. Available at http://www.academia.edu/1161166/The_Impact_of_the_Bill_of_Rights_on_State_Delictual_Liability_for_Negligence_in_South_Africa (accessed 3 January 2015).

¹⁶² Sections 67 and 67 (6) of the LRA (note 3 above). See also Cohan (note 42 above) 87.

¹⁶³ Ibid sections 67 and 67 (6) of the LRA (note 3 above).

¹⁶⁴ Basson (note 2 above) 327. Section 67 (5) of the LRA (note 3 above) limits the right of strikers not to be dismissed by providing that even where employees are participating in a strike, the employees may be dismissed for misconduct.

¹⁶⁵ *Eskom Ltd v National Union of Mineworkers* (2001) 22 ILJ 618 (W).

¹⁶⁶ Gericke (note 11 above) 575.

¹⁶⁷ Ibid.

¹⁶⁸ Rycroft (note 34 above) 7.

The trade union will not be immune from liability for damages suffered by the employer in such a case. At common law an employer who suffers damage arising from criminal conduct or otherwise may sue for damages in delict.¹⁶⁹ This dissertation is concerned with the liability of a trade union. The above delictual principle applies to unlawful acts or omissions which take place during the course of a strike, such as malicious damage to property and assault.¹⁷⁰ An employer who suffers loss due to such actions may be able to institute a delictual claim for damages to recover this loss.¹⁷¹ In order to succeed, the employer must show that the wrongdoer is a union member, or otherwise authorized to act on behalf of the union, and that the wrongdoer caused the loss intentionally and the extent of the loss.¹⁷²

Le Roux is of the view that in many cases it may be easier to succeed with a delictual claim against the strikers or the individuals who maliciously damaged the property than a criminal charge.¹⁷³ This is so because it is very difficult to ascribe criminal liability on the trade union but in a delictual claim you can ascribe liability vicariously.¹⁷⁴ This was the case in *Mondi Ltd (Mondi Kraft Division) v Chemical Energy Paper Printing Wood & Allied Workers Union & Others*.¹⁷⁵ The employer instituted a claim for delictual damages against the union for the unlawful acts (switching off machinery) committed by the union members whilst on a protected strike. Mondi held CEPPWAWU vicariously liable for the delicts committed by its members. The court had to first establish whether a relationship existed between the member and the trade union to see if the trade union could be held vicariously liable for its member's actions.¹⁷⁶ The court held that the only other basis for a union to be found liable could be that of agency because the employers could have acted under the trade union's instruction as the principal. The union as the principal can authorise, instigate or ratify the commission of the delict. In this case Mondi failed to discharge the onus to prove its allegations that the union as principal, authorised, instigated or ratified the commission of the delict.¹⁷⁷ Francis J in *Mondi Ltd (MondiKraft Division)* noted that although negligence (*culpa*) was sufficient to found a claim for damages that was not sufficient in this case as the employer was also obliged to

¹⁶⁹ Landman (note 16 above) 846.

¹⁷⁰ Le Roux (note 20 above).

¹⁷¹ Ibid.

¹⁷² Ibid.

¹⁷³ Ibid.

¹⁷⁴ His reasoning for this is that it is sometimes difficult to hold the union accountable for wrongful actions committed by its members in a protected strike.

¹⁷⁵ *Mondi Ltd (Mondi Kraft Division) v Chemical Energy Paper Printing Wood & Allied Workers Union & Others* (note 21 above).

¹⁷⁶ Ibid 1470.

¹⁷⁷ *Mondi Ltd (Mondi Kraft Division)* (note 21 above) 1470.

show that a crime had been committed. In the circumstances of this case the employer was obliged to prove the commission of a crime and had to show who did so.¹⁷⁸ This would have helped the court in deciding whether the trade union could be held liable vicariously, unfortunately the employer failed to do so.

It is important to note that claims against individual employees will not be of much help to the employer because individual employees may not have the resources to compensate the employer in accordance with the court order.¹⁷⁹ Furthermore the court may be hesitant to hold an individual employee liable for the total loss suffered as a result of a strike where a few other members also participated.¹⁸⁰ The lesson learnt from the Labour Court judgment in the *Mondi* case is that a principal cannot be held vicariously liable for the unauthorised acts of his agent even if the act was ancillary to carrying out the mandate.¹⁸¹ It has been confirmed that before a union can be found liable as a principal, there must be proof that an agent acted within his authority on behalf of the principle.¹⁸² This means that the trade union will not be readily held liable for the actions of its members unless it can be shown that the employees acted under the principal agent relationship. The LRA, which provides for claims for damages for unlawful strike action, seems not to have diverted entirely from the requirements of the common law in cases involving pure economic loss since the general principles of holding one liable are still the same.¹⁸³

In the case of *Lillicrap Wassenaar & Partners v Pilkington Brothers (SA) (Pty) Ltd*¹⁸⁴ it was held that in cases where pure economic loss is sought to be recovered, the concept of 'wrongfulness' (a necessary requirement for liability) involved an assessment of policy considerations for the purposes of determining the point to which liability should be limited. The court in *National Union of Metalworkers of SA v Jumbo Products CC*¹⁸⁵ made it clear that under the 1956 LRA¹⁸⁶ the mere fact that a strike was illegal did not necessarily make it

¹⁷⁸ *Mondi Ltd (Mondi Kraft Division)* (note 21 above) 36.

¹⁷⁹ *Le Roux* (note 20 above) 12.

¹⁸⁰ *Ibid.*

¹⁸¹ *Ibid.*; Also see *Gericke* (note 11 above) 579.

¹⁸² *Heatons Transport (St Helens) Ltd v Transport & General Workers Union* [1972] 3 All ER 101 (HL). Also see *Mondi Ltd (Mondi Kraft Division)* (note 21 above) 1471.

¹⁸³ *Grogan* (note 73 above) 396.

¹⁸⁴ *Lillicrap Wassenaar & Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 475 (A).

¹⁸⁵ *National Union of Metalworkers of SA v Jumbo Products CC* (1997) 18 ILJ 107 (W) at 122-3.

¹⁸⁶ See note 4 above.

'wrongful' for the purposes of delictual liability. Section 67 of the LRA prohibits such claims if the strike complies with the provisions of the LRA and is therefore protected.¹⁸⁷

3.2.3 Claims for compensation vs Delictual claims: Do they amount to the same thing?

With the vast number of legal remedies at the disposal of the employer, and often claims for compensation and delictual claims being mostly utilised, academics have sought answers as to whether a claim for compensation and a claim for damages amount to the same thing?¹⁸⁸ The question that arises is whether the LRA has impliedly excluded a claim for damages if a claim for damages differs from a claim for compensation?¹⁸⁹ Differing views have been expressed on the answers to these two issues. Brassey, in *Commentary on the Labour Relations Act*¹⁹⁰ Vol 3 A4:51 suggest that we are dealing with two different claims.¹⁹¹ The claim for compensation is one created by the LRA, and the claim for damages is a claim based on common law principles.¹⁹² He argues that the LRA has ousted any potential claim for damages.¹⁹³ In any event, if such a cause of action still exists, it would have to be brought in the ordinary Courts, the labour court would not have jurisdiction to consider such a claim this is so because the claim will be entirely a delictual matter.¹⁹⁴ Thomson and Benjamin, in *South African Labour Law* AAI-347, also accept that a claim for damages and compensation are separate causes of action.¹⁹⁵ They also argue that to permit a claim for damages would be at odds with the clear intention of the legislature.¹⁹⁶

Grogan in *Collective Labour Law* also seems to agree with this view.¹⁹⁷ On the other hand, Du Toit accepts that the common law delictual claim for damages is still available to plaintiffs.¹⁹⁸ The decision in *Lomati Mill Barberton (A Division of Sappi Timber Industries) v Paper Printing Wood & Allied Workers Union & others*¹⁹⁹ accords with this view. The

¹⁸⁷ Le Roux (note 20 above) 12.

¹⁸⁸ Ibid 13.

¹⁸⁹ Ibid.

¹⁹⁰ Brassey (note 63 above) 51.

¹⁹¹ Ibid 51.

¹⁹² Ibid 51.

¹⁹³ Ibid 51.

¹⁹⁴ Ibid.

¹⁹⁵ Ibid.

¹⁹⁶ Ibid.

¹⁹⁷ Ibid.

¹⁹⁸ Grogan J *Collective Labour Law* 208.

¹⁹⁹ *Lomati Mill Barberton (A Division of Sappi Timber Industries) v Paper Printing Wood & Allied Workers Union & others* (1997) 18 ILJ 178 (LC).

decision of the Labour Court in *Post Office Ltd v TAS Appointment and Management Services CC & Others*²⁰⁰ accepts that a common law claim for delictual damages can still be utilised but it seems to accept that a claim for damages and a claim for compensation in terms of section 68(1)(b) are one and the same thing. The *Mondi*²⁰¹ decision indicates that delictual claims can be brought to recover losses suffered as a result of criminal actions committed during the course of a protected strike but this decision dealt with employee actions that took place prior to the extension of section 68(1) (b) in 2002 to cover acts or omissions occurring during the course of a strike.²⁰²

Finally, reference can be made to the decisions in *Jumbo Products CC v National Union of Metalworkers of SA*²⁰³ and *National Union of Metalworkers of SA v Jumbo Products CC*²⁰⁴ where it was held that a union can be held liable in delict for losses suffered as a result of an unlawful strike. However, although both decisions were decided after the introduction of the LRA, the strike that formed the basis for the claim took place prior to the introduction of the LRA.²⁰⁵ Le Roux is of the view that a claim for damages in terms of common law delictual principles is based on a cause of action that is separate from that found in section 68(1) (b).²⁰⁶ The common law delictual claim requires that the plaintiff must prove that he or she suffered loss caused by an unlawful and intentional or negligent act or omission of another party.²⁰⁷ If these requirements are met, the plaintiff is entitled to recover the full loss suffered.²⁰⁸ A claim for compensation will succeed if the requirements of section 68(1) (b) are met and the court has a wide discretion to determine what the amount of compensation to be awarded will be.²⁰⁹ Le Roux opines that the LRA does not provide any basis for the view that the common law delictual claim has been abolished by implication, this is so because section 67 (2) provides that a person does not commit a delict by taking part in a protected strike. This presupposes that such a common law remedy still exists and had to be expressly excluded in the case of protected.²¹⁰ As indicated above, section 67 (2) expressly states that a person does not

²⁰⁰ *Post Office Ltd v TAS Appointment and Management Services CC & Others* [2012] 6 BLLR 621 (LC).

²⁰¹ *Mondi Ltd (Mondi Kraft Division)* (note 21 above).

²⁰² Le Roux (note 20 above) 13.

²⁰³ *Jumbo Products CC v National Union of Metalworkers of SA* (1996) 17 ILJ 859 (W).

²⁰⁴ *National Union of Metalworkers of SA v Jumbo Products CC* (1997) 18 ILJ 107 (W).

²⁰⁵ Le Roux (note 20 above) 13.

²⁰⁶ *Ibid.*

²⁰⁷ *Ibid.*

²⁰⁸ *Ibid.*

²⁰⁹ Le Roux (note 20 above) 14.

²¹⁰ *Ibid.* Le Roux further opines that, the fact that such an express exclusion is not found in s 68 means that the common law principles still apply to unprotected strikes.

commit a delict or by taking part in a protected strike or instituting a protected lock-out.²¹¹ This suggests that such a common law remedy still exists and had to be expressly excluded in the case of protected strikes and lock-outs.²¹² Le Roux is of the opinion that the fact that such an express exclusion is not found in section 68 means that the common law principles still apply to unprotected strikes and lock-outs.²¹³

3.3 Conclusion

All of the above decisions that dealt with claims for compensation in terms of section 68(1) (b) required the claimant to establish that the losses suffered were attributed to an unprotected strike. The court would still have to consider various other factors before exercising its discretion to grant an order for compensation. It seems to be implicit in both the decisions of *Rustenburg Platinum Mines*²¹⁴ and *Mangaung Local Municipality*²¹⁵ that the court does not accept that the union would always and automatically be liable for the actions of its members because sometimes the union members would have acted out of their own accord and not under the principal-agent relationship.²¹⁶ In the *Rustenburg Platinum Mines*, case the Court held the union liable on the basis of the acts and omissions of senior officials and office-bearers of the union.²¹⁷ In the *Mangaung Local Municipality*²¹⁸ case the union was held liable for the actions of its shop stewards, at least in the situation where certain responsibilities had been delegated to them. Of particular interest are the acts or omissions of officials and shop stewards for which the union was held accountable. It is important to note that, if a trade union elects to delegate the responsibility to resolve the strike to its shop stewards employed by the employer facing an unprotected strike, and such shop stewards fail to discharge the same obligation that the trade union has, the trade union is also liable to compensate the employer for any losses that it has suffered as a result of such strike.²¹⁹ The above obligation arises because the trade union, as a party to a collective bargaining relationship with the employer, has a duty to ensure that its members comply with the provisions of the Act in relation to such an employer when they seek to exercise their collective power by way of

²¹¹ Section 67 (2) of the LRA (note 2 above).

²¹² Ibid.

²¹³ Ibid.

²¹⁴ *Rustenburg Platinum Mines* (note 146 above)

²¹⁵ *Mangaung Local Municipality* (note 89 above).

²¹⁶ Le Roux (note 20 above) 17.

²¹⁷ Ibid.

²¹⁸ *Mangaung Local Municipality* (note 89 above).

²¹⁹ Ibid 50.

strike action.²²⁰ In both cases the union was held liable as a result of the fact that the officials, office-bearers or shop stewards actively associated themselves with, supported, or called for, the strike.²²¹ This is so because the shop stewards had participated in the strike action and neglected their duty of reigning in the union members. The shop stewards were supposed to discharge their duties diligently.

However, in the *Mangaung Local Municipality*²²² case the court goes further and finds that the union can be held liable if the union fails to intervene and to take steps to bring an end to an unprotected strike. It seems unlikely that a union would be held liable for isolated acts of violence committed during the course of a strike.²²³ However liability may accrue if the trade union members are involved in the commission or planning of such acts.²²⁴ Liability will also accrue if the union officials or its representatives fail to take steps to prevent such actions.²²⁵ It is submitted that Grogan's view on the role played by the factors mentioned in section 68(1) (b) is correct. These factors are relevant in determining both the liability and the extent of any such liability that is found to exist.

Lastly, it should be noted that although section 68 confers exclusive jurisdiction on the Labour Court to award compensation, it does not prevent an employer from claiming damages in delict or for breach of contract in the civil courts in terms of section 77 (3) of the Basic Conditions of Employment Act 1997. The claimant may choose which forum to approach for such actions.

²²⁰ Ibid 47.

²²¹ Its shop stewards at the electricity department were aware of and participated in the strike. They took part in meetings with the applicant and instead of agreeing to call of the strike, made demands in support thereof. In addition, the evidence was that the branch committee, which includes shop stewards outside of the electricity department, was part of the meeting with the applicant on 16 January 2002 and did not take any steps to end the strike. The respondent, having made it clear in its letter of 16 January that its shop stewards were available to meet with the respondent to discuss the striking employees' grievances, delegated responsibility to them to take whatever steps were necessary to deal with the strike. The obligation to advise the striking employees that the strike was unprotected and that they should return to work rested on the branch committee. They did not do so and as a result, the strike continued and the applicant incurred losses in the process.

²²² *Mangaung Local Municipality* (note 89 above).

²²³ *Le Roux* (note 20 above) 17.

²²⁴ Ibid.

²²⁵ Ibid.

CHAPTER 4

4. Trade union's liability to its members

4.1 Introduction

Employers often resort to dismissal when strikes are unprotected or coupled with unlawful conduct. However an employer may not dismiss employees engaged in a protected strike.²²⁶ The dismissal of employees for taking part in a protected strike is regarded as automatically unfair.²²⁷ In the case of *Kroukam v SA Airlink (Pty) Ltd*,²²⁸ the court unanimously held that dismissing an employee for participating in union activities is an example of an automatically unfair dismissal. The Labour Appeal Court held that where the main reason for an employee's dismissal was the activities undertaken by the dismissed employee on behalf of a union, the dismissal of the employee is automatically unfair.²²⁹ Although the right to strike implies that employees who take part in a protected strike may not be dismissed, the protection afforded by sections 67(4) and 187(1) (a) is not absolute.²³⁰

Section 67(5) limits the rights of strikers not to be dismissed by providing that even where employees are participating in, or supporting, a protected strike, the employees may be dismissed for misconduct committed during the course of the strike.²³¹ In *Ram Transport (Pty) Ltd v SA Transport & Allied Workers Union & others*,²³² the court noted that the labour court is always open to those who seek the protection of the right to strike. The court qualified this statement by saying: 'But those who commit acts of criminal and other misconduct during the course of strike action in breach of an order of this court must accept in future to be subjected to the severest penalties that this court is entitled to impose.'²³³

When a dismissal is based on misconduct, the employer is required to ensure that the dismissal is fair, and complies with the requirements for a fair dismissal based on

²²⁶ Section 67(4) of the LRA (see note 3 above).

²²⁷ Section 187(1) (a) of the LRA (see note 3 above).

²²⁸ *Kroukam v SA Airlink (Pty) Ltd* (2005) 26 ILJ 2153 (LAC)

²²⁹ Cohan (note 42 above) 4.

²³⁰ Basson (note 2 above) 328.

²³¹ Section 67(5) of the LRA (note 3 above). See also Basson (note 2 above) 328.

²³² *Ram Transport (Pty) Ltd v SA Transport & Allied Workers Union & others* (2011) 32 ILJ 1722 (LC).

²³³ *ibid* 9.

misconduct.²³⁴ In terms of section 68 (5) of the LRA, dismissal may be a fair sanction when employees participate in an unprotected industrial action or unlawful conduct in contemplation or furtherance of such action.²³⁵ In evaluating the fairness of such dismissals, the provisions of the Code of Good Practise: Dismissal (the Code) contained in schedule 8 to the LRA must be taken into account.²³⁶ The employer also has discretion to take disciplinary action short of dismissal or alternatively issue a final written warning.²³⁷ In the case of *NUFAWU of SA v New Era Products (Pty) Ltd*,²³⁸ the court focused on the fundamental right to strike under the ‘new’ labour dispensation. Employees were dismissed on account of their participation in an unprotected strike disregarding numerous warnings and ultimatums.

The court in the above case compared the position before the 1996 constitution with position under the new constitution with a specific focus on the current requirements for a protected strike in accordance with section 64 of the LRA. The court said that the labour court should regard unprotected strike action coupled with serious misconduct in a very serious light and should therefore not readily come to the assistance of unprotected strikers who ignored repeated warnings and ultimatums to resume employment.²³⁹ The court held that serious damage to the very workbenches which provided daily work for the employees was destructive action which invited serious censure from the court.²⁴⁰ The court concluded that the general approach of the unprotected strikers to ignore the advice of officials regarding the legality of the strike, the various assaults launched by some of the strikers and the destruction of the employer’s property, ‘disentitled’ the strikers from any protection by the court.²⁴¹

²³⁴E Manamela (note 97 above) 326; Also see CCMA guidelines, Item 6 of The Code of good practice: Dismissal.

²³⁵ Gericke (note 11 above) 573.

²³⁶ Code of Good Practice: Dismissal, item 6 provides that:

(1) Participation in a strike that does not comply with the provisions of Chapter IV is misconduct. However, like any other act of misconduct, it does not always deserve dismissal. The substantive fairness of dismissal in these circumstances must be determined in the light of the facts of the case, including-

- (a) the seriousness of the contravention of this Act;
- (b) attempts made to comply with this Act;
- (c) whether or not the strike was in response to unjustified conduct by the employer.

(2) Prior to dismissal the employer should, at the earliest opportunity, contact a trade union official to discuss the course of action it intends to adopt. The employer should issue an ultimatum in clear and unambiguous terms that should state what is required of the employees and what sanction will be imposed if they do not comply with the ultimatum. The employees should be allowed sufficient time to reflect on the ultimatum and respond to it, either by complying with it or rejecting it. If the employer cannot reasonably be expected to extend these steps to the employees in question, the employer may dispense with them.

²³⁷ Gericke (note 11 above) 57.

²³⁸ *NUFAWU of SA v New Era Products (Pty) Ltd* 1999 ILJ 869 (IC).

²³⁹ Ibid 877.

²⁴⁰ Ibid 878.

²⁴¹ Ibid 878.

Employers are required to take precautionary measures before implementing unilateral decisions which could cause harm to the employment relationship.²⁴² Furthermore, the employer may not dismiss employees in order to compel them to accept a demand.²⁴³ Section 187 (1) (c) of the LRA makes it automatically unfair for an employer to dismiss employees on the condition that, if they agree to the change, the dismissal will be reversed.²⁴⁴ When trade union members are on the firing line and are likely to face dismissal for misconduct during the strike, they may call upon the trade union to come to their assistance. This is so because a trade union owes its members a duty of care in assisting them in employment related matters.

Members of trade unions may seek recourse against the employer for unfair dismissal during the strike. If the trade union fails to come to the rescue or assistance of the workers, it can be held liable for breaching any of the many duties entrusted upon them. As trade union members, employees may stipulate their demands and interests and the union is expected to regulate relations between employers and employees in meeting those demands.²⁴⁵ In performing these functions, trade unions are required to act within their mandate and in the best interests of their members.²⁴⁶ A union can be held liable in delict if it breaches its duty of care owed to its members and such breach is wrongful if it causes loss to the claimant and is due to the fault of the union.²⁴⁷

This was illustrated in the case of *SAMWU v Jada*,²⁴⁸ where dismissed employees instituted a delictual claim against the trade union, alleging that the union had breached its constitutional duty of care to ensure that the strikers did not participate in an unprotected strike which resulted in their dismissal.²⁴⁹ The court held that the members had failed to prove that the trade union owed them duties of care in such circumstances where the unprotected strike fell beyond the scope of their union's collective bargaining process.²⁵⁰ The court noted that members, who knowingly embark on an unprotected strike, should not benefit from their

²⁴² Gericke (note 11 above) 576.

²⁴³ Section 187 (1) (c) of the LRA (note 3 above). Also see Cohan (note 42 above) 60.

²⁴⁴ Section 187 (1) (c) of the LRA (note 3 above).

²⁴⁵ Cohan (note 42 above) 88.

²⁴⁶ Ibid.

²⁴⁷ Cohan (note 42 above) 83.

²⁴⁸ *SAMWU v Jada* (2003) 6 SA 294 (W)

²⁴⁹ Ibid 298F-H; See also Gericke (note 11 above) 578.

²⁵⁰ *Jada* (note 248 above) 302C-E; See also Gericke (note 11 above) 579.

criminal conduct which resulted in their dismissal and financial loss.²⁵¹ Such an action, according to the court, would be in conflict with public policy.²⁵² The maxim of *volenti non fit iniuria* operated as a defence against the members' claim for damages as they consented to the risk of financial loss.²⁵³ In *Mokgata v FAWU*²⁵⁴ the court held that the union was not obliged to provide legal assistance to its members in terms of its Constitution and could not be held liable for reimbursing the members for legal costs incurred.²⁵⁵

4.2 The trade union's mandate

Trade union representation is based on the principle of 'majoritarianism'. In terms of this principle, the trade union is bound to act on behalf of the majority of its members affected by a decision.²⁵⁶ Thus individual members of a trade union cannot terminate their collective agreement whenever they are unhappy, and they may not resign from the union in order to escape their effects. The decisions taken by the union as a majority would prevent these members from performing outside the scope of their union's collective agreement. The collective agreement regulates the terms and conditions of employees in their workplace, their duties and the duties of the employer. It is usually the result of a process of collective bargaining between an employer (and a number of employers) and a trade union representing workers.²⁵⁷ Employers in negotiation agreements with unions are bound to negotiate with majority unions only, and its members will be bound by collective agreements concluded as a result of such negotiations which fall within the ambit of their mandate.²⁵⁸

The court in *SA Post Office Ltd v CWU*²⁵⁹ supported the view of Grogan²⁶⁰ who underlines the *crux* of this judgment. A union's authority to conclude an agreement on behalf its members is based on the principle of 'majoritarianism'.²⁶¹ Implied in the principle of

²⁵¹ Ibid 303D-E.

²⁵² Ibid.

²⁵³ *Jada* (note 248 above) 303G-H.

²⁵⁴ *Mokgata v FAWU* (2007) 28 ILJ 2696 (T).

²⁵⁵ Cohan (note 42 above) 88.

²⁵⁶ Ibid.

²⁵⁷ A collective agreement is a written agreement concerning terms and conditions of employment, or any other matter of mutual interest, concluded by one or more registered trade unions on the one hand and, on the other hand one or more employers; one or more registered employers' organisations; or one or more employers and one or more registered employers' organisations.

²⁵⁸ Cohan (note 42 above) 88.

²⁵⁹ *SA Post Office Ltd v CWU* [2010] 1 BLLR 84 (LC).

²⁶⁰ J Grogan *Workplace law* (1998) 203.

²⁶¹ J Grogan *Collective labour law* (2007) 40.

‘majoritarianism’ is that the union leadership, as representatives and not as agents of members, may take binding decisions which may not necessarily be supported by the membership or other structures of the union.²⁶² Union leaders act as representatives and not as agents of members because they have the constitutional authority to do so. They conclude binding decisions which may not necessarily support all members or other related structures, but may nevertheless be enforceable because the majority of member’s interests are served.²⁶³ The court concluded that a settlement agreement entailing the cancelling of a strike was thus binding even though one of the union’s branches did not accept the agreement. This was so because in terms of the principle of ‘majoritarianism’ the settlement agreement was enforceable on everyone even the dissenting union.²⁶⁴ The case of *Mhlongo v FAWU*²⁶⁵ also confirms the view that a union represents its members on the principles of majoritarianism. A settlement agreement was binding on all the members regardless of some individual members’ alleged withdrawal of the union’s mandate prior to the conclusion of the collective agreement. The majority’s interests preside over the individual’s interests.²⁶⁶

It is important for members to ascertain whether a union is duly appointed in accordance to the terms of its constitution before they are bound by a collective agreement concluded on their behalf, and whether their conduct fall within the scope of their mandate because a collective agreement is binding on the union members and also because of the principle of ‘majoritarianism’.²⁶⁷ In *Mhlongo and others v Food and Allied Workers Union and another*,²⁶⁸ the applicants, employees of South African Breweries (SAB), were represented by the union in their unfair dismissal proceedings. The union, acting on behalf of its members, concluded a settlement agreement with SAB, but before the settlement agreement was concluded, the applicants terminated the union’s mandate to act on their behalf. They sought to review and set aside the settlement agreement, alleging that the union did not have a mandate to negotiate on their behalf, that the union and SAB had acted in bad faith by

²⁶² This principle is well pronounced in the case of *Ramolesane and another v Andres Mentis and Another* (1991) 12 ILJ 329 (LAC) at 336A, where the court the following to say:

“By definition, a majority is, albeit in a benevolent sense, oppressive of a minority. In those circumstances, therefore, there will inevitably be groups of people, perhaps even fairly large groups of people, who will contend, with justification that a settlement was against their interests. None the less, because of the principle of majoritarianism, such decision must be enforceable against them also.”

²⁶³ *SA Post Office Ltd* (note 259 above) 90, 23.

²⁶⁴ *Ibid* 93, 33.

²⁶⁵ *Mhlongo v FAWU* [2007] 2 BLLR 141 (LC) 14.

²⁶⁶ *Ibid*.

²⁶⁷ *Cohan* (note 42 above) 91.

²⁶⁸ *Mhlongo and others v Food and Allied Workers Union and another* (2007) 28 ILJ 397(LC).

concluding the settlement agreement, and that the agreement was not binding on them (the employees). The court held that despite the applicant employees' alleged termination of the union's mandate, the applicants had not terminated their membership of the union. Such termination had to comply with the union's constitution.²⁶⁹ The court said that the employees were not entitled to negotiate on their own on certain issues, unless the union had refused to act on their behalf or their membership had been terminated as the employer dealt with the employees in a collective manner.²⁷⁰ Furthermore, as the settlement agreement was a collective agreement the applicants were bound as members of the union irrespective of whether they subsequently continued to be members of the trade union.²⁷¹

4.3 Union Representation

The law has imposed many duties upon trade unions, their officials and representatives in terms of statutes and case law.²⁷² One of these fundamental duties that are relevant in this discussion is the 'duty of fair representation'. There are many ways in which a trade union can represent its members; these can be through collective bargaining, in disciplinary hearings and litigation.²⁷³ Section 200 of the LRA provides that a registered trade union may act in any one or more of the following capacities in any dispute to which any of its members is a party: a) in its own interest; b) on behalf of any of its members and c) in the interest of any of its members.²⁷⁴ In *Manyele and others v Maizecor (Pty) Ltd and another*²⁷⁵ the court confirmed that, unlike legal representatives, unions do not have to obtain a power of attorney or obtain the leave of the CCMA or Labour Court to represent its members.²⁷⁶ The court said that it is an institutional embodiment of its members and, as such, is a party to the proceedings.²⁷⁷

The right of a trade union to represent its members is not unlimited and unions are expected to uphold their members' interests and constitutional rights in the exercise of their duties.²⁷⁸

²⁶⁹ Ibid 4.

²⁷⁰ Ibid 15.

²⁷¹ Ibid 17.

²⁷² Cohan (note 42 above) 81.

²⁷³ Ibid 23.

²⁷⁴ Section 200 of the LRA (note 3 above); See also Cohan (note 42 above) 23.

²⁷⁵ *Manyele and others v Maizecor (Pty) Ltd and another* (2002) 23 ILJ 1578 (LC).

²⁷⁶ Cohan (note 42 above) 90.

²⁷⁷ Ibid.

²⁷⁸ Ibid 92.

The labour court in terms of section 158 (1) (e) has the power to determine disputes between registered trade unions and their members about issues relating to non-compliance with the unions constitution.²⁷⁹ It has been suggested that a union alleged to have exceeded its mandate could potentially face a claim for delictual damages from its members.²⁸⁰ In the case of *FAWU v Ngcobo*²⁸¹ the dismissed employees sought help from a trade union to represent them in their unfair dismissal claim. The dispute was not resolved in the CCMA. The union told its members that it would refer their dispute to the labour court for adjudication, but this was never done and the 90 day period for referring the dispute to the Labour Court had lapsed.

The union never attempted a condonation application. The High Court awarded the two members consolation payment (solatium) of 12 months' remuneration as being just and equitable.²⁸² The court held that the union had an obligation to prevent prejudice to its members where it agreed to assist them.²⁸³ FAWU appealed the High Court Judgment. On appeal, the SCA, in a split decision, held in favour of the two members. It held that the union agreed to assist the members under a contract of mandate, as such; it was obliged to perform its functions faithfully, honestly, and with care and diligence.²⁸⁴ FAWU's failure to, firstly, refer the dispute and, having failed to do so, then to apply for condonation, was in breach of its duty to act honestly or diligently.²⁸⁵ In proceedings before the Constitutional Court, FAWU argued that it had a right to determine its own administration in terms of section 23(4) (a), however the court rejected this argument. The court in coming to its conclusion held that

The union could not pursue its own interests, with impunity, when it has caused injury to members by failing to represent them properly. The union's own constitution suggested that the union will take responsibility for the negligent action of those acting on its behalf. Even if the trade union was permitted to withdraw from a matter where it agreed to represent its members, it was still obliged to take such a decision in good faith and inform the members timeously. It was obliged to act in good faith and could only withdraw if the members could fulfil the mandate previously given to the trade union.²⁸⁶

²⁷⁹ Section 158 (1) (e) of the LRA (note 2 above).

²⁸⁰ Cohan (note 42 above) 92.

²⁸¹ *FAWU v Ngcobo* [2013] 12 BLLR 1171 (CC).

²⁸² Ibid 11.

²⁸³ Ibid 9.

²⁸⁴ Ibid 12.

²⁸⁵ Ibid 42.

²⁸⁶ Ibid 31-43.

Another example of a union's failure in prosecuting its members' claim is found in the case of *SA Transport and Allied Workers Union v Maxi Strategic (Pty) Ltd.*²⁸⁷ The court distinguished between three categories of employees who participated in an unprotected strike:

- (a) The first category of *strikers participated voluntarily* in the strike whilst behaving in a belligerent, uncooperative manner. These employees failed to react to an ultimatum to return to work and refused to accept advice from their union, thereby abandoning the right to a hearing and an appeal. The court upheld the dismissal of these members.²⁸⁸
- (b) The second category of strikers was *intimidated into participation* and prevented from working. These members received final written warnings because they were found to be less culpable as they did not want to strike.²⁸⁹
- (c) The third group was the shop stewards who participated in the unprotected strike.²⁹⁰

The first and third category of employees received a fair ultimatum to return to work and to obtain advice from their union. Their dismissals were upheld.²⁹¹ Union members who intimidated the second category of employees and prevented them from working were interdicted and dismissed after disciplinary hearings were held in their absence. The court found them guilty of misconduct and consequently upheld their dismissals. The court furthermore rejected the union officials' and some of the employees' denial that they were on strike.²⁹²

4.4 Conclusion

It is important that trade unions should guard against the negligent conduct committed by its officials towards its members because the union members are not without remedy when faced with negligent conduct by its labour representatives. Thus the trade union should act in the best interests of its members and apply greater care to the management of labour disputes by

²⁸⁷ *SA Transport and Allied Workers Union v Maxi Strategic (Pty) Ltd* (2009) ILJ 1358 (LC).

²⁸⁸ *Ibid* page 3 of judgment.

²⁸⁹ *Ibid*.

²⁹⁰ *Ibid*.

²⁹¹ *Ibid* page 7 of judgment.

²⁹² *Ibid*.

trade unions. It is important to note that the judgment in *FAWU v Ngcobo NO above*, where the Constitutional Court held that a trade union cannot avoid liability for its neglect to prosecute claims by its members merely because the union has a constitutional right to determine its own administration, represents a victory for members against negligent conduct by their trade union representatives. This decision stresses and confirms the duty upon trade unions to act in the interests of their members and the responsibility placed on them to represent members even when the union is of the opinion that it is not in its interest to do so. The trade union will attract liability for its actions where it agrees to act on behalf of its members and then fail to carry out that mandate diligently and in good faith. The lesson derived from the *Jada* case is that in order to avoid liability, unions should ensure that they take steps to prevent their members from taking part in illegal actions which could lead to their dismissal. Furthermore, unions should act within the scope of their mandate in order to avoid liability at all costs. They should not knowingly encourage members to embark upon illegal strikes when they are aware that such action is illegal.²⁹³

²⁹³Cohan (note 42 above) 89.

CHAPTER 5

5.1 Liability of trade union to third parties in terms of the Regulation of Gatherings Act 205 of 1993

The Regulation of Gatherings Act (RGA)²⁹⁴ was introduced as an attempt to reconcile the right of assemblers with the state's interest in maintaining public order.²⁹⁵ The RGA distinguishes between a demonstration and a gathering. A demonstration refers to 'any demonstration by one or more persons, but not more than 15 persons, for or against any person, cause, action or failure to take action.'²⁹⁶ On the other hand a 'gathering', as defined in section 1 of the RGA, means 'any assembly, concourse or procession of more than 15 persons in or on any public road as defined in the Road Traffic Act 1989' (which must be read as a reference to the National Road Traffic Act 93 of 1996 which repealed the 1989 Act) or any other public place or premises wholly or partly open to the air.'²⁹⁷

The Act recognises everyone's right to assemble and protest peacefully and that authorities have a duty to facilitate this through negotiations with organisers of such events if necessary.²⁹⁸ However in terms of section 11 of the Gatherings Act, participants in the gathering can be held liable where the riot results in damage.²⁹⁹ Section 11(1) provides for the recovery of 'riot damage'. This section provides that

if 'riot damage' occurs as a result of a gathering, every organisation on behalf of, or under the auspices of which, the gathering was held will be jointly and severally liable for that riot damage, together with any other person who unlawfully caused or contributed to the riot damage or any other organisation who is held liable in terms of section 11(1).³⁰⁰

The section creates a specific statutory liability in addition to any other common law liability based on delictual principles that may exist.³⁰¹ The statutory liability created by this section

²⁹⁴ The Regulation of Gatherings Act (note 38 above).

²⁹⁵ D Brand *et al* 'South African Constitutional Law in Context' (2014) 556.

²⁹⁶ Section 1 of the RGA (note 38 above).

²⁹⁷ *Ibid.*

²⁹⁸ *Ibid.*

²⁹⁹ Section 11 of the RGA (note 38 above). See also Landman (note 15 above) 846.

³⁰⁰ Section 11(1) of the RGA (note 38 above).

³⁰¹ PAK Le Roux 'The rights and obligations of trade unions: Recent decisions clarify some limits to both' (2012) 22:4 *CLL* 31.

does not require that the organisation concerned or its office bearers intentionally or negligently caused the riot damage, which is contrary to the position liability based on delictual principles.³⁰² Riot damages are ‘any loss suffered as a result of any injury to or the death of any person, or any damage to or destruction of any property, caused directly or indirectly by, and immediately before, during or after, the holding of a gathering.’³⁰³ Riot damage would not include damages suffered from an inability to trade as a result of the gathering.³⁰⁴

Section 17 of the Constitution places an obligation on the trade union to ensure a peaceful gathering without the risk of riot damage to persons and property.³⁰⁵ Section 11(2) requires the union concerned (and its organizers if they are sued) to prove three things that:

- a) he or it did not permit or connive at the act or omission which caused the damage in question;
- (b) the act or omission in question did not fall within the scope of the objectives of the gathering or demonstration in question and was not reasonably foreseeable;
- (c) that he or it took all reasonable steps within his or its powers to prevent the act or omission in question. Provided that proof that he or it forbade an act of the kind in question shall not by itself be regarded as sufficient proof that he or it took all reasonable steps to prevent the act in question.³⁰⁶

This section was necessary as it creates a defence against the statutory liability found in section 11(1).

In *SATAWU v Garvas*,³⁰⁷ a claim for compensation was instituted against the trade union for damages caused during the gathering. The main contention in this case was the constitutional validity of section 11(2) of the Gatherings Act. Section 11 of the RGA imposes joint and several liabilities on the organisers of a demonstration or gathering for riot damage caused by the participants in the demonstration or gathering.³⁰⁸ According to section 11 of the Act,

³⁰² Ibid 32.

³⁰³ Section 1 of the RGA (note 38 above).

³⁰⁴ Landman (note 16 above) 834.

³⁰⁵ Section 17 of the Constitution (note 1 above)

³⁰⁶ Section 11(2) of the RGA (note 38 above).

³⁰⁷ *SATAWU v Garvas* (2012) 33 *ILJ* 1593 (CC).

³⁰⁸ Brand (note 293 above) 558.

when there is riot damage, every organisation under whose auspices the gathering took place will be liable unless it can be proved that the organiser had taken all the necessary steps to prevent the occurrence of the act or loss and that it was not reasonably foreseeable.³⁰⁹ SATAWU argued that section 11(2) of the Gatherings Act was irrational as it required the organisers of a gathering to take all reasonable steps to prevent the act or omission in question even when that act or omission was not reasonably foreseeable. SATAWU further argued that section 11(2) also limited the right to freedom of assembly and that this limitation was not reasonable and justifiable. A majority of the Constitutional Court rejected both these arguments and found that section 11(2) was constitutionally valid.³¹⁰ The Constitutional Court began by first noting that it was obliged to interpret section 11(2) in a manner that gave it a rational meaning and preserved its validity so that the purpose for which it was enacted could be realised.³¹¹ The court remarked that:

Gatherings, by their very nature, do not always lend themselves to easy management. They call for extraordinary measures to curb potential harm. The approach adopted by Parliament appears to be that, except in the limited circumstances defined in section 11(2), organisations must live with the consequences of their actions, with the result that harm triggered by their decision to organise a gathering would be placed at their doorsteps.³¹²

The Constitutional Court found that section 11(2) was rational. The court found the limitation on the right to freedom of assembly to be reasonable and justifiable in terms of the limitation clause set out in section 36 of the Constitution. The Constitutional Court found that this is because the limitation served an important purpose of protecting members of society, including those who do not have the resources or capability to identify and pursue the perpetrators of the riot damage for which they seek compensation. This limitation was therefore found to be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.³¹³ The court rejected the union's argument that since it had foreseen the damage causing act and had taken reasonable steps to prevent it, it would have been impossible for it to prove that the act was not reasonably foreseeable. The court found that the protest had been preceded by a violent march and therefore it was foreseeable that it would be a riot. According to the court, 'when a gathering imperils the physical

³⁰⁹ Section 11 of the RGA (note 37 above).

³¹⁰ Brand (note 295 above) 559.

³¹¹ *ibid.* See also Garvas (note 18 above) 37.

³¹² Garvas (note 18 above) 39.

³¹³ Garvas (note 18 above) 51-52.

integrity, the lives and sources of livelihood of the vulnerable, the organisations that are responsible for setting in motion the events that gave rise to the suffered loss must bear liability for damages arising therefrom.³¹⁴ The appeal was dismissed.

The claim for damages in terms of the RGA, termed 'riot damages', is provided for in section 11. A claim for riot damages constitutes an additional remedy as section 11(4) provides that the provisions of section 11 do not affect in any way the right, under the common law or any other law, of a person or body to recover the full amount of damages arising from the negligent or intentional act or omission, or delict of whatever nature committed by or at the behest of any other person.³¹⁵ In such case ordinary common law principles would apply insofar as the damage or loss is caused by acts or omissions that constitute a criminal offence.³¹⁶

5.2 Conclusion

Although the members of SATAWU had embarked on a protected strike, one cannot excuse the actions that took place and caused damages to properties and led to several injuries on ordinary citizens who had no part in the dispute.³¹⁷ The court was undoubtedly correct in taking the decision to hold the trade union liable for the damages. The question of what acts or omissions are reasonably foreseeable can be linked directly with the steps that the union is required to take in order to prevent any consequences arising from the riot.³¹⁸ It is submitted that SATAWU should have foreseen the resultant damage causing riot and should have taken steps to prevent this from occurring. In a strike situation, violence will always become a possibility because strikers' demands are not always met and as a result people are frustrated. It is evident that this decision makes it difficult for a union to defend itself against claims arising from gatherings.³¹⁹ The action in this case could have been instituted in the Labour Court but this would have required the court to look at factors which would not have applied in a claim under the RGA or the common law in deciding the claim for compensation. Whether the action was instituted under the RGA, LRA, or Civil Law the outcome would

³¹⁴ Garvas (note 18 above) 34 & 94.

³¹⁵ Section 11(4) of the RGA (note 38 above). See also Landman (note 16 above) 838.

³¹⁶ Le Roux (note 301 above) 33.

³¹⁷ J Grogan 'Riotous strikes Unions liable to victims' (2012) *Employment Law Journal* 11.

³¹⁸ W Malcom 'Now you see it, now you don't- *SATAWU v Garvas and others*' (2012) 33 *ILJ* 2257.

³¹⁹ Le Roux (note 301 above) 33.

have been the same since unlawful acts and misconducts are not permitted by law during strikes. This is truly a lesson to unions who fail to warn their members of the consequences of their unlawful acts.

CHAPTER 6

6.1 Conclusion

It goes without saying that trade unions are invaluable institutions in terms of South African labour law.³²⁰ Gericke³²¹ opines that the trade union's administrative and legal skills are priceless in the collective bargaining process; and so is the degree of accuracy and commitment to their responsibilities and obligations to serve the interests of their members. They provide an essential counterbalance to the power of management during negotiations.³²² Thus, dereliction of their duties in terms of their constitution and the provisions of the LRA can have untold detrimental effects on their members. A lack of accountability in the decisions and actions taken by trade unions may end in financial loss and unemployment for members.³²³

It is important to note that the judgment in *FAWU v Ngcobo NO* confirms that if the trade union fails its members it will be attracting liability on itself. This decision stresses and confirms the duty upon trade unions to act in the interests of their members and the responsibility placed on them to represent members even when the union is of the opinion that it is not in its interest to do so.

Our courts will not tolerate unlawful conduct from trade union members during strikes. In the case of *FAWU obo Kapesi v Premier Foods Ltd t/a Blue Ribbon Salt River* [2010] JOL 25623 (LC)³²⁴ the court held that:

It is certainly not acceptable to force an employer through violent and criminal conduct to accede to their demands. This type of vigilante conduct not only seriously undermines the fundamental values of our Constitution, but only serves to seriously and irreparably undermine future relations between strikers and their employer. Such conduct further completely negates the rights of non-strikers to continue working, to dignity, to safety and security and privacy and peace of mind.³²⁵

³²⁰ Gericke (note 11 above) 584.

³²¹ Ibid.

³²² Ibid.

³²³ Ibid.

³²⁴ *FAWU obo Kapesi v Premier Foods Ltd t/a Blue Ribbon Salt River* [2010] JOL 25623 (LC)

³²⁵ Ibid 6.

The above statement is evidence of the fact that the courts have now adopted a robust approach in trying to compel trade unions to reign in their members so that they do not commit any act of misconduct during a strike action. This is so because death, personal injury, and damage of property by striking workers have become disturbing features of protests and demonstrations in South Africa.³²⁶ Such behaviour has led courts to impose liability on trade unions for breaching the various duties bestowed upon them, fundamental amongst these being their duty to protect the interests of their members in the workplace. It cannot be said that the interests of their members are being protected when they face dismissal for the unlawful conducts and/or unprotected strikes which the trade union should have prevented in the first place.

It can successfully be argued that there is a duty upon trade unions to take all reasonable steps to stop and prevent violence, damage to property, and other acts of misconduct during a strike.³²⁷ The court in the case of *Garvis v SATAWU*³²⁸ had a chance to consider whether section 11(2) (b) of the RGA,³²⁹ which fixes the union with delictual liability for riot damage unless the union can prove that the act or omission complained of did not fall within the objectives of the gathering and was not reasonably foreseeable, infringed the rights of the participants to demonstrate, picket, and present petitions in terms 17 of the constitution.³³⁰

It should be noted that section 17 of the constitution³³¹ protects only peaceful and unarmed assemblies, demonstrations and pickets. Trade union officials and their members should now know that section 17 of the constitution³³² has no application to gatherings that result in riot damage and they will be held liable for the riot damages. This is so because the constitutional right to picket in terms of section 17 of the constitution,³³³ coupled with the constitutional right of employees to strike, is balanced with the rights of employers, non-striking employees and innocent third parties.

Section 11 of the RGA does not preclude striking workers from demonstrating, picketing, carrying placards, singing and chanting peacefully and unarmed. The entire scheme of the

³²⁶ Rautenbach (note 159 above) 151.

³²⁷ Cohen (note 42 above) 81.

³²⁸ *Garvis* (note 18 above)

³²⁹ Section 11 (2) (b) of the RGA (note 38 above).

³³⁰ Section 17 of the Constitution (note 1 above).

³³¹ *Ibid.*

³³² *Ibid.*

³³³ *Ibid.*

Act, including section 11, is designed to prevent unlawful violent behaviour that impinges on the rights of others, and to ensure that persons or organisations that organise assemblies that degenerate into riots should bear liability.

After the cases of *Eskom Ltd v National Union of Mineworkers*³³⁴ and *Mondi Ltd v CEPPAWU and Others*³³⁵ it became clear that trade unions are capable of being held vicariously liable for the acts of their members if the employer can establish that there was a wrongful act committed by the union members and that it was liable for its members' actions. However, the trade union will not be readily held liable because there is a burden of proof on the plaintiff to prove that the trade union acted with common purpose by authorising the employees' behaviour.

The trade union has to try by all means to discourage its members from embarking on an unprotected strike given that it is not burdensome to comply with the section 64 of the LRA which governs protected strike. The trade union should respect the collective bargaining relationship that exists between it and the employer, and if its members embark on unprotected strike action, the trade union should intervene to put to an end to the strike unless it has a just cause not to intervene. This is so because failure to intervene to put to an end an unprotected strike, when called to do so by the employer will result in trade union being liable in terms of section 68(1)(b) of the LRA to compensate the employer who suffers losses due to such an unprotected strike.

It is important to note that our law and our courts³³⁶ offer legal protection to the vulnerable members whose rights are infringed by a trade union in terms of collective agreements, fundamental rights, statutory rights and the common law.³³⁷ However it seems unlikely that a union will be held liable for isolated acts of violence committed during the course of the strike.³³⁸ Given the jurisdiction upon tribunals and courts, members of trade unions may hold unions liable for the damages sustained in cases where unions have failed to comply with

³³⁴ *Eskom Ltd* (note 165 above).

³³⁵ *Mondi Ltd* (note 21 above)

³³⁶ Special tribunals and courts have jurisdiction to adjudicate disputes between a union and its members, or to hold a union liable for damages sustained by members in cases where a union failed to comply with its statutory duties to act in the best interest of its members as their representative.

³³⁷ Gericke (see note 11 above) 585.

³³⁸ Le Roux (note 20 above) 17.

their statutory duties.³³⁹ Innocent third parties also have legal actions against trade unions for the damages they suffered during strike misconduct. Liability in terms of the RGA is wider than the LRA and includes damage caused by negligence.³⁴⁰ Conduct will only be protected in a strike if it advances the lawful and legitimate objects of a protected strike.³⁴¹ It is in a trade union's interest, as the facilitator, protector and representative of its members, that it exercises its rights in accordance with section 23(4) and (5) of the constitution.³⁴²

Lastly it should be emphasised that lawlessness should not be allowed to infiltrate and pollute the right to strike. The right to strike is an important tool for employees during collective bargaining, but it should not be abused and misused by workers through acts of violence. Accordingly, it is up to trade unions to ensure that their members conduct themselves properly during strikes, whether protected or not.³⁴³

³³⁹ Gericke (note 11 above) 585.

³⁴⁰ Landman (note 16 above) 847.

³⁴¹ Manamela (note 97 above) 326.

³⁴² Section 23(4) and (5) of the constitution (note 1 above).

³⁴³ Manamela (note 97 above) 336.