

UNIVERSITY OF KWAZULU-NATAL  
SCHOOL OF LAW, PIETERMARITZBURG

**An investigation into the effectiveness of trade unions  
in advancing the cause of workers during strikes in the  
face of an emerging culture of violence and criminality**

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This mini-dissertation is submitted in partial fulfilment of the requirements for the degree of Masters in Business Law in the College of Law and Management Studies at the University of KwaZulu-Natal, 2019

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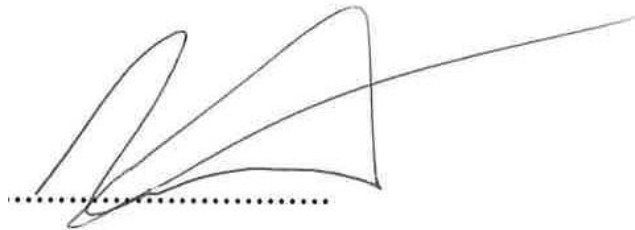
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## **ACKNOWLEDGEMENTS**

I would like to extend my sincerest gratitude to my Supervisor, Dr Tenza, for his continued support and guidance in assisting me to complete this dissertation. Dr Tenza always availed himself, often at short notice, to provide me with valuable input for the dissertation. I would further like to thank my family, and also my husband for his constant encouragement and insistence that I commit to completing my LLM. This work is dedicated to my mother, Mrs Zamadlomo Arnold, who has always shown me unwavering love and support. I would also like to express my appreciation to my colleagues at the KZN Provincial Office of the Legal Practice Council for their support – particularly Sanelisiwe Ngcobo, Ayanda Mchunu, Sindiswa Ndaba and Engela Pienaar. A special vote of thanks also goes to the course co-ordinator, Mrs Robynne Louw, who has always availed herself to respond to queries and assist where it was necessary.

## TABLE OF CONTENTS

CHAPTER 1 .....	6
INTRODUCTION AND GENERAL OVERVIEW .....	6
1.1 Introduction .....	6
1.2 Background .....	9
1.3 Structure .....	10
1.4 Rational for The Study .....	11
1.5 Research Questions .....	12
1.6 Methodology .....	13
1.7 Literature Review .....	13
CHAPTER 2 .....	16
THE ROLE AND RESPONSIBILITIES OF TRADE UNIONS IN STRIKES .....	16
2.1 Introduction .....	16
2.2 The Role of Trade Unions in Relation to its Members .....	18
2.3 The Role of Trade Unions in a Democratic South Africa.....	19
2.4 The Role of Trade Unions in Strikes .....	21
2.4.1 Protected Strikes.....	21
2.4.2 Unprotected Strikes .....	26
2.5 Conclusion .....	29
CHAPTER 3 .....	31
THE IMPACT OF VIOLENT STRIKES ON EMPLOYERS, TRADE UNIONS, EMPLOYEES AND THE ECONOMY .....	31
3.1 Introduction .....	31
3.1.1 The Impact of Strikes on the Relationship between the Employer, Trade Union and Employees .....	32
3.1.2 The Impact of Violent Strikes on the Economy .....	32
3.2 The Impact of Violent Strikes on the Credibility of Trade Unions.....	35
3.3 Conclusion .....	36
CHAPTER 4 .....	38
THE RECOURSE AVAILABLE TO VICTIMS OF VIOLENT STRIKES .....	38
4.1 Introduction .....	38
4.2 Remedies Available to Victims of Violent strikes .....	39
4.2.1 The Employer’s Right to Dismiss Employees on the Grounds of Misconduct	39
4.3 Interdicts.....	42
4.4 Criminal Prosecution.....	47
4.5 Claims for Damages.....	47

4.6	The Trade Union’s liability in terms of the Regulation of Gatherings Act .....	48
4.7	Claims for Compensation.....	49
4.8	Conclusion .....	51
CHAPTER 5 .....		53
CONCLUSION AND RECOMMENDATIONS .....		53
5.1	Recommendations and Conclusion .....	53
BIBIOGRAPHY .....		58

# **CHAPTER 1**

## **INTRODUCTION AND GENERAL OVERVIEW**

### 1.1 Introduction

South Africa has, since its democratisation in 1994, made significant strides in the advancement and protection of human rights. The Constitution<sup>1</sup> and the Bill of Rights<sup>2</sup> are indicative of the legislature's commitment to ensuring that the historical injustices perpetrated under the apartheid regime, are adequately addressed and never repeated again.<sup>3</sup> The democratisation of the country has further contributed to the protection and advancement of the rights of employees through the promulgation of various pieces of legislation, such as the Labour Relations Act<sup>4</sup> (hereinafter referred to as "the LRA"), the Basic Conditions of Employment Act,<sup>5</sup> and the Employment Equity Act.<sup>6</sup> These are just a few of the legislative instruments upon which employees are reliant to ensure that fair labour practices are observed by the employer and that issues of inequality and unfair discrimination in the workplace are addressed.

It is, however, unfortunate that despite these legislative developments and interventions, South Africa has in recent years experienced a growing culture of violence and lawlessness during labour-related strikes. This is evident from the increase in the number of incidents that have been reported over the years, involving acts of violence that have been perpetrated during strikes. The consequences of violent strikes include damage to property, the intimidation of non-striking workers, and, in extreme cases, the loss of life.<sup>7</sup> Members of society at large are also adversely affected by violent strikes and may suffer, *inter alia*, injury or damage to their property.

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<sup>1</sup> The Constitution of the Republic of South Africa Act 108 of 1996.

<sup>2</sup> Ibid Chapter 2.

<sup>3</sup> Preamble of the Constitution. The Constitution is adopted as the supreme law of the land to heal divisions of the past and to establish a society based on democratic values, social justice and fundamental human rights, lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law, improve the quality of life of all citizens and free the potential of each person, and build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.

<sup>4</sup> The Labour Relations Act 66 of 1995.

<sup>5</sup> The Basic Conditions of Employment Act 75 of 1997.

<sup>6</sup> The Employment Equity Act 55 of 1998.

<sup>7</sup> Manamela E and Budeli M 'Employees right to strike and Violence in South Africa' (2013) Volume 46 *CILSA* 322 and 323.

A number of cases have come before the Labour Court where the issue concerned related to violence committed during strikes and the liability of trade unions in this regard. *SATAWU v Garvis*<sup>8</sup> is one such case, which required the court to consider whether the trade union could be held accountable for violence and extensive damage to property that had occurred when a march that it had arranged took a riotous turn. The march had been preceded by a protracted strike that resulted in the deaths of no less than 50 people. The trade union had committed to appointing 500 marshals to control the crowd, but failed to manage the march.<sup>9</sup> The High Court found in favour of the plaintiffs and held the trade union liable for the damage sustained by the City of Cape Town, private property, and business owners. The damage to property was estimated to be R1,500 000.<sup>10</sup> The matter was taken on appeal to the Supreme Court of Appeal and was eventually escalated to the Constitutional Court to determine the constitutional validity of certain sections in the Regulation of Gatherings Act,<sup>11</sup> the outcome of which is deliberated on in greater detail in chapter four of this dissertation.

In August 2012, workers employed by the Lonmin Mine in Marikana embarked on a strike to demand what they termed to be “a living wage”. The strikers and law enforcement officers clashed – with 34 fatalities reported and 78 people seriously injured. The police insisted that they had acted in self-defence as the strikers were allegedly heavily armed.<sup>12</sup>

On 26 April 2019, employees of the eThekweni Municipality engaged in a violent strike, which lasted for two weeks. The workers demanded an increase in their wages and alleged that they were being subjected to unfair labour practices, because the employer had allegedly given MK veterans preferential treatment in terms of promotions and salary increases. They then, during the strike, went on a rampage through the city, damaging city property and barricading the city centre utilising vehicles owned by the municipality. One person was reported to have died and

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<sup>8</sup> (CCT 112/11) [2012] ZACC 13; 2012(8) BCLR 840 (CC); [2012] 10 BLLR 959 (CC); (2012) 33 ILJ 1593 (CC); 2013

<sup>9</sup> Supra note 8 above at paras 10 and 11.

<sup>10</sup> Supra note 8 at para 12. Add full stop at the end of your footnotes.

<sup>11</sup> The Regulation of Gatherings Act 205 of 1993.

<sup>12</sup> Alexander P ‘*Marikana, turning point in South African history*’. 17 December 2013. South African History Online. Online article available at [https://www.sahistory.org.za/sites/default/files/marikana\\_turning\\_point\\_in\\_south\\_african\\_history.pdf](https://www.sahistory.org.za/sites/default/files/marikana_turning_point_in_south_african_history.pdf) (Accessed : 29 May 2019).

several others were injured. Media reports estimated the damages to be in the region of R3,500 000, for which the municipality has indicated that it intends to hold the trade unions liable.<sup>13</sup>

These are but a few examples of strikes that have taken a violent turn, which demonstrate the growing phenomenon of violence, which has become synonymous with strikes. The consequences of violent strikes have far-reaching implications, particularly on a country which is trying to develop a sustainable and thriving economy. The prevalence of violent strikes negatively impacts on the ability of the South African economy to develop, as international investors are reluctant to invest in a country which is unable to guarantee a return on their investments due to volatile financial markets – which are a result of violent labour strikes. Research conducted on the effect of strikes on the South African economy by a university lead research foundation, the Mandela Initiative,<sup>14</sup> reflected the view of Mr Jacki Condon, MD of Apache Security Services, that the impact of violent strikes was:

“The negative effects on international trade include the hinderance of economic development creating great economic uncertainty especially as the global media continues to share details, images and videos of violent damage to property and ferocious clashes between strikers and security.”<sup>15</sup>

Against this background, it has become essential for the effectiveness of trade unions in advancing the cause of workers during strikes to be thoroughly investigated. It is further necessary to interrogate whether the purpose for which strikes were intended, has in any way been diminished by the growing prevalence of violence. Lastly, whether the legal consequences that flow from violent strikes have any significant impact on the trade unions and the employees whose interests they seek to protect, also needs investigation.

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<sup>13</sup> Singh O ‘Durban municipal workers’ illegal strike caused R3,5m in damage – premier. 3 May 2019. Times Live. Available at <https://www.timeslive.co.za/news/south-africa/2019-05-03-durban-municipal-workers-illegal-strike-caused-r35m-in-damage-premier/> ( Accessed: 30 May 2019).

<sup>14</sup>Mavuso Z ‘Study examines impact of strikes on the South African economy’. 26 October 2018. Engineering News. Available at <https://m.engineeringnews.co.za/article/new-study-on-the-impact-of-strikes-on-s-african-economoy-2018-10-11> (Accessed: 21 March 2019).

<sup>15</sup> Ibid.



## 1.2 Background

Strikes are a fundamental part of the South African socio-economic and political culture. During the apartheid era, strikes were used as a form of expressing discontent with the oppression that people of colour were subjected to and as a medium of highlighting the disheartening state of affairs at the time. The Constitution affords everyone “the right to fair labour practices”,<sup>16</sup> the right to engage in collective bargaining and the right to strike.<sup>17</sup> The Constitution further provides that any gathering of people, including strikes, should be peaceful and unarmed.<sup>18</sup> In this regard, the LRA defines a strike as:

“the partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee”.<sup>19</sup>

The right to strike is undeniably the most effective form of negotiation that is available to “employees who are involved in a dispute with their employer”. Characterised by the withdrawal of labour, the purpose of a strike is to exert economic pressure on the employer in an effort to compel it to address the demands of employees.<sup>20</sup>

The imperative of the right to strike was acknowledged by Yacoob ADCJ in *SATAWU v Moloto*,<sup>21</sup> wherein he stated that “the right to strike, rooted in collective bargaining is premised on the need to introduce greater balance in the relations between employers and employees, where employers have the greater social and economic power”.<sup>22</sup> The court in *National Union of Metalworkers of SA v Bader Bop (Pty) Ltd*<sup>23</sup> reinforced this position and expressed similar sentiments on the implication of the right to strike, and discovered that it is through industrial action that workers can maintain bargaining power in industrial relations.<sup>24</sup>

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<sup>16</sup> S23(1) of the Constitution.

<sup>17</sup> *Ibid* s23 (2)(c).

<sup>18</sup> *Ibid* s17.

<sup>19</sup> S213 of Act 66 of 1995.

<sup>20</sup> Botha MM ‘Responsible Unionism during Collective Bargaining and Industrial Action: Are we ready yet?’ (2015) Volume 48 *De Jure Law Journal* 332.

<sup>21</sup> 2012(6) SA 249 (CC).

<sup>22</sup> *Supra* note 21 above at para 85.

<sup>23</sup> (2003) 24 ILJ 305 (CC).

<sup>24</sup> *Supra* note 23 above at para 13.

It is, however, significant that while the right to strike is an important right and is afforded a high degree of protection by virtue of it being a constitutional right, it is in no way absolute and is subject to the limitations clause<sup>25</sup> in the Constitution.<sup>26</sup> The limitation clause provides that the rights contained in the Bill of Rights may be limited only in terms of the “law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors”.<sup>27</sup>

It should further be acknowledged that employees who participate in a strike are not entitled to abuse the right. The courts have consistently expressed displeasure at violent strikes by imposing sanctions on the trade unions which have been found to have failed to adequately manage a strike. In *FAWU obo Kapesi v Premier Foods (Pty) Ltd t/a Blue Ribbon Salt River*,<sup>28</sup> the Honourable Madam Justice Basson made scathing remarks and expressed her displeasure at the conduct of strikers who had perpetrated acts of violence on non-striking workers.<sup>29</sup> Strikes therefore should always be peaceful and orderly, with strikers ensuring that they do not engage in any acts of misconduct, which may compromise the integrity of the action and undermine its legitimacy.<sup>30</sup> The full extent of the consequences that flow from violent strikes for the trade unions, their members, employers, and the economy, will be discussed in further detail in ensuing chapters.

### 1.3 Structure

The study will comprise five chapters. The first chapter contains an introduction to the topic and gives brief background on the relevance of the topic. The importance of the right to strike and the extent to which it is protected is discussed. A brief summary on the legislative requirements for a strike and the limitations thereon is also discussed.

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<sup>25</sup> S36(1) of the Constitution.

<sup>26</sup> Ibid.

<sup>27</sup> Ibid.

<sup>28</sup> (C640/07) [2010] ZALC61;(2010) 31 ILJ 1654 (LC); [2010] 9 BLLR 903 (LC).

<sup>29</sup> Supra note 29 above at paras 5 and 6.

<sup>30</sup> Rycroft A ‘What can be done about Strike – Related Violence?’ (2014) Volume 30 *IJCLIR* 202.

The second chapter commences with a brief background on trade unionism in South Africa. An analysis of the role played by trade unions in relation to their members and their responsibilities when a strike has been called, is discussed in detail. The distinction between a protected and unprotected strike is discussed. The researcher will investigate whether trade unions have a role to play in a democratic South Africa, and, if so, what their impact on the labour market is. A brief discussion is presented of the recent amendment to the LRA,<sup>31</sup> requiring trade unions and employer organisations to record a “secret ballot” prior to a strike being called and to amend their constitutions accordingly, if such provision is not catered for. The effect of this amendment on the legality of strikes will be discussed in the context of the relevant case law. The arguments in support of and against the amendment will also be discussed.

The third chapter will consider the extent to which violent strikes have impacted on trade unions, employers and employees’ ability to sustain a mutually beneficial relationship. The impact that violent strikes have on the economy will also be discussed, as well as the unintended results thereof. The impact that adverse court judgments have on the credibility of trade unions will be addressed in detail.

The fourth chapter will examine whether trade unions can be held liable for the conduct of their members during strikes. This chapter will consider the legal remedies available to the employer and third parties who have been affected by violent strikes – as well as the responsibilities of trade unions during strikes. Recent developments in the law relating to strikes will be discussed.

The fifth chapter will be the conclusion drawn following analysis of the information gathered on the topic. A discussion on the effectiveness of the remedies available to victims of violent strikes, as well as the possible solutions that may be implored to address the issue of violent strikes, will be discussed.

#### 1.4 Rationale for The Study

The topic is of great relevance to South Africa, particularly because of the prevalence of violence during strikes and the effect this has on the economy of the country. South Africa has

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<sup>31</sup> The Labour Relations Amendment Act 8 of 2018.

recently faced an increase in violent strikes. Workers are heavily reliant on strikes to compel their organisations to agree to their demands or to address their grievances. Strikes have unfortunately become synonymous with violence – with resultant destruction of property, intimidation and killing of people, looting, and other forms of unlawful conduct. Mostly targeted are replacement workers and non-striking workers, the latter often being victimised and even killed because of their non-participation in strikes. It is the prevalence of such criminality that often necessitates the presence of law-enforcement officials at strikes.

The study will seek to determine whether criminal elements that have plagued strike action have succeeded in diluting the effectiveness of what is undeniably the strongest bargaining tool at the disposal of workers. Furthermore, it will determine whether the unlawful acts perpetrated during strike action and the consequences thereof, hinder the capability of trade unions to efficiently advance the interests of workers. The study will conclude by determining whether the use of violence during strikes has in any way impacted on the employer's willingness to negotiate in respect of the demands of the workers and to settle the issue that is in dispute.

### 1.5 Research Questions

The study will attempt to address the following research questions:

- Does violence or criminality perpetrated during strike action hinder or advance the trade union's effectiveness in addressing the cause of workers?
- To what extent, if any, does violence and unlawful conduct perpetrated during strikes have an impact on strikes as an effective tool of collective bargaining?
- Do violent strikes have any impact in persuading the employer to comply with the demands of workers?
- Has the increase in violent strikes affected the credibility and sustainability of trade unions?
- What role does the trade union play in facilitating a strike and what are the expectations that arise when it becomes violent?

## 1.6 Methodology

The research will be desktop-based. It will incorporate legislation, case law and journal articles. Reference will also be made to online sources, including grey literature.

## 1.7 Literature Review

A significant amount of research has been conducted on the importance of the right to strike and the legitimacy afforded to it – as illustrated in the view expressed by the Constitutional Court in *National Union of Metalworkers of SA & Others v Bader Bop (Pty) Ltd*,<sup>32</sup> when it was said that the right is important for the “dignity of workers who may not be treated as coerced employees in our constitutional order”.<sup>33</sup> Du Toit and Ronnie<sup>34</sup> have considered in great detail the legislative provisions as contained in the Labour Relations Act – governing the right to strike and the gaps perceived to be in the legislation – that hamper the effective regulation of strikes. They suggest that the legislation has failed to keep abreast with the evolving labour market trends that have seen a shift from conventional forms of employment to non-standard jobs because of globalisation. The authors further suggest amendments that can be made to existing legislation to address the deficiencies in the law, in response to the changing demands of the labour market.<sup>35</sup> These interventions are reflective of a broader approach to the application of the right to strike, which would allow individuals to exercise it outside of the context of collective action. They further support what they term, the need for the effective organisation of “non-standard” workers. This point is argued by the comparison of the definitions contained in the Constitution and the Labour Relations Act. The latter offers a more restrictive definition of employee as opposed to the broader term of worker. The view expressed by the authors is that the restrictive definition of employee has an exclusionary implication and does not accommodate those employed in non-standard employment, and, as such, impedes their ability to exercise their right to strike.<sup>36</sup>

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<sup>32</sup> (CCT/14/02){2002} ZACC 30; 2003 (2) BLLR 182; 2003(3) SA513 (CC); [2003] 2 BLLR 103 (CC).

<sup>33</sup> Supra note 32 above at para 13.

<sup>34</sup> Du Toit D and Ronnie R ‘The Necessary Evolution of Strike Law’ (2012) Volume 2012 *Acta Juridica* 198 - 199.

<sup>35</sup> Ibid at 196-201.

<sup>36</sup> Ibid at 205-207.

The dissertation by Tom<sup>37</sup> investigated strike action and the recourse available to parties who have been adversely affected by violent strikes. Tom gives a detailed analysis of the attitude of the courts towards trade unions that fail to ensure that strikes are peaceful and free from any unlawful conduct. She further considers the extent to which trade unions can be held liable for the damages arising from violent strikes.<sup>38</sup>

Extensive research on the liability of a trade union for the unlawful conduct of its members in pursuance a strike has been conducted over the years. The question of whether the Labour Court is empowered to amend the status of a protected strike because of violence, has arisen in the face of the growing culture of violent strikes. Rycroft<sup>39</sup> is among the academics who believe that violence in strikes impacts on their functionality and extinguishes the purpose for which the action was intended – thus making it likely for a strike to lose its protection. He argues that whilst there is no provision in the LRA empowering the Labour Court to make such a determination, it may be implicit in its powers.<sup>40</sup> Some academics have criticised this view on the basis that the functionality test was actually formulated for the protection of striking workers<sup>41</sup> as the court in *Black Allied Workers Union v Prestige Hotels CC t/a Blue Waters Hotel*<sup>42</sup> held:

“... the right to strike is important and necessary to a system of collective bargaining. It underpins the system – it obliges the parties to engage thoughtfully and seriously with each other ... 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 ... The Strike would cease to be functional to collective bargaining and instead it would be an opportunity for the employer to take punitive action against the employees concerned.”<sup>43</sup>

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<sup>37</sup> Tom PY ‘A trade union’s liability for damages caused during a strike: A critical evaluation of the Labour Relations Act and recent judgements’. (Unpublished LLM dissertation, University of KwaZulu-Natal, 2014) 12-33. Available at <http://hdl.handle.net/10413/12361> (Accessed: 23 January 2018).

<sup>38</sup> Ibid at 44-48.

<sup>39</sup> Rycroft op cit note 30 at 208.

<sup>40</sup> Ibid.

<sup>41</sup> Fergus E ‘Reflections on the (Dys)functionality of Strikes to Collective Bargaining: Recent Developments’ (2016) 37 *ILJ* 1543.

<sup>42</sup> (1993) 14 *ILJ* 963 (LAC).

<sup>43</sup> Supra note 42 at para 972 A-D.

The existing research, does not however address the impact that violent strikes have on the trade union's ability to advance the interests of workers. This research is intended to investigate the impact that violent strikes have on the employer's willingness to resolve the issues amicably with employees – with a view to reaching a settlement on their demands. It will further investigate whether there are consequences beyond those imposed by the courts on the trade unions, which ultimately affect the employees whom the strike was intended to benefit. The issue of whether the nature of violent strikes is such that it undermines the legitimacy of the right to strike, will be explored. This study will consider how employers react to the demands of employees who have opted to make their voice heard through violent strikes. It will further consider whether the intended outcomes are achieved or alternatively whether violent strikes have the opposite effect – not only on the employer but on the labour market at large. This research is intended to show that the use of violence in strikes is a serious threat to the sustainability of trade unions, and the very employees they seek to defend. An argument will be advanced that violent strikes place the continued employment of strikers at risk and goes against the very principle of bargaining in good faith. The gaps in the law will be identified and recommendations on the development of the law to address the problem of violent strikes, will be made.

**CHAPTER 2**

**THE ROLE AND RESPONSIBILITIES OF TRADE  
UNIONS IN STRIKES**

2.1 Introduction

A trade union is defined in the Labour Relations Act<sup>1</sup> as “an association of employees whose principal purpose is to regulate relations between employees and employers, including any employers’ organizations”.<sup>2</sup> The Constitution of the Republic of South Africa<sup>3</sup> confers upon every worker “the right to form and join a trade union<sup>4</sup> and to participate in the activities and programmes of a trade union”.<sup>5</sup> A trade union can only be recognised in the workplace on registration, which occurs once the requirements in sections 95 and 96 of the Labour Relations Act<sup>6</sup> have been complied with. A trade union must determine its own constitution and rules. The trade union is empowered by the rights conferred upon it in the Labour Relations Act and is thus able to function effectively. These rights include the right to:

“hold elections for the appointment of office bearers, officials and representatives, plan and organize their administration and lawful activities, participate in forming a federation of trade unions or a federation of employers organizations, subject to its constitution, and to participate in lawful activities; and to affiliate with, participate in the affairs of, any international employers’ organization or the International Labour Organization, and contribute to, or receive financial assistance from those organizations”.<sup>7</sup>

The employer by virtue of the existence of the aforementioned rights, is prohibited from discriminating against employees who are affiliated to trade unions, and is required to observe

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<sup>1</sup> The Labour Relations Act 66 of 1995.

<sup>2</sup> Ibid s213 (Definitions).

<sup>3</sup> The Constitution of the Republic of South Africa, 1996.

<sup>4</sup> Ibid s23(2)(a).

<sup>5</sup> Ibid s23(2)(b).

<sup>6</sup> S95(1) of Act 66 of 1995.

<sup>7</sup> Ibid.



the provisions of the LRA<sup>8</sup> – specifically in relation to the exercising of the organisational rights by the trade union.<sup>9</sup>

Trade unionism in South Africa is not a new concept, as its origins have been traced to the 18th Century, at a time when the oppression of workers – particularly those of colour – was rife.<sup>10</sup> The first trade union for non-white workers was established in 1919 and was mandated to fight against the discrimination that the workers were subjected to on the basis of their skin colour.<sup>11</sup> Trade unions further played a critical role in the abolishment of apartheid through their mobilisation alongside political parties, against the oppressive practices of the apartheid government.<sup>12</sup> The shift in the political dispensation of the country from apartheid to democracy has not adversely affected the sustainability of trade unions, but instead rather supported an increase in trade unionism in the workplace.

The South African Department of Labour had, as at February 2019, recorded 205 registered trade unions.<sup>13</sup> The growth in the number of trade unions has empowered workers, while simultaneously being criticised for disadvantaging those wishing to enter the labour market. Labour costs have increased as a direct result of the demands placed on employers by trade unions seeking to advance the interests of members. This makes it difficult for employers to sustain existing employment and to contract new workers.<sup>14</sup>

This argument is possibly a contributing factor to the steady increase in the engagement of foreign nationals in the informal trade sectors. Foreign nationals are prepared to work at rates that are significantly lower than are prescribed in the minimum wage and are not accorded any benefits that would ordinarily be claimed by an employee. They are oblivious to the rights that are afforded to employees by the Labour Relations Act<sup>15</sup> and the Constitution,<sup>16</sup> and are not

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<sup>8</sup> Act 66 of 1995.

<sup>9</sup> Ibid s11.

<sup>10</sup> Timeline of the Labour and Trade Union Movement in South Africa 1881 – 1919. 26 October 2012. South African History Online. Available at <https://www.sahistory.org.za/topic/timeline-labour-and-trade-union-movement-south-africa-1881-1919> (Accessed: 13 March 2018).

<sup>11</sup> Ibid.

<sup>12</sup> Congress of South African Trade Unions (COSATU). 8 December 2011 South African History Online. available at <https://www.sahistory.org.za/article/congress-south-african-trade-unions-cosat> (Accessed: 12 March 2018)

<sup>13</sup> South Africa. Department of Labour [www.labour.gov.za/DOL/downloads/documents/useful-documents/labour-relations/regtradeunions\\_feb2019.pdf](http://www.labour.gov.za/DOL/downloads/documents/useful-documents/labour-relations/regtradeunions_feb2019.pdf) (Accessed: 10 February 2019)

<sup>14</sup> Soon Beng C 'Union Responsibility: A necessary Public Good in a Globalized World ' 2010 *IJCLLIR* 435.

<sup>15</sup> Act 66 of 1995.

<sup>16</sup> Act, 1996.

affiliated to any trade unions – thereby exposing them to higher risks of exploitation. The foreign nationals – as a result of the factors indicated above – tend to become the preferred choice of employees in the informal labour market. This ultimately increases the level of unemployment and has even resulted in xenophobic attacks on foreign nationals, as South Africans claim they are replacing them in the labour market and are therefore taking their jobs. The freight industry was recently brought to its knees and was unable to function effectively as a result of violent attacks on truck drivers who were foreign nationals.<sup>17</sup> These strikes had a negative impact on other industries reliant on the freight industry to transport their goods – i.e. agriculture, the import and export industry, and the motor and fuel industries. The full extent of the economic impact of these strikes is discussed in further detail in chapter three.

## 2.2 The Role of Trade Unions in Relation to their Members

Trade unions are undeniably critical to the protection and advancement of employees' rights in that they are instrumental<sup>18</sup> in *inter alia*:

- a) Assisting the employees to negotiate better working conditions.
- b) Protecting the employees from the violation of their rights in the workplace.<sup>19</sup>
- c) Regulating the relationship between the employer, employees and any other relevant stakeholder.<sup>20</sup>
- d) Representing employees in disciplinary proceedings.
- e) Providing the necessary legal support to employees on labour related matters.
- f) Representing employees on bargaining councils and other relevant forums.
- g) The engagement in collective bargaining on behalf of the employees and concluding collective agreements.
- h) Facilitating the exercising of employees' rights to take on collective action, i.e. the right to strike and picket and further ensuring their protection by complying with the legislative requirements for the exercising of such rights.<sup>21</sup> and

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<sup>17</sup> South Africa: Deadly Attacks on Foreign Truck Drivers. 26 August 2019 Human Rights. Watch. Available at <https://www.hrw.org/news/2019/08/26/south-africa-deadly-attacks-foreign-truck-drivers> (Accessed: 23 November 2019)

<sup>18</sup> Botha MM 'Responsible Unionism during Collective Bargaining and Industrial Action: Are we ready yet?' (2015) Volume 48 *De Jure Law Journal* 336.

<sup>19</sup> Ibid.

<sup>20</sup> Gericke SB 'Revisiting the Liability of Trade Unions and /or their Members during Strikes: Lessons to be Learnt from Case Law' (2012) Volume 75 *THRHR* 570.

<sup>21</sup> Ibid.

- i) Ensuring job security by defending employees against unfair retrenchments and the unilateral amendments of conditions of employment.

### 2.3 The Role of Trade Unions in a Democratic South Africa

Trade unions are key role-players, not only in the labour market, but in the economic and political sectors by virtue of the influence they yield. They are responsible for not only ensuring that the employers adhere to fair labour practices, but have become key stakeholders who influence the development of labour and economic policies that support the protection of employees, and job creation and preservation in South Africa. According to Hepple,<sup>22</sup> the primary role of trade unions is:

“to serve the interests of their members as the weaker bargaining party, who need the collective voice of a stronger party to uphold the members’ rights and it is above all not merely the sense of being ruled by law, but also of being able to shape the law by which one is ruled”.<sup>23</sup>

While most authors agree that the principal role of trade unions is to serve the interests of members, others have expressed the view that the role extends beyond the protection of the rights of workers. Botha<sup>24</sup> argues that trade unions are meant to produce wealth in a continuous and sustainable manner.<sup>25</sup> This view is supported by the fact that the employers have transitioned over the years, and have, *inter alia*, through sound corporate practices introduced initiatives aimed at empowering their employees through things such as share schemes, corporate social investments, and study opportunities. These are some of the benefits that trade unions are able to negotiate on behalf of workers, and, in so doing, support the development of sustainable employment and economic opportunities.

Another school of thought suggests that trade unions are a mechanism for achieving social justice.<sup>26</sup> A liberal perspective on trade unions is as follows:

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<sup>22</sup> Hepple B ‘The Role of Trade Unions in a Democratic Society’ 1990 *ILJ* 645-646.

<sup>23</sup> *Ibid.*

<sup>24</sup> Botha *op cit* note 18 at. 334.

<sup>25</sup> *Ibid* at 335.

<sup>26</sup> *Ibid.*

“Beyond their functions of defending and vindicating, unions have the duty of acting as representatives working for the proper arrangement of economic life and of educating the social consciences of workers so that they will feel that they have an active role, according to their proper capacities and aptitudes, in the whole task of economic and social development and in the attainment of the universal common good.”<sup>27</sup>

The above-mentioned views, although articulated from different perspectives, are all reflective of the extent trade unions have evolved over the years from their inception in the eighteenth century until now. The trade unions have a significant contribution to make in society, politics and the economy. This is illustrated by the impact they have in addressing the significantly high levels of unemployment in South Africa. Their efforts to fight for job preservation at a time when the world is on the verge of entering the Fourth Industrial Revolution, cannot go unnoticed. The revolution comes with several positive aspects, however, and the increase in the reliance of companies on technology will result in a significant share of jobs being performed through electronic means with limited human intervention. This will doubtless create a significant threat to manual labour jobs across various industries.

The fight for job preservation positively impacts on society at large in several ways. If jobs are preserved, the level of unemployment is not further exacerbated. Employees will remain gainfully employed, and thus people will become less dependent on the government to sustain themselves and are less inclined to engage in unlawful means to survive. This clearly confirms that the role of trade unions is such that it extends beyond the workplace.

It is therefore, on this basis, that the study supports the view that trade unions contribute positively to the economic and social development of society. The role played by trade unions representing employees of South African Airways in the November 2019 strike, is reflective of the unions’ ability to constructively participate in meaningful discussions on strategies that can be implemented to avoid job losses and to ensure that workers remain gainfully employed.

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<sup>27</sup>Botha op cit note 18 at 335.

The trade unions in this strike went to the extent of publicly expressing their views on the state's proposal to consider the privatisation of the airline.<sup>28</sup>

## 2.4 The Role of Trade Unions in Strikes

A trade union's responsibility in the process of collective bargaining would include engagements with the employer on the demands of employees, as well as negotiating the resolution of disputes that have arisen between the parties. The inability of the employer and employees to settle issues may ultimately result in the trade union being given a mandate to call for a strike. In South Africa, strikes are grouped into two distinctive categories: protected and unprotected strikes. These are discussed below.

### 2.4.1 Protected Strikes

A strike that accords with the definition in the LRA<sup>29</sup> and which has satisfied the procedural requirements in Chapter IV and section 95(9) of the Act respectively, is protected. The trade union must initiate a strike by calling and recording a secret ballot before the strike commences. Of note is that trade unions were, prior to the amendment to the LRA, required to make provision for "a ballot of its members in respect of whom it intended to call a strike or lock out to be conducted prior to a strike being called".<sup>30</sup> The circumstances and manner in which the ballot was to be conducted had to be prescribed in the Constitution.<sup>31</sup> However, the failure of a trade union to ballot members prior to a strike did not affect the legality of the strike.<sup>32</sup>

The introduction of the new amendments to the Labour Relations Act changed this position. The amendment includes the incorporation of section 95(9),<sup>33</sup> which makes provision for trade unions to conduct a ballot recorded in secret, prior to the strike being called. It is significant that while balloting is not a new requirement as indicated above, the key distinction between the past position prior to the amendment and that which is currently applicable, is the element

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<sup>28</sup>Saunderson-Meyer W 'Unions achieve a pyrrhic victory with SAA strike' 30 November 2019. IOL News Available at <https://www.iol.co.za/ios/opinion/unions-achieved-a-pyrrhic-victory-with-saa-strike-38276688> (Accessed: 16 December 2019)

<sup>29</sup> Act 66 of 1995.

<sup>30</sup> Ibid s 95(p).

<sup>31</sup> Ibid s 95(o).

<sup>32</sup> Ibid s 67(7).

<sup>33</sup> The Labour Relations Amendment Act 8 of 2018.

of secrecy in the recording of the ballot. Section 19(1) of the Labour Relations Amendment Act<sup>34</sup> is a transitional provision that enabled trade unions that had not yet amended their constitutions to incorporate the provision of secret balloting prior to a strike being called and in so doing ensure compliance with the provisions of section 95(9).<sup>35</sup>

The court in *Johannesburg Metropolitan Bus Services (SOC) Ltd v Democratic Municipal and Allied Workers Union*<sup>36</sup> had to decide whether failure of the trade union to conduct a secret ballot prior to facilitating a strike constituted a breach of section 19 of the Labour Relations Amendment Act. The employer instituted legal proceedings to interdict a strike that was intended to commence without the trade union having conducted a secret ballot. The Court interdicted the trade union from proceeding with the strike until the provisions of section 19 of the Labour Relations Amendment Act were complied with. The Court, in its reasoning, found that “the obligation of the trade union to comply with the terms of section 19 by amending its constitution to include the provision of a secret ballot, does not impose a limitation on the right to strike as it was entirely within the union’s power to remedy the situation”.<sup>37</sup> There has also been a set of guidelines that have been published simultaneously with the amendment, which stipulate how the ballot should be conducted.

The Court had in the earlier case of *Foskor v Numsa*,<sup>38</sup> adopted a similar view. In this case, the court was required to establish whether the transitional provisions were applicable to a trade union that did not cater for secret balloting prior to a strike being called – in its constitution. The trade union argued that the transitional provision infringed on its members’ constitutional right to strike and that the obligation to conduct a secret ballot arose only after the Registrar issues a certificate directing it to conduct the secret ballot in accordance with section 19(1)(b). The court rejected these arguments and held that the transitional provision applied to all trade unions whose constitutions did not incorporate the requirement of recording a secret ballot – prior to a strike being called. The court held that a secret ballot had to be recorded prior to a strike being called, and, as such, the trade union was interdicted from continuing with the strike. It further established that the trade union had not conducted the ballot as provided for in section

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<sup>34</sup> Ibid.

<sup>35</sup> Act 66 of 1995.

<sup>36</sup> (J1799/190 [2019] ZALCJHB 297; [2019] 12 BLLR 1335 (LC).

<sup>37</sup> Supra note 36 above at paras 1-10.

<sup>38</sup> (D439/19) ZALCD (2019) 40 ILJ 1814 (LC) paras 14 and 18.

95(5)(p) or (q) of the LRA, prior to embarking on the strike, and it was therefore common cause that no secret ballot was registered as contemplated in section 95(9).<sup>39</sup>

It is concerning that despite the amendments, which became effective on 1 January 2019, section 67(7) of the LRA<sup>40</sup> which specifically states that “the failure of the trade union to conduct the ballot does not in itself affect the legality of the strike”, has not been amended. This is clearly a contradiction in law that cannot be taken lightly because of the serious consequences that may arise for trade unions and their members, in instances of non-compliance with the provisions of section 95(9),<sup>41</sup> as illustrated by the position adopted by the court in both the above cases.

The legislature has, in addition to its failure to amend the provisions of section 67(7),<sup>42</sup> created further confusion by neglecting to place section 95(9)<sup>43</sup> with other related sections, specifically sections 64, 65 & 67<sup>44</sup> that address the issue of strikes. This omission does not assist the trade unions to fulfill the mandate of protecting and advancing the interests of their members. It is expected that there may be difficulty in complying with the prerequisite of a secret ballot before a strike – arising from the contradiction in the legislation and the separation of the provisions that deal with strikes

There have been conflicting views on the objectives of the amendment. There are trade unions that have welcomed the introduction of the requirement of a secret ballot vote before a strike, and, as such, have amended their constitutions to reflect the same. The National Union of Mineworkers believe that the requirement will assist in supporting the principals of democracy in the workplace and in so doing give a greater level of credibility to strikes. It is yet to be seen whether the provision of the secret ballot will yield intended results.

A contrary view expressed by the SA Federation of Trade Unions (SAFTU), is that the requirement is too onerous, particularly for the larger unions who have a presence across various industries, as this would mean facilitating and recording a secret ballot in respect of a

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<sup>39</sup> Supra note 38 at paras 14-18.

<sup>40</sup> Act 66 of 1995.

<sup>41</sup> Ibid.

<sup>42</sup> Ibid.

<sup>43</sup> Ibid.

<sup>44</sup> Ibid.

significant number of members who may not necessarily be employed by the same employer – which may create logistical difficulties.<sup>45</sup> Some trade unions have gone to the extent of threatening to challenge the constitutional validity of the secret ballot requirement, on the grounds that it appears to infringe on the right of workers to strike.<sup>46</sup>

The intention of the legislature was clearly to ensure that individual members of the trade unions are afforded an opportunity to vote freely for or against the strike – without fear of reprisal. It was further intended by the legislature that the outcome of the secret ballot would be reflective of the appetite of the majority of employees to embark on a strike, and will ensure that the trade union is properly mandated to call a strike. The strike will therefore only proceed if the majority of union members vote for the strike to be called. The principle that has been established, therefore, is that of ‘no secret ballot, no strike’. It is submitted that the secret ballot requirement will support the reduction in the number of violent incidents that arise from the victimisation of employees who are not in support of the strike, at the hand of striker, as the former’s identities will not be known. In the event there is no support for a strike, the trade union cannot initiate a strike based on the whims of its leadership, as it is obligated to act in accordance with the will of its members. This will considerably reduce the number of unprotected strikes called for purposes other than the interests of the employees, as was the case in the Lonmin strike, which reportedly arose as a result of trade union rivalry.<sup>47</sup> The prerequisite of a secret ballot prior to a strike is not only practised in South Africa, and is also relied upon in other countries like Botswana, Australia and the United Kingdom.

If the outcome of the secret ballot indicates support for the strike, then the trade union is deemed to be in possession of a mandate to facilitate a strike. The trade union must ensure that the strike is protected by complying with provisions of section 64(1) of the LRA.<sup>48</sup> This section allows the exercise of the right if:<sup>49</sup>

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<sup>45</sup>Omarjee L ‘Explainer: Why unions have mixed feelings on secret ballot votes for strikes’ 15 September 2019. FIN24. available at <https://www.fin24.com/explainer-why-unions-have-mixed-feelings-on-secret-ballot-votes-for-strikes-20190913> (Accessed: 18 October 2019)

<sup>46</sup>Sibanyoni M ‘Secret vote before strike pits unions against each other’ 13 September 2019. Sowetan live. available at <https://www.sowetanlive.co.za/news/south-africa/2019-09-13-secret-vote-before-strike-pits-unions-against-each-other/> (Accessed: 18 October 2019)

<sup>47</sup>Nicolson G ‘The missing consequences of a massacre’ 11 August 2016. Daily Maverick. available at <https://www.dailymaverick.co.za/article/2016-08-11-marikana-the-missing-consequences-of-a-massacre/> (Accessed: 13 September 2019)

<sup>48</sup> Act 66 of 1996.

<sup>49</sup> Ibid s64(1).



- “(a) the issue in dispute has been referred to a council or to the commission as required by the Act
- (i) A certificate that the dispute remains unresolved has been issued;<sup>50</sup>
  - (ii) a period of 30 days, or any extension of that period agreed to between the parties to the dispute, has elapsed since the referral was received by the council or the commission; after that –
- (b) in the case of a proposed strike, at least 48 hours’ notice of the commencement of the strike, in writing, has been given to the employer, unless –
- (i) the issue in dispute relates to a collective agreement to be concluded in a council, in which case, notice must have been given to that council; or
  - (ii) the employer is a member of an employers’ organization that is a party to the dispute, in which case, notice must be given to that employers’ organization; or
- (d) in the case of a proposed strike or lockout where the State is the employer, at least seven days’ notice of the commencement of the strike or lockout has been given to the parties as contemplated in paragraph (b).”

Section 64(2)<sup>51</sup> provides that “if the issue in dispute concerns a refusal to bargain, an advisory award must have been made in terms of section 135(3) (c) before notice is given in terms of subsection (1)(b)”.

The requirements are intended to ensure that a strike is initiated as a last resort and is only invoked in circumstances where all other attempts that have been made to settle the dispute have failed. Employees who participate in a protected strike cannot be dismissed by the employer, as this would in effect undermine the right to strike and it would therefore cease to be an effective tool for collective bargaining.<sup>52</sup> The employees who participate in a protected strike cannot be found to have committed a delict or a breach of contract,<sup>53</sup> nor can civil

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<sup>51</sup> Act 66 of 1995.

<sup>52</sup> Ibid s67(4).

<sup>53</sup> Ibid s67(2)(a).

proceedings be instituted against them. The requirements contained in section 64(1) of the LRA do not apply to a strike or lockout in circumstances where:<sup>54</sup>

- “a) The parties to the dispute are members of a council and the dispute has already been dealt with by that council in accordance with their constitution;
- b) the strike or lockout is in accordance with the procedures in a collective agreement
- c) the employees’ strike is in response to a lockout by the employer that does not comply with the provisions of the chapter IV
- d) the employer locks out employees who have participated in an unprotected strike
- e) the employer fails to comply with requirements of subsections (4) and (5).”

#### 2.4.2 Unprotected Strikes

A strike which is not in compliance with the provisions of sections 64(1) and 65(1) of the LRA<sup>55</sup> is deemed to be an unprotected strike. The employees who engage in an unprotected strike are exposed to a range of unfavourable consequences, which may jeopardise their continued employment.<sup>56</sup> The employer should in circumstances where it seeks to enforce the sanction of dismissal, ensure that such dismissals are procedurally and substantively fair. Schedule 8 of the Code of Good Practice on Dismissals<sup>57</sup> requires that the employer take the following factors into account, in determining whether employees should be dismissed:<sup>58</sup>

- “1. the seriousness of the contravention of the LRA
- 2. the Attempts to comply with the Act
- 3. whether the strike was in response to any unjustified conduct of the employer.”<sup>59</sup>

The employer is further required to engage the trade union at its earliest convenience on its intentions in response to the unprotected strike. The employer must further issue a clear

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<sup>54</sup> S64(3)(a) - (e) of Act 66 of 1995. Check my comment above on small “s” when starting a footnote

<sup>55</sup> Ibid.

<sup>56</sup> Ibid s68(5).

<sup>57</sup> The Code of Good Practice: Dismissals Schedule 8 of the Labour Relations Act 66 of 1995 Item 6.

<sup>58</sup> Ibid Item 6(1).

<sup>59</sup> Ibid.

ultimatum on what is required of the employees, and the sanction it intends to impose in the case of non-compliance.<sup>60</sup> The employees must be afforded a chance to respond to the ultimatum prior to a decision being taken on whether it is appropriate to dismiss them.<sup>61</sup> The court in *Nhlapho v Sasol Mining Ltd*<sup>62</sup> had to determine whether the 666 employees who engaged in an unprotected strike had been dismissed in a manner that was procedurally and substantively fair. The employees had staged a sit-in underground at the end of their shifts for two days. Three ultimatums were given directing the strikers to stop the sit-in and to return to duty – failing which disciplinary proceedings would be instituted. The sit-in compromised mine safety and prevented additional shifts from going underground. The employer obtained an interdict and the employees were advised by a shop steward to stop the sit-in, which they duly did. The court found that the dismissal was procedurally fair, but substantively unfair. The court directed that the dismissed workers be re-instated and that those who had not sought reinstatement, be compensated. The court, in granting the order, considered a number of factors, including the fact the ultimatum had not reached all strikers and that Sasol had following an unprotected strike in 2006, and had given the offenders written warnings. Its conduct of dismissing the workers in the current strike was not consistent with its past practice.<sup>63</sup> This case is reflective of the principle that misconduct is not always sanctioned by dismissal. The guidelines in the Code of Good Practice on Dismissals<sup>64</sup> is instructive in this regard.

The employer may make application to court to interdict<sup>65</sup> the strike by virtue of it being unprotected and may further institute a claim for “just and equitable compensation” for any loss sustained because of the strike.<sup>66</sup> In *Algoa Bus Company (Pty) Ltd v Transport Action Retail and General Workers Union (Thor Targwu)*,<sup>67</sup> the company instituted a claim against the trade union and its members for the financial losses it had sustained because of the unprotected strike. The court ordered the trade union and its members to compensate the company for the financial losses sustained because of the strike. However, the award was substantially lower than the amount claimed by the employer.<sup>68</sup> The principles established in

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<sup>60</sup> The Code of Good Practice: Dismissals Schedule 8 of the Labour Relations Act 66 of 1995 Item 6(2).

<sup>61</sup> *Ibid.*

<sup>62</sup> (J5737/09; J5778/09)[2019] ZALCJHB 260.

<sup>63</sup> *Supra* note 62 above at paras 538-567.

<sup>64</sup> The Code of Good Practice: Dismissals Schedule 8 of the Labour Relations Act 66 of 1995 (Item 6).

<sup>65</sup> s 68(1)(a) of Act 66 of 1995.

<sup>66</sup> *Ibid* s68(1)(b).

<sup>67</sup> [2010] 2 BLLR 149 (LC).

<sup>68</sup> *Supra* note 67 at paras 38-44.

this case will be deliberated on further in chapter four, which deals with the legal recourse available to victims of violent strikes.

The LRA<sup>69</sup> limits the right to strike in circumstances where:<sup>70</sup>

- “a) that person is bound by a collective agreement that prohibits a strike or lockout in respect of the issue in dispute;
- b) that person is bound by an agreement that requires the issue in dispute to be referred to arbitration;
- c) the issue in dispute is one that a party has the right to refer to arbitration or to the Labour Court in terms of this Act or any other employment law;
- d) (i) an essential service;  
or  
(ii) a maintenance service.”

The courts have attempted, as far as possible, to avoid the undue limitation of the right to strike and have sought to apply a broad application of the procedural requirements for a strike.<sup>71</sup> It is accepted that the courts are loathe to interfere with the exercise of the right in the absence of any serious abuse of the right. The court in *Jumbo Products v Numsa*<sup>72</sup> confirmed this position and discouraged the interference of a court in a strike, save for circumstances wherein it had established that a trade union has failed to demonstrate that it has the legitimate interests of its members in mind.<sup>73</sup> This principle was further demonstrated in *Tiger Wheels Babalegi (Pty) Ltd t/a TSW International v Numsa*,<sup>74</sup> case wherein the court was not overly prescriptive on the exercise of the right and established that there was nothing in the provisions of the LRA that required strikers to commence the strike on the day that had been stipulated in the Notice.<sup>75</sup>

While it is accepted that courts will not readily interfere with the right of workers to strike, the courts are equally firm on the stance of not condoning the abuse of the right and the violation

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<sup>69</sup> Act 66 of 1995.

<sup>70</sup> Ibid s65(1).

<sup>71</sup> Du Toit D and Ronnie R “The Necessary Evolution of Strike Law (2012) Volume 2012 *Acta Juridica* at 205.

<sup>72</sup> 1996 *ILJ* 859 (W).

<sup>73</sup> Supra note 72 above at para 878.

<sup>74</sup> (1999) 20 *ILJ* 677 (LC).

<sup>75</sup> Supra note 74 above at para 35.

of the rights of third parties. The trade unions should, by all means possible, strive to ensure that the actions of strikers do not erode the relationship between the employer and the strikers and that the strike should for all intents and purposes seek to empower the strikers and not result in unintended consequences and irreparable harm. The view expressed by the court in *Fawu v Mnandi Meat Products & Wholesalers*<sup>76</sup> suggests that the responsibility of maintaining good relations in the face of differences, lies with both the trade union and the employer.

## 2.5 Conclusion

It is evident from the discussion in the preceding paragraphs of this chapter, that trade unions are of critical importance and that their contribution transcend the workplace. It is further apparent that trade unions will continue to remain relevant because of the threat to jobs that may arise as a result of the Fourth Industrial Revolution. It therefore follows that trade unions would have a higher level of responsibility and accountability – not only to their members, but to society at large.

It is the ability of the trade union to properly and effectively facilitate a strike that will determine their legality and effectiveness. It is therefore necessary for trade unions to be diligent in ensuring that the legislative requirements for a strike are complied with for the strike to be protected. Once the legalities in respect of a strike have been complied with, it becomes the responsibility of the trade union to ensure that the strikers do not abuse the right by violating the rights of others through engagement in violent and unlawful conduct.

A trade union that is facilitating a strike must take the necessary precautions to manage the strike and ensure that it ultimately serves the purpose for which it was called. This would involve providing proper and sound advice to strikers – particularly on the consequences of engaging themselves in unlawful conduct. When a strike becomes violent, despite the precautionary measures having been taken, it is expected that the trade union will not assume a passive role, but that it will engage its members and try through all means possible to adequately manage the situation by encouraging strikers to desist from the undesirable conduct which seeks to undermine the legitimacy of the right to strike. This view is shared by Gericke,<sup>77</sup>

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<sup>76</sup> 1995 *ILJ* 151(LC).

<sup>77</sup> Gericke op cit note 20 at 585

who encourages trade unions to seek assistance from the police to ensure that violence and criminal conduct during strikes is prevented, instead of them being passive.

## CHAPTER 3

# ***THE IMPACT OF VIOLENT STRIKES ON EMPLOYERS, TRADE UNIONS, EMPLOYEES AND THE ECONOMY***

### 3.1 Introduction

The dynamics involved in violent strikes has been crystalised in the preceding chapters of this dissertation. This chapter seeks to examine whether the violent nature of strikes has impacted on trade union ability to advance the cause of the workers during strikes. It is submitted that the response to this question is in the affirmative, for reasons that will be aired throughout this chapter. The effects of violent strikes transcend the actual strike and in certain instances can be the cause of irreparable harm that no legal remedy can adequately address – i.e. the loss of life. While it can be argued that a violent strike is likely to attract the attention of all parties concerned and society at large because of the attention drawn to it, it is incorrectly perceived to give strikers a greater chance of succeeding in terms of having their demands met. It is submitted that violent strikes are counterproductive and serve no legitimate purpose. The court in *Fawu obo Kapesi v Premier Foods Ltd t/a Ribbon Salt River*<sup>1</sup> denounced the use of violence and criminal conduct by workers to compel the employer to accept their demands. The court further emphasised that “such conduct by its implication undermines the rights of those workers who are not participant in the strike and undermines the future relationship between the strikers and the employer”.<sup>2</sup>

Violent strikes are a significant threat to the sustainability of a mutually beneficially association between the employer, the trade union and the employees. The violent nature which strikes have assumed exposes the trade union, its members and the employer to unnecessary risks that may materialise as a result thereof. The cause for which the employees declare a strike is lost, as the priority of the employer shifts from negotiating with the trade unions on the demands that gave rise to the strike, to the management of the risk to which it is exposed. The question that then arises for trade unions and strikers is whether participating in a violent strike is worth the unintended consequences that follow thereafter.

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<sup>1</sup> (C640/07) [2010] ZALC 61; (2010) 31 *ILJ* 1654 (LC); [2010] 9 *BLLR* 903 (LC).

<sup>2</sup> *Supra* note 1 above at para 6.

### 3.1.1 The Impact of Strikes on the Relationship between the Employer, Trade Union and Employees

The role of the trade union after it has been mandated by the majority of its members to call a strike, becomes critical to the ability of the parties to effectively mediate the dispute or to reach a settlement on the demands being made by the employees. It is therefore imperative that the trade union ensures that the right to strike is exercised within the ambit of the law so that the relationship between the parties is not unnecessarily compromised to the point that it becomes impossible to continue to sustain a healthy and productive work relationship. The employer is fully dependent on the trade union to engage its members and to negotiate constructively on their behalf. The presence of violence in whichever form negates the ability of the parties to negotiate a resolution of the dispute, and immediately gives way to hostile engagement, often resulting in litigation. Once it becomes necessary for the intervention of the court to be sought by the employer to restore peace and to protect the infringement of its rights, and that of any other third party, then the known relationship begins to disintegrate to a point where it can be perceived to be irretrievably broken down. Litigation is costly, and at times is protracted, and is therefore not productive to the cause for which the strike was initiated. What is further problematic is that depending on the relief sought, the union and its members may suffer financial loss if costs are awarded against them or if an order of the court is granted directing the trade union and/or its members to assume liability for damages suffered as a consequence of the strike.

### 3.1.2 The Impact of Violent Strikes on the Economy

The employer may dismiss employees implicated in the unlawful conduct perpetrated during the course of the strike, provided that the process is procedurally and substantively fair. The dismissal of employees is counter-productive to the cause that resulted in them embarking on the strike from the onset. This will therefore mean that the employees following the dismissals will lose their livelihoods and will certainly not be in a position to reap any benefit that would have accrued if the demands or dispute had been peacefully resolved. It is not the individual employees that are affected – but entire households that are financially dependent on the respective employees for continued subsistence. The level of unemployment therefore increases because these employees will probably struggle to find alternative employment, particularly because of being dismissed for misconduct. The dismissal of those employees who



were found to have participated in acts of misconduct in pursuance of a strike are then left unemployed and worse off than they were prior to the strike – thus having lost the strong leverage they yielded over the employer in the form of a protected strike. This has an indirect impact on society at large, as unemployed people place a strain on the public fiscus as they become dependent on state grants in order to sustain themselves. There are further unintended consequences which may contribute to societal ills in the various communities – such as substance abuse, crime, and psychological problems.

The case of *Mzeku v Volkswagen SA (Pty) Ltd*<sup>3</sup> is a clear illustration of how an illegal strike negatively impacted on the South African economy. The strike compromised the ability of a significant portion of the motor manufacturing industry to perform under an international contract, which would have sustained existing employment and possibly supported the development of further job opportunities. In this case, the employees went on an illegal strike – contrary to the advice of their union. They caused their employer severe financial harm and jeopardised an international contract, which threatened the job security of many employees. The strike was marred by serious acts of misconduct, resulting in the dismissal of 1336 employees. These dismissals were found to be justified in the circumstances and fair by the court. The negative impact that the dismissal of such a significant number of employees has on the economy, is unquestionable. The loss in production as a result of the strike would have obviously caused the employer financial strain and negatively impacted on the motor manufacturing industry. The court in *MAWU v BRT Sarmcol*<sup>4</sup> made the following remarks:

“Industrial action in the form of a strike is an extremely serious matter which may be accompanied by irrevocable or irremediable results. It can place the viability of the industry in jeopardy, the continued employment of workers at risk and can prejudice the livelihood of dependent persons. Consequently, strike action should only be undertaken with the highest degree of circumspection and responsibility.”<sup>5</sup>

The transport industry strike that was mentioned in the previous chapter also negatively impacted on the ability of South African traders to export and import goods throughout Africa. The assault and fatal attacks on drivers who are foreign nationals and non-striking workers,

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<sup>3</sup> *Mzeku v Volkswagen SA (PTY)* 2001 ILJ 771 (CCMA).

<sup>4</sup> 1987 ILJ 815 (IC) 816 835.

<sup>5</sup> Supra note 4 above at para 835.

along with the constant torching of trucks and cargo, has crippled the industry. Media reports have estimated that 213 foreign truck drivers have been killed between March 2018 and September 2019. The Road Freight Association further estimated the damages suffered as a result of the continued attacks on trucks were about R1.2 billion, with 1200 vehicles and cargo being destroyed during the aforementioned period.<sup>6</sup> The unfortunate result is that many employers in the transportation industry will find it increasingly difficult to sustain economically viable businesses and will resort to the dismissal of employees for operational reasons, as a result of the losses directly attributable to violent strikes. The employer is entitled to dismiss employees who participated in a protected strike for operational reasons, provided the dismissal complies with section 189A of the Labour Relations Act.<sup>7</sup>

The Court confirmed this position in *SACWU v Afrox (Pty) Ltd.*<sup>8</sup> The employees in this case went on a strike after the employer had introduced a rotational shift system that would bring the drivers (employees) hours of work within the legal limits. The system was not well received by the employees, as it reduced the amount of overtime that they were able to work and claim. The system was abandoned by the employer after a short period of time and a different system of staggered shifts was implemented. The employees initially accepted the change, but subsequently refused to perform in accordance with the staggered shift system. The employer then started to consider the possibility of retrenchment and the employees declared a strike. The employer dismissed the employees that were on strike for operational reasons. The dismissal was unsuccessfully challenged in the Labour Court and was subsequently taken on appeal. The Labour Appeal Court dismissed the appeal and found that the employer had complied with the LRA, as there was consultation prior to the strike and the engagement of the employees in the strike was not the main reason for the dismissal. The court was satisfied that the employer had proved that it had dismissed the employees based on its operational requirements and not because of their participation in the strike.<sup>9</sup> The Labour Appeal Court in *Pep Stores v SA Commercial Catering & Allied Workers Union*<sup>10</sup> set aside the order of the lower

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<sup>6</sup>Maeko T 'Violence exacts huge toll on lives and a R1bn loss in the freight sector' 5 September 2019. Mail & Guardian. available at <https://mg.co.za/article/2019-09-05-violence-exacts-huge-toll-on-lives-and-a-r1bn-loss-in-the-freight-sector/> (Accessed: 23 November 2019)

<sup>7</sup> The Labour Relations Act 66 of 1995.

<sup>8</sup> [1999] 10 BLLR 1005 (LAC).

<sup>9</sup> Supra note 8 above at para 55.

<sup>10</sup> (JA105/97) [1998] ZALAC 5.

court which had found that the dismissal of employees on the basis of operational requirements had been procedurally and substantively fair”.<sup>11</sup>

The employer is not the only party subjected to economic pressure during a strike. The employees who engage in protracted strikes do so to their detriment as the employer is, according to the provisions of section 67(3) of the Labour Relations Act,<sup>12</sup> not obliged to pay wages/salaries for the duration of the strike. The employees’ ability to continue to participate in a strike that has no clear end in sight undermines the cause, in that it becomes difficult to continue with the strike due to financial strain. The strike will, as a result, gradually lose momentum and other employees may opt to return to work due to their inability to financially sustain themselves in the absence of salaries/wages. These situations tend to create conflict among the employees, as those who continue with the strike regard those who have withdrawn from it as not being loyal to the cause – often with grave repercussions.

### 3.2 The Impact of Violent Strikes on the Credibility of Trade Unions

The involvement of trade unions in litigation arising from violent strikes is not only costly in monetary terms but affects its ability to effectively and speedily facilitate the resolution of disputes between the employer and employees. When a court makes an adverse finding against a trade union as a result of a violent strike, it can be reasonably inferred that the union has failed in its duties to act in the best interests of its members and to ensure that their rights are not unduly compromised. The employees who are not affiliated to trade unions will become disillusioned with the concept of trade unionism when they see the impact that violent strikes have on those employees who participated in the strikes. This will affect the trade unions ability to grow membership. The employers will not have confidence in the ability of trade unions to act as a mediator between them and employees. The risk exposure of trade unions in strikes will possibly create a reluctance to obtain a mandate to call a strike, for fear of failing to properly manage the conduct of strikers. The reluctance of trade unions to call a strike may in turn be perceived by some its members as an inability to be effective.

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<sup>11</sup> Supra note 10 at paras 8 and 15.

<sup>12</sup>Act 66 of 1995.

The attention given to violent strikes through various media platforms and their ability to immediately seize the attention of the employer and other relevant stakeholders, leaves the strike open to exploitation by other third parties seeking to further their own unrelated agendas. These third parties could simply be criminal elements who take advantage of the chaotic nature of a violent strike – to loot, damage property, and commit all sorts of unlawful acts. Political parties also seek an opportunity to grandstand by publicly demonstrating support for strikers in order to achieve a platform for campaigning. These exploitive acts can undermine the legitimacy of the strike and call into question the purpose on which it is premised. The employer in *Universal Product Network (Pty) Ltd v NUFBWSAW & Others*<sup>13</sup> brought an urgent application to interdict the violence and political interference that dominated the strike. The members of the Economic Freedom Fighters – commonly known as the EFF – joined the strikers and displayed anti-semitic Israeli placards and pro-Palestinian flags, demanding that Woolworths (the employer) should terminate its business association with Israel. The trade union was adamant that its members had not committed any acts of violence and that the participation of the EFF was purely a motion of support for the cause that the strikers were defending. The court had to decide whether the violence and political interference in the course of the strike warranted it losing its status. The court found that the level of violence and political interference did not warrant the loss of the strike’s protection.<sup>14</sup>

### 3.3 Conclusion

The failure of a trade union to prevent acts of misconduct during a strike has serious and, at times, unintended consequences. Strikes are the most effective tool of collective bargaining. However, their effectiveness in the face of the prevalence of violence is brought into question. The adverse impact that violent strikes have on the employer, the striking employees, trade unions, and even third parties who have no interest in the dispute, is undeniable. Trade unions must be held to a higher standard of accountability. However, the reasonableness of this standard is what appears to be problematic as it is not clearly defined. The claims for damages or compensation which succeed against the trade union, negatively impact on its financial state and threaten its ability to sustain itself. The credibility of the trade union is also adversely affected and may cause its members to doubt its ability to protect their interests. Trade unions can also risk being deregistered if it becomes clear that the objectives of the union are not

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<sup>13</sup> (2016) 37 ILJ 476 (LC).

<sup>14</sup> Supra note 13 at paras 39 and 45.

aligned with those in the LRA, and if it ceases to be functional to the process of collective bargaining. In view of the consequences that flow from a violent strike, I am inclined to believe that the trade unions are not able to advance the cause of workers in the course of strikes because of the tendency of strikes to turn violent. There is therefore a strong advocacy for the reliance on strikes as a last resort.<sup>15</sup>

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<sup>15</sup> Botha MM 'Can the Ultima Ratio and Proportionality Principles Possibly Curb Unprotected Industrial Action in South Africa' 2016 *THRHR* 388

## **CHAPTER 4**

# ***THE RECOURSE AVAILABLE TO VICTIMS OF VIOLENT STRIKES***

### 4.1 Introduction

The presence of law enforcement officials has become a common sight during strikes, because of the prevalence of violence and other unlawful acts committed during strikes – so much so that such incidents can almost be readily anticipated. The report by the South African Institute of Race Relations on 21 January 2013 reflects shocking statistics on the number people who have been killed or injured as a result of strike-related violence. An estimated 181 fatalities were reported to have occurred between 1999 and 2012. It was further reported that 313 people were injured and over 3058 arrests were made during the same period.<sup>1</sup> This clearly indicates that the consequences of violent strikes are felt long after the actual incident has ended, because of the severity of the harm often suffered by those who have been directly or indirectly affected. This chapter will consider the legal remedies available to those who have been negatively affected by violent strikes. It further considers the effectiveness of the legal remedies that are currently available to those affected. A thorough study will be conducted of case law and the principles that have been established in relation to the liability of trade unions for violent strikes.

As indicated in chapter two, the right to strike, notwithstanding the extent to which it is protected, does not give strikers the authority to abuse the right by engaging in conduct that is unlawful and which is clearly intended to undermine the legitimacy of the right.<sup>2</sup> Trade unions whose members have been found to have engaged in violent and unlawful acts have been held accountable for such,<sup>3</sup> where it has been established that the union failed to implement adequate measures in circumstances where it was reasonably foreseeable that it was necessary to do so. A court may, on good cause shown, impose sanctions on a trade union and its members in

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<sup>1</sup> Nearly 200 killed in strike action in 13 years. 21 January 2013. South African Institute of Race Relations available at <https://irr.org.za/media/media-releases/Strike%20violence.pdf/view> (Accessed: 18 January 2019).

<sup>2</sup> Manamela E & Budeli M 'Employees Right to Strike and Violence in South Africa' (2013) Volume 46 *CILSA* 334.

<sup>3</sup> (LC Case J350/13).

accordance with the provisions of section 68(1) of the LRA.<sup>4</sup> The court however does not apply a blanket approach to cases of this nature, and, depending on the relief sought, will apply the appropriate test to determine whether liability should be apportioned to the trade union, and, in certain instances, the strikers. Rycroft suggests that violent strikes have become normative and has called for a more holistic approach in dealing with the problem. He believes that the current mechanisms are largely reactive and punitive.<sup>5</sup> He argues that there should be a greater understanding of the factors that contribute to violence in strikes as well as what he terms to be a “robust and systematic pre-strike facilitation process” in negotiations.<sup>6</sup>

## 4.2 Remedies Available to Victims of Violent Strikes

### 4.2.1 The Employer’s Right to Dismiss Employees on the Grounds of Misconduct

An employer is permitted to dismiss employees who have engaged in an unprotected strike or in misconduct in pursuance of a strike, regardless of its status. The dismissals must be procedurally and substantively fair.<sup>7</sup> The Code of Good Practice on Dismissals<sup>8</sup> requires that the employer have regard to the following factors prior to taking the decision to dismiss employees for misconduct in pursuance of a strike:

- “a) The seriousness of the contravention of the Act;
- b) Attempts made to comply with the Act; and
- c) Whether or not the strike was in response to an unjustified conduct by the employer.”<sup>9</sup>

Strikers who were involved in an unprotected strike characterised by violence and damage to the employer’s property were not shown any leniency by the court in *National Union of Furniture & Allied Workers Union of SA v New Era Products (Pty) Ltd.*<sup>10</sup> The court took the position that “the conduct of the strikers disentitled the strikers from any protection by the court. It was further stated that an unprotected strike which is accompanied by serious

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<sup>4</sup> The Labour Relations Act 66 of 1995.

<sup>5</sup> Rycroft A ‘What can be done about Strike Related Violence?’ (2014) Volume 30 *IJCLLR* 216.

<sup>6</sup> *Ibid.*

<sup>7</sup> Section 67(5) of Act 66 of 1995.

<sup>8</sup> The Code of Good Practice – Dismissal Schedule 8 of the Labour Relations Act, item 6.

<sup>9</sup> *Ibid.*

<sup>10</sup> 1999 *ILJ* 869 (LC).

misconduct should be viewed in a serious light and invited the serious censure of the court.”<sup>11</sup> The court found that the employer was entitled to impose the sanction of dismissal, and, as such, ordered that the application for the re-instatement of the dismissed employees be dismissed.

The dismissal of strikers, who it has been established, have committed acts of misconduct is justified in law regardless of whether the strike is protected.<sup>12</sup> It is, however, important for the sanction of dismissal to be imposed only if the misconduct is of such gravity that it causes the relationship between the parties to be incapable of restoration. This reasoning is well illustrated *Transport and Allied Workers Union of South Africa obo Ngedle v Unitrans Fuel and Chemical (Pty) Ltd*,<sup>13</sup> where the court dealt with the dismissal of employees who had engaged in an unprotected strike. The court expressed the view that dismissal as a sanction should only be imposed in instances where the misconduct of the employee is of such a nature that the employer would find a continued employment relationship intolerable or unacceptable.<sup>14</sup> The acts of misconduct can include, *inter alia*, damage to property, violence directed at non striking workers and/or any other third party, and looting. The onus however rests on the employer to satisfactorily prove that the employee/s have committed such acts. The employer must prove the misconduct by the employee on a balance of probabilities.

The court in *Moahlodi v East Rand Gold & Uranium Co Ltd*<sup>15</sup> formulated a test for the standard of proof that is required in cases of dismissal for misconduct. The test is whether the employer had reasonable grounds for believing that the employee has committed the offence. The court found that it was sufficient for “the employer if upon its own investigation, it is satisfied on a balance of probability that the employee did commit the offence and provided that it affords the employee a fair opportunity of stating his/her story in refutation of the charge”.<sup>16</sup>

The difficulty that the employer would encounter in enforcing this remedy would be conclusively identifying the individual strikers who have engaged in the misconduct. In

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<sup>11</sup> Supra note 10 at paras 877 and 878.

<sup>12</sup> The Code of Good Practice: Dismissal Schedule 8 of the LRA s2(2) and (3) – reasons for fair dismissal.

<sup>13</sup> (CCT131/15) [2016] ZACC 28; 2016 (11) BCLR 1440 (CC); [2016] 11 BLLR 1059 (CC); (2016) 37 *ILJ* 2485 (CC).

<sup>14</sup> Supra note 13 above at paras 173 and 174.

<sup>15</sup> (1988) 9 *ILJ* 597 (IC).

<sup>16</sup> Supra note 16 above at para 601 I – J.



*NSCWAWU & Others v Coin Security Group (Pty) Ltd*,<sup>17</sup> the employer attempted to dismiss employees who it was alleged had engaged in acts of misconduct during the strike. The court found that although it was common cause that the employees had engaged in a collective action, it had not been proven that they had committed the relevant misconduct. It further found that the employer could not rely on the principle of collective guilt, as this would be tantamount to a violation of the principle of natural justice that makes provision for the presumption of innocence until proven guilty.<sup>18</sup>

A more recent case that is of interest and which ultimately found its way to the Constitutional Court, is *National Union of Metalworkers of South Africa obo Nganezi v Dunlop Mixing and Technical Services (Pty) Limited*.<sup>19</sup> The employees of Dunlop had embarked on a protected strike, which subsequently turned violent. The employer after having failed to bring an end to the strike, which continued to be violent even after an interdict had been granted, dismissed the employees who were directly implicated in the misconduct, the employees who were identified as being present during the violence but had not participated therein, as well as those employees who were not positively identified as being present when the violence occurred. This action on the part of the employer resulted in the trade union proceeding to arbitration, where the ruling determined that the dismissal of the first two categories of employees had been substantively fair. The arbitrator found that the employees who had not been positively identified as being present at the time when the violence occurred, ought not to have been dismissed, and ordered that they be reinstated. Dunlop succeeded in the review of the arbitration order in the Labour Court. The trade union took the matter on appeal to the Labour Appeal Court, but failed to have the order overturned, and, as such, petitioned the Constitutional Court.

The Constitutional Court had to deliberate on whether the employer was entitled to rely on the doctrine of derivative misconduct as the basis upon which it dismissed those employees who were not positively identified as having been present at the time the violent conduct was perpetrated. The doctrine is centred on the principle of an employee who has knowledge of any wrongful conduct directed at the employer and who fails to disclose this information, being

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<sup>17</sup> [1997] 1 BLLR 85 (IC).

<sup>18</sup> Supra note 18 above at para 91F-G.

<sup>19</sup> (CCT202/18) [2019] ZACC 25; 2019 (8) BCLR 966 (CC); (2019) 40 *ILJ* 1957 (CC); [2019] 9 BLLR 865 (CC); 2019 (5) SA 354 (CC).

also guilty of misconduct.<sup>20</sup> The Constitutional Court upheld the appeal against the dismissal of the workers who were not positively identified as being present when the violence occurred. The Constitutional Court, in its reasoning, rejected the submission that employees were obligated to disclose information about colleagues who participated in strikes, in the guise of acting in good faith. It further found that employees who fail to exonerate themselves are not necessarily guilty of acting in bad faith. It was found from the facts presented, that it was probable that some of the applicants were present when the violence occurred – but that this was not sufficient basis to dismiss all of them in the absence of individual identification.<sup>21</sup> This groundbreaking judgment will certainly ensure that the rights of strikers are not unduly compromised by an employer who seeks to dismiss all in the absence of tangible proof of their having engaged in acts of misconduct. The principle of substantive fairness is clearly at the centre of the employer’s authority to dismiss an employee on the basis of misconduct.

It is further important for the employer to be consistent in the manner in which it applies the sanction of dismissal when dealing with employees who participated in the same strike.<sup>22</sup> This particular principle was highlighted in *Henred Fruehauf Trailers (Pty) Ltd v National Union of Metalworkers of SA*.<sup>23</sup> The court rejected the decision of the employer, which “singled out certain workers to be dismissed, from a group of workers who had engaged in an unprotected go-slow, which was completely unfair”.<sup>24</sup>

#### 4.3 Interdicts

The most common response by the employers to violence and strikes is to approach the Labour Court – usually on an urgent basis – for an order interdicting the strikers from engaging in acts of misconduct. It must be clarified from the outset that the interdict in the case of a protected strike is in fact in relation to the conduct complained of, which for the purposes of this paper, is acts of violence and any other unlawful conduct. The employer is only entitled to interdict a strike where it is found to be unprotected. The courts in such circumstances are relatively conscious of the need to balance the rights of strikers with those of society at large and will not

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<sup>20</sup>Supra note 20 at para 38

<sup>21</sup> Supra note 20 at paras 80 and 81

<sup>22</sup> Gericke SB ‘Revisiting the Liability of Trade Unions and /or their Members during Strikes: Lessons to be Learnt from Case Law’ (2012) 75 *THRHR* 573. See also *FAWU v Amalgamated Beverage Industries Ltd* (1994) 15 *ILJ* 1057 (LAC).

<sup>23</sup> 1992 *ILJ* 593 (LAC).

<sup>24</sup> Supra note 24 above at paras 599-600.

condone the violation of the rights of any party. The court may, on good cause shown, grant an interim interdict and any other such further relief that may be necessary to avert any further prejudice, provided that the following requirements have been satisfied:

- a) A prima facie right has been infringed;
- b) The conduct must reasonably cause irreparable harm
- c) There must be no other readily available remedy available to the plaintiff to prevent the continuation of the violation of the right.<sup>25</sup>

In *Tsogo Sun Casinos (Pty) Ltd v Future of South African Workers*<sup>26</sup> the employees engaged in a strike which ultimately degenerated into a violent riot – resulting in *inter alia* malicious damage to property, assaults on third parties, blockading access to the employer’s property, throwing bricks at police officials, and emptying refuse from bins. The employer approached the court and sought an interdict to stop the violence. The court not only granted the interdict compelling the strikers to desist from the unlawful conduct, but went to the extent of questioning whether the time had come for the protected status of a strike to be altered because of violence – which would thus expose the trade union and strikers to possible further legal action. The court found the unlawful conduct of the strikers to be unacceptable and in conflict with the very purpose and intent for which the right to strike is exercised. The court’s dissatisfaction with the conduct of the strikers was further reflected in its willingness to order costs on an attorney and own client scale, had these been sought by the applicant.<sup>27</sup>

The court in *National Union of Food Beverage Wine Spirits & Allied Workers v Universal Product Network (Pty) Ltd*,<sup>28</sup> dealt with a strike that was protected but had been marred by political interference and violence. The court applied the functionality test to determine whether the conduct displayed by strikers had gone to the extent that the strike no longer promoted functional collective bargaining and was therefore no longer deserving of its

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<sup>25</sup>Van Eck S and Kudinga T The Role of the Labour Court in Collective Bargaining: Altering the Status of Strikes on Grounds of Violence in *National Union of Food Beverage Wine Spirits & Allied Workers v Universal Product Network (Pty) Ltd* (2016) 37 *ILJ* 476 (LC), *PER/PELJ* (2017) (20) - DOI 13.

<http://dx.doi.org/10.17159/1727-3781/2017/v20i0a1774>

<sup>26</sup> (2012) 33 *ILJ* 998 (LC).

<sup>27</sup> Supra note 27 above at para 14.

<sup>28</sup> (2016) 37 *ILJ* 476 (LC).

protected status.<sup>29</sup> The court took the view that the degree of violence and political inference in the circumstance did not warrant an alteration of the protected status of the strike. The court, however, reaffirmed the view that it would be empowered to alter the status of a protected strike in circumstances where the strike no longer promoted collective bargaining.<sup>30</sup>

The question of whether the Labour Court is empowered to alter the status of a protected strike in the context of the growing pandemic of violent strikes, has been debated by academics – namely S van Eck, T Kujinga, Rycroft, Tenza and Fergus. While the Labour Court had in *Universal Product Network (Pty) Ltd* alluded to the fact that it considers itself empowered to change the status of a strike where it ceases to be functional to the process of collective bargaining, the Labour Relations Act does not confer such authority upon it. It has in fact been argued by S van Eck and T Kujinga that “any attempt by the Labour Court to alter the status of a protected strike because of violence under the existing legal framework, would be overstepping its mandated jurisdiction and would not readily be accepted by the Constitutional Court.”<sup>31</sup> Van Eck and Kujinga submit that “there are sufficient legal remedies available to address violent strikes and that the change in the status of a strike would unduly restrict the right of workers to strike save for in the following circumstances as pronounced by the Constitutional Court in the Unitrans case.”<sup>32</sup>

- “a) An employer has fully remedied the grievance or complied with the demand that was at the center of the strike; or
- b) The trade union has abandoned the original demand and seeks to achieve a different purpose that is not authorized, or
- c) The parties could conclude an agreement that settles the dispute even though the employer has not fully complied with the trade union or workers original demand.”<sup>33</sup>

Rycroft entertains the possibility of the extension of the powers of the Labour Court to alter the status of a protected strike on the grounds of violence. Tenza likewise supports the loss of

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<sup>29</sup> Supra note 29 at para 32.

<sup>30</sup> Supra note 29 at paras 38 and 39.

<sup>31</sup> Van Eck and Kudinga op cit note 26 at 12 and 19.

<sup>32</sup> Ibid at 20.

<sup>33</sup> *Transport & Allied Workers Union of SA obo Ngedle v Unitrans Fuel & Chemical (Pty) Ltd* 2016 37 ILJ 2485 (CC) paras 119 and 120.

the protection of a strike on the basis of it being violent.<sup>34</sup> Fergus rejects the notion that violence is a justification for empowering the Labour Court to strip a strike of its protected status, and says that “this would fly in the face of the constitutional right to strike and in so doing disturb the collective bargaining equilibrium.”<sup>35</sup> Interdicts often give rise to Contempt of Court proceedings as a result of the trade union or strikers not complying with a court order interdicting violent or unlawful conduct. These proceedings may result in the trade union being sanctioned, depending on the extent to which the court order has been violated.

The case of *Pickitup Johannesburg (Pty) Ltd v South African Municipal Workers Union*<sup>36</sup> involved the failure of the trade union and its officials “to desist from encouraging employees to participate in an unprotected strike and showed blatant disregard for the interdict that had been granted”. The strikers not only continued with the unprotected strike but were found to have marched to the premises of the employer on the very day the interdict was granted, and created mayhem by pelting the building with stones, emptying dustbins and burning tyres – which made it necessary for the police to fire rubber bullets in an attempt to disperse the strikers. Certain key officials were identified as having played a visible role in encouraging the conduct. What is of interest is that the court found both the trade union and its Secretary General guilty of contempt and imposed fines, which were suspended.<sup>37</sup> In both the cases, the court ensured that it was satisfied that the respondents were indeed in contempt, and there was proof to this effect. The most recent judgment in *KPMM Road & Earthworks (Pty) Ltd v Association of Mineworkers & Construction Union*<sup>38</sup> involved the contempt of a court order interdicting strikers from committing acts of violence and other unlawful conduct. The strike, which was protected, became violent and resulted in the employer successfully obtaining an interdict. The strikers disregarded the interdict and continued with violent and unlawful conduct in furtherance of the strike. The Labour Court, as a result, found that there had been wilful disregard of the interdict and fined the trade union R1000 000. The court further ordered that each employee be fined R1000. The matter was taken on appeal and the Labour Appeal Court set aside the finding of the lower court on the basis that it had failed to satisfy itself that the

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<sup>34</sup> Tenza M ‘*The liability of trade unions for conduct of members during industrial action*’ (unpublished dissertation, Doctor of Law, University of South Africa, 2016) 132-134. available at <http://uir.unisa.ac.za/handle/10500/23172> (Accessed: 20 April 2018).

<sup>35</sup> Fergus E ‘Reflections on the (Dys)functionality of Strikes to Collective Bargaining: Recent Developments’ (2016) 37 *ILJ* 1546.

<sup>36</sup> (J2362/15) [2016] ZALCJHB 149; (2016) 37 *ILJ* 1710 (LC).

<sup>37</sup> *Supra* note 37 above at paras 36-38.

<sup>38</sup> (2018) 39 *ILJ* 609 (LC).

appellant had acted in common purpose with the employees who had engaged in violence, and that it had willingly been in contempt of the interdict order.<sup>39</sup>

The courts do not absolve applicants who institute contempt of a court proceedings, from proving the breach of the court order. The court will therefore not make a finding in this regard if it is not satisfied that the applicant has satisfactorily proved the breach. The Labour Court in *Food and Allied Workers Union v In2food (Pty) Ltd*<sup>40</sup> granted an interdict to stop an unlawful strike, which had also become violent. The strikers continued with the strike and the violence escalated. The court found that “it was incumbent on the trade union to take the necessary steps to dissuade and prevent its members from continuing with their violent and unlawful conduct”. The court ordered the trade union to pay a fine of R500 000 for breaching the court order. The trade union instituted appeal proceedings and the Labour Appeal Court upheld the appeal based on the employer’s failure to prove that the trade union was in breach of the court order by continuing with the strike in its own right after the interdict had been granted, nor had it in its own right blocked access to the employer’s property. The Appeal Court further found that “contempt of a court order is strictly determined by what the court ordered the union itself to do and that this should not be confused with the concept of vicarious liability of the union for the conduct of its members”.<sup>41</sup>

While interdicts are widely accepted as an effective remedy to address unlawful strikes or behaviour of strikers that is of an unacceptable nature, the remedy has been criticised on the basis that “it interferes with the power dynamics at play and affects the exercise of a right protected by the constitution”.<sup>42</sup> It is submitted that the limitation is justified in the circumstances, as the employer has to take urgent action to try and manage its risk of exposure to losses that may result from a violent strike. It is, however, conceded that the employer or any third party that seeks the urgent relief is held to a lower standard of evidence, while the union is required to disprove the allegations, which is obviously prejudicial to the latter because its priority shifts from the actual cause of the strike to defending the application for the interdict.

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<sup>39</sup> Supra note 39 at paras 18 and 19.

<sup>40</sup> (JA61/2013) [2014] ZALAC 31; (2014) 35 *ILJ* 2767 (LAC).

<sup>41</sup> Supra note 41 above at para 12.

<sup>42</sup> *NUFBWS v Universal Product Network (Pty) Ltd* (2016) 37 *ILJ* 476 at para 2.

#### 4.4 Criminal Prosecution

An employee who commits an offence in contemplation or in furtherance of a strike or lockout does not enjoy the protection afforded under section 67(2) and (6) of the LRA, and is therefore exposed to civil legal proceedings and/or criminal proceedings being instituted by the employer and/or third party.<sup>43</sup> Criminal matters will require that the state proves beyond a reasonable doubt that a criminal offence was committed and that the elements of the offence were satisfied. The elements of the offence must be satisfied prior to a finding of guilty being made, and the necessary sanction being imposed. The state will be responsible for the prosecution of those implicated in the commission of the offence, and the sanction imposed will be at the discretion of the court. Criminal proceedings, by their very nature, are not always effective because of the delays that often occur and the higher standard of proof required. It is the individual strikers and not the trade union that may be subjected to criminal proceedings. The court in *Lomati Mill Barberton v Paper Printing Wood & Allied Workers Union*<sup>44</sup> confirmed that “it had exclusive jurisdiction over every kind of unlawful act that is committed during a protected strike relating to both criminal offences and delicts”.

#### 4.5 Claims for Damages

Trade unions have, over the years, been subjected to a litany of civil claims for damages that have arisen because of violence and unlawful acts perpetrated in pursuance of a strike. There is no provision made in the LRA for claims for damages to be instituted against the trade unions and/or its members, by third parties who have been prejudiced because of violent strikes. The party affected is entitled to relief found in the common law principles of delictual liability. In such cases the plaintiff can only succeed in a claim for damages by demonstrating to the court that the requirements for a valid delictual claim have been satisfied. The court must thereafter determine whether that the conduct which gave rise to the delictual claim “was authorized, instigated or ratified by the trade union as the principal”. In *Mondi Ltd v Chemical Energy Paper Printing Wood & Allied Workers Union*,<sup>45</sup> the court had to consider whether the trade union was liable for the damages suffered by the employer (Mondi), after a plug for machinery was switched off at its mill during the course of a strike, resulting in loss of production. Mondi

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<sup>43</sup> S67(8) of Act 66 of 1995.

<sup>44</sup> (1997) 18 *ILJ* 178 (LC) 184.

<sup>45</sup> (D622/2002) [2005] ZALC 84 paras 40 and 41.

alleged that the trade union was vicariously liable for the conduct of its members, whom it alleged were supported and encouraged by shop stewards. The court considered the “nature of the relationship between the trade union and the perpetrator of the unlawful act and concluded that it could be accepted as a relationship of agency”. The court found that Mondi had failed to discharge the onus of proof that the perpetrator of the conduct that resulted in the loss had acted on the authority of the principal.<sup>46</sup>

The court when dealing with claims for damages, would have to consider the Apportionment of Damages Act<sup>47</sup> and apply the concept of joint or several wrongdoers, which arises when it is alleged that two or more parties are jointly and severally liable for the same damage. The court would apportion damages if the parties alleged to be the wrongdoers are cited in the action. The wrongdoers will be liable to the plaintiff for their duly apportioned share of the damages. The court in apportioning damages applies the reasonable man test. This test considers whether “a reasonable person would have foreseen the possibility of the damage arising and the precautions that he/she would have been reasonably expected to take in the circumstances”.

#### 4.6 The Trade Union’s Liability in Terms of the Regulation of Gatherings Act

Trade unions who arrange gatherings or pickets in support of a protected strike are compelled to take the necessary precautions to ensure that these are carried out in a peaceful and orderly manner. The failure of a trade union to take reasonable steps to prevent any foreseeable harm has, in certain circumstances, resulted in the trade union being ordered to pay damages to the employer or any other third party who has suffered harm as a result thereof. This sanction, however, is only enforced where a court is satisfied that the trade union failed to take adequate steps to prevent the harm, in circumstances where it was reasonably foreseeable that the harm would materialise.

The leading authority on the issue of the liability of trade unions for the damages that arises as a result of a gathering is *SATAWU and Another v Garvis*,<sup>48</sup> the facts of which are found in chapter one. The claim for damages was brought by the respondents under section 11(1) of the

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<sup>46</sup> Supra note 46 at paras 37-40.

<sup>47</sup> The Apportionment of Damages Act 34 of 1956.

<sup>48</sup> (CCT 112/11) [2012] ZACC 13; 2012 (8) BCLR 840 (CC); [2012] 10 BLLR 959 (CC); (2012) 33 *ILJ* 1593 (CC); 2013(1) SA 83 (CC).



Regulation of Gatherings Act. Section 11(1) makes provision for liability to accrue jointly and severally to the convener of a gathering, participant in the demonstration, or any other organisation on behalf of whom the gathering was held where any riot damage has occurred. SATAWU denied liability for the damages and went as far as challenging the constitutional validity of section 11(2)b, on the basis that the words “and was not reasonably foreseeable” were incompatible with the Constitution. The High Court rejected the defence by SATAWU, on the basis that section 11(2) did not in any way limit any of rights, as contained in section 17 of the Constitution. The court found that “the violent nature of the gathering placed it outside of the parameters of gatherings protected under section 17”. The matter was taken on appeal to the Supreme Court of Appeal but was dismissed. The Constitutional Court had to deal with the issue of the challenge to section 11(2) on the grounds of constitutional invalidity. The Constitutional Court found that the trade union had failed to demonstrate that section 11(2) constitutes a limitation on the right contained in section 17.

#### 4.7 Claims for Compensation

A party who has suffered loss as a consequence of an unprotected strike is entitled to claim compensation which is “just and equitable” from either the trade union or its members or even both.<sup>49</sup> The compensation that is awarded does unfortunately not fully equate with the losses sustained and therefore offers very little consolation to those who seek to enforce the right. A court in deciding whether an order for compensation should be granted, must take the following relevant factors into account:

- “a) Whether the trade union made any attempts to comply with the provisions of section 64(1) and 65(1) of the LRA and if the answer is in the affirmative, the extent to which these attempts were made.
- b) Whether the strike or lockout was premeditated.
- c) Whether the strike or lockout was in response to unjustified conduct by another party to the dispute.
- d) The interests of orderly collective bargaining.
- e) The duration of the strike or lockout; and

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<sup>49</sup> s 68(1)(b) of Act 66 of 1995.

- f) The financial position of the employer, trade union or employees respectively.”<sup>50</sup>

The court in *Algoa Bus Company (Pty) Ltd v Transport Action Retail and General Workers Union (Thor Targwu)*<sup>51</sup> took the aforementioned factors into account, and, in addition, considered the nature of the business operated by the applicant and the financial impact that the unprotected strike had on its ability to operate. The court, in reaching the decision to hold the trade union and its members liable for the financial losses suffered by the employer as a result of the unprotected strike, confirmed the following key factors:

- “a) The trade union on a balance of probabilities did little if anything to discourage the members from engaging in the unprotected strike.
- b) The strike had arisen in response to disciplinary action that had been pending against certain members who were subsequently dismissed. The strike was not a response to the conduct of the employer and therefore served no collective bargaining purpose.
- c) The trade union had been advised that the employer was considering instituting an application for damages suffered as a result of the strike but did not to indicate that it was deterred by this threat.
- d) The strike continued despite an interdict having been obtained which itself was a contravention of the court order. The trade union did not at any stage make attempts to restore peace.”

The employer was awarded compensation of R1,400 000, which it directed should be paid in monthly instalments. The court further ordered the deduction of monthly payments from the salaries of members of the trade union in the amount of R214, 50.<sup>52</sup> The strikers were therefore not able to escape liability for their actions. This case clearly reflects the seriousness with which the court views violent strikes and the transgressions committed therein.

Another case which dealt with an award of just and equitable compensation is that of *Rustenburg Platinum Mines Ltd v Mouthpiece Workers Union*.<sup>53</sup> The court considered a claim for compensation that had been instituted by the employer. The amount claimed was initially R15 370 000,00 but was subsequently reduced to R100 000,00. The claim had arisen as a result

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<sup>50</sup>S68(1)(b) of Act 66 of 1995.

<sup>51</sup> (P368/13)[2015] ZALCPE 31 [2015] 36 *ILJ* 2292 (LC).

<sup>52</sup> *Supra* note 52 above at paras 7-14.

<sup>53</sup> [2002] 1 BLLR 84 (LC).

of an unprotected strike, which resulted in the employer suffering financial losses estimated to be R15 000 000. The court awarded compensation in the amount of R100 000 as claimed and directed that it be paid in monthly instalments. The court confirmed the principle that “compensation awarded need not necessarily equate to a full indemnity for the loss suffered”.<sup>54</sup>

In *Manguang Local Municipality v SAMWU*,<sup>55</sup> the court held that the trade union was accountable for the financial losses sustained by the municipality because of its failure to intervene without just cause when its members engaged in an unprotected strike. The strikers blocked access to the electrical department, and, by so doing, made it difficult for non-striking workers to render electrical assistance to residents they service. The court was, however, only prepared to award compensation for the losses suffered as a direct consequence of the strike, which included “the loss of income arising from the strikers refusal to work and the costs of engaging the non-striking workers to work overtime as a result of the strike”.<sup>56</sup>

The introduction of the new Code of Good Practice<sup>57</sup> has, in addition to the requirement for secret balloting, addressed issues of picketing and introduced the recourse of advisory arbitration – which can be regarded as a positive step towards addressing the issue of violent strikes. The Code requires that picketing be conducted within the confines of a picketing agreement and that no picketing may occur in the absence of such an agreement. The Code allows the employer to interdict the picket if there is non-compliance with the picketing agreement. The Code further gives clear guidelines on how the picket should be organised. The additional provision for the intervention of an advisory arbitration panel in instances where a strike is protracted and violent, is another positive step in ensuring that exercising the right to strike remains an effective tool for collective bargaining, for which it was intended.

#### 4.8 Conclusion

The courts are not tolerant of unlawful behaviour perpetrated in pursuance of a strike and will sanction conduct which seeks to undermine the legitimacy of the right. It can therefore be safely

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<sup>54</sup> Supra note 54 above at para 91.

<sup>55</sup> [2003] 3 BLLR 268 (LC).

<sup>56</sup> Supra note 56 above at paras 47-52.

<sup>57</sup> Code of Good Practice on Collective Bargaining, Industrial Action and Picketing, Government Gazette No 142121 of 19 December 2018.

concluded that there are no winners at the end of a violent strike because of the consequences suffered by the employees that are striking, by the trade union, and by the employer – as well as any affected third parties. It is yet to be determined whether the provisions in the Code of Good Practice will provide a lasting resolution to the problem of violent strikes.

It is further still necessary to consider whether the remedies available to parties affected by violent strikes provide just and effective relief, and whether they also have the effect of unduly restricting employees from striking. It appears that the remedies are such that they expose strikers and the trade unions alike to legal consequences that, in my view, detrimentally affect the cause for which they are fighting. The use of violence during strikes can never be condoned and should always be sanctioned.

## **CHAPTER 5**

### **CONCLUSION AND RECOMMENDATIONS**

#### 5.1 Recommendations and Conclusion

The right to strike, when exercised properly and within the confines of the law, is arguably the most effective form of collective bargaining. It is expected that the employer when subjected to economic harm caused by the disruption in its operations because of a strike, will want to make all attempts that are reasonably possible to end the impasse and restore operations.<sup>1</sup> This makes it possible for negotiations and active engagements to take place between the parties. The role assumed by the trade union in collective bargaining is critical because it is by far the strongest voice in the negotiation of favourable working conditions for employees. Gericke<sup>2</sup> correctly articulated the role of the trade union as being invaluable in a modern democratic system because of the role that it plays in the protection of its members' interests, the labour and economic market, as well as society at large. Trade unions have therefore become a key stakeholder in the effective management of the relationship between the employer and employees. It is against this background that it has become necessary to consider an intervention that will assist in addressing the growing threat posed by violent strikes – to the legitimate exercise of the right and the credibility of trade unions.

The failure of trade unions to effectively lead members in the peaceful and orderly exercise of the right to strike has been strongly criticised by academics and the judiciary alike. The reality of the crisis is evident in the alarming statistics of incidents of misconduct and unlawful acts that have been reflected throughout this dissertation. There are gaps within the current legal framework that require urgent development to adequately deal with the problem of violent strikes and a number of amendments to the legislation have been suggested in this regard.<sup>3</sup> The protection afforded to trade unions and their members in violent strikes should be re-evaluated.

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<sup>1</sup> See *National Union of Metalworkers of SA & Others Bader Bop (Pty) Ltd & Another* (2003) 24 ILJ 305 (CC) at para 13.

<sup>2</sup> Gericke SB 'Revisiting the Liability of Trade Unions and/or their Members during Strikes: Lessons to be Learnt from Case Law' (2012) 75 *THRHR* 58.

<sup>3</sup> Myburgh A 'The Failure to Obey Interdicts Prohibiting Strikes and Violence' 2013 *CLL* 6-10. See also

Tenza M 'An Investigation into the causes of violent strikes in South Africa: Some lessons from foreign law and possible solutions' (2015) Volume 19 *Law, Democracy & Development* 211-231. Available at <http://dx.doi.org/10.4314/idd.v19i1.11> (Accessed : 22 June 2019).

The courts are disinclined, and understandably so, to interrupt the exercising of the right to strike because of the constitutional protection afforded to it.<sup>4</sup> However, in cases of violent strikes, court orders have been granted providing the necessary relief to those parties whose rights have been violated in the pursuance of a strike.

The effectiveness of the legal recourse that is available to the employer and third parties is questionable – particularly with respect to court orders granted interdicting unprotected strikes or violence during strikes.<sup>5</sup> This assertion is supported by the number of applications for contempt of court that have arisen as a result of the trade union and its members blatantly disregarding interdicts that have been granted in respect of violent or unprotected strikes. The case of *Pickitup Johannesburg (Pty) Ltd v South African Municipal Workers Union*<sup>6</sup> illustrates the tendency of trade unions to willfully contravene a court order interdicting acts of violence and other forms of misconduct. While it is appreciated that such conduct does not go unsanctioned, it is submitted that a stronger sanction should be introduced to serve as a deterrent to the conduct.

In *Tsogo Sun Casinos (Pty) Ltd v Future of South African Workers*,<sup>7</sup> the court ignited the debate on whether the problem of violent strikes could be adequately addressed by stripping a protected strike of its status on the grounds of violence.<sup>8</sup> This proposition has no basis in law because the Labour Relations Act<sup>9</sup> does not confer the authority to alter the status of strikes on the Labour Court. It is, however, suggested that the expansion of the law in this regard would give the Labour Court the requisite authority to deal with the problem of violent strikes. The trade unions would be compelled to commit themselves to facilitating strikes that are orderly, peaceful, and which are “functional to collective bargaining”. The extension of the powers of the Labour Court will make trade unions more conscious of the risk of losing the status of a protected strike, and, in so doing, exposing themselves and their members to severe sanctions.<sup>10</sup> It is important to mention that there would be those academics like van Eck and Kujinga, who would find this recommendation to be unacceptable on the basis that exercising such authority

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<sup>4</sup> See *Jumbo Products v NUMSA*, where the court said it would be slow to interfere in the process of industrial action, unless the trade union was failing to show that it has the legitimate interests of its members at heart.

<sup>5</sup> Myburgh op cit note 3 at 3.

<sup>6</sup> (J2362/15)[2016] ZALCJHB 149; (2016) 37 *ILJ* 1710 (LC).

<sup>7</sup> (2012) 33 *ILJ* 998 (LC).

<sup>8</sup> Supra note 7 above at paras 12 and 13.

<sup>9</sup> The Labour Relations Act 66 of 1995.

<sup>10</sup> Rycroft A ‘What can be done about Strike – Related Violence?’ (2014) Volume 30 *IJCLIR* 208.

by the Labour Court would unfairly inhibit the exercising of the right and would not be justified because of the availability of other remedies to address violent strikes.<sup>11</sup>

It is submitted that a further aspect of legal remedies that requires development is that of claims for compensation. The relief in the form of compensation – as contained in section 68(1) (b) of the Labour Relations Act<sup>12</sup> is ineffective, simply because the full value of the losses sustained are not fully recoverable. The Court makes a finding on the quantum which is fair and equitable. The awards made in such applications are far less than the amount claimed as a result of actual losses sustained. The Court in *Algoa Bus Company (Pty) Ltd v Transport Action Retail and General Workers Union (Thor Targwu)*<sup>13</sup> was correct in sanctioning the trade union and its members, as an indication of its displeasure with the conduct of the parties. The compensation awarded was notably only for the financial losses incurred during five of the seven and a half days' duration of the strike. This, in practical terms, means that the employer had to bear the financial losses in respect of the two and a half days. The financial position of the trade union appears to take greater credence in determining the quantum of the award by the court, which is arguably not fair. The failure of the court to restore the plaintiff to the financial position that prevailed prior to the loss can be construed as a failure to protect those who have suffered loss because of violent strikes. This may appear to some to be a remedy in law that is not worth pursuing. This view is supported by Davhana, who finds the inconsistency in the court's determination of the quantum of the award to be problematic,<sup>14</sup> and supports the argument by Myburgh that courts should award more significant amounts in relation to compensation, in order for the remedy to be more effective.<sup>15</sup>

The trade unions must be more proactive in their leadership of members during strikes. It would be useful to ensure that judgments which set precedents in the area of strike law are circulated to the trade union so that they can keep abreast with legal developments in this regard. This

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<sup>11</sup> Van Eck S and Kujinga T 'The Role of the Labour Court in Collective Bargaining: Altering the Protected Status of Strikes on Grounds of Violence in *National Union of Food Beverage Wine Spirits & Allied Workers v Universal Product Network (Pty) Ltd* (2016) 37 *ILJ* 476 (LC)' *PER/PELJ* (2017) (20) - DOI 12. Available at <https://dx.doi.org/10.17159/1727-3781/2017/v20i0a1774>.

See, also, Fergus E (2016) 37 *ILJ* 1537-1551.

<sup>12</sup> Act 66 of 1995.

<sup>13</sup> (P368/13) [2015] ZALCPE 31.

<sup>14</sup> Davhana N 'Compensation against trade unions in respect of unprotected strikes in South Africa' (Unpublished Dissertation, LLM, University of Pretoria, 2018). Available at [https://repository.up.ac.za/bitstream/handle/2263/70065/Davhana\\_Compensation\\_2018.pdf?sequence=1&isAllowed=y](https://repository.up.ac.za/bitstream/handle/2263/70065/Davhana_Compensation_2018.pdf?sequence=1&isAllowed=y)

<sup>15</sup> Myburgh op cit note 3 at 9.

will also assist trade unions to better advise members on issues relating to strikes, so that a decision to embark on a strike is made from an informed position. The members of trade unions are reliant on the trade union to provide advice.

The Labour Relations Act<sup>16</sup> must be structured more efficiently by grouping related sections together – i.e. the provisions of section 95(9)<sup>17</sup> should be placed with all other provisions that relate to strikes, specifically sections 64-69.<sup>18</sup> It is not practical to have related sections far apart, as this could result in provisions being overlooked with serious consequences.

In conclusion, the findings in this dissertation reflect a need to take a more robust approach in dealing with violent strikes. The sanctity of the right to strike is dependent on this proposed approach. It is submitted that violence during strikes does nothing to advance the interest of employees, but instead creates hostility between the parties and becomes a material threat to the continued employment of workers.<sup>19</sup> This in turn negatively affects the credibility of the trade union and threatens its sustainability. The trade union's ability to grow will be inhibited by the fear of non-unionised employees of joining the trade union, because of the repercussion suffered by those who participated in a strike which turned violent. The employer will further see no value in engaging with trade unions because of the ineffective leadership of the employees in strikes. Employees need to be sensitised to the fact that a violent approach renders negotiations devoid of progress and creates a hostile environment. This is not conducive to negotiations in good faith.<sup>20</sup> The consequences that flow from a violent strike are not worth risking one's employment.

Trade unions and their members must be held to a higher standard of accountability for violence perpetrated in pursuance of strikes. The introduction of heavier punitive sanctions for failure to exercise proper oversight over trade union members during strike action, will assist immensely in:

- 1) Restoring law and order during strikes.

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<sup>16</sup> Act 66 of 1996.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

<sup>19</sup> Gericke op cit note 2 at 584.

<sup>20</sup> Manamela E and Budeli M 'Employees Right to Strike and Violence in South Africa' (2013) Volume 46 *CILSA* 323.



- 2) Facilitating smoother negotiations with the employer.
- 3) Avoiding unnecessary litigation between the parties.
- 4) Ensuring that trade unions take greater care in ensuring that strikes do not degenerate into platforms for lawless conduct.
- 5) Ensuring that non striking employees are not subjected to victimisation.
- 6) Elimination of criminal elements who seek to use strikes as an opportunity to conduct criminal activities, and who will be less likely to do so if it is evident that strikers are adequately supervised by trade union representatives.

It is lastly submitted that in extreme cases of violent strikes, a further sanction of deregistration of a trade union should be applied by the court. This would only apply in extremely serious cases or if it is demonstrated that the trade union in question has a propensity to lead violent strikes. This would require an amendment to the LRA empowering the court to order the deregistration of a trade union. This proposal is supported by Maluleke<sup>21</sup> who has stated that violent strikes are indicative of a trade union's fitness to remain on the roll of registered trade unions. He draws comparisons from the legal and medical professions, which strike members from the roll of the respective professions if they are found guilty of a criminal offence or if they are found to be failing to measure up to the required standard. The comparison which appears to be more relevant though, is that of soccer clubs who are heavily fined and have even been suspended from playing matches as a result of the misconduct of their fans or criminal offences that are committed during a match. He argues that trade unions should also be subjected to the penalties of criminal liability and deregistration for the conduct of strikers, as this would be in line with the principle of equality of treatment. This proposal will help ensure that strikes return to being purposeful and therefore effective. Too many lives have been lost in the name of economic freedom, which can never have been the intention of the drafters of the Constitution, when the right to strike was accorded to South African citizens. The exercising of the right to strike must therefore be balanced with the rights afforded to all citizens under the Constitution.

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<sup>21</sup> Maluleke MD 'Liability for strike and related action' (2011) *Dec De Rebus* 29.

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