



A CRITICAL EVALUATION ON HOW WE CAN ADDRESS VIOLENT STRIKES IN  
SOUTH AFRICA: WHAT DOES THE LABOUR RELATIONS ACT REQUIRE?

BY

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## DECLARATION

I, Nkululeko Bethwell Mthembu, declare that:

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## CHAPTER 1: INTRODUCTION

### 1.1 Background

The right to strike in South Africa is safeguarded by the Constitution<sup>1</sup> and labour laws. Strikes, whether violent or peaceful are costly to the employers involved.<sup>2</sup> The harm which is caused by these strikes is not only to the employer, but also the workers suffer loss of income and great hardships during these strikes.<sup>3</sup> The loss is not only suffered by the employer, but customers and suppliers too. The economy of the country is adversely affected. This deters investments in big companies, where its employees are on violent strikes. South Africa has one of the most inflated rates of violent strikes in the world.<sup>4</sup> The Labour Relations Act<sup>5</sup> (hereinafter referred to as the LRA) does not precisely address violent strikes. It has been suggested that protected strikes could forfeit their protection if it occurs that they descend into violence which has a potential to cause mass damage to the employer.<sup>6</sup> It cannot but be disputed that violent strikes amount to the abuse of the constitutional protected right to strike and the courts have acknowledged it as being a scourge. Courts should be empowered to put an end to these violent strikes.

In South Africa, strike and protest actions are not new phenomena.<sup>7</sup> During the 1970s, there was a large number of strikes. The most notable examples are the 1973 strikes which took place in Durban, when 'Black workers' embarked on a wave of strikes over wage dispute. Both the Government and the employers were shocked but responded by giving in to the workers' demands.<sup>8</sup> The Soweto uprising in 1976, although not related to labour issues, is one of the most significant examples of violent protests against apartheid in history which started peacefully but ended violently.

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

<sup>2</sup> B Hepple 'The Freedom to Strike and its Rationale' in: Hepple B, Le Roux R, Sciarra S (editors). *Laws against strikes. The South African Experience in an international and comparative perspective* (2015) 27.

<sup>3</sup> Ibid.

<sup>4</sup> N Odendaal 'SA one of the world's most violent, strike-prone countries' (2014), available at <http://www.miningweekly.com/article/sa-one-of-the-worlds-most-violent-strike-prone-countries-2014-08-06>, accessed on 01 April 2018.

<sup>5</sup> Act 66 of 1995.

<sup>6</sup> N Coetzer 'A new remedy for violent strikes?' available at <https://www.labourguide.co.za/most-recent/2242-a-new-remedy-for-violent-strikes>, accessed on 04 April 2018.

<sup>7</sup> T Petrus and W Martin 'Reflection on violence and scapegoating in the strike and protest culture in South Africa' (2011) 41 (2) *African Insight* 49.

<sup>8</sup> South African History Online 'History of Labour Movement in South Africa' available at <http://www.sahistory.org.za/article/history-labour-movements-south-africa>, accessed on 29 March 2018.

In the post-democracy, violent strikes in South Africa continues. Between 2007 and 2011, South Africa had encountered about of 65 strikes per year.<sup>9</sup> In 2012, “the country had a loss of 17 million working hours, 16 million of these in the mining sector,<sup>10</sup> as a result of 99 strikes, 45 of which were unprotected”.<sup>11</sup> In addition, the number of work stoppages is rapidly increasing. It has been established that for every 1 000 working South Africans, from year 2006 to 2011, about 507 working days were lost a year as a result of strikes,<sup>12</sup> bearing in mind that this does not include the 2012 period to present strikes, an unimaginable amount of working days has been lost due to strikes, which in turn have an adverse effect on the economy. South Africa has been established as having the highest rate of strikes in the world. However, the Chamber of Mines president ‘disagreed with the assertion that South Africa has excessive number of strike occurrences in the world, he did however acknowledge that the nation was confronted with intensifying number of strikes and admitted that the increasing number of unprotected strikes were disturbing.’<sup>13</sup>

Despite the harm strikes cause or have the potential to cause, all democratic countries such as South Africa, regard the ‘right to strike’ as essential, along with the freedom of association, freedom to join and organise trade unions, freedom of assembly and freedom of speech.<sup>14</sup> Moreover, an employee’s right to strike is one of the weapons exercised by trade unions when collective bargaining become unsuccessful.<sup>15</sup> Strike action is used as a last resort by the employees and their organisations in making sure that their grievances are met. Without the protection of the right to strike, employees would not be able to easily exercise their right to freedom of association.<sup>16</sup>

Before the LRA was amended there were much doubts as to whether a trade union could be held liable for damages suffered during strike action.<sup>17</sup> Under the common law principles, an

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<sup>9</sup> Odendaal (note 4 above).

<sup>10</sup> In 2012, at Marikana, where a large number of striking worker were killed, and hundreds injured during a wage related strike at Lonmin, a misconception that the workers received a 22% hike in wages had spurred strike action across the mining sector, particularly the gold and coal sectors.

<sup>11</sup> Coetzer (note 6 above).

<sup>12</sup> Ibid.

<sup>13</sup> Ibid.

<sup>14</sup> Hepple (note 2 above) 27.

<sup>15</sup> E Manamela and M Budeli ‘Employees’ right to strike and violence in South Africa’ (2013) 46 (3) *CILSA* 308.

<sup>16</sup> Ibid.

<sup>17</sup> Z Zakasa ‘Comments regarding the Labour Relations Amendment Bill’ (2018), available at <https://www.wits.co.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/programmes/rule-of-law/resources/CALS%20Comments%20on%20LRA%20Amendment%20Bill.pdf>, accessed on 09 September 2018. The amendment to the LRA addresses the increasing levels of unprotected strikes (as well as violent strikes) by

employer who experiences a loss due to a strike may have delictual claim against the union and the employees who were involved in such a strike.<sup>18</sup> Nevertheless, it has been held that there are complications in holding the union responsible mainly for actions perpetrated by its members.<sup>19</sup>

## 1.2 Statement of purpose

The main objective of the right to strike is to strive to replace the imbalance which have been created by socioeconomic factors.<sup>20</sup> Without the protection of the right to strike, trade unions become pathetic, powerless bodies and the rule of management become absolute.<sup>21</sup> Strikes, especially violent strikes, tend to be the final stage where the employer does not agree to the employees' grievances, and the employer, in order to save his company, tries to meet his employees half way. Moreover, most of the strikes in South Africa are commenced by trade unions during the collective bargaining process, when trade unions and employers fail to reach agreement on matters which are of mutual interest.<sup>22</sup> The LRA provides protection to the employees on strike and their trade unions. However, should unlawful conduct arise during the strike, either protected or unprotected, the trade union will be liable for such damages caused. This study will consider the extent of violent strikes, how they can be addressed and trade unions liability for loss caused during violent strikes. It will critically evaluate the ways in which South Africa can address the violent strikes and minimise loss to the stakeholders, such as applying to the Labour Court for an interdict, claims for compensation and dismissal of the employees.

## 1.3 Rationale

Employees tend to engage in strike action to effect economic damage on their employers, so that the employers will give way to their grievances.<sup>23</sup> The employees may abuse this power as it may even escalates to third parties who are not involved in the strike. The courts are often

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further determining the circumstances under which employees may strike. Since the right to strike is an important tool for trade unions, a duty is placed upon them to make sure that the strike follows the prescribed procedures by the amendment. Failure will result to the trade union being held liable for the misconduct committed during a strike. The amendment introduced a requirement that the vote by the members of trade unions on whether to embark on strike action be by secret ballot. This will reduce a number of violent strikes that the employers face.

<sup>18</sup> P. A. K Le Roux 'Claims for compensation arising from strikes and lockouts' (2013) 23 (2) *CLL* 11.

<sup>19</sup> *Mondi Ltd (Mondi Kraft Division) v Chemical Energy Paper Printing Wood and Allied Workers Union and others* (2005) 26 *ILJ* 1458 (LC).

<sup>20</sup> Hepple (note 2 above) 18.

<sup>21</sup> Manamela (note 15 above) 309.

<sup>22</sup> *Ibid*, 310.

<sup>23</sup> A Basson... et al. *Essential Labour Law* 5<sup>th</sup> Ed (2009) 303.

unwilling to interrupt the process of industrial action so as not to interfere with the right to strike.<sup>24</sup> Nevertheless, it has been held that the courts could intercede when the union failed to show that it had any lawful interest of its member in mind.<sup>25</sup>

The main purpose of this study is to focus on means by which we can address violent strikes. Furthermore, this study will evaluate the relevant provisions in the LRA and how they protect employees and employers.

#### **1.4 Research Questions**

This study seeks to answer the questions that arise in the analysis of violent strikes and whether trade unions are liable for damages caused such strikes, and how these strikes can be addressed by labour laws. The questions to be answered are the following:

- a) How does the LRA protect employees engaged in strikes?
- b) What are the prerequisites of a protected strike?
- c) What are the remedies that are available to stakeholders?
- d) Can trade unions be held liable for damages that arise from a protected strike that turns violent?
- e) What are the claims that can arise for the employer or innocent 3<sup>rd</sup> parties, particularly delictual claims and compensation?
- f) When trade union members refuse the representation of a trade union, can a trade union be held liable for damages caused by violent strikes?

#### **1.5 Research Methodology**

This research will be conducted through the desktop research method with reference to the labour law legislations, particularly the Labour Relations Act, case-law and most importantly the Constitution. The research will be done by using both primary and secondary sources which will give an overview of the legal framework as regarding to strikes, protected and unprotected. This study will contain a literature review on the chosen topic with relevant case law as to how the courts have tried to resolve the issue of violent strikes which is faced by South Africa.

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<sup>24</sup> SB Gericke 'Revisiting the liability of trade unions and or their members during strikes: Lessons to be learnt from case law' (2012) 75 *THRHR* 566.

<sup>25</sup> *Jumbo Products v NUMSA* 1996 *ILJ* 859 (W) 878.

## 1.6 Literature Review

The right to strike is a significant constituent of collective bargaining as per the International Labour Organisation, Convention 98.<sup>26</sup> Industrial action is a weapon which is utilised by employees to make sure there is equality in the workplace. Therefore, by collective bargaining the employees enforce economic pressure against an employer to persuade them to give way to their demands. The LRA, in section 5, safeguards employees against harm and victimization for utilising rights conferred by it. Manamela points out that, whether protected or not, a strike will incur certain consequences.<sup>27</sup> Employees should not make themselves guilty of misconduct during their strike action, even though they have complied with the required requirements in the LRA.<sup>28</sup>

Vettori asserts that the right to strike in the LRA is made accessible to a trade union when the employer does not want to bargain collectively with the union or declines to acknowledge the union, provided that the procedural requirements of a strike action were complied with, and the strike is in compliance with section 67 of the Act.<sup>29</sup> The Labour Appeal Court has stated that ‘by withholding their labour, the employees are in hope to discontinue to the production, precipitating the employer to lose business and experience overhead expenses without the anticipation of income, in the expectation that should losses be sufficiently substantial, the employer will recognise to their grievances.’<sup>30</sup> A trade union possesses the right to dictate its own constitutional rules, and to plan and organise its administration and lawful activities, including strike action.<sup>31</sup> Trade unions and employer or their organisations are given a right to engage in collective bargaining.

Furthermore, an employer may not dismiss an employee who is lawfully exercising his right to engage in a strike or any lawful conduct in furtherance of a protected strike.<sup>32</sup> Nevertheless, the courts have had difficulty in deciding what should be done when unlawful conduct is involved during strike action such as a protected strike which becomes violent. Tom in her thesis says, “damage caused as a result of violent strikes does not only affect employers, but

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<sup>26</sup> A Van Niekerk... et al *Law@work* 3 ed (2015) 415.

<sup>27</sup> Manamela (note 15 above) 322.

<sup>28</sup> Ibid.

<sup>29</sup> S Vettori ‘The Labour Relations Act and the Protection of Trade Unions’ (2005) 17 *SA Merc LJ* 304.

<sup>30</sup> *VNR Steel (Pty) Ltd v NUMSA* 1995 *ILJ* 1483 (LAC).

<sup>31</sup> Section 23 (note 1 above).

<sup>32</sup> Section 67 (note 5 above).

members of trade unions and innocent third parties are also affected.”<sup>33</sup> In the case of *FAWU v Premier Foods Ltd t/a Ribbon Salt River*,<sup>34</sup> the court held that, ‘it is certainly not acceptable to force an employer through violent and criminal conduct to accede to their demands. This type of vigilante conduct not only seriously undermines the fundamental values of the Constitution, but also serves to seriously and irreparably undermine future relations between strikers and their employer.’ The court was of the view that the strikers conduct resulted in those employees who did not want to strike, being affected because they no longer felt safe within the workplace premises as the employees who were on strike threatened them if they continued working. When employees exercise their right to strike should not seek to affect those who do not want to part and parcel in that strike.

There are lot of consequences that are associated with strikes, particularly where a strike involves violent conduct. According to the common law principles, “an employer may have delictual claim against a trade union or an employee who is involved in an unlawful conduct for damages caused during a strike action.”<sup>35</sup> Trade unions should control strikes which are convened by their members for it to be within the bounds of law.

Le Roux points out that a strike will thus be unprotected as soon as violent acts are present. In the *Tsogo Sun Casinos (Pty) Ltd t/a Monte casino v Future of South African Worker’s Union and Others*<sup>36</sup> it was held that a court will always intervene to protect both the right to strike, and the right to peaceful picketing. This is an inherent part of the court’s mandate, conferred by the Constitution and the LRA. The exercise of the right to strike is ‘however sullied and ultimately eclipsed when those who purport to exercise it engage in acts of gratuitous violence in order to achieve their ends.’<sup>37</sup>

Moreover, in the *National Union of Food Beverages Wine Spirit and Allied Workers and Others v Universal Product Network (Pty) Ltd*,<sup>38</sup> the court pointed out that in relation to the

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<sup>33</sup> P. Y Tom ‘A trade union’s liability for damages caused during a strike: a critical evaluation of the Labour Relations Act and recent judgements’ (LLM Theses, University of KwaZulu-Natal, 2014) available at <https://researchspace.ukzn.ac.za/handle/10413/12361>, accessed on 26 May 2018.

<sup>34</sup> *FAWU obo Kapesi and Others v Premier Foods Ltd t/a Ribbon Salt River* (2010) 31 *ILJ* 1654 (LC).

<sup>35</sup> Le Roux (note 18 above) 11.

<sup>36</sup> (2012) 33 *ILJ* 998 (LC); in this case the strike had gone beyond control, resulting in violence and damage to property. The Labour Court granted an interdict in favour of the employer and the order of costs was granted against the employees involved in a strike and their trade union.

<sup>37</sup> *Ibid*, at para 13.

<sup>38</sup> (2016) 37 *ILJ* 476 (LC) at 37; in that matter, the Court was faced with a situation where banners had been displayed which criticised the employer’s holding company for doing business with Israel, Palestinian flags were waved and official and members of the Economic Freedom Fighters become involved in the strike in various ways. In addition, the Union’s members engaged in several acts of violence.

acts of violence in respect of which the applicant seeks to have the strike declared unprotected, it was regrettable that acts of wanton and gratuitous violence appear inevitably to accompany strike action, whether protected or unprotected. It was further held that strike related misconduct is a scourge and a serious impediment to the peaceful exercise of the right to strike and picket.<sup>39</sup> Therefore, those who are not involved in a strike become victims of the violence committed by those in strike who believe that they are ‘sell-outs’ (those not in a strike). There is high risk posed on investors and this ultimately has a negative impact on the economy.

Rycroft has pointed out that there is no provision in the LRA that clearly provides that a strike will lose its protection if misconduct takes place, nevertheless, this is implied in the powers of the Labour Court.<sup>40</sup> Employers tend to use this to justify dismissing striking employees.

When employees picket, they should refrain from exceeding the bounds of peaceful persuasion to support a strike, should they exceed the bounds, the picket then ceases to be reasonable and lawful.<sup>41</sup> Therefore, where the employer suffered harm as a result of a strike, there can be a delictual claim. Also, should there be loss, a claim for compensation in section 68 of the LRA is available if the strike turns violent. However, the claim for compensation is not only available when the strike turns violent, it can also be available when the striking employees do not comply with the laws and procedures made available to them by the employer.

Rather than condemning the violence which takes place during strike, the Labour Court in *National Union of Food Beverages Wine Spirit and Allied Workers*<sup>42</sup> reached a conclusion which seems to imply that a strike’s protected status is only capable of being impugned if and when the level of violence passes a certain threshold. That which needs to be examined is what this threshold is since it not yet clear. Coetzer is of the view that the labour court will be slow to intervene in circumstances where the strike remains functional to collective bargaining, even in the presence of violence.<sup>43</sup> A strike will be judged as functional where it does not delegitimise the process of collective bargaining.

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<sup>39</sup> Ibid.

<sup>40</sup> A Rycroft ‘What Can Be Done about Strike-Related Violence?’ (2014) 30 (2) *IJCLLIR* 199.

<sup>41</sup> *Shoprige Checkers (Pty) Ltd v CCMA* (2006) 27 *ILJ* 2681 (LC) at para 30.

<sup>42</sup> *Universal Product Network* supra note 38.

<sup>43</sup> Coetzer (note 6 above).

## CHAPTER 2: LAWS CONTROLLING STRIKES IN SOUTH AFRICA

### 2.1 Introduction

Strikes in nature have a negative impact on the economy of our country. However, strikes are considered as a fundamental right by international laws and in terms of South African law.<sup>44</sup> Employees often resort to strike action as they believe it is the legitimate weapon against their employer to persuade the employer to accede to their demands, and this has been accepted by the courts.<sup>45</sup> Whilst the right to strike is acknowledged as a foundational right in South Africa, this right can only be utilised if it is in compliance with certain promulgated requirements as set out in the LRA.<sup>46</sup> It is clear that should the strike not comply with the requirements in the LRA, it will not be protected and that will give an employer a right to institute a disciplinary action against those engaged in a strike and to sue strikers or their trade union for the loss suffered.<sup>47</sup> Therefore, although the right to strike is statutory protected, it is limited in certain instances. This chapter will provide how this right is limited.

### 2.2 The statutory definition of a strike

A strike is defined in the LRA as follows:

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 purposes or remedying a grievance or resolving a dispute in respect of any matter of mutual interest between the employer and the employee, and reference to work in this definition includes overtime work, whether it is voluntary or compulsory.<sup>48</sup>

In breaking down the definition, it is clear that there are elements which needs to be present in order for a strike to exist, which are as follows: (a) there must be refusal to work by workers; (b) there must be collective actions of workers with the same purpose; (c) the rationale behind the refusal to work by workers must be to remedy a grievance or resolve a dispute; (d) the case in point must be of a ‘mutual interest’ between an employer and employee.

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<sup>44</sup> Hepple (note 2 above) 27.

<sup>45</sup> SR van Jaarsveld and BPS van Eck. *Principles of Labour Law*. 2 ed. (2002) 379; see also *NUM v East Rand Gold and Uranium Co Ltd* 1991 ILJ 1222 (A); *NUMSA v Boart MSA (Pty) Ltd* [1996] 1 BLLR 13 (LAC).

<sup>46</sup> J Grogan *Workplace law*. 12 ed. (2017) 405.

<sup>47</sup> *Ibid*, 438.

<sup>48</sup> Section 213 (note 5 above).

### 2.2.1 Refusal to work

Strikes have been said to be easily recognisable especially when it turns violent. Hence, ‘when employees lay down their tools during their working hours and refuse to continue working when they should be doing so, their action normally comprises a strike.’<sup>49</sup> As the definition states, the refusal to work can be partial or complete and can also include retardation or obstruction of work.<sup>50</sup> Strike action does not need to amount to a complete disengagement of labour. A partial refusal could be understood to mean that employees are willing to perform part of their duties, but not all of them. The retardation of work is manifested by what is referred to as a ‘go-slow’, where employees continue to work, but not at their usual pace (they work at slower pace).<sup>51</sup> Furthermore, obstruction of work refers to where employees in one way or another hamper production or the work process.<sup>52</sup> What also emerges from the definition is that refusal by employees to work overtime in support of their grievances is viewed as a strike, whether the overtime is voluntary or not.

In *Gobile’s* case,<sup>53</sup> employees refused to work overtime on public holidays and stated that they were not contractually compelled to work over time. There were three of these employees and their denial to work was not guided by any communicated request. The court examined the objective of their action in order to decide whether their refusal to work composed a strike.<sup>54</sup> The court held that the employees purpose was to make their employer accept their impression of what their contractual burdens should be. Therefore, actions comprised of a strike in that their refusal to work emanated from the fact that they did not want to work overtime if it was not agreed from the first instance that they will have to work overtime.

### 2.2.2 Collective action

A single employee cannot strike as the definition of a strike requires that the failure or refusal to work must be by collective employees. Therefore, more than two employees can engage in a strike provided that they must have the same objective. ‘In the unlikely event of a number of employees independently and simultaneously resolving to put down the tools in response to the same grievance, their action will not comprise a strike if their refusal to work is not

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<sup>49</sup> Grogan (note 46 above) 406.

<sup>50</sup> *Ibid.*

<sup>51</sup> S Bendix. *Labour Relations: A Southern African Perspective*. 6 ed. (2015) 527.

<sup>52</sup> *Ibid.*

<sup>53</sup> *Gobile v BP Southern Africa (Pty) Ltd and others* (1999) 20 ILJ 2027 (LAC).

<sup>54</sup> T Cohen, A Rycroft and B Whitcher *Trade Unions and the Law in South Africa* (2009) 48.

collective in both nature and intent.<sup>55</sup> The right to strike extends even to employees who fall outside the bargaining unit or belong to a different trade union.<sup>56</sup>

In *Afrox Ltd*,<sup>57</sup> employees engaged on a strike to place compulsion on their employer to abandon a staggered shift system. The employer abandoned the shift system and started a retrenchment process. The LC held that when the cause of complaint is withdrawn, the existing strike is flawed and no longer has an objective.<sup>58</sup> The court further held that the employees could not proceed striking in reaction to the retrenchments. This was because the retrenchments did not give rise to the disagreement, rather it was a shift system that did, which the employer had abandoned.<sup>59</sup>

### **2.2.3 Following a grievance or dispute**

Unlike the current definition of ‘strike’ in the LRA, “the definition of ‘strike’ in the 1956 LRA made it clear that a strike had to be aimed at inducing an employer to comply with some demands.”<sup>60</sup> Hence, strike actions usually ensue from unsuccessful negotiations between employees and their employer. Employees cannot simply refuse to work if they do not have any grievances against their employer or are not seeking to remedy a grievance or resolve a dispute that will not amount to a strike in terms of the statutory definition.<sup>61</sup> Moreover, if a demand is unlawful, the union which represents employees should not support that strike. The strike will cease when the employer has acceded to the employees’ grievances. Hence, if the employees continue striking after that point, it will be unlawful and unprotected.

### **2.2.4 The dispute must concern a matter of mutual interest**

From the definition, it is clear that the ‘refusal to work’ to comprise a strike, it must be ‘for the purposes of remedying a grievance or determining a dispute in respect of any matter of mutual interest between the employer and employee’.<sup>62</sup> The phrase “matters of mutual interest” is not defined in the LRA. Nevertheless, it appeared in section 24(1) of the 1956 LRA (previously known as the Industrial Conciliation Act), which provided that industrial-council agreements

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<sup>55</sup> Grogan (note 46 above) 407.

<sup>56</sup> Ibid.

<sup>57</sup> *Afrox Ltd v SACWU and others (1)* (1997) 18 ILJ 399 (LC).

<sup>58</sup> M. D Mbona ‘A critical analysis of the law on strikes in South Africa’ (LLM thesis, University of KwaZulu-Natal, 2014) available at <https://researchspace.ukzn.ac.za/handle/10413/13401>, accessed on 17 July 2018.

<sup>59</sup> Ibid; *Afrox* supra note 57 at para 388.

<sup>60</sup> Grogan (note 46 above) 408.

<sup>61</sup> Bendix (note 51 above), 527.

<sup>62</sup> Grogan (note 46 above) 408.

could include “any matters whatsoever of mutual interest to employers and employees”.<sup>63</sup> In *Vanachem Vanadium Products (Pty) Ltd v National Union of Metal Workers of South Africa*,<sup>64</sup> the court found that “matters of mutual interest” means no more than what is of mutual advantage or benefit to employers and employees and therefore of the industry as a whole.

In *Mzeku and others v Volkswagen SA (Pty) Ltd and others*,<sup>65</sup> the union suspended its shop stewards who had ignored an agreement formed by the union and the employer. As a result, the employees decided not to work and insisted that the stop stewards be returned to work. The LC reasoned that the stoppage of work by employees did not constitute a strike, and the Labour Appeal Court welcomed this reasoning. The reason for this was that it aimed at settling an internal disagreement between the employees and the union and at compelling the union to accept a demand. Therefore, the LAC considered the stoppage of work as an unprotected strike because the employer could not comply with the demand.<sup>66</sup>

### **2.3 Primary and secondary strikes**

When carefully reading the statutory definition of a strike, a strike can be primary or secondary. A primary strike is where employees put compulsion on their employer for their grievances to be met and they have direct interest on the outcome of the matter.<sup>67</sup> Primary strikes can happen in the following ways: a full work stoppage, a repetition/intermittent strike or a partial strike. A full work stoppage is a complete refusal to work by employees.<sup>68</sup> A repetition/intermittent strike is a recurring strike, which is undertaken by the same employees in respect of the same issues and at the same time.<sup>69</sup>

Furthermore, a partial strike is a strike which is the opposite of a total stoppage of work. A partial strike is a collective term of the following: go-slows, work-to-rule, overtime ban and grasshopper.<sup>70</sup> Employees engaged in a ‘go-slow strike’, do not work according to their usual pace, they work slowly. The impact of such a strike is that an employer will see a decline in production and income to the company. It has been said that it is not easy for the management of a company to take proper action against the employees who are on a go-slow strike because

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<sup>63</sup> M.E. Manamela ‘Matters of mutual interest for purposes of a strike’ (2015) 36 (3) *Obiter* 793.

<sup>64</sup> *Vanachem Vanadium Products (Pty) Ltd v NUMSA* [2014] 9 BLLR 923 (LC).

<sup>65</sup> (2002) 22 *ILJ* 1575 (LAC).

<sup>66</sup> Cohen (note 54 above) 49.

<sup>67</sup> *Ibid*, 65.

<sup>68</sup> Grogan (note 46 above) 406.

<sup>69</sup> Cohen (note 54 above) 46.

<sup>70</sup> Grogan (note 46 above) 407.

it is strenuous for the employer to show that the employees are on that strike.<sup>71</sup> In a ‘work-to-rule strike’ the employees objective is similar to that of a go-slow strike, which is a decrease in production and income, but the techniques used for the attainment of such an aim are not the same. The employees try to make certain that the employer loses profit without breaching the contract.<sup>72</sup> With regards to an overtime ban, employees can refuse to work overtime even if they were contractually bound to do so, such refusal constitutes a strike.<sup>73</sup> However, where there is no contractual obligation to work overtime and the employees refuse to work, that will not amount to a strike and the definition includes voluntary overtime.

A secondary strike, also known as a sympathy strike, is a strike in which employees strike to assist employees engaged in a different strike.<sup>74</sup> Hence, this kind of strike is in support of a primary strike. Further, this strike need not be a total refusal to work by employees. A strike is not classified as a secondary strike if the employees have referred their demands to a council and if the employees have a material interest in the demand.<sup>75</sup> Secondary strikers are afforded protection only if the primary strike has satisfied the requirements of the LRA.<sup>76</sup> Should the secondary strike not comply with the required requirements then the secondary employer can approach the Labour Court for an interdict.

In *Clidet No 957 (Pty) Ltd v SAMWU*,<sup>77</sup> the court held that establishing whether secondary strikes are protected and permissible, entails examining the likely result on the secondary employer, having regard to the duration and form of the secondary strike, the number of employees involved, their conduct, the extent of the strike’s impact on the secondary employer and on the sector in which they occur.<sup>78</sup> In *SALGA v SAMWU*,<sup>79</sup> it was held that because the municipalities provide a number of functions for the provincial and national tiers of government, a strike by municipal workers in support of a nationwide strike by public servants would have complied with the requirements of the LRA.<sup>80</sup>

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<sup>71</sup> SR van Jaarsveld and BPS van Eck *Principles of Labour Law* (1998) 320.

<sup>72</sup> Cohen (note 54 above) 46.

<sup>73</sup> *Ibid*; Grogan (note 46 above) 406.

<sup>74</sup> R Bregman ‘Strikes’ (2014), available at <https://www.bregmans.co.za/strikes/>. (Accessed: 7 August 2018).

<sup>75</sup> *Ibid*.

<sup>76</sup> Grogan (note 46 above) 417.

<sup>77</sup> [2011] 3 BLLR 225 (LC).

<sup>78</sup> Grogan (note 46 above) 417.

<sup>79</sup> [2011] 7 BLLR 649 (LAC).

<sup>80</sup> Grogan (note 46 above) 417.

## 2.4 Protected and unprotected strikes

In the LRA there are two different kinds of strikes which are: protected and unprotected strikes. Section 67 of the LRA contains protected strikes. For brevity, these are strikes that fulfil the requirements in sections 64 of the LRA.<sup>81</sup> One of the most important outcomes of a protected strike is that employees who are on such a strike may not be unfairly dismissed by their employer.<sup>82</sup> On the other hand, section 68 of the LRA regulates unprotected strikes. Unprotected strikes are those that do not comply with the procedural requirements in section 64 of the LRA. Furthermore, a strike is also unprotected if it is disallowed by section 65 (1) of the LRA. If employees are engaged in an unprotected strike, the employer can dismiss them as the strike is not in compliance with the procedural requirements. Nonetheless, the dismissal must be procedural and substantively fair as per the Code of Good Practice.

Employees on a protected strike are not allowed to act violently, cause damage to property or intimidate non-striking employees and employers or take part in other unlawful conduct while they are on strike.

## 2.5 The right to strike in terms of the Constitution

Originally, strike action was governed by the common law under breach of contract.<sup>83</sup> Under the common law, an employer would be able to dismiss an employee who took part in a strike action if that employee breached the contract.<sup>84</sup> In *Smith's* case,<sup>85</sup> the court pointed out that if an employee participated in a strike, he then breached his contract of employment and such an employee could therefore be dismissed for such action. There was no obvious protection of employees engaged in strikes against dismissal in the 1956 LRA.<sup>86</sup> A clear protection of the right to strike is granted by the Constitution and the LRA (1995), as mentioned above.

The right to strike is incorporated in the Constitution, section 23 (2) (c) and states clearly that every worker has a right to strike.<sup>87</sup> However, this right is subject to limitations in the Constitution, it is not absolute.<sup>88</sup> A Constitutional right to strike is considered as a higher

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<sup>81</sup> Cohen (note 54 above) 45; Grogan (note 46 above) 412.

<sup>82</sup> Manamela (note 15 above) 326.

<sup>83</sup> Grogan (note 46 above) 405.

<sup>84</sup> A Myburgh '100 Years of Strike Law' (2004) 24 *ILJ*, 966.

<sup>85</sup> *R v Smith* (1995) 1 SA 239 (C).

<sup>86</sup> Myburgh (note 84 above) 966.

<sup>87</sup> Section 23 (2)(c) of the Constitution (note 1 above).

<sup>88</sup> *Ibid*, section 36; Manamela (note 15 above) 334.

standard against which ordinary legislation is scrutinised for its similarity.<sup>89</sup> Therefore, the LRA was enacted to give effect to this right and to limit it. The constitutional right to strike can be interpreted as a “means to an end” in that it is a significant way to protect the interest of workers.<sup>90</sup>

Moreover, section 64 and 65 are the dominating provisions in the LRA for strikes. Hence, section 64 provides employees with the right to strike and employers are provided with a right to ‘lock-out’. The section further provides procedural requirements which must be complied with for a strike to be protected. Section 65 provides for the limitations of the right to strike and recourse to ‘lock-out’.<sup>91</sup> While the LRA is narrow when it comes to the rights to strike, the Constitution widely accommodates persons who want to strike. The right to strike emanates from collective bargaining and it is a tool which unions use to achieve their demands during the bargaining process.<sup>92</sup>

In *NUMSA v Bader Bop (Pty) Ltd*,<sup>93</sup> the court held that the Constitution recognises the importance of ensuring fair labour relations. The court further pointed out that this right is important for two reasons: firstly, it is important for the dignity of workers, in that the workers may not be treated as coerced employees. Secondly, it will ensure that workers are able to reclaim bargaining power during the collective bargaining process.<sup>94</sup>

## **2.6 Limitations to the right to strike**

It is understood that although the constitutional right to strike is unrestricted, like any other right in the Constitution, it is not absolute.<sup>95</sup> It has been pointed out that the right to strike envisages restrictions and limitations.<sup>96</sup> Further, the right to strike is restricted in terms of general application in terms of section 36 of the Constitution. The limitation to this right should however be reasonable and the interests of the society must be balanced against that of affected persons.<sup>97</sup>

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<sup>89</sup> H Cheadle “Constitutionalising the right to strike” in B Hepple, R Le Roux and S Sciarra (editors) *Laws against strikes: The South African experience in an international and comparative perspective* (2015), 67.

<sup>90</sup> Hepple (note 2 above) 41.

<sup>91</sup> Section 65 of the LRA (note 5 above).

<sup>92</sup> Grogan (note 46 above) 405; A van Niekerk (note 26 above) 415.

<sup>93</sup> (2003) *ILJ* 316 (CC).

<sup>94</sup> *Ibid.*

<sup>95</sup> Gericke (note 24 above) 567.

<sup>96</sup> H Cheadle (note 89 above) 75.

<sup>97</sup> Section 36 of the Constitution (note 1 above); Cheadle (note 89 above) 73.

The LRA which is a national legislation, was enacted to give effect to the right to strike as it was generally stated in the Constitution.<sup>98</sup> Even though the LRA gives effect to the right to strike, it sets limits to this right. Therefore, certain requirements must be met for a strike to be protected. The LRA prescribes to these requirements so that the parties involved in a dispute pertaining to a strike, can find a way to settle their dispute. This also helps the employer to get ready for any actions that the employees may take. The LRA provides for procedural and substantive limitations to the right to strike.

### **2.6.1 Procedural Limitations to the right to strike**

Section 64 of the LRA sets out procedural requirements which must be followed prior to a strike being protected:<sup>99</sup>

- (a) The issue in dispute must be referred for conciliation to a bargaining council or to the CCMA.
- (b) A certificate stating that the dispute remains unresolved must be issued or alternatively a period of 30 days must have lapsed from the date of the referral of the dispute.
- (c) The employer must be given at least 48 hours written notice of the commencement of the strike.

#### *Referring a dispute for conciliation*

Referring a matter for conciliation to a bargaining council or the CCMA (Commission for Conciliation, Mediation and Arbitration) is the first step to be taken.<sup>100</sup> The representative of the employees' lists all the issues in dispute when referring the matter, since employees or workers can only strike based on the submitted issues for conciliation. The union is the only party that can be cited in the referral.<sup>101</sup> It must be clear which issue or issues are strikable at referral.

In *City of Johannesburg Metropolitan Municipality v SAMWU*,<sup>102</sup> the court found that the 'stalemate' stage had not been reached (that there is no issue in dispute until the employer has

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<sup>98</sup> Section 23 (5) and (6) of the Constitution (note 1 above); L Corazza "Representativeness and the legitimacy of bargaining agency" in B Hepple, R Le Roux and S SCiarra (editors) *Laws against strikes: The South African experience in an international and comparative perspective* (2015), 88.

<sup>99</sup> Section 64 (1) to (5) (note 5 above); Grogan (note 46 above) 412; Van Niekerk (note 26 above) 426.

<sup>100</sup> Grogan (note 46 above) 412; Cohen (note 54 above) 49.

<sup>101</sup> Cohen (note 54 above) 49.

<sup>102</sup> (2008) 29 *ILJ* 650 (LC); Grogan (note 46 above) 413.

had the opportunity to accept or reject a demand put forward by the employees or their representative in respect of any of the issues referred for conciliation).<sup>103</sup> The union and its members were accordingly restrained from striking over those issues.<sup>104</sup>

In *Early Bird Farm (Pty) Ltd v FAWU and others*,<sup>105</sup> the company had a farming and processing division. The processing division embarked on a strike to settle a wage dispute. The plant thereafter followed suit.<sup>106</sup> The LAC held that since only the dispute of the processing plant employees had been referred for conciliation, the strike on the other division was unprotected. However, the court pointed that, to a level that the individual workers engagement in the strike was in support of grievances relating only to the union members based in the processing plant, such participation was lawful and protected.<sup>107</sup>

#### *A certificate with regards to the dispute being obtained*

A certificate must be provided by the CCMA detaining that the issues remains unresolved.<sup>108</sup> The employees may not embark on a strike until the commissioner verified that the parties are unable to resolve the dispute, or until 30 days have passed since the date of referral.<sup>109</sup> It is best for the employees to wait for conciliation so that they will know which matter is not strikable. If the matter concerns a refusal to bargain, a non-binding advisory arbitration award must first be issued in such a case before proceeding to the next step.<sup>110</sup> Furthermore, the fact that the certificate has been obtained verifying that the matter remains unresolved does not mean that the strike that will ensue is protected from the legal challenge.<sup>111</sup> A good example which Grogan uses is that of the case of *Vodacom (Pty) Ltd v CWU*,<sup>112</sup> where the LAC held that a strike in conflict with the provisions of a collective agreement was unlawful, even though the commissioner had authorised the strike.<sup>113</sup>

#### *Giving an employer a written notice of the date for the commencement of the strike*

The union representing the employees must give notice the employer in writing when the strike is to begin. The employer must be given at least 48 hours' notice of the commencement of the

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<sup>103</sup> Grogan (note 46 above) 413.

<sup>104</sup> Ibid.

<sup>105</sup> (2004) 25 *ILJ* 2135 (LAC).

<sup>106</sup> Cohen (note 54 above) 49.

<sup>107</sup> Ibid, at para 50.

<sup>108</sup> Section 64(1)(a)(i) (note 5 above).

<sup>109</sup> Section 64(1)(a)(ii) (note 5 above); Grogan (note 46 above) 412.

<sup>110</sup> Section 64(2) (note 5 above); Grogan (note 46 above) 412.

<sup>111</sup> Grogan (note 46 above) 412.

<sup>112</sup> (2010) 31 *ILJ* 2060 (LAC).

<sup>113</sup> Ibid; Grogan (note 46 above) 412.

strike.<sup>114</sup> Furthermore, “where the employer is bound by a bargaining council agreement and the issue in dispute relates to a collective agreement to be concluded in the council, notice need only be given to the council”.<sup>115</sup> In instance where employer is the state, then the notice must be given to the State at least seven days before the strike.<sup>116</sup> In the case of secondary strikes, the employer must be given seven days’ notice. Accordingly, this will allow the employer of the secondary strikers to prepare for their absence from work.<sup>117</sup> Grogan points out that ‘the notice must set out the issues in dispute with reasonable clarity but need not indicate which employees will participate in the strike, or in which division of the employer’s workplace it will occur.’<sup>118</sup>

In the case of *SATAWU and others v Moloto NO and others*,<sup>119</sup> the company employed individuals who were members of SATAWU while others were not members of the union. The union had provided a single strike notice and some non-members engaged in the strike as well. As a result of their engagement on a strike while they were not members of the union, they were dismissed for unapproved absence from work. It was found by the Constitutional Court that the provisions of section 64 contemplate only a strike in respect of one dispute or issue in dispute. The court further found that section 64 does not indicate that more than one notice in relation to the single strike is compulsory. The court dismissed the assertion that the employees on strike complied with the provisions of section 64(1)(b) by engaging in a strike when only SATAWU and not its non-members provided a strike notice.

In the case of *Ceramic Industries Ltd t/a Betta Sanitaryware and others v NCBWU and others*,<sup>120</sup> the union referred a dispute to the CCMA regarding the payment of wages during an early work stoppage. The union gave notice to the company that a strike would begin at any time after 48 hours from the date of the notice. The LAC held that the provisions of section 64(1)(b) of the LRA needed to be interpreted and applied in a way that gave best effect to the primary objects of the LRA and its own determined objective, which needed to be done within the limitations of the language used in section 64(1)(b).<sup>121</sup> The court further pointed out that one of the primary objects of the LRA is to advance orderly collective bargaining. Section

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<sup>114</sup> Section 64(1)(b) (note 5 above).

<sup>115</sup> Grogan (note 46 above) 414.

<sup>116</sup> Section 64(1)(d) (note 5 above).

<sup>117</sup> Cohen (note 54 above) 50.

<sup>118</sup> Grogan (note 46 above) 414.

<sup>119</sup> (2012) 33 *ILJ* 2549 (CC).

<sup>120</sup> (1997) 18 *ILJ* 617 (LAC).

<sup>121</sup> Mbona (note 58 above) 15.

64(1)(b) give expression to this object by demanding written notice of the commencement of the proposed strike. The court found the union's notice flawed for failing to specify the requested time for the beginning of the strike and stated that the provisions of section 64(1)(b) were not met.

Moreover, strikes need not comply with above stated pre-strike procedures in the following circumstances:<sup>122</sup>

- Where the parties to the dispute are members of a bargaining council and the dispute has been dealt with by that bargaining council in accordance with its constitution (section 64(3)(a));
- Where the parties have complied with the provisions of a collective agreement by which they are bound (section 64(3)(b));
- Where the strike is in response to an illegal lock-out by the employer (section 64(3)(c));
- The employer locks out its employees in response to their taking part in a strike that does not conform with the provisions of Chapter 4 (section 64(3)(d));
- Where the employer has introduced a unilateral change to the employees' terms and conditions of employment and has failed to comply with a request that it either refrain from implementing or revoke the change for 30 days (section 64(3)(e)).

### **2.6.2 Substantive limitations to the right to strike**

Section 65 prohibit strikes in certain circumstances and certain employees are prohibited from striking.<sup>123</sup> The section provides that no employee may strike in the following circumstances:<sup>124</sup>

- (a) *If employees are bound by collective agreement prohibiting them from striking over the disputed issues, or which requires that the dispute be arbitrated section 65(1)(a) and*
- (b).

If there is a contract which was concluded by the employer and the employees' representative, then the employer can rely on that contract for the strike not to take place because it will be

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<sup>122</sup> Grogan (note 46 above) 415.

<sup>123</sup> Grogan (note 46 above) 418; Van Niekerk (note 26 above) 421.

<sup>124</sup> Section 65(1) (note 5 above); Grogan (note 46 above) 418-428.

unprotected in terms of section 64 of the LRA. The employees may not strike if the commissioner ruled that the dispute is covered by collective agreement.<sup>125</sup>

In the case of *BAWU and others v Asoka Hotel*,<sup>126</sup> the parties involved fell under the jurisdiction of an Industrial Council and were bound by the terms of a gazetted Industrial Council agreement which set minimum wages.<sup>127</sup> The union requested that the employer negotiate with it over a wage increase. However, employer rejected to negotiate, and the union members embarked on a strike. Accordingly, the employees that were on strike were dismissed and they sought reinstatement in terms of the LRA. The Industrial Court held that the demand for negotiations over higher wages was not protected by any provision of the Industrial Council agreement and that consequently the strike infringed section 65(1)(a) of the LRA. It was further held that it would protect employees who embarked in legal strikes in circumstances where the employer neither in good faith nor had proven to be reasonable. Therefore, the court found that the employer had dismissed the employees permanently and it was procedurally unfair.

In *Early Bird Farming*,<sup>128</sup> the LAC held that for the reason that the employees were bound by a collective agreement with the union, the farm workers were not permitted to strike over wage demands on their behalf.

*(b) The issue in dispute relates to a disagreement which one of the parties can refer to the Labour Court or for arbitration (section 65(1)(c))*

According to Grogan ‘this section is the most extensive statutory limitation on the right to strike.’<sup>129</sup> The objective behind this subsection is that no employee should be seen striking if the matter can be taken to the relevant court where a remedy can be granted. Hence, employees may not strike over disputes concerning the following: automatically unfair dismissals, the interpretation and application of a collective agreement; picketing; allegations of unfair dismissal; unfair labour practices, victimisation; agency and closed shop agreements; admission or expulsion from bargaining councils; freedom of association.<sup>130</sup>

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<sup>125</sup> Grogan (note 46 above) 419.

<sup>126</sup> (1989) 10 *ILJ* 167 (IC).

<sup>127</sup> Mbona (note 58 above) 16.

<sup>128</sup> *Early Bird Farming* supra note 105.

<sup>129</sup> Grogan (note 46 above) 419.

<sup>130</sup> Grogan (note 46 above) 420; Cohen (note 54 above) 55.

According to Grogan, ‘there are two exceptions to the prohibition of strikes over disputes of right.’<sup>131</sup> The first exception relates to disputes concerning claims by unions for organisational rights and the second exception is found in section 189A (9)(2)(b) of the LRA.<sup>132</sup>

*(c) When employees are engaged in essential or maintenance services (section 65(1)(d))*

Essential services are those services which protection for life or personal safety is provided.<sup>133</sup> Hence, employees engaged in essential services may not strike.<sup>134</sup> In the case of the *South African Police Services v Police and Prisons Civil Rights Union*,<sup>135</sup> the Constitutional Court held that not all persons engaged in the SAPS would be regarded as essential service members who are involved in an essential service. Members of the SAPS not involved in essential services may exercise their right to strike.

Section 70 of the LRA which establishes the Essential Services Committee which is tasked with task of determining whether a service falls within the definition of essential service.<sup>136</sup> It is the task of this committee to examine if a service is essential or not.

## **2.7 Conclusion**

Even though a strike is considered to have an adverse effect on the economy, it is acknowledged as a fundamental right in South Africa. Section 23 of the Constitution of South Africa was entrenched for the purpose of accommodating this right to strike. Further, the LRA was enacted to give effect to this right and to make sure that every employee enjoys this right. What is important, is that for there to be a strike there must be refusal by employees/workers collectively to work because refusal by only ‘one employee/worker’ to work does not constitute a strike. The matter must be of mutual interest between the employer and the employees, respectively. The Constitution widely accommodates those who wish to engage in a strike (workers), while the LRA is limited in this instance (employees). Moreover, the LRA provides requirements which must be met for a strike to be protected and the employees to enjoy immunity against dismissal. These requirements are provided for in section 64 of the LRA and is the most important provision in the LRA regarding strikes. The Act also outlines which employees will not be able to participate in a strike due to certain circumstances. Therefore,

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<sup>131</sup> Ibid, 421.

<sup>132</sup> Ibid.

<sup>133</sup> Van Niekerk (note 26 above) 424.

<sup>134</sup> Grogan (note 46 above) 424.

<sup>135</sup> (2011) 32 *ILJ* 1603 (CC).

<sup>136</sup> Grogan (note 46 above) 424.

when employees engage in violent strikes, they violate the laws and procedures which needs to be followed. Failure to abide by these laws and procedures are a misuse of the right to strike.

## **CHAPTER 3: REMEDIES AVAILABLE**

### **3.1 Introduction**

The LRA provides that for a strike to be protected, it must comply with all procedural and substantial requirements. This protection by the LRA is offered to employees who engage in a protected strike.<sup>137</sup> Grogan points out that the “purpose of granting protection to strikers is to encourage employees to comply with statutory provisions before and while resorting to industrial action.”<sup>138</sup> Previously, under the 1956 LRA,<sup>139</sup> employees who were engaged in a strike but failed to follow the required requirements, faced criminal liability and the possibility of being dismissed from work. The current LRA discourages strikes which do not comply with the requirements by giving employers certain remedies to exhaust.<sup>140</sup> Hence, the employer can approach the Labour Court for an interdict prohibiting a strike which does not comply with the requirements;<sup>141</sup> the employer can sue for compensation for the loss it has suffered as a result of an unprotected or violent strike;<sup>142</sup> the employer has a remedy where he or she can treat participation in an unprotected strike as a form of misconduct;<sup>143</sup> and locking-out employees. Therefore, this chapter will discuss the legal steps available to the employer to prevent violence that takes place during a strike.

### **3.2 Remedies available to the employer:**

#### **3.2.1 Interdict**

This is one of the remedies available to the employer who is faced with employees who are engaged in a strike which has the potential to become violent. Interdicts are intended to protect employers from damages that can result from the unprotected or violent strikes and any other wrongful act associated with such strikes. In terms of section 68(1) of the LRA the Labour Court is granted with complete jurisdiction to grant an interdict to deter any person from participating in an unprotected strike or any conduct in contemplation or in furtherance of such an unprotected strike.<sup>144</sup>

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<sup>137</sup> Grogan (note 46 above) 429.

<sup>138</sup> Ibid, 436.

<sup>139</sup> Act 28 of 1956.

<sup>140</sup> Grogan (note 46 above) 436.

<sup>141</sup> Ibid; Section 68(1)(a) (note 5 above).

<sup>142</sup> Ibid; section 68(1)(b) (note 5 above).

<sup>143</sup> Ibid; section 68(5) (note 5 above).

<sup>144</sup> Section 68(1)(a) (note 5 above); Grogan (note 46 above) 437.

Employers cannot use the restraining order (interdict) as a form to strip employees their right to strike which is constitutionally guaranteed. Thus, this would amount to an unreasonable limitation of the employees' constitutional right to strike.<sup>145</sup> At least 48-hour notice must be given to the employees or to their representative (union) detailing the employer's purpose to interdict the strike. A shorter period may be allowed by courts if the union has been given a chance to be heard after the notice of the application and the employer gives a justification why a court should allow a shorter period.<sup>146</sup> Before granting the relief sought, the employer has to establish a prima facie right to the relief sought (even if this may be opened to some doubts); whether there are grounds to believe that irreparable harm will be done or is to be done to the applicant if the interdict is not granted; whether the balance of convenience favours the grant of the relief; and whether no other satisfactory remedy the applicant has.<sup>147</sup>

Nevertheless, an interdict can only be functional if it is respected by the strikers or their representatives. Employees who are engaged in a strike which tends to be violent has the tendency of not obeying the court order prohibiting them from any action which jeopardise the employer's company. Should the strikers or their union fail to obey an interdict, a contempt of court application can be applied for.<sup>148</sup> In assessing whether there has been contempt of court by employees engaged in a violent strike, the case of *Fakie*<sup>149</sup> set out the test for contempt of court. Hence, the test for a contempt of court application is to establish whether the breach was committed deliberately and mala fide.<sup>150</sup> A deliberate disregard is not enough, since the non-complier may genuinely believe that he is entitled to act in the way claimed to constitute the contempt.<sup>151</sup>

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<sup>145</sup> Grogan (note 46 above) 437.

<sup>146</sup> Ibid.

<sup>147</sup> Ibid; *National Council of SPCA v Open Shore* 2008 (5) SA 339 SCA, this case set out the factors which a court must consider or consider before granting an interim interdict. The court will grant the interim order if all the questions are properly answered.

<sup>148</sup> T Cohen and R Le Roux "Liability, Sanctions and other Consequences of Strike Action" in Happle B, Le Roux R and Sciarra S (editors) *Law against strikes: The South African experience in an international and comparative perspective* (2015) 153.

<sup>149</sup> *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA).

<sup>150</sup> Ibid; A Rycroft "The Role of Trade Unions in Strikes" in Happle B, Le Roux R and Sciarra S (editors) *Law against strikes: The South African experience in an international and comparative perspective* (2015) 2501.

<sup>151</sup> D Ramjettan 'Contempt of court orders fail to stick' (2014), available at <https://www.iol.co.za/business-report/opinion/contempt-of-court-fail-to-stick-1750585>. (Accessed: 08 October 2018).

In *Xtrata South Africa (Pty) Ltd v AMCU*,<sup>152</sup> the court found that when the union is instructed to ensure compliance with an order granted against it members, all that is expected of it is to take reasonable steps and measures to ensure that its members comply with the interdict.<sup>153</sup>

Furthermore, considering that employees engaged in violent strikes totally disobey court interdicts, employers may choose applying for contempt of court against the employees and their members. In *Modise v Spar Blackheath*<sup>154</sup> where employees had ignored or disobeyed the interdict prohibiting them from striking, the court pointed that compliance with a court order is fundamental to a state based on the rule of law and that courts should apply a strict approach to ensure that it remains that way.<sup>155</sup> If the employees in a violent strike do not obey the interdict prohibiting the strike, chaos would erupt, thus defeating the object of the collective bargaining. Thus, the court in *Modise* pointed out that a party who committed an offence should be penalised for its non-compliance.<sup>156</sup>

In the case of *In2Food (Pty) Ltd v FAWU and others*<sup>157</sup> the parties engaged in an unprotected strike for two consecutive weeks. The interim interdict which was applied for by the employer was granted by the Labour Court prohibiting the union and its members from unceasing with the unprotected strike and from intimidating other employees who were not part of the strike. The interdict was not challenged by the union, however, the strike became violent and there was damage to property. A contempt of court application was brought forward by the employer. On reading the evidence, the court noted that the union and its striking members were in contempt of court. The court held that the right to strike is protected in the Constitution but there are limitations to that right. It was further held that the union cannot escape liability for actions of its members, and it will therefore be held liable. The union was ordered to pay a fine of a half a million rands (R500 000).<sup>158</sup> The most significant points which the court noted are that, the time has come for unions to be held liable for their actions and that for too long trade unions have easily washed their hand of the violent actions of their members.<sup>159</sup>

Clearly, an interdict is to the advantage of the employer since it is a speedy way of solving the issue at point and the employer not be facing the possibility of a full trial. However, it has been

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<sup>152</sup> *Xstrata SA (Pty) Ltd v AMCU and others* (J1239/13) [2014] ZALCJHB at 58.

<sup>153</sup> Ramjettan (note 151 above).

<sup>154</sup> (2000) 5 BLLR 496 (LAC).

<sup>155</sup> *Ibid*, at para 120.

<sup>156</sup> *Ibid*.

<sup>157</sup> (2013) 34 *ILJ* 2589 (LC).

<sup>158</sup> *Ibid*.

<sup>159</sup> *Ibid*.

argued that there is nothing much that the Labour Court can do to guarantee that strikers comply with strike interdicts against them.<sup>160</sup> This has led to other writers labelling violent strikes as more political in nature than legal.<sup>161</sup> Considering non-compliance of an interdict by strikers on violent strike, employers should consider taking further legal action against the employees in order to curb violence during a strike.

### 3.2.2 Compensation

Section 68(1)(b) of the LRA permits the Labour Court jurisdiction to order payment of “just and equitable compensation” for any loss incurred due to the unprotected or violent strike.<sup>162</sup> It has been held that the words ‘just and equitable’ means more than that compensation awarded must be fair.<sup>163</sup> Initially, the employer needs to prove that it has suffered loss as a result of a violent strike before the court grants compensation, and that the loss was a result of the respondent’s participation in the unprotected strike.<sup>164</sup>

Furthermore, in determining whether compensation should be awarded, the court must consider the following elements, whether:<sup>165</sup>

- attempts were made to comply with the provisions of the LRA and the extent of such attempts;
- the strike was premeditated (was there compliance with the LRA provisions in relation to strikes);
- the strike was a response to the employer’s unjustified conduct;
- there was compliance with an earlier interdict or restraining order by the trade union and their members.

The above elements are not the only that the court can consider in assessing just and equitable payment of compensation; the court will also look if there are any other elements which can be considered. In *Algo Bus Company v SATAWU and others*,<sup>166</sup> the union and its members had been sued by the company for loss of a large sum of money it incurred because of the unlawful

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<sup>160</sup> A Myburg ‘The Failure to Obey Interdicts Prohibiting Strikes and Violence: The Implications for Labour Law and the Rules of Law’ (2013) 23 *CLLJ* 1.

<sup>161</sup> A van Niekerk ‘Marikana: the Perspective of the Labour Court’ (2012) available at <http://www.salaw.org.za/papers/2012%20conference/SALAW%20conference%2012.docx>. (Accessed: 16 May 2018); T Ngcukaitobi ‘Strike Law, Structural Violence and Inequality in the Platinum Hills of Marikana’ (2013) 34 *ILJ* 839-840.

<sup>162</sup> Section (68)(1)(b) (note 5 above); Grogan (note 46 above) 438.

<sup>163</sup> *Platinum Mines Ltd v The Mouthpeace Workers Union* (2001) 22 *ILJ* 405 (LC).

<sup>164</sup> Grogan (note 46 above) 438.

<sup>165</sup> *Ibid.*

<sup>166</sup> [2010] 2 *BLLR* 149 (LC).

strike. The court pointed out that if it is proven that the strike induced loss to the employer and that it was a disruption to the public, then the employer would be allowed to be compensated for the loss suffered.<sup>167</sup> The court held that while employers are permitted to claim compensation for losses suffered during an unlawful strike, the amount awarded for such loss need not necessarily be complete compensation for such loss.<sup>168</sup> The union and its members were ordered to pay the company one hundred thousand rands in monthly instalments of R50. This case clearly shows that the court awarded a small amount than the damage which the company had suffered (financial loss of R465 000).

In *Rustenburg Platinum Mines Ltd v Mouth Piece Workers Union*,<sup>169</sup> the company had suffered a loss estimated at R15 million but was reduced to R100 000. It was noted by the court that the union's representatives had not opposed the company's allegations that they were behind the strike.<sup>170</sup> The court held that the employer would only be entitled to compensation which is just and equitable. It was pointed out by the court that what is regarded as just and equitable is calculated by the weighing up of the loss suffered against the nature of the conduct and blameworthiness of the individuals responsible for the loss.<sup>171</sup>

In *Mangaung Local Municipality v SAMWU*,<sup>172</sup> the court refused to compensate the employer for loss of income resulting from employees who were not part of the strike, but being unable to attend work because of a blockade by the strikers.<sup>173</sup> It was held that the union's liability emerged from its failure to take precautions to end the strike.<sup>174</sup> Hence, the union was ordered to pay compensation to the employer amounted to R25 000 notwithstanding the fact that the employer suffered a loss of R272 541, 84.

### **3.2.3 Discouragement**

Discouragement is one of the remedies at the employer's disposal in addition to interdicts and compensation. Employees engaged in a strike may be discouraged by the employer if they did not follow the procedure stipulated in the LRA.<sup>175</sup> One of the strategies which the employer can use in discouraging employees involved in an unprotected strike is withholding their

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<sup>167</sup> Ibid.

<sup>168</sup> Ibid, at 44.

<sup>169</sup> (2001) 22 *ILJ* 2035 (LC).

<sup>170</sup> Ibid; Grogan (note 46 above) 439.

<sup>171</sup> Rustenburg supra note 169.

<sup>172</sup> (2003) 24 *ILJ* 405 (LC).

<sup>173</sup> Ibid; Grogan (note 46 above) 439.

<sup>174</sup> Ibid.

<sup>175</sup> Grogan (note 46 above) 440.

salaries and wages (since all strikes are no work no pay), encourage them not to strike (especially if the strike has the tendency of turning violent), and giving non-striking employees additional salaries such as bonuses for their commitment to work even in the face of difficulties.<sup>176</sup> For the employer, it is difficult to discourage employees who are on violent strike, simply because they are not protected. Hence, should the employer suffer any damages during the strike, these employees will be liable and can be dismissed from work, even if no damages were sustained they can still be dismissed.

The employers try to curtail violence that takes place during strikes by concluding collective agreements that will balance the employer and employee(s) relationship.<sup>177</sup> ‘Collective agreements’ can discourage strikes because they stipulate which issues the employees are not allowed to strike over. By this they try to minimise violence that can ensue even if the strike is protected. Hence, the reason why collective agreement is concluded is because employers and unions are free to agree to choose any other ways of resolving disputes which can arise, and especially if the strike did not follow the requirements in the LRA.<sup>178</sup> If the employees are involved in a protected strike, the employer may withhold wages or use other means of discouraging employees to strike (as discussed above), provided that employees do not unfairly discriminate against the strikers or amount to victimisation.<sup>179</sup> Furthermore, there are two forms of collective agreement which are, ‘agency shop agreements’ (which is provided for in section 25(1) of the LRA and is concluded between a majority union and the employer) and a ‘closed shop agreements’ (which is provided for in section 26(1) of the LRA and is concluded between the employer and a trade union).<sup>180</sup>

In *SACCAWU v OK Bazaar*,<sup>181</sup> the court held that, in so far as it remains applicable, withholding bonuses permitted for work completed or remunerating non-strikers with additional bonuses or benefits may be permissible in the case of unprotected strikes.<sup>182</sup>

Nevertheless, Grogan points out that the ‘courts will probably investigate such stratagems more strictly under the current LRA,’ so that there will be no unfair discrimination against strikers or them being victimised.<sup>183</sup>

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<sup>176</sup> A Basson (note 23 above) 330; section 64 (note 5 above).

<sup>177</sup> Grogan (note 46 above) 440.

<sup>178</sup> Ibid; Basson (note 23 above) 330.

<sup>179</sup> Grogan (note 46 above) 440; Manamela (note 15 above) 319.

<sup>180</sup> Section 25(1) and 26(1) (note 5 above).

<sup>181</sup> (1995) 16 *ILJ* 1031 (A).

<sup>182</sup> Ibid; Grogan (note 46 above) 440.

<sup>183</sup> Grogan (note 46 above) 440.

### 3.2.4 Disciplinary action

The employees conduct is regulated by the Code of Good Practice: Dismissal, in Schedule 8 of the LRA.<sup>184</sup> The Code of Good Practice provides that instigation or participation in an unprotected strike, by a union or their members, may effectively be regarded as a form of misconduct justifying dismissal.<sup>185</sup> This entitles employers to take disciplinary action short of dismissal against employees who were engaged in an unprotected strike, especially if it was violent, when they return to work.<sup>186</sup>

In the case of *Mzeku*,<sup>187</sup> an unprotected strike took place and as a result the dismissal of the union's members ensue for failing to follow a fair final demand. The employees on strike continued with their unprotected strike against their union's advice not to strike. Hence, a collective agreement and a court order was breached costing their employer huge financial loss. The strikers conduct was intentional and wilful misconduct without any ground of justification that was reasonable against their employer's conduct. A total of 1336 employee were dismissed from their work after the union and the employer had done everything to stop the unprotected strike. The court found that the dismissal of the employees was substantively and procedural fair. Hence, the employees were given a chance to be heard pursuant the dismissal. It was found that the commissioner had incorrectly found that the dismissal of those workers who failed to continue their work would have been fair had the employer followed a fair procedure.<sup>188</sup> It was further held that the reinstatement and re-employment of workers were not appropriate remedies in the circumstances. The court concluded by not making an order of reinstatement simply because it said that such relief was not appropriate in this case of a dismissal that was unfair because the employer did not follow a legitimate procedure.

Employees who are unhappy about their employer's decision of dismissing them for being part of the unprotected strike can oppose their employer's action in the appropriate bargaining council or the CMMA.<sup>189</sup> The employees on an unprotected or violent strike must first be given warnings before being dismissed. Furthermore, employers sometimes find it difficult to

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<sup>184</sup> Section 187(1) and Schedule 8, Code of Good Practice (note 5 above).

<sup>185</sup> Grogan (note 46 above) 440.

<sup>186</sup> Ibid.

<sup>187</sup> *Mzeku* supra note 65.

<sup>188</sup> Ibid at 50.

<sup>189</sup> Grogan (note 46 above) 440.

dismiss employees who participated in in a violent strike since it may not be easy to identify the offender if there were no cameras or a whistle-blower.<sup>190</sup>

In *NSCAWU and others v Coin Security Group (Pty) Ltd*,<sup>191</sup> employees were dismissed by the employer after a strike that involved misconduct. It was held that although the employees were involved in collective action, there was no proof that any of the employees were directly involved in the misconduct they were dismissed for. It was pointed out that the employer relied on the collective guilt more than on the doctrine of common purpose. The court's conclusion was that in terms of the law, there was no collective guilt because this would contravene the principle of natural justice that provides that everyone is innocent until proven guilty.

### **3.2.5 Lock-out**

This is another remedy which is available to the employer against employees who participated in an unprotected strike or one that was violent. Hence, this recourse is provided by the LRA to the employer who may use it until the employees comply with the employer's plan.<sup>192</sup> Section 213 of the LRA defines a lock-out as "the exclusion by an employer of employees from the employer's workplace, for the purpose of compelling the employees to accept a demand in respect of any matter of mutual interest between the employer and the employee, whether or not the employer breaches the employees contracts of employment in the course of or for the purpose of exclusion".<sup>193</sup> When locking out the employees, the employer may refuse to pay those employees involved in a violent or unprotected strike.<sup>194</sup> In addition, such refusal to pay remuneration is supported by the LRA.<sup>195</sup>

### **3.3 Conclusion**

The LRA is fair legislation as it provides protection to both employees and employers. Employers are not left without any remedy they can rely on should the strike turn violent or be unprotected. Hence, the employer has remedies he or she can rely on to reduce violence that takes place during a strike. By concluding a collective agreement, the employer and employees agree that there are certain matters which they cannot strike over. Employees most of the time fail to follow picketing rules and 'cross the line' by engaging in violent strikes which compels

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<sup>190</sup> See *Fawu obo Kapesi and others v Premier Foods Ltd t/a Blue Ribbon* [2010] 9 BLLR 903 (LC).

<sup>191</sup> [1997] BLLR 85 (LC).

<sup>192</sup> Grogan (note 46 above) 459.

<sup>193</sup> *Ibid*; section 13 (note 5 above).

<sup>194</sup> Grogan (note 46 above) 489.

<sup>195</sup> Section 67(3) (note 5 above), provides that an employer is not obliged to remunerate an employee for services that the employee did not render during a lock-out.

the employer to obtain an interdict in order to prohibit them from engaging in violent actions that can cause massive damage to the company. Moreover, if that prohibitory interdict is disobeyed (as it normally happens) the employer can make an application for contempt of court and an appropriate compensation can be made by the court against the union and its members for their involvement in a violent strike. An interdict can only be functional if it is respected by the union and its members.

Employers may also use certain measures to discourage employees from engaging in violent or unprotected strikes. An employer is entitled to dismiss employees engaged in violent strikes for committing misconduct justifying dismissal. However, the dismissal needs to be substantively and procedural fair to the employees. Locking out employees is also another remedy which the employer can make use of if they continue with their violent strikes.

Some of these remedies have not helped employers and it is up to the courts to treat each case according to its own facts. The courts must make sure that awards which they give employers who suffered damages due to violent strikes are the appropriate ones, and that will deter employees from engaging in violent strikes in future because they will be aware of the consequences that can arise from such strikes.

## CHAPTER 4: TRADE UNIONS LIABILITY FOR VIOLENT STRIKES

### 4.1 Introduction

Protected or unprotected strikes are considered violent where damage to property, looting, intimidation, assaults, etc. occurs. It is the trade union's role to make sure that such violent actions are not committed by its members. Hence, there is an obligation imposed on trade unions to take all reasonable steps to halt violence and any other misconduct committed during a strike.<sup>196</sup> Gericke asserts that "the primary role of trade unions is to serve the interests of their members who need the collective voice of a stronger party to uphold the members' right."<sup>197</sup> As members of a trade union, employees are allowed to utilise their right to strike as collective. Thus, it is the trade union that is entrusted with the duty to organise such action for the employees and it is in this respect that every trade union balance relations between employees and employers.<sup>198</sup>

Considering that trade unions are representatives of employees, trade unions can be held accountable for any delictual violations that are committed by the employees during strikes.<sup>199</sup> Hence, the employers should lay charges against trade unions for wrongs committed by employees who are members to those unions. The reason why employers chose to institute action against a trade union is the fact that it becomes difficult for the employer to identify individual employees who were engaged in violent strikes or wrongful acts and employees cannot pay on their own.<sup>200</sup> Trade unions are in a better position to satisfy the claim by the employer against them and they are expected to take positive steps to ensure that employees are behaving during a strike and their actions are within the law.<sup>201</sup>

### 4.2 The rights of trade unions

In South Africa, every employee has the Constitutional right to form and be part of a trade union subject to its constitution.<sup>202</sup> Trade unions are also given rights by the Constitution and the LRA and these rights must be respected by the trade unions. Hence, trade unions rights include: the right to access the employer's premises to talk to the union members or to recruit

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<sup>196</sup> Manamela (note 15 above) 333.

<sup>197</sup> Gericke (note 24 above) 569.

<sup>198</sup> Ibid, 570.

<sup>199</sup> See section 11(1) of the Regulations of Gatherings Act 1993 of 2005.

<sup>200</sup> D Venter 'Derivative Misconduct: Labour Law' (2008) *Without Prejudice* 44.

<sup>201</sup> M Wallis 'Now you foresee it, now you don't – *SATAWU v Garvas and others*' (2012) 33 *ILJ* 2262.

<sup>202</sup> Section 23 (note 1 above); section 4 (note 5 above); J Rheeder 'The right of managers to belong to a trade union' (2018) available at <http://www.labourguide.co.za/43-general/general/672-the-right-of-managers-to-belong-to-a-union>. (Accessed on 10 November 2018).

new members; conduct union elections or ballots at the workplace; right to elect trade union representatives; being consulted before disciplinary of a shop steward; holding meeting with employees outside working hours; instruct the employer to make deductions of and pay over union membership subscription for employees; the right to be recognised as the employees representatives; the right to access to information; apply for admission to bargaining councils; and the right to appoint shop stewards.<sup>203</sup> These rights are most important for trade unions and they must be followed by each trade union as liability will emerge from the rights they are afforded.

### **4.3 Trade unions duties**

In addition to the rights which trade unions have, they also have duties which are relevant to their accountability. Hence, all trade unions have the following duties:

to keep books and records of its income, expenditure, assets and liabilities, prepare financial statements, and to preserve them for a minimum of three years; have its books and records audited for that year; make financial statements and the auditor's report available to members for inspection, and to submit them at members meetings; to keep a list of members, minutes of meetings and ballot papers for at least three years; to provide the registrar of the High Court with a copy of the auditor's report, the names and addresses of officer-bearers, notice of change of address and, by 31 March each year, a statement regarding the number of members; and to send the Registrar of the High Court a copy of any resolution taken to amend its constitution, and the secretary's certificate that such resolution complies with the constitution.<sup>204</sup>

Trade unions have a duty to make sure that the strike follows proper procedures which are stipulated in the LRA. Failure by a trade union to take proper and necessary reasonable steps to eradicate unlawful conduct during strike by their members, could mean that they will face severe consequences.<sup>205</sup> Hence, the trade union is expected to instruct its members not to engage in violent conducts that can cause damage to the employer's business. Therefore, a union cannot escape the conduct of its members, officials and shop stewards and can be held liable for delictual damages due to the culpability of the union, which caused a loss to the

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<sup>203</sup> Section 23(4) (note 1 above); Cohen (note 54 above) 21.

<sup>204</sup> See section 98 to 101 (note 5 above); Cohen (note 54 above) 21.

<sup>205</sup> *KPMM Road & Earthworks (Pty) Ltd v Association of Mineworkers & Construction Union & others* (2018) 39 ILJ 609 (LC).

employer.<sup>206</sup> If the union fails on its duty to control the strike when it turns violent, it can be held liable for acts of its members, if the employer can prove that there was a violent or wrongful act committed by its employees. In *Mondi Ltd v CEPPWAWU and others*,<sup>207</sup> during a protected strike, employees who were on strike switched off the employer's machinery and the employer incurred damages of R673 000.<sup>208</sup> The employer thereafter claimed these damages from the union. The court held that in order to for the union to be held vicariously liable for its members' action, it must be shown that they acted with common purpose by allowing the employees' behaviour. However, it was found that there was inadequate evidence to identify the employees responsible for switching off the machine, and therefore that the union could not be held vicariously liable.<sup>209</sup> In *Eskom Ltd* case,<sup>210</sup> Eskom sued the union for more than R6 million in damages caused by union members who were part of a union-organised demonstration, which turned violent and damage to property was suffered. Eskom claimed that the union was vicariously liable for the damages.<sup>211</sup>

In *Richfield Graduate Institute of Technology v Private Schools and Allied Workers Union and others*,<sup>212</sup> the union was instructed to take particular steps to bring an unprotected strike and associated violence to an end. These included publicly calling on the strikers to respect the court order by reading it out using a loud-hailer in the language that is used for communication on the employer's premises. In addition, the union was directed to report to the court after three days by way of affidavit to show that those involved have complied with the terms of the interim order.<sup>213</sup> The union did not comply with the instruction from the court and it made no attempt to comply. It was accordingly found to be in obvious disregard of the interim court order and the court concluded that a severe suspended fine should be imposed against the Union as a reminder that court orders are to be taken seriously in future. This case shows that duties which the union owes to the members needs to be followed in such a way that if the union is given a role to regulate the strike so that it does not escalate to violence it should do so without hesitating.

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<sup>206</sup> Manamela (note 15 above) 333; Rheeder (note 202 above).

<sup>207</sup> *Mondi Ltd (Mondi Kraft Division) v CEPPWAWU & others* (2005) 26 ILJ 1458 (LC).

<sup>208</sup> *Ibid*; Manamela (note 15 above) 333.

<sup>209</sup> *Ibid*.

<sup>210</sup> *Eskom v National Union of Mineworkers* (2001) 22 ILJ 618 (W); Manamela (note 15 above) 333.

<sup>211</sup> *Ibid*.

<sup>212</sup> [2017] ZALCJHB 236 (13 June 2017).

<sup>213</sup> *Ibid*; see *Gri Wind Steel South Africa v AMCU and others* (2018) 39 ILJ 1045 (LC) at para 17.

Moreover, a trade union has duty to discourage its members from participating in an unprotected strike which tends to turn violent. In *Algoa Bus (Pty) Ltd v Transport Action Retail and General Workers Union and others*,<sup>214</sup> a claim for compensation was lodged against a union emerging from an unprotected strike which the union's members embarked on that lasted for about seven days. The Labour Court issued an order in terms of which the union and its members who participated in a strike were held jointly and severally liable to pay the employer R1 406 285, 33. The union was ordered to pay this amount in monthly instalments of R5 280, 50 and its members to pay R214, 50 per month. Clearly, the amount which the union and its members were required to pay is the losses which the employer suffered when the strike did not stop after the interdict was issued and the union took no positive steps to stop the strike.

#### **4.4 Liability of a trade union to its members**

Technically, trade unions have the capacity and are in charge of taking decisions on behalf of their members. Hence, 'they are required to seek approval from their members before concluding a collective agreement.'<sup>215</sup> By so doing, they are required to uphold interests of most of the members, even if this will be unfavourable to the minority. Grogan asserts that "this proposition has its roots in the principle of majoritarianism and is supported by section 200 of the LRA."<sup>216</sup> The Labour Court confirmed the proposition that trade unions represent their members on the principle of majoritarianism.<sup>217</sup> However, there are instances where union members can claim damages against the union for neglecting in its mandates and duties.

In *Ngcobo v FAWU*,<sup>218</sup> the court had to decide whether members may sue their union for damages emanating from the union's negligent failure to pursue an unfair dismissal action on their behalf in the Labour Court.<sup>219</sup> The two employees were retrenched by Nestle SA during a restructuring exercise. The union referred the matter to the CCMA on the employees' behalf but later failed to attend to the matter until it prescribed (90-day period lapsed). The union thereafter referred the matter to an attorney for an opinion on the prospects of success of on the matter and the attorney believed they will not succeed. When the employees pressurise the union with legal action, it denied that they were members by the time they were dismissed. However, the court found that the employees were members of the union, and that the union

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<sup>214</sup> (2015) 36 *ILJ* 2292 (LC).

<sup>215</sup> J Grogan *Collective Labour Law*. 2<sup>nd</sup> ed. (2014) 47.

<sup>216</sup> *Ibid*.

<sup>217</sup> *Mhlongo v FAWU* (2007) 28 *ILJ* 397 (LC).

<sup>218</sup> (2012) 33 *ILJ* 1337 (KZD).

<sup>219</sup> Grogan (note 215 above) 49.

had breached an obligation to provide them with legal assistance.<sup>220</sup> The union had contended that it would be against public interest to allow members to sue their own unions. The court dismissed this argument. The court awarded each of the two employees with compensation equalling to 12 months. Clearly the union failed on its obligation to prevent prejudice to its members when it had agreed to help them.

*FAWU* appealed to the SCA which was split on the matter and held in favour of the employees.<sup>221</sup> It was noted by the majority that the claim by employees was based on a breach of contract, not on delict. The SCA held that the union consented to help these two employees as members under the contract of mandate. Thus, the union was compelled to perform its functions, honestly, faithfully, and with care and diligence. The union's failure to refer the matter and apply for condonation in time was in breach of its duty to act honestly or diligently. Therefore, the SCA dismissed the appeal.

The matter went to the Constitutional Court which upheld the SCA's judgment.<sup>222</sup> The union contended that it is afforded special protection under the Constitution and the LRA. The argument by the union was rejected. It was held that the union could not follow its own interests with exemption when it has caused damage to the members by failing to represent them properly. The constitution of the union recommended that the union will bear responsibility for negligent action of its office bearers.<sup>223</sup> The union's constitution could not be interpreted to mean that it could desert its members after agreeing to help them, and that if a union is allowed to withdraw from agreements to assist its members, it must do so in good time. Further, the court held that the union could not depend on the fact that the employees could have applied for condonation themselves. Clearly, the union had breached its obligation by not referring the matter on time. Therefore, the court held it could not be argued that the employees had tacitly agreed that the union could refer the dispute at any stage, regardless of the statutory deadline.<sup>224</sup> The union was liable to pay the employees compensation equal to 12 months.

Although the above case is not about violent conduct committed by employees during a strike, it is a good example of a union liability to its members where it has acted negligently in pursuing the dispute for its members. Hence, *FAWU* was held to be liable to compensate its

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<sup>220</sup> Ibid, 50.

<sup>221</sup> *FAWU v Ngcobo* (2013) 34 *ILJ* 1383 (SCA); Grogan (note 215 above) 50.

<sup>222</sup> *FAWU v Ngcobo* (2013) 34 *ILJ* 3061 (CC); Grogan (note 215 above) 50.

<sup>223</sup> Grogan (note 215 above) 51.

<sup>224</sup> Ibid.

members who were retrenched. Trade unions cannot escape liability where it has not acted honestly and faithfully in perform its functions.

In *SAMWU v Jada and others*,<sup>225</sup> the respondents who were all members of the union, sued the union after they were dismissed for engaging in an unprotected strike.<sup>226</sup> The dismissed employees argued that the union owed them duty of care which it did not uphold as they were dismissed, and that the duty was breached. The court expressed uncertainty about whether union members may sue their union merely because it happens to be an independent juristic entity.<sup>227</sup> The judge pointed out that unlike shareholders of a company who can sue the company, trade union members have a clear identity of interest with the union.<sup>228</sup> The court found that the union did not entice the strike and that the employees had engaged in a strike knowing very well that they might be dismissed, and they had assumed that risk.

The above cases represent instances where the union members failed in their action for claiming damages from the union. It is clear that the employees are entrusted with the task to prove that the union is the cause of the loss they have suffered.

#### ***4.5 KPMM Road and Earthworks (Pty) Ltd v Association of Mineworkers and Construction Union and others (2018) 39 ILJ 606 (LC)***

In *KPMM Road and Earthworks*<sup>229</sup> the LC had granted an interim order interdicting the members of the union who were participating in a protected strike from engaging in unlawful and violent acts, included harming, intimidating, threatening or assaulting non-striking employees and subcontractors, blocking access to and egress from the applicant employer's site, blockading a portion of the national road leading to the cite of the employer.<sup>230</sup> In terms of the interdict the union had 'to take reasonable steps within its powers' to prompt its members not to engage in such unlawful conduct.<sup>231</sup> The order was served to the union and the striking employees were given copies thereof. Notwithstanding the order being served to the union and its members, the striking employees continued with their unlawful conduct. The employer, being concerned, wrote letters to the union complaining about the action of the employees, but no response was received. An application for contempt of court was launched

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<sup>225</sup> (2003) 34 *ILJ* 1344 (W).

<sup>226</sup> *Ibid*; Grogan (note 215 above) 46.

<sup>227</sup> Grogan (note 215 above) 46.

<sup>228</sup> *Ibid*; *SAMWU* supra note 225 at 1348B-C.

<sup>229</sup> *KPMM Road and Earthworks* supra note 205.

<sup>230</sup> *Ibid*, at paras 17 – 20.

<sup>231</sup> *Ibid*, para 21.

after the strike had ceased.<sup>232</sup> The court granted an interim order summoning on the union and the employees to show why they should not be held in contempt for their failure to obey the interim order.<sup>233</sup> The court strongly condemned unlawful conduct, violence and intimidation during the course of a protected strike and its harmful effect on collective bargaining.

Regarding the issue of contempt, the court noted that it had to be satisfied, beyond reasonable doubt, that there was a refusal to comply with the order; that this refusal was wilful; and that the deliberate refusal to comply was *mala fide*.<sup>234</sup>

The court acknowledged that both the union and the employees had proper service of the order granted against them, that they were aware of its contents and knew what they had to do to comply with it. However, the union argued that the employer had failed to identify each and every individual perpetrator of the unlawful conduct constituting the breach, and that the employees could therefore not be held in contempt. The court rejected this argument and held, relying on the approach of earlier judgments, that it was not necessary for the employer to identify each and every perpetrator.<sup>235</sup> The court further held that, where all the employees acted in concert, and with common purpose, as they did, they could all be held accountable for violation of the order, even if perpetrated by unidentified individuals.<sup>236</sup> If employees are given a chance to come forward and explain why they should not be held in contempt, they should do so, if however, they fail to do so, they will be held in contempt.

In addition, the union contended that it had complied with the obligations imposed on it by the interim order. The court agreed that the obligations imposed on the employees by the order had to be distinguished from those imposed on the union, however, they could not be separated especially where the obligation imposed on the union was to take ‘all reasonable steps with its powers’ to ensure that the employees did not participate in the unlawful conduct specified in the order.<sup>237</sup> The court considered prior authorities on the concept of ‘reasonable steps’, and held that the conduct of the union in this matter fell short of what could legitimately be considered to be reasonable measures to intervene and encourage the striking employees to comply with the order. Further it was held that actual and positive intervention by the union was needed including continuous marshalling of the striking employees, having a constant

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<sup>232</sup> Ibid, para 30.

<sup>233</sup> Ibid, 32.

<sup>234</sup> Ibid, para 35.

<sup>235</sup> Ibid, para 46.

<sup>236</sup> Ibid.

<sup>237</sup> Ibid, paras 50 – 51.

presence at the premises to deal with violations of the order in interfering urgently and immediately when instances of breaches were brought to its attention.<sup>238</sup> Nevertheless, what the union did was to transfer the order to its striking members, telling them to comply, and then it washed its hands of what happened thereafter. Therefore, the court was satisfied that the union had not complied with its obligations in terms of the order and it was in breach of that order and that both the union and striking employees had acted in wilful and mala fide breach of the court order.<sup>239</sup>

As to the penalty to be imposed, the court agreed with prior judgements that the principal aim was to ensure compliance and not punishment. As the strike had ended the primary objective of ensuring compliance was no longer an issue, and the penalty of imprisonment was no longer appropriate. Therefore, the court was of the view that the imposition of a fine was appropriate, both as a warning and to serve the interest of society by ensuring the integrity of the rule of law and respect for the orders of court.<sup>240</sup> Thus, the court determined that the fine of R1 000 000 suspended for three years be imposed against the union and the employees were fined R1 000 each (which was going to be deducted from their remuneration).<sup>241</sup>

The author strongly agrees with the approach which the LC followed in its judgment. Relying on the above case, unions are expected to take reasonable steps in making sure that violent conduct does not occur during a strike, especially if the court has issued an order against such actions by strikers. The union will do this by guarding every move that the strikers engage in which could exceed the right to strike, they also have to ensure that all the strikers do is within the bounds of the Constitution and the LRA. Hence, unions should continuously monitor a strike embarked on by its members. The penalty which the court imposed against the union in the case under discussion is the appropriate one, as this will send the right message to other trade unions that failure on part of the trade unions to take the proper and necessary reasonable steps to eliminate unlawful and violent conduct in the course of strike action by their members, could mean that they will face severe consequence. Considering that this is a recent judgement, other courts ought to follow it when dealing with violent conducts committed during a strike and establishing union liability.

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<sup>238</sup> Ibid, paras 59 – 60.

<sup>239</sup> Ibid, paras 63 – 64.

<sup>240</sup> Ibid, paras 67 – 71.

<sup>241</sup> Ibid, paras 77 – 78.

## 4.6 Conclusion

Although trade unions have rights and duties in terms of the Constitution and the LRA, they will never escape liability if it is proved that they have breached their duties in taking care of their members. It has pointed out that “it is entirely reasonable for an employer to expect protected industrial action to be accompanied by the orderly conduct by those employees who have embarked on the industrial action. This is particularly so in circumstances where the employer has not only entered into picketing rules agreement with the representative trade union regulating the conduct of striking employees but has as a result of the conduct of the employees been forced to obtain an interdict restraining the striking employees from committing misconduct.”<sup>242</sup> However, the facts that trade unions can be held liable for the acts of its members does not assist in deciding whether the trade union, in its own right breached a court order.<sup>243</sup> Thus, the union is expected to continuously take positive steps to bring violent strikes to an end to avoid liability. Moreover, even the union members can hold liable the union, for loss the members have suffered because of negligence of a trade union. Therefore, trade unions are expected to discourage any violent conduct during a strike and illegal activities that the employees might engage in.

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<sup>242</sup> See *Dunlop Mixing and Technical Services (Pty) Ltd and other v National of Metalworkers of SA of on behalf of Khanyile and others* (2016) 37 ILJ 2065 (LC) at para 77.

<sup>243</sup> See *Food and Allied Workers Union v In2Food (Pty) Ltd* (2014) 35 ILJ 2767 (LAC) at para 12.

## CHAPTER 5: MISCONDUCT COMMITTED DURING STRIKES AND THE LIABILITY TO THIRD PARTIES OF TRADE UNIONS

### 5.1 Introduction

Violent strikes equal to the abuse of the right to strike and is the reversal of constitutional values. Hence, employers are commonly at the receiving end of such violence. Strike violence comprises serious misconduct and usually renders continued employment relationships intolerable.<sup>244</sup> Coetzer and Mulligan asserts that in many occasions, “such conduct comprises criminal conduct and is particularly egregious in the context of the workplace, given the duty of subordination and good faith owed by the employee to the employer.”<sup>245</sup> Thus, employers are not simply expected to permit employees who participated in vicious intimidation of non-striking employees, destruction to property or violence to continue their functions with other employees as if nothing happened.

In addition, whilst the right to strike is statutorily protected, and ‘employees can participate in a strike once the designated requirements have been complied with, employees should not make themselves guilty of misconduct during a strike action.’<sup>246</sup> Violence during strikes has become a serious problem in our country. For example in the *Garvas*<sup>247</sup> case, some fifty people allegedly lost their lives and there was damage to property estimated to more than a million rands during a strike by security industry employees who were members of SATAWU.<sup>248</sup> Another good example is the Marikana strike which took place in 2012 where as a result of violent conduct mineworkers and police officers died, others were injured and there was massive damage to property. The LRA does not encourage violent action by employees during a strike even if the strike is protected.

Moreover, unions will not escape liability to the public (third parties) for misconduct committed by its striking members during a strike which resulted in the damage to property and any loss suffered by the third parties. The liability in such instances is created by the Regulation of Gatherings Act (RGA).<sup>249</sup> This chapter will focus on how the RGA creates liability of a trade union to third parties and discuss the relevant case law.

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<sup>244</sup> N Coetzer and T Mulligan ‘What do the Courts say about the reinstatement of violent strikers’ (2018) available at <https://www.golegal.co.za/employee-strike-violent/>. (Accessed: 17 November 2018).

<sup>245</sup> Ibid.

<sup>246</sup> Manamela (note 15 above) 322.

<sup>247</sup> *SATAWU and Another v Garvas and others* (2012) 33 *ILJ* 1593 (CC).

<sup>248</sup> Ibid at paras 5 – 6; Manamela (note 15 above) 322.

<sup>249</sup> Act 205 of 1993.

## 5.2 Misconduct committed during a strike by striking employees

When an employer has a ground to believe that the employee has committed serious misconduct during a strike, it may be required for an employer to conduct an investigation. Specific acts of misconduct which may be committed by employees during a strike includes damage to property, assault and intimidation. To justify dismissal, the damage to property must be deliberate and serious.<sup>250</sup> The employee's action must be intentionally directed towards the destruction of property. In terms of item 3(4) of the Code of Good Practice, wilful damage to property of the employer comprises serious misconduct.<sup>251</sup>

In addition, assault as a specific act of misconduct is “unlawful and intentional application of force to a person, or threat that such force will be applied.”<sup>252</sup> Threat of violence may be sufficient, it does not need to be real application of physical force and assault includes different personal interaction (shoving non-striking employees, employers, customers, etc during a violent strike being the most common). In terms of item 3(4) of the Code, physical assault of the employer, a fellow employee, a client, or a customer, is a serious act of misconduct.<sup>253</sup> Lastly, intimidation which entails threat uttered seriously, is a ground for dismissal.<sup>254</sup> In *Adcock Ingram Critical Care v CCMA and others*,<sup>255</sup> it was stated that to constitute intimidation words need not be directed at particular persons. It was further held that words are intimidatory if they are calculated to ‘terrify’, ‘overcome’, or ‘cow’.

In *National Union of Mineworkers and others v Letropower (Pty)*,<sup>256</sup> the court held that, employees who misconduct themselves during a strike, protected or unprotected, ought not to anticipate this court to come to intervene in any subsequent litigation, let alone order of reinstatement. Unfortunately, intimidation, assault and damage to property have come to distinguish strikes to the extent that they appear to be considered an inevitable consequence and essential component of the exercise of the right to strike. The court stated that it expresses its dissatisfaction of any act of misconduct committed during a strike and which impacts materially and negatively on the rights of the employer and those employees who elect not to participate in the strike.

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<sup>250</sup> Manamela (note 15 above) 332.

<sup>251</sup> Ibid.

<sup>252</sup> Ibid.

<sup>253</sup> Ibid.

<sup>254</sup> Ibid; see *Metal and Allied Workers Union and others v Transvaal Pressed Nuts, Bolts and Rivets (Pty) Ltd* (1988) 9 ILJ 129 (IC).

<sup>255</sup> (2001) 22 ILJ 1799 (LAC).

<sup>256</sup> (2014) 35 ILJ 3205 (LC) at para 27.

In the case of *Dunlop Mixing and Technical Services (Pty) Ltd and others*,<sup>257</sup> employees initiated a protected strike in support of wage demands. Many employees committed acts of misconduct and violence during the strike. The employer obtained an interdict from the LC in an effort to put a stop to the unlawful conduct. Notwithstanding the order being obtained, the employees continued with misconducting themselves until the dates of their dismissals on the grounds of ‘derivative misconduct’. The employees thereafter referred the matter to CCMA as an unfair dismissal. The CCMA found that the derivative misconduct originated from the fact that the non-violent striking employees failed to come forward and assist the employer in identifying the employees who had used violence.<sup>258</sup> The CCMA came to the conclusion that the dismissals were both substantively and procedurally fair. However, it was found that the dismissal of certain employees was substantively unfair in that there was not enough evidence to implicate those employees present during the strike. Thus, the employer was ordered to reinstate those employees. The employer applied to the LC to have the award by the CCMA reviewed.

The LC held that it was not unreasonable to deduce from all evidence that all the striking employees were participants in the strike and accordingly, in the absence of any explanation, were to be regarded as being present during the strike. Further held that, ‘in light of the trust nature of an employment relationship there is an obligation on those it can be inferred were present, to give evidence or provide some explanation’ as to the identity of the perpetrators or their own innocence.<sup>259</sup> The court pointed out that an employee who claims to have no such information cannot simply claim to remain silent.<sup>260</sup> It was further pointed out that where employees remain silent, in circumstances where misconduct has been committed, the only reasonable inference that could be drawn is that they committed derivative misconduct.<sup>261</sup> Therefore, the court stated that had the employees not been present when the misconduct took place, they would have said so. The court concluded that due to the violent nature of the misconduct, the employees’ failure to provide information about the violent perpetrators, or to offer valid explanation to the employer as to their innocence, constituted derivative misconduct which justified their dismissal.<sup>262</sup>

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<sup>257</sup> *Dunlop Mixing and Technical Services* supra note 242.

<sup>258</sup> Ibid at para 27.

<sup>259</sup> Ibid at para 33.

<sup>260</sup> Ibid at para 60.

<sup>261</sup> Ibid at para 63.

<sup>262</sup> Ibid at para 79.

### 5.3 Trade union liability to third parties in terms of the Regulation of Gatherings Act 205 of 1993 (hereinafter referred to as RGA)

Membership of a trade union does not make a person liable for any of the duties or liabilities of the union.<sup>263</sup> Those performing functions on behalf a trade union, even members, cannot be personally liable for any loss suffered by any person because of an act performed in good faith for the union. Nevertheless, a trade union as a legal person is liable for its debts.<sup>264</sup> Trade unions, registered and unregistered, are liable for damages emanating from demonstrations by its members. Courts have dismissed the controversy that to allow those who have suffered damages because of demonstrations by unions to sue the organising union for damages would hinder their rights to bargain.<sup>265</sup> The RGA, which allows such actions, has been held to conform to the Constitution.<sup>266</sup>

The RGA was inaugurated as an effort to integrate the right of those assembling with the state's interest in maintaining public order.<sup>267</sup> Distinction should be made between a gathering and a demonstration. In terms of the RGA a demonstration means "any demonstration by one or more persons, but not more than 15 persons, for or against any person, cause, action or failure to take action".<sup>268</sup> On the other side, gathering means "any assembly, concourse or procession of more than 15 persons in or on any public road as defined in the Road Traffic Act 29 of 1989, or any other public place or premises wholly or partly open to the air."<sup>269</sup> Furthermore, the RGA acknowledges everyone's right to assemble and protest peacefully and the authorities have a duty to facilitate this through negotiations with those who organised such events if necessary.<sup>270</sup> Nonetheless, where riot results in damages participants in that gathering can be held liable in terms of section 11 of the RGA.<sup>271</sup>

In addition, section 11 of the RGA provides as follows:<sup>272</sup>

(1) if any riot damage occurs as a result of a gathering, every organisation on behalf of or under the auspice of which held, or if so not held,, the convener; a demonstration,

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<sup>263</sup> Grogan (note 215 above) 56; section 97(2) (note 5 above).

<sup>264</sup> Ibid.

<sup>265</sup> Ibid.

<sup>266</sup> Ibid; *Garvas* (note 247 above).

<sup>267</sup> D Brand et al 'South African Constitutional Law in Context' (2014) 556.

<sup>268</sup> Section 1 of the RGA (note 249 above).

<sup>269</sup> Ibid.

<sup>270</sup> Ibid.

<sup>271</sup> Section 11 (note 249 above).

<sup>272</sup> See section 11(1) (note 249 above).

every person participating in such demonstration, shall, subject to subsection (2), be jointly and severally liable for that riot damage as a joint wrongdoing contemplated in Chapter II of the Apportionment of Damages Act 34 of 1956, together with any other person who unlawfully caused or contributed to such riot damage and any other organisation or person who is liable thereof in terms of this subsection.

Section 11 creates specific statutory liability additionally to any other common law liability based on delictual principles that may exist.<sup>273</sup> Le Roux points that “unlike liability based on delictual principles, the statutory liability created by section 11(1) does not require that the organisation concerned, or its office bearers intentionally or negligently causes the riot damage.”<sup>274</sup> Those who claim that they had suffered loss need to prove that the loss was as a result of a riot damage. Hence, riot damage is defined as “any loss suffered as a result of any injury to or the death of any person, or any damage to or destruction of any property, caused directly or indirectly by, and immediately before, during or after, the holding of a gathering”.<sup>275</sup>

Section 17 of the Constitution affords everyone the right to assemble, demonstrate, picket, and present petitions.<sup>276</sup> Hence, this section places a duty on trade unions to ensure that it is exercised peacefully. Section 11(2) of the RGA provides for statutory defence against statutory liability found in section 11(1), and requires a person or organisation to prove that:<sup>277</sup>

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

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<sup>273</sup> PAK Le Roux ‘The rights and obligations of trade unions: Recent decisions clarify some limits to both’ (2012) 22(4) *CLL* 32.

<sup>274</sup> *Ibid.*

<sup>275</sup> Section 1 (note 249 above).

<sup>276</sup> Section 17 (note 1 above).

<sup>277</sup> Section 11(2) (note 249 above).

In the *Garvas* case,<sup>278</sup> SATAWU assembled a march in support of a protected strike that its members had embarked upon and that took place in the Cape Town city centre. During this march which comprised a gathering as defined in the RGA, acts of violence and damage to property allegedly occurred which caused loss to various individuals and businesses.<sup>279</sup> In preparation for the gathering, SATAWU took steps to meet the procedural requirements set out in the RGA. It gave notice of the gathering to the local authority and appointed about 500 marshals to manage the crowd.<sup>280</sup> It advised its members to desist from any unlawful and violent behaviour and requested the local authority to clear the roads of vehicles and erect barricades along the prescribed route on the day of the gathering. Regardless of these preventive measures being taken, the gathering allegedly resulted in riot damage estimated at 1, 5 million, many people were injured and about 39 others were arrested, shops were vandalised and looted, and vehicles were damaged.<sup>281</sup> Eight of these businesses or individuals sought to hold SATAWU liable in terms of s11(1) of the RGA for the losses they have suffered and instituted proceedings against SATAWU in the High Court.

SATAWU contested liability on merit and raised the argument that section 11(2)(b) was constitutionally invalid, particularly the words “and was not reasonably foreseeable” in that section.<sup>282</sup> The legal issue before the High Court was whether section 11(2) unjustifiably limits the rights to assemble peacefully and unarmed.<sup>283</sup> SATAWU advanced two inter-related arguments in support of its argument that section 11(2) unjustifiably limits the right to assemble peacefully and unarmed. The High Court rejected the arguments and held that section 17 of the Constitution is not compromised by section 11(2)(b) because the right to freedom of assembly does not extend to gatherings which are not peaceful and section 11(2)(b) does not have a chilling effect on the exercise of the right. It was also held that, even if section 11(2)(b) does limit the right to freedom of assembly, this limitation must be balanced against the rights of individual members of the public to dignity, freedom from violence and arbitrary deprivation of property, all of which are affected by riot damage.<sup>284</sup> The court concluded that the limitation

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<sup>278</sup> *Garvas* (note 247 above).

<sup>279</sup> *Ibid* at para 10.

<sup>280</sup> *Ibid* at para 11.

<sup>281</sup> *Ibid* at para 12.

<sup>282</sup> *Ibid* at para 13.

<sup>283</sup> *Ibid* at para 15.

<sup>284</sup> *Ibid* at para 19.

is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.<sup>285</sup>

SATAWU appealed to the Supreme Court of Appeal which dismissed the appeal on the ground that the statutory defence provided for in section 11(2) against a claim for riot damage is not illusory but real and capable of being proved.<sup>286</sup> The SCA found that the scheme of the RGA, including section 11, is aimed at restricting unlawful, violent behaviour that violates the rights of others and ensuring that organisers of those gatherings are held liable.

Furthermore, SATAWU then appealed to the Constitutional Court which also dismissed the arguments by SATAWU and the appeal failed. In coming to this conclusion, the CC considered two main arguments submitted on behalf of SATAWU. The first was based on the wording of section 11(2)(b) and (c). There are three requirements which must be proved for the defence of section 11(2) to succeed. The argument by SATAWU was that two of the requirements of the defence, when read together, infringed the constitutional principle of legality in that they were irrational.<sup>287</sup> Hence, if an organiser of a gathering takes reasonable steps to guard against the act or omission occurring he would never be able to prove that these acts were not reasonably foreseeable.<sup>288</sup> This was rejected by the court by saying the following:<sup>289</sup>

there is an inter-relationship between the steps that are taken by an organiser on the one hand and what is reasonably foreseeable on the other. The section requires that reasonable steps within the power of the organiser must be taken to prevent the act or omission that is reasonably foreseeable. The real link between the foreseeability and the steps taken is that the steps must prove to have been reasonable to prevent what was foreseeable. If the steps taken at the time of planning the gathering are indeed reasonable to prevent what was foreseeable, the taking of these preventive steps would render that the act or omission that subsequently caused riot damage reasonably unforeseeable. Both section 11(2)(b) and section 11(2)(c) would have been fulfilled.

The court went on to point out that “it must be emphasised that organisations are required to be alive to the possibility of damage and to cater for it from the beginning of the planning of the protest action until the end of the protest action. At every stage in the process of planning,

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<sup>285</sup> Ibid.

<sup>286</sup> Ibid at para 21.

<sup>287</sup> Ibid at para 35.

<sup>288</sup> Le Roux (note 273 above) 32.

<sup>289</sup> *Garvas* (note 247 above) at 43.

and during the gathering, organisers must always be satisfied of two things: that an act or omission causing damage is not reasonably foreseeable and that reasonable steps are continuously taken to ensure that the act or omission that becomes reasonably foreseeable is prevented. This is the only way in which organisers can create a situation where acts or omissions causing damage remains unforeseeable. In such a case, the requirement of taking reasonable steps is not met simply by guarding against the occurrence of the damage-causing act or omission. The inquiry whether steps taken were sufficient to render the act or omission in question no longer reasonably foreseeable might be very exacting.<sup>290</sup>

The second contention was that section 11(2) infringed the Constitutional guarantee of freedom of assembly found in section 17 of the Constitution. The majority of the court concluded that the section did limit the rights found in section 17.<sup>291</sup> Nevertheless, the majority went on to consider whether the limitation of this right is justifiable by virtue of the requirements set out in section 36 of the Constitution. This section contemplates that a right may be limited if this is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom and considering a range of factors set out in that section.<sup>292</sup> The court concluded that the limitation on the right to assemble is reasonable and justifiable.<sup>293</sup>

Although it is clear that this judgement does not make it more difficult for a union to protect itself against claims arising from gatherings, it should be recalled that section 11 does not apply to ‘actions committed during the course of a picket that complies with the provisions of the LRA’.<sup>294</sup> Hence, ordinary common law principles will apply.<sup>295</sup> Therefore, it is clear that question whether a member of the public have a claim against a union was answered in the affirmative by the CC in the Garvas case. While trade unions have a choice whether to hold gatherings that may lead to rioting, those who are victims of riot damages do not have that choice. Thus, trade unions must consider the harm that materialize for others because of that riot.

## 5.4 Conclusion

The foundation of the employment relationship is trust and a duty to be honest (good faith). Employees are therefore not expected to engage in any misconduct that will breach the duty

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<sup>290</sup> Ibid at 44.

<sup>291</sup> Ibid at para 57.

<sup>292</sup> Ibid at para 60; Section 36(1) – (2) of the Constitution (note 1 above).

<sup>293</sup> Ibid at para 84.

<sup>294</sup> Le Roux (note 273 above) 33.

<sup>295</sup> Ibid.

that they owe to their employer. Hence, if they participate in violent strike the duty of good faith is directly impacted.

Moreover, in addition to section 23 of the Constitution and section 64(1) of the LRA which grants every worker with the right to strike, section 17 of the Constitution grants everyone the right to assemble, demonstrate, picket, and present petitions.<sup>296</sup> Nonetheless, it limits these rights by stipulating that all these actions must take place peacefully and those taking part must be unarmed.<sup>297</sup> In terms of section 11(1) of the RGA, an organisation responsible for a gathering or demonstration which resulted in damage, shall be jointly and severally liable together with any other person who unlawfully caused or contributed to the damage.<sup>298</sup> Statutory defence is provided for in section 11(2) of the RGA. As a result of the *Garvas* case, trade unions are expected and encouraged to take proper measures when convening a gathering to prevent violent conduct by the members which will result in liability of the union. SATAWU should have anticipated the aftermath damages effectuating riot and should have taken precautions to guard this from materialising. Furthermore, the RGA in *Garvas* allowed third parties to claim against a trade union for the fact that they should have reasonably foreseen that the strike will result from riot damage. This case is a lesson to trade unions who fail on their duties to control strikes which they convened.

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<sup>296</sup> Manamela (note 15 above) 335.

<sup>297</sup> Ibid.

<sup>298</sup> Ibid.

## CHAPTER 6: CONCLUSION AND RECOMMENDATIONS

The right to strike has been regarded as a foundational right in that it plays an important duty in collective bargaining. Hence, this right is a fruitful bargaining tool for employees. It is protected at international, regional and national level.<sup>299</sup> In our South African law, the right to strike is protected in terms of section 23(2)(c) of the Constitution and section 64(1) of the LRA. Nonetheless, this is not absolute as it is limited in terms of section 36 of the Constitution which is a general limitation clause for all rights in the Bill of Rights.<sup>300</sup> Not only section 36 of the Constitution limits the right to strike, it is also limited in terms of section 64 and 65 of the LRA. For a strike to be protected it must comply with the procedure set out in section 64 of the LRA and employees will not be held accountable for engaging in such a strike. For brevity, the LRA protect employees who are on strike if they followed the prerequisite set out in section 64. Therefore, employees are discouraged to engage in violent acts of misconduct and dismissal may follow.

Non-compliance with the procedure that has been set out in section 64(1) of the LRA, will render a strike unprotected and engaging in such actions comprises misconduct.<sup>301</sup> Furthermore, if employees engage in such actions, an employer may approach the LC for an interdict against the employees and may also claim compensation for the loss suffered. In *Kapesi and others v Premier Foods Ltd t/a Blue Ribbon Salt River*,<sup>302</sup> an interdict was granted by the LC after several acts of violence and damage to property ensued during a strike. The violence continued despite the court granting an interdict. Employees are expected to respect a court order which is granted because if they do not respect it, they will be held in contempt of court. Employers may use any of the remedies (such as interdict, claim compensation, discouragement, disciplinary action and locking-out the employees) available if the strike continues to be violent. Hence, employees who commit violent acts of misconduct during an unprotected strike may be dismissed based on such conduct in terms of the provision of section 188 of the LRA, and, items 4(1) and 7 of the Code of Good Practice.<sup>303</sup>

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<sup>299</sup> Manamela (note 15 above) 334.

<sup>300</sup> Ibid; see chapter 2 of the Constitution (note 1 above).

<sup>301</sup> Manamela (note 15 above) 335.

<sup>302</sup> (2012) 33 *ILJ* 1779 (LAC).

<sup>303</sup> Manamela (note 15 above) 335.

In *Verulam Sawmills (Pty) Ltd v Association of Mineworkers and Construction Union and others*,<sup>304</sup> Steenkamp J when considering violent conduct in the context of breach of picketing rules, said the following:

“not only are picketing rules there to attempt to ensure the safety and security of persons and the employer’s workplace, but if they are not obeyed and violence ensued resulting in non-strikers also withholding their labour, the strike gain an illegitimate advantage in the power play of industrial action, placing illegitimate pressure on the employers to settle. Typically, one of two things then happen – either the employer gives in to the pressure and settles at a rate above that reflecting the forces of demand and supply or the employer digs in its heels and refuses to negotiate or settle while the violence is ongoing (this normally prolongs the strike). Either way, the orderly system of collective bargaining that the LRA aspires to is undermined – and ultimately, economic activity and job security are threatened.”

Moreover, trade unions are indispensable institutions in modern democratic society and their administrative skills are invaluable in the collective bargaining process, and they also provide an important counterbalance to the power of management during negotiations.<sup>305</sup> They are entrusted with the duty to guard over the rights of their members. Failing on their duties in terms of their constitution and the provisions of the LRA can have undesirable result on their members. Furthermore, a lack of responsibility in the decisions and actions taken by trade unions may end in financial loss and joblessness for members.<sup>306</sup> Trade unions are expected to encourage its members to comply with the court that had been issued by the courts against violent strikes. In the case of *In2Food (Pty) Ltd*,<sup>307</sup> the LAC held that “the fact that a trade union can be liable for the acts of its members does not assist in deciding whether the trade union has breached a court order. The upshot is that when there is evidence to implicate the union vicariously in the unlawful acts of its members, there may well be an action available to the respondent for redress, but the liability of the appellant for contempt of a court order is strictly determined by reference to what the court ordered the trade union, itself, to do and the presentation of evidence that it did not do as it was told.”<sup>308</sup>

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<sup>304</sup> (2016) 37 *ILJ* 246 (LC) at para 15.

<sup>305</sup> Gericke (note 24 above) 584.

<sup>306</sup> *Ibid*, 585.

<sup>307</sup> *In2Food* supra note 243.

<sup>308</sup> *Ibid* at para 12.

There is an obligation on trade unions to take all reasonable steps within their powers to persuade their members not to engage in unlawful action. It follows that where it is established that the members did engage in unlawful action, can it be said that the trade union did take all reasonable steps in its power to prevent it? This enquiry requires an investigation of what exactly the trade union did after the order of the court was granted and compare this with what it could reasonably have been expected to do. Hence, in simple terms the obligation contemplates continuous monitoring and intervention by the trade union.<sup>309</sup> In *Verulam Sawmills*,<sup>310</sup> the court held that in the context of the pandemic of unprotected strike action and strike violence in South Africa, the courts are inclined to hold unions accountable for the unlawful conduct of their members and impose on them obligations to control their membership. This being a possible means of attempting to address the pandemic.

The Labour Court does not expect the union to wash off its hands after it has convened a strike and that strike turned to be violent. Therefore, the court will hold the union liable. It can be disputed that the court may hold liable the union for failing on its duty to act on the interest of its members. Hence, this was confirmed in the case of *FAWU v Ngcobo* where it was held by the Constitutional Court that the union's constitutional right to determine its administration did not mean that it could escape liability for responsibilities it had assumed and failed to honour.

It is, therefore, submitted that there is duty on the trade unions to take reasonable steps to put an end to violence, damage to property, intimidation and any other act of misconduct that could be committed during a strike. Section 23 of the Constitution and section 64 of the LRA grants every worker with the right to strike, in addition to these sections, section 17 of the Constitution grants everyone the right to assemble, demonstrate, picket, and present petitions. What is important is that this section (section 17) limits these rights by stipulating that all these actions must take place peacefully and those participating must be unarmed. Section 11(1) of the RGA provides that an organisation responsible for a gathering or demonstration which has resulted in damage, shall be jointly and severally liable together with any other person who unlawfully caused or contributed to the damage. The Constitutional Court in *Garvas*<sup>311</sup> case examined whether section 11(2)(b) of the RGA, which imposes on the union delictual liability for riot damages unless it can prove that the act or omission complained of did not fall within the objectives of the gathering and was not reasonably foreseeable, contravened the right of those

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<sup>309</sup> *KPMM Road and Earthworks* supra note 205.

<sup>310</sup> *Verulam Sawmills* supra note 304 at para 12.

<sup>311</sup> *Garvas* (note 247).

participating to demonstrate, picket, and present petitions in terms of section 17 of the Constitution. Hence, the court held that the objective of section 11 of the RGA served to protect members of the society, encompassing those who do not have the resources to identify and pursue the perpetrators of riot damage.<sup>312</sup> Therefore, the union can be held liable for damages suffered by innocent individuals during a violent strike by its members.

Moreover, due to the fact that there is a high number of violent strikes in South Africa, law enforcement authorities should consider developing areas of labour relations so that they provide how to deal with violent strikes. Since the Labour Court is the accredited court to deal with labour matters, it must be given more power to deal with violent strikes. The LC must be strict when dealing with matters involving violent conduct and impose a harsh sanction so as to deter others (trade unions and their members) from engaging in violent conduct during a strike. The powers that should be given to the LC should include terminating industrial action. The courts trust trade unions to follow proper procedures and make sure that the strike does not escalate to violent, however, in most of the cases it has been seen that these unions fail on their duties on stopping violence and sometimes they ‘wash their hands off’ of what has happened.

Lastly, it is up to the trade unions to ensure that their members behave themselves properly during a strike, even if it is not protected.<sup>313</sup> Trade unions should take all reasonable steps to make sure that the strike follows prescribed procedures, and can do this by even seeking help from the South African Police to assist in the prevention of damage during strikes.<sup>314</sup> Hence, this will ensure that law and order is maintained, and violent conducts are not committed during a strike. Therefore, Lawlessness should not be allowed to invade and deprave the right to strike which employees should not abuse and misuse through acts of violence.<sup>315</sup>

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<sup>312</sup> Ibid.

<sup>313</sup> Manemela (note 15 above) 336.

<sup>314</sup> Gericke (note 24 above) 585.

<sup>315</sup> Manemela (note 15 above) 336.

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