

THE NATURE AND EXTENT OF LIABILITY INCURRED BY A TRADE UNION, IN
THEIR ROLE AS REPRESENTATIVES OF THEIR MEMBERS

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ABSTRACT

Trade unions play a crucial role in the employment relationship. Their contributions and commitment to the protection, promotion and enforcement of their members' rights cannot be overlooked. Trade unions are granted wide rights in representing their member's collective interest. Therefore when these rights are exercised in a manner that infringes on the rights of others trade unions will be held accountable. The collective bargaining relationship that exists between an employer and a trade union creates a legal obligation on unions to ensure that their members exercise their right to strike in compliance with the law. The courts have set a precedent by attaching liability to trade unions for damages and loss sustained by an employer during an unprotected strike. If a claimant can prove that the union instigated and supported the unprotected strike or failed to intervene when it is required to do so, the courts will not hesitate to make a finding against a union. Similarly where it is proved that a trade union called for or ratified unlawful acts by their members during a protected strike then they may also be held jointly and severally liable for loss arising from the unlawful acts.

When a trade union organises a public gathering the potential for damage and loss is much wider. In these instances there is no limitation on the potential victims of riot damage. The Regulation of Gathering Act 305 of 1993 creates a statutory liability in that organisers of a gathering are held jointly and severally liable for riot damage with any wrong doer. The imposition of strict liability and the defences found in the Regulation of Gatherings Act 305 of 1993 has been found to be constitutional. In order to escape liability a trade union must at all stages of the gathering assess the potential for damage and take sufficient reasonable steps to prevent the threats from materialising.

In addition to possible liability to employers trade unions may also be held liable to their own members collectively or individually where they breach their duty of good faith, act outside their mandate or fail to honour their agreements with the members. Moreover as separate legal personality, a union can also be held liable for costs orders and be found guilty of contempt of court orders.

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CHAPTER 1: INTRODUCTION

1.1 Background

Judged against the backdrop of our pre-democratic government the importance of the role of trade unions in the bargaining process cannot be over emphasised. Bob Hepple¹ in his first public conference on the role of trade unions in a democratic society submitted:

*'Democracy means participation. It is, above all, not merely the sense of being ruled by law, but also of being able to shape the law by which one is ruled. It is not surprising that trade unions past and present have a crucial role in the fight for democracy all over the world, because they consist mainly of those with relatively few rights in society. Their particular contribution has been to extend the concept of democracy from political rights such as the rights to vote, to speak freely, to assemble and to associate to social and economic rights.'*²

It is trite that employees' right to gather and strike for the purpose of furthering their interests plays a pivotal role in the dispute resolution and bargaining process between employers and employees. The Constitutional Court has held in the matter of *SATAWU v Garvis and others*³ that 'the right to freedom of assembly is central to our constitutional democracy'⁴ and 'it exists primarily to give a voice to the powerless.'⁵ It has been noted in this regard that:

*'If workers could not, in the last resort, collectively refuse to work, they could not bargain collectively, the power of management to shut down the plant (which is inherent in the right of property) would not be matched by corresponding power on the side of labour. These are the ultimate sanctions without which the bargaining power of the two sides would lack credibility.'*⁶

Section 17 of the Constitution of the Republic of South Africa 1996 (hereinafter the Constitution) states that, 'everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions.'⁷ Section 4 of the Labour Relations Act 66 of 1995 (hereinafter the LRA) affords employees the right to join a trade union, subject to its

¹ Bob Hepple 'The Role of Trade Unions in a democratic society' (1990) 11 *ILJ* 645

² *Ibid* at 645

³ *SATAWU v Garvis and others* (2012) 33 *ILJ* 1593 (CC)

⁴ *Ibid* para 61

⁵ *Ibid*

⁶ Paul Davies & Mark Friedland *Khan – Freund's Labour and The Law* 3rd ed (1983) 292

⁷ Section 17 of The Constitution of the Republic of South Africa 1996

constitution. Section 23 of the Constitution and section 8 of the LRA collectively provides trade unions with the right to plan and organise lawful activities. Further section 69 (1) of the LRA gives registered trade unions the right to authorise their members and supporters to picket 'for the purposes of peacefully demonstrating', in support of protected strikes and against any lockout.

Section 67 (1) of the LRA defines a protected strike as one which is in compliance with the requirements set out in section 64 of the LRA.⁸ An employee participating in a protected strike or in conduct in furtherance of a protected strike is immune from claims of breach of contract or delict by their employer.⁹ Further an employee may not be dismissed for participating in a protected strike or conduct in furtherance of a protected strike.¹⁰ An employee participating in a protected strike would have immunity against civil claims provided that their conduct does not amount to an offence.¹¹ Whilst the strike may continue to enjoy its protected status the employee whose conduct amounts to an offence would be subject to criminal and civil claims.¹²

An unprotected strike is one that does not comply with the requirements set out in Section 64 of the LRA. Section 68 of the LRA provides that the Labour Court has exclusive jurisdiction to grant an interdict and restrain any employee from participating in the strike or in conduct in furtherance of the strike. The Labour Court may also make an order against persons participating in the unprotected strike for compensation or loss attributed to the unprotected strike having due regard to certain circumstances. Failure to comply with an interdict granted by the Labour Court constitutes an act of contempt of court and if found guilty a party may be imprisoned or ordered to pay a fine. Further employees may be dismissed for participating in an unprotected strike.

⁸ Section 64 of the Labour Relations Act 66 of 1995 requires in the case of a proposed strike that the issue in dispute to must be referred to the appropriate Council or the Commission for Conciliation Mediation and Arbitration for conciliation. If the issue remains unresolved after the referral to relevant body, the Council or Commission will issue a certificate stating that the issue in dispute remains unresolved. A period of 30 days from the date on which the dispute was referred to the Council or Commission must lapse thereafter the trade union or employees intending to embark on strike action must give the employer concerned 48 hours' notice, in writing, of the impending strike.

⁹ Section 67 (2) of the Labour Relations Act 66 of 1995

¹⁰ Section 67 (4) of the Labour Relations Act 66 of 1995

¹¹ *Mondi Ltd (Mondi Kraft Division) v Chemical Energy Paper Printing Wood and Allied Workers Union* (2005) 26 ILJ 1458 (LC) para 25

¹² Section 67 (8) of the Labour Relations Act 66 of 1995; *Lomati Mill Barberton v Paper Printing Wood & Allied Workers Union & others* (1997) 18 ILJ 178 (LC) at page 184 'Any act in contemplation or in furtherance of a strike or lock-out which constitutes a criminal offence is unprotected and amenable to the jurisdiction of a civil court'

The preamble of the Regulations of Gatherings Act 205 of 1993 (hereinafter RGA) provides that every person has the right to assemble with other persons and to express his views on any matter freely in public and to enjoy the protection of the State while doing so. The Act further states that the exercise of such right shall take place peacefully and with due regard to the rights of others.

Trade unions are granted wide rights, in terms of the Constitution, the LRA and the RGA. These rights include the right to strike in an effort to bargain with stake holders and negotiate for the benefit of their members. These must be exercised in a peaceful manner which does not infringe on the rights of others. The right to strike as enshrined in section 17 and 23 of the Constitution and section 64 of the LRA are not absolute. Similarly the right to gather in terms of the RGA is not without limitations. In the matter between *Xstrata South Africa (Proprietary) Limited v Association of Mine Workers and Construction Union & Others*¹³ the Labour Court held that it is 'a fundamental value, if not obligation of a democratic society, that every right must be exercised with due regard to the rights of others.'¹⁴

In the matter of *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of South African Workers' Union & Others*¹⁵ the court held that:

*'This court will always intervene to protect both the right to strike, and the right to peaceful picketing. This is an integral part of the court's mandate, conferred by the Constitution and the LRA. But the exercise of the right to strike is sullied and ultimately eclipsed when those who purport to exercise it engage in acts of gratuitous violence in order to achieve their ends. When the tyranny of the mob displaces the peaceful exercise of economic pressure as the means to the end of the resolution of a labour dispute, one must question whether a strike continues to serve its purpose and thus whether it continues to enjoy protected status.'*¹⁶

Section 36 of the Constitution provides that:

¹³ *Xstrata South Africa (Proprietary) Limited v Association of Mine Workers and Construction Union & others* [2014] ZALCJHB 58 (25 Feb 2014)

¹⁴ *Ibid* para 22

¹⁵ *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of South African Workers' Union & Others* (2012) 33 ILJ 998 (LC)

¹⁶ *Ibid* at 999

'The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including:

- a. the nature of the right;*
- b. the importance of the purpose of the limitation;*
- c. the nature and extent of the limitation;*
- d. the relation between the limitation and its purpose; and*
- e. less restrictive means to achieve the purpose.'*¹⁷

Every right contained in the Constitution is thus capable of being limited in terms of section 36 of the Constitution if the provisions of section 36 are satisfied. In the matter of *SATAWU and another v Garvas and Others*¹⁸ the Constitutional Court had to consider the validity of section 11 (2) of the RGA and whether it had the effect of unjustifiably limiting the right to assemble in terms of that Act. The Court held that 'the exercise of the right to freedom of assembly may not be limited without good reason, the purpose sought to be achieved by the limitation should be sufficiently important to warrant the limitation.'¹⁹ The purpose of the limitation, namely the protection of members of society who might not have the resources to identify the individuals who had caused the damage, is very important in that the organisers of gatherings are expected to exercise their rights with due regard to the rights of others.²⁰ Accordingly they should be conscious of the foreseeable harm that the gathering may have on others.²¹ The limitation does not entirely remove the right to freedom of assembly, but merely imposes 'strict conditions' on it with the view to preventing damage to property or injury to people.²² The court concluded that the provision succeeded in striking a balance between the right to assemble and the safety of people and property.²³ The limitation on the right to freedom of assembly was thus found to be

¹⁷ Section 36 of the Constitution of the Republic of South Africa 1996

¹⁸ *SATAWU and another v Garvas and Others* (2012) 33 ILJ 1593 (CC)

¹⁹ *Ibid* para 66

²⁰ *Ibid* para 67

²¹ *Ibid* para 68

²² *Ibid* para 69

²³ *Ibid* para 81

'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.'²⁴

When a strike or gathering leads to violence and damage to property, the aggrieved party must have recourse. 'Dispute resolution and the process of collective bargaining between employers and employees, needs to reflect peaceful negotiations and the settlement of interest differences.'²⁵ According to the Department of Labour's 2014 Industrial Labour Report, 118 566 employees participated in strike action in 2014, of which 48% were unprotected, and R 6.1 billion was lost in wages.²⁶

Strike action and action in furtherance of a strike has shown an increasing and alarming trend of violence and damages. According to Grogan, 'industrial action frequently deteriorates into mass mayhem bordering on anarchy accompanied by murder, assault, intimidation, arson, industrial sabotage, disruption of public services, littering and other criminal acts.'²⁷

Whilst trade unions provide employees with collective power and accordingly representation at the bargaining table, the consequences of the illegal activities resulting in violence and damage cannot be justified. In the matter of *SATAWU v Garvis & Others*²⁸ the SCA stated that 'in the past the majority of the population was subjected to the tyranny of the state'²⁹ and that 'it could not now be subjected to the tyranny of the mob.'³⁰ Employers and third parties are placed in a position whereby it is difficult and in some cases impossible to identify specific employees engaged in strike action who caused damage to their property. They are therefore often unable to pursue a claim for these damages or compensation.

The members of trade unions voluntarily submit themselves to the union's constitution and unions in turn are called upon to act in the interests of the collective whole. In exercising their

²⁴ Supra note 15 para 84

²⁵ 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 at 568

²⁶ South African Dept. of Labour Industrial Action Annual report (2014) at 8, available at <http://www.labour.gov.za/DOL/downloads/documents/annual-reports/industrial-action-annual-report/2014/industrialaction2014.pdf> accessed on 2 November 2016

²⁷ John Grogan 'Tone it down! Curbing union exuberance' (2011) *ELJ* 1

²⁸ *SATAWU v Garvis & Others* (2011) 32 *ILJ* 2426 (SCA)

²⁹ *Ibid* para 50

³⁰ *Ibid*

responsibilities a trade union must have due regard to the rights of their individual members and third parties. Section 97(1) of the LRA provides that a trade union acquires a legal personality upon registration. As a separate legal personality, a trade union should be held accountable for their actions and the consequences that flow from their actions. It has been held in *Xstrata South Africa (Proprietary) Limited v Association of Mine Workers and Construction Union & others*³¹ that a trade union cannot distance itself from the conduct of its members, when it is called to account for their actions.³²

The purpose of this paper is to establish the legal basis upon which a trade union may be held liable for damages that arise from strike action and the extent of that liability. This paper will further address circumstances in which a trade union may attract liability for their conduct in representing the interests of their members.

1.2 Structure

This paper will be divided into six chapters. Chapter one provides an introduction of the paper and sets out the purpose and structure that the paper will take. Chapter two analyses and determines whether a trade union can be held liable to an employer, for damages and loss arising out of protected and unprotected strike action, in terms of the Labour Relations Act 66 of 1995. Chapter three analyses and determines whether a trade union can be held liable for damages and loss, arising from a gathering in terms of the Regulation of Gatherings Act 205 of 1993, to a member of the public. Chapter four analyses and determines circumstances in which a trade union can be liable for damages and loss sustained by their members when acting on their behalf, as well as the extent of that liability. Chapter five analyses and determines a trade union's liability for costs orders and whether they may be found guilty of being in contempt of a court order.

³¹ Supra note 13

³² Ibid para 42

1.3 Research questions

This paper seeks to answer questions of trade union liability in their role as representatives of their members and the extent of any such liability. The research questions are as follows:

- Can a trade union be held liable for damages and loss sustained by an employer during an unprotected strike?
- Can a trade union be held liable for damages and loss, through the unlawful conduct of its members, sustained by an employer during a protected strike?
- Can a trade union be held liable for damages and loss, through the unlawful conduct of its members, during a gathering in terms of the Regulation of Gatherings Act 205 of 1993;
- Does a trade union owe its members a duty of care, and if so what is the extent of such liability to members should they fail to exercise that duty?
- Does a trade union have *locus standi* to represent its members?
- Does a member of a trade union have *locus standi* to act against the union?
- In the context of strike action can a trade union be held liable for costs orders
- Can a union be found guilty of contempt of a court order?

1.4 Research Methodology

This dissertation will predominantly involve an evaluation and analysis of the various legislation and case law on the topic.

CHAPTER 2: A TRADE UNION'S LIABILITY TO AN EMPLOYER FOR LOSS AND DAMAGES RESULTING FROM AN UNPROTECTED STRIKE

A trade union is considered a separate legal personality.³³ In cases of unprotected strikes, section 68 of the LRA grants the Labour Court exclusive jurisdiction to make an order for just and equitable compensation against any person. Section 68 read with section 97(1) of the LRA extends the Labour Court's exclusive jurisdiction to make an order against a trade union. Employers are therefore entitled to just and equitable compensation in respect of strike action or conduct in furtherance of a strike that does not comply with the provisions of the LRA.

According to Professor Alan Rycroft, strikes are 'usually initiated, led and ended by trade unions.'³⁴ He reasons that this is because, 'trade unions exist to represent the collective interest of workers, and the effective use of collective power is one of those interests.'³⁵

Trade unions have, in a plethora of case law, argued that holding them liable for compensation orders is a limitation on their rights to represent the interests of their members and further that there is no legal obligation on a union to police the actions of its members. However the courts have taken a firm stance against union involvement in unprotected strike action. In *In2food (Pty) Ltd v Food & Allied Workers Union & Others*³⁶ the court found that 'the time has come in our labour relations history that trade unions should be held accountable for the actions of their members.'³⁷ The court further held that 'for too long trade unions have glibly washed their hands of the violent actions of their members.'³⁸

In the matter of *Xstrata South Africa (Proprietary) Limited v Association of Mine Workers and Construction Union & others*³⁹ the employees of the applicant embarked on an unprotected

³³ Section 97(1) of the Labour Relations Act 66 of 1995 provides that a trade union acquires a legal personality upon registration

³⁴ Alan Rycroft 'The role of trade unions in strikes' in Bob Hepple et al (eds) *Laws against strikes, the South African Experience in an international and comparative perspective* (2015) 109

³⁵ *Ibid*

³⁶ *In2food (Pty) Ltd v Food & Allied Workers Union & Others* (2013) 34 ILJ 2589 (LC)

³⁷ *Ibid* at 2591

³⁸ *Ibid* at 2590

³⁹ *Supra* note 13

strike. The applicant was successful in their application for an interdict which included an order that the union ensures that their members comply with the interdict. When the employees failed to abide by the court order, the applicant instituted contempt proceedings against *inter alia*, the union. The union argued that the order to ensure compliance was inappropriate⁴⁰, that there was no legal basis for the obligation⁴¹ and that there was no contractual or delictual duty between the union and the members which required them to police their members and ensure they acted in a lawful manner⁴². It was further argued that the union had no duty to the employer to ensure that its members do not participate in unlawful activities⁴³. The Labour Court found that the rights contained in the Bill of Rights are not 'self standing, they also impose obligations.'⁴⁴ A union has an obligation in terms of section 17 of the Constitution to ensure that its members exercise these rights 'within the confines of other laws of the land.'⁴⁵ The obligation further arises as a result of the 'relationship of guardianship between the union and its members.'⁴⁶ Further, the 'collective bargaining relationship between the union and the employers'⁴⁷ places an obligation on both the union and the employer.⁴⁸ The court stated that when a union is called to answer for the actions of its members 'it cannot wash its hand of them in the mould of the proverbial Pontius Pilate.'⁴⁹

It has been argued that compensation orders against unions would place a financial burden on their administration. The Courts have held that the fact that a union may suffer financial damage is not sufficient reason for the Courts to deny relief. In the matter of *Algoa Bus Co (Pty) Ltd v Transport Action Retail & General Workers Union & Others*⁵⁰ the court had to consider a claim for compensation in terms of section 68(1) (b) of the LRA, following unprotected strike action by the respondent employees and their union. The fact that the strike was unprotected and interdicted was neither disputed by the respondents nor did the respondents present a material dispute to the quantum of damages sought by the employer. The court noted that the evidence

⁴⁰ Ibid para 29

⁴¹ Ibid

⁴² Ibid

⁴³ Ibid

⁴⁴ Ibid para 36

⁴⁵ Ibid

⁴⁶ Ibid para 37

⁴⁷ Ibid para 38

⁴⁸ Ibid

⁴⁹ Ibid para 42

⁵⁰ *Algoa Bus Co (Pty) Ltd v Transport Action Retail & General Workers Union & Others* (2015) 36 ILJ 2292 (LC)

showed that the union did not dissuade its members from participating in the strike⁵¹; it did not 'distance itself from the strike'⁵² or attempt to 'restore labour peace.'⁵³ Further the employees did not desist from the unprotected strike following the court's interdict.⁵⁴ The union argued that it was financially distressed and that a compensation order against it would further burden their current position.⁵⁵ In considering whether to grant an order against the union, the court considered whether granting the order would compromise the union's ability to function and the effect that the order would have on the rights of other members of the union who have not participated in the strike. The court held that a union cannot 'expect to remain immune from the reckless conduct of its members or office bearers'⁵⁶ and made an order for compensation of R 1.4 million jointly and severally, payable in monthly instalments, against the union and its members who participated in the unprotected strike.⁵⁷

The defence that a union had not 'authorised, instigated or ratified'⁵⁸ an unprotected strike' will not be taken at face value. Further a union cannot avoid liability where its members acted in an unlawful manner and the union did nothing to stop them. In *Mangaung Local Municipality v SA Municipal Workers Union*⁵⁹, the Labour Court found:

'Where a trade union has a collective bargaining relationship with an employer, and its members embark on unprotected strike union and the trade union becomes aware of such unprotected strike and is requested to intervene but fails to do so without just cause, such trade union is liable in terms of s68(1)(b) of the Act to compensate the employer who suffers losses due to such an unprotected strike. Similarly, if a trade union elects to delegate the responsibility to resolve the strike to its shop stewards employed by the employer facing an unprotected strike, and such shop stewards fail to discharge the same obligation that the trade union has, the trade union is also liable to compensate the employer for any losses that it has suffered as a result of such strike. The obligation arises because the trade union, as a party to a collective bargaining relationship with

⁵¹ Supra note 50 para 7

⁵² Ibid

⁵³ Ibid para 8

⁵⁴ Ibid para 9

⁵⁵ Ibid para 11

⁵⁶ Ibid para 10

⁵⁷ Ibid para 1

⁵⁸ Supra note 11 para 37

⁵⁹ *Mangaung Local Municipality v SA Municipal Workers Union* (2003) 24 ILJ 405 (LC)

the employer, has a duty to ensure that its members comply with the provisions of the Act in relation to such an employer when they seek to exercise their collective power by way of strike action.⁶⁰

The argument that a union may lose the confidence of the members or are perceived weak when they are seen to be intervening in an unprotected strike or unlawful acts during a strike is not plausible. The Labour Court in *Xstrata South Africa (Proprietary) Limited v Association of Mine Workers and Construction Union & others* found that this attitude implies that 'the concept of a disciplined cadre within the context of strikes, protest action and similar activities has become confined to and defined by how much mayhem a union member can cause.'⁶¹ In this matter, the court noted that 'unions are readily and easily prepared to lead employees out on any form of industrial action whether lawful or not'⁶² - by implication they should equally be readily prepared to assist in dissuading and curbing unlawful behavior by its members when they resort to unlawful conduct and unprotected strike action.

Collective bargaining rights must be exercised peacefully and with respect for the rights of others. If it is accepted that a union is not legally obliged to intervene when their members participate in unprotected strikes or that they should not be ordered to compensate an employer for loss, then unions and their members would enjoy an unfair advantage. In this case employers would readily accede to the demands of the union and their members for fear of irreparable economic loss and violence with no legal recourse. It is improbable that the LRA would protect the rights of trade unions and employees from consequences flowing from a protected strike and fail to come to the assistance of an employer, by granting immunity to a trade union for consequences flowing from an unprotected strike. Unions are expected to ensure that their members act in a lawful and peaceful manner during strikes. The courts have held that orders requiring the union to take reasonable steps and intervene when their members act unlawfully are a reinforcement of what they should know and do, in any event.⁶³

⁶⁰ Supra note 59 para 47

⁶¹ Supra note 13 para 34

⁶² Ibid para 35

⁶³ Supra note 13 para 43

In the matter of *Rustenburg Platinum Mines Ltd v Mouthpiece Workers Union*⁶⁴ the court held that in determining whether compensation may be awarded, three requirements must be satisfied:

*'In the first instance it must be established that a strike does not comply with the requirements of the Chapter IV of the Act. Secondly the party invoking the remedy must have sustained loss in consequence of the strike. Thirdly, it must be demonstrated that the party sought to be fixed with liability participated in the strike or committed acts in contemplation or in furtherance thereof.'*⁶⁵

Although the court's interpretation of the then section 68(1) (b) of the LRA in *Rustenburg Platinum Mines Ltd v Mouthpiece Workers Union* was rejected in *Mangaung Local Municipality v SA Municipal Workers Union*⁶⁶, it affirmed the requirements for establishing a party's liability for compensation.⁶⁷

An employer's claim for compensation is not a claim for all losses it sustained during an unprotected strike and is limited to compensation which is 'just and equitable'⁶⁸ 'it is not punitive in nature and is intended to compensate the claimant for losses actually sustained.'⁶⁹ What is just and equitable will be judged according to the circumstances of each case, with due regard to the factors set out in section 68 (1) (b). Section 68 (1) (b) (i) to (iv) of the LRA sets out the factors which a court will consider as follows:

'(i) whether—

- (aa) attempts were made to comply with the provisions of this Chapter and the extent of those attempts;*
- (bb) the strike or lock-out or conduct was premeditated;*
- (cc) the strike or lock-out or conduct was in response to unjustified conduct by another party to the dispute; and*
- (dd) there was compliance with an order granted in terms of paragraph (a);*
- (ii) the interests of orderly collective bargaining;*
- (iii) the duration of the strike or lock-out or conduct and*

⁶⁴ *Rustenburg Platinum Mines Ltd v Mouthpiece Workers Union* [2002] 1 BLLR 84 (LC)

⁶⁵ *Ibid* at 89

⁶⁶ *Supra* note 59

⁶⁷ *Ibid* para 41

⁶⁸ Section 68 (1) (b) of the Labour Relations Act 66 of 1995

⁶⁹ Rycroft, Cohen & Whitcher *Trade unions and the law in South Africa* (2009) 88

(iv) *the financial position of the employer, trade union or employees respectively.*⁷⁰

In *Mangaung Local Municipality v SA Municipal Workers Union*⁷¹ the employer sought an order for compensation for two claims. The first claim arose out of loss of income occasioned by striking employees not generating fees as well as the fact that the employer had to pay overtime to non striking employees. The second claim emanated from the employees blockading the entrances to the electricity departments which prevented non striking employees from being able to generate fees. The court found that the employer was entitled to compensation in terms of its first claim as these were losses sustained as a result of the strike. The court did not award compensation for the second claim as the losses were as a result of conduct in furtherance of a strike.⁷² This case was decided before the amendments to the LRA by the Labour Relations Amendment Act 12 of 2002 (hereinafter the Amendment Act).

Prior to the enactment of the Amendment Act, payment of just and equitable compensation in terms of section 68 (1) (b) of the LRA was limited to losses arising from the employees' participation in an unprotected strike.⁷³ This meant that an employer could only claim compensation in respect of actual loss of income and expenses which was a direct consequence of the unprotected strike. An employer would not have succeeded in a claim for compensation for loss of income caused by the conduct of striking employees acting in furtherance of the unprotected strike.⁷⁴ Therefore an employer would not have been entitled to compensation for acts such as striking employees preventing the non striking employees from generating an income or by the striking employees preventing access to an employer's premises.⁷⁵

The Amendment Act introduced the wording 'or conduct' to section 68 (1) (b). John Grogan⁷⁶ is of the opinion that the words 'or conduct' in section 68 (1) (b) of the LRA is a shortened version of 'conduct' referred to in section 68 (1) (a) of the LRA, which allows a court to interdict any

⁷⁰ Section 68 (1) (b)(i) to (iv)

⁷¹ Supra note 59

⁷² Ibid para 39

⁷³ Supra note 59 para 26

⁷⁴ Ibid

⁷⁵ Ibid para 39

⁷⁶ John Grogan '*Collective Labour Law*' 2nd ed (2014)

person from 'conduct in contemplation or furtherance of strike.'⁷⁷ As a result of the amendment, the Labour Court may order compensation for production lost as a result of the work stoppage and for additional losses occasioned by the conduct of the strikers, where these losses can be 'separately itemized.'⁷⁸

Had the unprotected strike in *Mangaung Local Municipality v SA Municipal Workers Union* commenced after the promulgation of the Amendment Act, it is probable that the court would have awarded compensation on both of the employer's claims.

In considering and granting orders for compensation, the Court will adopt a 'robust'⁷⁹ approach. In *Mangaung Local Municipality v SA Municipal Workers Union*⁸⁰ the court held that a message must be sent to the union and its members that 'in light of the ease at which a strike may proceed on a protected basis, unprotected strikes will not be tolerated.'⁸¹ Moreover, in the recent judgment of *Verulam Sawmills (Pty) Ltd v Association of Mineworkers & Construction Union & Others*⁸² the union failed to comply with the agreed picketing rules. It was held that 'the courts are inclined to hold unions accountable for the unlawful conduct of their members, and impose obligations on them to control their membership.'⁸³ The court reasoned that this is a 'potential means of attempting to address the pandemic.'⁸⁴

⁷⁷ Ibid at 342

⁷⁸ Ibid

⁷⁹ Supra note 59 para 51

⁸⁰ Supra note 59

⁸¹ Ibid para 51

⁸² *Verulam Sawmills (Pty) Ltd v Association of Mineworkers & Construction Union & Others* (2016) 37 ILJ 246 (LC)

⁸³ Ibid para 12

⁸⁴ Ibid

CHAPTER 3 TRADE UNION LIABILITY UNDER THE LRA FOR LOSS AND DAMAGES RESULTING FROM UNLAWFUL ACTS PERPETRATED DURING A PROTECTED STRIKE

3.1 Compensation and Damages

When a strike is in compliance with the provisions of the LRA, an employer may not claim compensation or common law damages against their employees or the trade union for their participation in the strike or their participation in conduct that is in furtherance of a protected strike. The rationale against holding employees and trade unions liable for participation in a strike or conduct in furtherance of a strike is to ensure that the employee's and the trade union's right to strike is not rendered meaningless for fear of the adverse economic consequences. It has been held by the Labour Appeal Court in *Black Allied Workers Union & others v Prestige Hotels CC t/a Blue Waters Hotel*⁸⁵ that:

*'The right to strike is important and necessary to a system of collective bargaining. It underpins the system - it obliges the parties to engage thoughtfully and seriously with each other. It helps to focus their minds on the issues at stake and to weigh up carefully the costs of a failure to reach agreement. If an employer facing a strike could merely dismiss the strikers from employment by terminating their employment contracts then the strike would have little or no purpose. It would merely jeopardise the rights of employment of the strikers. The strike would cease to be functional to collective bargaining and instead it would be an opportunity for the employer to take punitive action against the employees concerned.'*⁸⁶

Section 67 (2), section 67 (4) and section 67 (6) of the LRA provides an employee who participates in a protected strike with immunity against dismissal and civil action. This immunity is limited to participation and conduct that is in contemplation or furtherance of a protected strike. Section 67(8) of the LRA removes the immunity afforded by section 67 (2), (4) and (6) from employees and trade unions where the employees or union members commit acts which constitute a criminal offence.

⁸⁵ *Black Allied Workers Union & others v Prestige Hotels CC t/a Blue Waters Hotel* (1993) 14 ILJ 963 (LAC)

⁸⁶ *Ibid* at 972

Compensation in the context of section 68 of the LRA creates a statutory claim against parties who participate in an unprotected strike or conduct in furtherance of an unprotected strike. The extent of such compensation is qualified by the factors which the court is required to take into consideration in assessing the quantum of compensation awarded to a claimant. A claim for compensation is created by the LRA whilst a claim for damages arises from the common law of damages. These are two different claims and are applicable in two different circumstances. A claim for compensation is available to an aggrieved party who suffers loss arising from an unprotected strike. A claim for damages is a common law remedy available to a party who suffers loss arising from unlawful conduct occurring during a protected strike

It has been argued that section 68 of the LRA has, by implication, ousted a claimant's right to seek common law damages,⁸⁷ however Le Roux⁸⁸ is of the opinion that:

'section 67 (2) of the LRA expressly states that a person does not commit a delict for participation in a protected strike or for participation in conduct in furtherance of a protected strike This presupposes that such a common law remedy still exists and had to be expressly excluded in the case of protected strikes and lock-outs. The fact that such an express exclusion is not found in s 68 means that the common law principles still apply to unprotected strikes and lock-outs.'⁸⁹

Therefore by application, if a person does not participate in acts that promote the legitimate interests of a protected strike as contemplated in section 67 (8) then that person does in fact commit a delict, which entitles a claimant who suffered loss to claim common law damages. A claim in common law for delictual damage is established where a plaintiff can prove that the defendant committed an unlawful act or omission which was intentional or negligent and that, as a result of this act or omission, the plaintiff suffered loss.⁹⁰ A common law claim for 'damages'⁹¹

⁸⁷ Garth Abraham, Peter Buirski & Tanya Cohen et al *Brassey's commentary of the Labour Relations Act* Vol 3. A4:51

⁸⁸ P.A.K Le Roux 'Claims for compensation arising from strikes and lock outs' (2013) 23 *CLL* 11

⁸⁹ *Ibid* at 14

⁹⁰ Neethling, Potgieter & Visser *Law of Delict* 5th ed (2006) 195

⁹¹ *Ibid*

is a 'monetary equivalent'⁹² awarded to a claimant, and 'it is intended to eliminate all past and future patrimonial and non-patrimonial loss.'⁹³

3.2 Jurisdiction

In the matter between *Rand Water v Stoop & another*,⁹⁴ the Labour Appeal Court had to consider the argument by the respondent that the Labour Court did not have jurisdiction to determine the applicants counterclaim for damages. The respondent argued that the applicant's claim was a 'pure delictual claim'⁹⁵ and that section 77(3) of the BCEA did not grant jurisdiction to the Labour Court to determine the matter. The respondent also argued that the applicant should have pursued its claim in the High Court.⁹⁶ The Court stated that 'generally it has been held by the Labour Court and the Labour Appeal Court that if an issue in dispute relates to, is linked to, or connected with an employment contract then the Labour Court does have jurisdiction in terms of s 77(3) of the BCEA to entertain such a dispute'.⁹⁷ The court further held that 'the Labour Court is both a court of law and a court of equity its jurisdiction is concurrent to the jurisdiction of the High Court'⁹⁸ and it applied the 'appropriate principles depending on the matter before it'.⁹⁹ The court held that 'the fact that the claim is illiquid does not make it a claim which the Labour Court cannot adjudicate'¹⁰⁰ and accordingly the court held that 'there is no basis to assert that liquidity was a prerequisite for the Labour Court to entertain a contractual claim.'¹⁰¹

The question as to which court has jurisdiction for delictual claims arising from unlawful acts committed during a protected strike was dealt with in the case of *Lomati Mill Barberton v Paper*

⁹² Ibid

⁹³ Ibid

⁹⁴ *Rand Water v Stoop & another* (2013) 34 ILJ 576 (LAC)

⁹⁵ Ibid para 13

⁹⁶ Supra note 94 para 19

⁹⁷ Ibid para 19

⁹⁸ Ibid para 33

⁹⁹ Ibid

¹⁰⁰ Ibid para 34

¹⁰¹ Ibid

*Printing Wood & Allied Workers Union & others*¹⁰² where the court, 'adopting a purposive view of the LRA,¹⁰³ held that:

'It is apparent that this court has jurisdiction over all strikes and lock-outs and conduct in contemplation or in furtherance of that action. This jurisdiction was immunized by s 67(6) but restored to s 67(8). It is not a new jurisdiction, simply a revival of an existing jurisdiction. The conclusion must inevitably be that this court has the jurisdiction to hear and grant relief in regard to acts in contemplation or in furtherance of a protected strike or lock-out which constitute both a criminal offence and a delict.'¹⁰⁴

Further in *Mondi Ltd (Mondi Kraft Division) v Chemical Energy Paper Printing Wood and Allied Workers Union*¹⁰⁵ Francis J held that the Labour Court has jurisdiction over all conduct in contemplation or furtherance of a strike, including delictual claims arising from conduct amounting to a delict as well as an offence.¹⁰⁶ The court further held that 'if the legislature had deemed it necessary to oust the jurisdiction of the Labour Court in delictual claims in a protected strike it would have done so in clear terms.'¹⁰⁷

An employer therefore has the right to claim common law damages for delicts committed by employees during protected strikes and may do so in the Labour Court which has concurrent jurisdiction with the High Court to determine such matters. The fact that the claim for damages is 'illiquid'¹⁰⁸ is not a bar to a claimant from proceeding in the Labour court

¹⁰² *Lomati Mill Barberton v Paper Printing Wood & Allied Workers Union & others* (1997) 18 ILJ 178 (LC)

¹⁰³ *Ibid* at 184

¹⁰⁴ *Ibid*

¹⁰⁵ *Supra* note 11

¹⁰⁶ *Ibid* para 27

¹⁰⁷ *Ibid*

¹⁰⁸ *Ibid*

3.3 Vicarious Liability

An employer is placed in a disadvantageous position in seeking to claim delictual damages from individual employees as it is seldom that employees would have the means to satisfy a court order, and a court may be reluctant to hold an individual employee liable for the total loss occasioned by the unlawful acts.¹⁰⁹ In this instance a claim for vicarious liability against a trade union, if liability can be established, may assist an employer in recovering damages sustained by unlawful acts committed during a protected strike. Vicarious liability is described as 'a strict liability of one person for the delict of another where a particular relationship exists between the two parties.'¹¹⁰

In *Mondi Ltd (Mondi Kraft Division) v Chemical Energy Paper Printing Wood and Allied Workers Union*¹¹¹ the employer sought to recover damages resulting from the unlawful switching off of its machinery by members of the union, which was alleged to have been committed with the support and encouragement of the office-bearers of the union as well as the shops steward council. The court set out the grounds by which a union may be held vicariously liable for the conduct of its members. The Court stated the claimant must show that the act committed by the union member was unlawful and accompanied by intention or negligence, that the claimant suffered loss as a result of the member's actions, and that such loss was foreseeable.¹¹² A claimant must also prove the existence of a relationship between the parties.¹¹³ In the context of a claim for delictual damages arising from unlawful acts committed during a protected strike, the claimant must show that the wrongful conduct constitutes an offence. It is also necessary to establish that the union is '*socius criminus* or is guilty on the doctrine of common purpose.'¹¹⁴ The protection afforded by section 67 (2) of the LRA is only lost once all the elements that give rise to liability complies with section 67(8) of the LRA.¹¹⁵

¹⁰⁹ Supra note 88 at 12

¹¹⁰ Supra note 90 at 338

¹¹¹ Supra note 11

¹¹² Ibid para 29

¹¹³ Ibid

¹¹⁴ Ibid

¹¹⁵ Ibid

It was further held in *Mondi Ltd (Mondi Kraft Division) v Chemical Energy Paper Printing Wood and Allied Workers Union*¹¹⁶ that in order for a claimant to succeed in a claim for vicarious liability he must prove 'the union as principal authorised, instigated or ratified the commission of the delict.'¹¹⁷ In this case the employer could not prove that the union authorised or instigated the conduct for which it sought damages nor could the employer identify who had committed the alleged acts and their claim was accordingly dismissed.¹¹⁸

When faced with a claim of vicarious liability for the unlawful actions of members during a protected strike, a union would escape liability if it can show that the members were not authorised to perform the acts which caused damage, even if the act was 'ancillary to the mandate.'¹¹⁹ Having due regard to the onus of proof borne by a claimant, it seems more likely that a claimant will succeed in a claim against an individual, committing unlawful acts in a protected strike, than succeeding in a delictual claim based on vicarious liability against a union.

¹¹⁶ Supra note 11

¹¹⁷ Ibid para 37

¹¹⁸ Ibid para 38

¹¹⁹ Ibid

CHAPTER 4: A UNIONS LIABILITY TO MEMBERS OF THE PUBLIC

4.1 Introduction

The Regulation of Gatherings Act 205 of 1993 came into operation on 15 November 1996. It was enacted for the purpose of promoting the right to assembly as enshrined in the Constitution. The preamble to the RGA provides that:

*'every person has the right to assemble with other persons and to express his views on any matter freely in public and to enjoy the protection of the State while doing so, and shall do so peacefully having due regard to the rights of others.'*¹²⁰

Section 11 (1) of the RGA deals with liability for damage caused during a gathering or demonstration and provides that:

'If any riot damage occurs as a result of—

(a) a gathering, every organization on behalf of or under the auspices of which that gathering was held, or, if not so held, the convener;

*(b) a demonstration, every person participating in such demonstration, shall, subject to subsection (2), be jointly and severally liable for that riot damage as a joint wrongdoer contemplated in Chapter II of the Apportionment of Damages Act, 1956 (Act No. 34 of 1956), together with any other person who unlawfully caused or contributed to such riot damage and any other organization or person who is liable therefor in terms of this subsection.'*¹²¹

The RGA creates a 'statutory liability' on conveners of a gathering, which means that a person claiming damages under the RGA need not establish intention or negligence on the part of the convener.¹²² The RGA also provides a statutory defence against the 'statutory liability' imposed by section 11(1).¹²³ Section 11 (2) of the RGA provides that:

'It shall be a defence to a claim against a person or organization contemplated in subsection if such a person or organization proves—

¹²⁰ Preamble to Regulation of Gathering Act 205 of 1993

¹²¹ Section 11 (1) of the Regulation of Gathering Act 205 of 1993

¹²² P.A.K Le Roux 'The rights and obligations of trade unions' (2012) 22 *CLL* 32

¹²³ *Ibid*

- (a) *that he or it did not permit or connive at the act or omission which caused the damage in question; and*
- (b) *that 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) *that 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.*¹²⁴

4.2 Constitutional challenge to section 11 (2) of the RGA

The RGA came under the spotlight after 13 years since its enactment¹²⁵ in the matter of *South African Transport and Allied Workers Union and Another v Garvas and Others*.¹²⁶ In this matter, the union, SATAWU, organised a gathering for people to voice their employment related grievances in the security industry.¹²⁷ The gathering took place in Cape Town City Centre. SATAWU took certain precautionary steps for the gathering by informing the local authority, appointing 500 marshalls, advising their members against engaging in violent and destructive behavior and requesting that the local authority erect barricades.¹²⁸ Despite the precautionary measures the gathering caused R1.5 million in riot damages, several people were injured and 39 arrested.¹²⁹ A claim for damages was instituted under section 11(1) of RGA.¹³⁰

The union opposed the claim on its merits and argued that section 11(2) was constitutionally invalid in that the wording limited the right to freedom of assembly under section 17 of the Constitution and the right to fair labour practices under section 23 of the Constitution.¹³¹ Both the High Court and the Supreme Court of Appeal rejected the union's arguments. The union then

¹²⁴ Section 11 (2) of the Regulation of Gathering Act 205 of 1993

¹²⁵ Malcolm Wallis 'Now you see it, Now you don't'- SATAWU v Garvas and others' (2012) 33 *ILJ* 2257 at 2258

¹²⁶ Supra note 18

¹²⁷ Ibid para 10

¹²⁸ Ibid para 11

¹²⁹ Ibid para 11 and 12

¹³⁰ Ibid

¹³¹ Ibid para 24

appealed to the Constitutional Court. In the Constitutional Court, the union presented 'two inter-related arguments.'¹³²

The first argument proposed that the word 'and' between section 11(2)(b) and section 11(2)(c) imposes two requirements for an organization to avoid liability:

'One, the organization must prove that the act or omission which caused the riot damage was not reasonably foreseeable. Two, It must prove that it nevertheless took reasonable steps to prevent the occurrence of the act or omission that was not reasonably foreseeable.'¹³³

The union argued that it is not possible for an organisation to take reasonable steps to prevent an act or omission it did not and could not reasonably have been expected to foresee.¹³⁴ It is for this reason the union argued that the words 'and was not reasonably foreseeable' renders the defence 'internally incoherent and self-destructive'.¹³⁵

The second argument proposed that 'in all instances where there is an intended gathering and a threat of violence, the content of the negotiations and consultations with the local authorities will deal with the potential for injury to persons or damage to property.'¹³⁶ Therefore potential for damage will always be foresee and accordingly an organisation will be liable. For this reason, the union argued that 'section 11(2) does not provide a viable defence to a defendant who faces a claim for riot damage.'¹³⁷

The union was of the opinion that organisations are 'exposed to extensive liability'¹³⁸ which would discourage organisations from holding gatherings and demonstrations as a result of a 'chilling effect it has on the exercise of the right to assemble.'¹³⁹

The Constitutional Court considered two issues relative to the union's arguments - namely the meaning of section 11 (2) of the RGA and whether it creates 'a reasonable defence which meets

¹³² Ibid para 16

¹³³ Ibid

¹³⁴ Ibid

¹³⁵ Ibid

¹³⁶ Ibid para 17

¹³⁷ Ibid

¹³⁸ Ibid

¹³⁹ Ibid

the constitutional requirement of rationality.¹⁴⁰ The court also had to consider whether the defence, if found to be rational, limits the rights contained in section 17 of the Constitution and if it did, whether the limitation is justifiable.¹⁴¹

In considering the validity of the defence created by section 11 (2) of the RGA, the Constitutional Court held that 'there is an inter-relationship between the steps that are taken by an organiser and what is reasonably foreseeable.'¹⁴² It requires that 'reasonable steps within the power of the organiser must be taken to prevent the act or omission that is reasonably foreseeable.'¹⁴³ The court stated that '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.'¹⁴⁴ The court held that:

*'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 act or omission that subsequently caused riot damage reasonably unforeseeable. Both section 11(2) (b) and section 11(2)(c) would then have been fulfilled.'*¹⁴⁵

The Court further held that organisations are required to be aware of the possibility of damage at all times of the gathering and are required to take necessary precautions for the full duration of the gathering.¹⁴⁶ The court found that 'acts and omissions' become unforeseeable and organisers will not attract liability if they are 'satisfied 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.'¹⁴⁷ The Court found that the requirement of taking reasonable steps is not merely taking steps to prevent the act or omission from occurring but includes whether the steps taken were adequate in the circumstances to make the foreseeable occurrence unforeseeable.¹⁴⁸

¹⁴⁰ Ibid para 4

¹⁴¹ Ibid

¹⁴² Ibid para 43

¹⁴³ Ibid

¹⁴⁴ Ibid

¹⁴⁵ Ibid

¹⁴⁶ Ibid para 44

¹⁴⁷ Ibid

¹⁴⁸ Ibid

The court held that the purpose of the limitation imposed by section 11 of the RGA is important and necessary in order to protect the public who may not have resources or be able to identify perpetrators individually.¹⁴⁹

The court reiterated that every right must be exercised with due regard to the rights of others and that a union will always have a choice between holding a gathering in pursuance of its right to assemble or cancelling the gathering where there is a possibility of 'foreseeable damage.'¹⁵⁰ The court found that 'victims of riot damage do not have any choice in relation to what happens to them or their belongings.'¹⁵¹ In light of the availability of a choice between convening a gathering or cancelling it where potential risks of damage exist, the court held:

*'The decision to exercise the right to assemble is one that only the organisation may take. This must always be done with the consciousness of any foreseeable harm that may befall others as a consequence of the gathering. The organisers must therefore always reflect on and reconcile themselves with the risk of a violation of the rights of innocent bystanders which could result from forging ahead with the gathering.'*¹⁵²

The court reasoned that 'whilst the RGA does have a chilling effect on the exercise of the right, this should not be overstated'¹⁵³ and held that:

*'The Act does not negate the right to freedom of assembly, but merely subjects the exercise of that right to strict conditions, in a way designed to moderate or prevent damage to property or injury to people. Potentially, the exercise of the right also occasions deterrent consequences. One of them is the presumption of liability for riot damage, which can be traced back to the organization's decision to exercise the right to assemble. The effect of section 11 is thus to place the organisers in the first line of fire when riot damage occurs. The innocent victim need not look any further than the organisers for compensation. She does not need to prove negligence on their part. In this sense, the liability may be considered to be strict.'*¹⁵⁴

¹⁴⁹ Ibid para 67

¹⁵⁰ Ibid para 68

¹⁵¹ Ibid

¹⁵² Ibid para 68

¹⁵³ Ibid para 69

¹⁵⁴ Ibid para 69 - 70

The majority of the Constitutional Court found that 'the limitation was reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'¹⁵⁵ and held that:

*'when a gathering imperils the physical integrity, the lives and sources of livelihood of the vulnerable, the organisations that are responsible for setting in motion the events that gave rise to the suffered loss must bear liability for damages arising there from.'*¹⁵⁶

Judge Malcolm Wallis¹⁵⁷ is of the opinion that the argument raised by *SATAWU* was a 'curious way of approaching the constitutional challenge'¹⁵⁸ as well as a 'strange, pedantic and extremely literal approach to the interpretation of section 11 (2) of the RGA,¹⁵⁹ which is 'inconsistent with our law regarding the interpretation of statutes.'¹⁶⁰ Commenting on the argument presented by the *SATAWU* Judge Wallis states that the argument presumes that foreseeability is tested at the planning stage of the gathering,¹⁶¹ but the obligations created by section 11 (2) of the RGA are 'ongoing.'¹⁶² Unions must at all times of the gathering remain 'alert' as to what may occur.¹⁶³ He states that reasonableness does not mean 'every faint possibility that must be guarded against but those that are reasonably foreseeable as likely to occur.'¹⁶⁴

Reasonableness requires a balance to be struck between 'the assessment of the foreseeability of an occurrence' and the reasonableness of the steps taken to guard against it.¹⁶⁵ In explaining reasonable foreseeability, Judge Wallis uses the example of marchers arriving at the gathering with weapons, if a method of collecting any weapons brought by gatherers at the assembly point is adopted, then any damage caused by marchers using their weapons, is not foreseeable.¹⁶⁶ Judge Wallis reasons that if reasonable steps are taken to prevent the occurrence of an event, then that

¹⁵⁵ Ibid para 84

¹⁵⁶ Ibid para 67

¹⁵⁷ Supra note 125

¹⁵⁸ Ibid at 2262

¹⁵⁹ Ibid at 2267

¹⁶⁰ Ibid

¹⁶¹ Ibid at 2265

¹⁶² Ibid at 2266

¹⁶³ Ibid at 2269

¹⁶⁴ Ibid at 2268

¹⁶⁵ Ibid

¹⁶⁶ Ibid at 2265

event 'ceases to be foreseeable.'¹⁶⁷ Judge Navsa in the SCA judgment of *SATAWU v Garvis*¹⁶⁸ reasoned that if an organiser is not negligent it will not be liable, Judge Wallis, in agreement with this reasoning states that 'this removes the sting of section 11(2) of the RGA.'¹⁶⁹

Therefore a union in exercising its choice to convene a public gathering has a continuous duty from the planning stage until the end of the gathering to anticipate every reasonable situation where resultant damage and violence could occur and to take reasonable steps to prevent the resulting damage and violence. Unions should also educate their members on lawful and unlawful conduct during a public gathering and the resulting consequences of unlawful conduct.¹⁷⁰ The right to gather must always be exercised with due regard to the rights of others.

4.3 Extent and scope of potential claims in terms of S 11 (2) of the RGA

Section 11 (1) of the RGA imposes a strict liability on every organiser and convener of a gathering for riot damage occasioned as a result of the gathering. The definition of 'riot damage' in the RGA is broad, and 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.'*¹⁷¹

The multiple use of the word 'any' in the definition of riot damage 'means each and every thing of the type it refers and it indicates the extent of its application.'¹⁷² Judge Wallis argues that the use of the word 'directly and indirectly loosens the chains of causation.'¹⁷³ Further the fact that any damage caused before, during and after the gathering is classified as riot damage 'raises further difficult issues of remoteness.'¹⁷⁴

A union who organises a gathering in terms of the RGA would be liable for any resultant damage if it can be proved that riot damage occurred as a result of the gathering, subject to any defence

¹⁶⁷ Ibid at 2268

¹⁶⁸ Supra note 28

¹⁶⁹ Supra note 125 at 2269

¹⁷⁰ Ibid at 2270

¹⁷¹ Section 1 of the Regulation of Gathering Act 205 of 1993

¹⁷² Supra note 125 at 2260

¹⁷³ Ibid

¹⁷⁴ Ibid

raised by the union in terms of section 11 (2) of the RGA.¹⁷⁵ The loss defined by the RGA 'must still flow from injury, death, damage or destruction caused by a gathering.'¹⁷⁶

In the matter of *Mahlangu v SA Transport & Allied Workers Union, Passenger Rail Agency of SA & another, Third Parties*¹⁷⁷ the plaintiff; a member of the first respondent union, was forced by a group of striking employees wearing the union's regalia to accompany them to Johannesburg. At the Springs' train station, the plaintiff was forced onto a train by the union members where she was then stripped, assaulted and thrown off the moving train. The plaintiff was hospitalised and sustained multiple injuries. Relying on section 11(2) of the RGA, the plaintiff instituted an action against the union. The union sought to apportion liability onto the Passenger Rail Agency of SA and Intersite Property Management Services, through third party proceedings, but the court granted the latter absolution from the instance as the union failed to establish their liability.

The court considered the question of onus. Relying on the Constitutional Court's judgment in *SATTAWU V Garvis & Others* the court held that 'the Act places the onus on the defendant to prove its defenses instead of requiring the plaintiff to demonstrate the defendant's wrongdoing and fault.'¹⁷⁸ However fault remains 'a relevant consideration'¹⁷⁹ and the plaintiff would still have to adduce evidence in order to show that there was a gathering in terms of the RGA; that she was injured through the conduct of the members of the union and that she had suffered damage as a result of their conduct.¹⁸⁰

Focusing on the definition of the term 'gathering' in the RGA, the court held that it could not have been the intention of the legislature to hold an organisation liable for the conduct of members who decide to engage in acts of violence before they reach the designated location of the gathering.¹⁸¹ Moreover the legislature would not have intended that an organisation should be

¹⁷⁵ Supra note 125 at 2261

¹⁷⁶ Ibid at 2260

¹⁷⁷ *Mahlangu v SA Transport & Allied Workers Union, Passenger Rail Agency of SA & another, Third Parties*(2014) 35 *ILJ* 1193 (GSJ)

¹⁷⁸ Ibid para 38

¹⁷⁹ Ibid

¹⁸⁰ Ibid para 38-9

¹⁸¹ Ibid para 75

held liable for the unlawful conduct of its members before they arrive at the venue of the gathering, where the organisers have taken precautions to ensure that it proceed peacefully.¹⁸² The court ultimately found that the union was not liable and dismissed the plaintiffs claim.¹⁸³

If the assault in *Mahlangu* occurred in the designated location of the gathering, either before, during or after the gathering and if the union failed to prove its defence, it is probable that the court would have found the union liable to the plaintiff in this matter.

The wide scope of liability for damage in terms of section 11 (1) of the RGA together with the definition of riot damage has been recognised in *South African Transport and Allied Workers Union and Another v Garvis and Others*¹⁸⁴ The court held that;

*'the effect of section 11(1) and section 11(2), in the context of the Act as a whole, is to render holders of a gathering, organised with peaceful intent, liable for riot damage on a wider basis than is provided for under the law of delict. This is all the more so given the extremely wide definition of riot damage in the Act. This means that proof of liability will be easier in a large number of cases.'*¹⁸⁵

Judge Wallis¹⁸⁶ argues 'that given the breadth of section 11 (1), together with the no fault strict liability and the potentially considerable award of damage', there is a scope for the argument that section 11 (1) of the RGA may have a chilling effect on section 17 and section 23 constitutional rights and may in the future need to be addressed by our courts¹⁸⁷

Given the constitutional validity of section 11 (1) and section 11 (2) and the wide definition of riot damage, unions are advised, when they intend holding a gathering to consider foreseeable damage and take reasonable steps to prevent it.

¹⁸² Supra note 177 para 88-9

¹⁸³ Ibid para 99

¹⁸⁴ Supra note 3

¹⁸⁵ Ibid para 56

¹⁸⁶ Supra note 125

¹⁸⁷ Ibid at 2260 -2

CHAPTER 5: A TRADE UNIONS' LIABILITY TO ITS MEMBERS

5.1 Introduction

Section 18 of the Constitution provides that everyone has a right to freedom of association. Chapter 2 and Chapter 3 of the LRA affirm section 18 of the Constitution in the employment context, with greater detail.¹⁸⁸ Section 213 of the LRA defines a trade union as 'an association of employees whose principal purpose is to regulate relations between employees and employers, including any employers' organisations.'¹⁸⁹ The ultimate goal of a trade union in its representative capacity is to obtain the best possible outcome in the circumstances, for the collective group of employees which it represents.

A trade union forms a collective voice¹⁹⁰ on behalf of the employees which could match the bargaining power of an employer. This in turn provides the individual employee, a voice which it may not otherwise have, in the collective bargaining arena.

Section 95 (1) (b) of the LRA sets out that a trade union may apply for registration, if it has adopted a constitution that meets the requirements of section 95 (5) and (6). Section 95 (5) of the LRA sets out the required substance of a union's constitution which includes *inter alia* the aspects of governance of the union, membership of the union, termination of membership and various other important aspects. Section 95 (6) prohibits provisions which discriminate directly or indirectly on the grounds of sex.

According to Grogan, 'a trade union is a voluntary association'¹⁹¹ and membership of the union cannot be compelled (except for closed-shop agreements). By the nature of the voluntary membership, the member submits himself to the constitution of the union and therefore the relationship between the member and the union is governed by the constitution.¹⁹² All interactions and disputes which arise between the union and the member must be determined with reference to the constitution of the union.

¹⁸⁸ John Grogan '*Collective Labour Law*' 2nd ed (2014) 22

¹⁸⁹ Section 213 of the Labour Relations Act 66 of 1995

¹⁹⁰ Rycroft, Cohen & Whitcher *Trade unions and the law in South Africa* (2009) 88

¹⁹¹ *Supra* note 76 at 38

¹⁹² *Ibid* at 45

5.2 The principle of majoritarianism and collective agreements

When an employee becomes a member of a trade union, they authorise the union to bargain and enter into collective agreements on their behalf.¹⁹³ section 213 of the LRA defines a collective agreement as a written agreement concerning terms and conditions of employment or any other matter of mutual interest, concluded by one or more registered trade unions; one or more employers or one or more registered employers' organizations.¹⁹⁴

Section 23 (1)(a) to (c) of the LRA provides that a collective agreement binds parties to the agreement and members of parties to the agreement as well as members of a registered union if the agreement relates to terms and conditions of employment or the conduct of the employer and employee *vis-a-vis* each other. Section 23 (1) (d) of the LRA sets out that a collective agreement binds employees who are not members of the party unions if they are specifically identified, bound, or if those trade unions party to the agreement have the majority of employees employed by the employer in the workplace as their members.¹⁹⁵

In the matter of *Kem-Lin Fashions CC v Brunton & another*¹⁹⁶ the court held that:

'The legislature has also made certain policy choices in the Act which are relevant to this matter. One policy choice is that the will of the majority should prevail over that of the minority. This is good for orderly collective bargaining as well as for the democratization of the workplace and sectors. A situation where the minority dictates to the majority is, quite obviously, untenable.'¹⁹⁷

A majority union, in addition to organisational rights which regulate access to the workplace, stop-order facilities, and leave for union activities, receives additional rights which include the recognition of shop stewards and the disclosure of information.¹⁹⁸ Majority trade unions are also entitled to enter into collective agreements with the employer to set thresholds of representivity for the granting of access, stop-order and trade-union leave rights to minority unions, provided

¹⁹³ Supra note 145 at 45

¹⁹⁴ Section 213 of the Labour Relations Act 66 of 1995

¹⁹⁵ Section 23 (1) and of the Labour Relations Act 66 of 1995

¹⁹⁶ *Kem-Lin Fashions CC v Brunton & another* (2001) 22 ILJ 109 (LAC)

¹⁹⁷ Ibid para 19

¹⁹⁸ s12 – s 16 of the Labour Relations Act 66 of 1995; T Cohen; 'Limiting organisational rights of minority unions: Popcru v Ledwaba 2013 11 BLLR 1137 (LC)' *PER/PELJ* (2014) 2210

that they are applied equally to any registered trade union seeking any of the organisational rights referred to in that subsection.¹⁹⁹

The rationale behind the principal of majoritarianism according to Ian Maccun²⁰⁰ is based on the following assumptions:

Firstly, it is assumed that the presence of many small unions should be reduced. Small unions are thought to be inefficient as they are unable to cope with the costs of running an organisation are not able to service their members properly and are often dependent on idiosyncratic, individual leadership. Moreover the existence of large numbers of small unions perpetuates fragmentation of a union movement and weakens workers *vis-a-vis* employers. Secondly it is assumed that larger unions should be promoted and that union members should be concentrated in larger organisations. Larger unions are supposedly able to derive economies of scale in relation to bargaining strength and the level of membership service. Larger unions are also seen to be more powerful by virtue of numbers and their ability to make greater gains in the collective bargaining process. Thirdly it is assumed that the jurisdiction of unions should be streamlined and that there should be fewer unions operating in each industrial sector.²⁰¹

The nature of the relationship between a trade union and its members has not been clearly defined.²⁰² According to Grogan, the relationship between a union and its member is similar to the relationship between a principal and an agent.²⁰³ This notion is in contrast to the view postulated by Christie²⁰⁴ who is of the opinion that common law agency does not correlate with the complexity of 'collective and individual relationships in industrial life.'²⁰⁵ In her article titled *Majoritarianism, Collective Bargaining and Discrimination*, Christie explains the shortcomings of reliance on the common law principle of agency relative to the relationship between a union and its member. In a principal-agent relationship, the agent is not essential to the relationship.

¹⁹⁹ Section 18 (1) and (2) of the Labour Relations Act 66 of 1995; Supra note 195 at 2210

²⁰⁰ Ian Maccun 'Does size matter? The Labour Relations Act, majoritarianism and union structure' (1997) LDD (5)69

²⁰¹ Supra at 70-1

²⁰² Darcy Du Toit 'An Ill Contractual Wind Blowing Collective Good? Collective Representation in Non-Statutory Bargaining and the Limits of Union Authority' (1994) 15 *ILJ* 39

²⁰³ Supra note 76 at 45

²⁰⁴ Sarah Christie 'Majoritarianism, Collective Bargaining and Discrimination' (1994) 15 *ILJ* 708

²⁰⁵ Supra at 709

Once a contract is concluded between the principal and the third party the agent's role becomes redundant, he does not acquire rights or any liability as a result of the contract and the principal is at all times at liberty to deal with the third party directly.²⁰⁶ Christie advocates that the relationship between the trade union and its members is best explained by the principal of representative governance as opposed to agency. This view was accepted by the Labour Appeal Court in *Blyvooruitzicht Gold Mining Co Ltd v Pretorius*²⁰⁷ and also finds support in *Mhlongo & others v Food & Allied Workers Union & another*²⁰⁸ where the court held that:

*'The union representation is based on the principle of majoritarianism. The employer negotiates with the majority union. If employees are members of the union, the employer is not required to negotiate with individual employees in addition to negotiating with the union. The applicants now want the company to deal directly with them whilst they remain members of the union. The employer is entitled to refuse to deal with them directly.'*²⁰⁹

The principle of majoritarianism requires that an employer negotiate and conclude collective agreements with majority unions. As a member of a union, an employee cannot act contrary to a collective agreement in a manner which he may consider suitable to his individual interests nor can that employee seek to avoid the consequences of the collective agreement by resigning from the union.²¹⁰

Section 23 (2) of the LRA provides that a collective agreement:

*'binds for the whole period of the collective agreement, every person bound in terms of subsection (1) (c) who was a member at the time it became binding, or who becomes a member after it became binding, whether or not that person continues to be a member of the registered trade union or registered employers' organisation for the duration of the collective agreement.'*²¹¹

²⁰⁶ Ibid at 709-10

²⁰⁷ *Blyvooruitzicht Gold Mining Co Ltd v Pretorius* [2000] 7 BLLR 751 (LAC) at 754

²⁰⁸ *Mhlongo & others v Food & Allied Workers Union & another* (2007) 28 ILJ 397 (LC)

²⁰⁹ Ibid note 208 para 14

²¹⁰ Supra note 69 at 91; Supra note 208 para 21

²¹¹ Section 23 (2) of the Labour Relations Act 66 of 1995

A collective agreement may lose its effect if members were allowed to avoid the consequences of the collective agreement by resigning from the trade union at the time the agreement became binding.²¹²

5.3 Binding nature of settlement agreements concluded by the union officials acting on behalf of their members or directly affecting individual members

In terms of section 200 of the LRA a trade union may assist its members in disputes against their employers. In providing this assistance a representative of the union may conclude agreements resolving the dispute between the employer and employees, with the result that the terms and conditions of that agreement may have a direct impact on the continued relationship between the employer and the member.

It has been held that a settlement agreement qualifies as a collective agreement²¹³ - therefore an employee will be bound by an agreement concluded by the union representative on their behalf, 'if the union's actions benefit the majority of the union and the union representative acted in good faith.'²¹⁴ Further a union member is bound by a collective agreement concluded on their behalf if the union is duly appointed in terms of the union's constitution and their conduct is in line with the terms of their mandate.²¹⁵

In the matter between *Ramolesane & another v Andrew Mentis & another*²¹⁶ the Labour Appeal Court considered whether a settlement agreement concluded by the union on behalf of the appellant employee's was binding against the employees. The Court stated that:

'a majority is ...oppressive of a minority, In those circumstances, therefore, there will inevitably be groups of people, perhaps even fairly large groups of people, who will contend, with

²¹² Supra note 76 at 167

²¹³ Supra note 208 para 17

²¹⁴ Supra note 69 at 91

²¹⁵ Ibid

²¹⁶ *Ramolesane & another v Andrew Mentis & another* (1991) 12 ILJ 329 (LAC)

justification, that a settlement was against their interests. None the less, because of the principle of majoritarianism, such decision must be enforceable against them also²¹⁷

In the matter between *SA Post Office Ltd v CWU & Others*,²¹⁸ the Labour Court endorsed the reasoning applied in *Ramolesane*. It held that it is 'implied in the principle of majoritarianism is that the union leadership, as representatives instead of agents of members, may take binding decisions which may not necessarily be supported by the membership or other structures of the union.'²¹⁹

A union member will remain bound by the agreements concluded by union officials or shop stewards unless they deny and can prove that the union official, in concluding the agreement, was not properly authorised. Moreover, the allegation of lack of authority must be supported by the members or other union officials distancing themselves from the agreement.²²⁰ In the matter of *Samancor Ltd v NUMSA & others*²²¹ the shop steward in concluding a collective agreement on behalf of its members was alleged to have not been properly mandated to conclude the agreement on behalf of the members or the union. The union was estopped from relying on the shop steward's lack of authority on the basis that his actions were 'ratified by the conduct of the properly authorised officials'²²² following the conclusion of the agreement.

When a union official is properly mandated to conclude a settlement agreement on behalf of its members and the union itself, that agreement will be binding on all parties which are affected by it. However if it can be proved that the union official in concluding the agreement acted outside his mandate, which conduct was not subsequently ratified, then the union and the members will not be bound by the agreement.

²¹⁷ Ibid at 336

²¹⁸ *SA Post Office Ltd v CWU & Others* [2010] 1 BLLR 84 (LC),

²¹⁹ Ibid para 23

²²⁰ Supra note 69 at 91

²²¹ *Samancor Ltd v NUMSA & others* [2000] 8 BLLR 956 (LC)

²²² Ibid para 30

5.4 Locus Standi – a member's right to be represented and the right to represent its members

A trade union may act in one of three different capacities in a dispute. It may act in its own interest, on behalf of its members or in the interest of any of its members.²²³ Section 23 of the Constitution provides that a union is entitled to determine its own administration, programmes and activities. The rights conferred by section 23 of the Constitution provide the union with 'organisational autonomy'²²⁴ which is viewed as an 'integral part of the constitutional vision to redress the past'²²⁵ and allows a union to decide how they administer themselves and promote the interests of their members through their activities.²²⁶ Therefore it is the union's prerogative, and not an inherent right of a member, if it will provide legal assistance to its members in respect of their individual interests. A union may include a clause in its constitution which provides that it will provide legal assistance to their members, as was the case in *Food & Allied Workers Union v Ngcobo NO & another*²²⁷ or they may enter into an individual agreement with their member to provide such assistance.

A union's right to act on behalf of its members in disputes differs from the normal representation of the interests of another. A union is an 'institutionalised embodiment of its members and as such is a party to the proceedings.'²²⁸ In the matter of *Manyele & others v Maizecor (Pty) Ltd & Another*²²⁹ the employees were dismissed for dishonesty. A dispute was referred to the CCMA. In its award, the commissioner found that the dismissal of the employees was unfair and awarded the employees retrospective employment and compensation. The employer launched a review application at the Labour Court which found that the dismissal was substantively fair. The employees sought to rescind the judgment of the review court on the basis that the judgment was granted in error in terms of section 165 of the LRA, because the review application had not been served on the employees. The facts of the matter revealed that the application papers were served

²²³ Section 200 of the Labour Relations Act 66 of 1995

²²⁴ *Food & Allied Workers Union v Ngcobo NO & another* (2013) 34 *ILJ* 3061 (CC) para 27

²²⁵ *Ibid* para 28

²²⁶ *Ibid* para 29

²²⁷ *Supra* note 224

²²⁸ *Supra* note 69 at 91

²²⁹ *Manyele & others v Maizecor (Pty) Ltd & Another* (2002) 23 *ILJ* 1578 (LC)

on the employee's union, FAWU, who claimed that although they represented the employees at the CCMA, they did not do so thereafter. In considering section 200 of the LRA and dismissing the application, Judge Sutherland held as follows:

*'It seems to me plain that the purpose of this section is to confer on a trade union a right in law to make itself a party to any dispute between an employer and the employees of the employer if the employees are members of the union. A union comes into proceedings relating to such a dispute without having to require the leave of the CCMA or the Labour Court in order to do so. The union also has various choices in regard to how it participates in those proceedings. It can, as is evident from s 200(2), become a party distinct from its members. It may also pursue interests of its own which are not necessarily coexistent with those of its members. It may also in two distinct ways either act 'on behalf of' any of its members, or act 'in the interest of any of its members.....the union is the party in the proceedings. Philosophically, the union constitutes the institutional embodiment of the several members involved in the dispute.'*²³⁰

Relying on the reasoning of the learned judge in the above matter it is evident that a union has the necessary *locus standi* to act on behalf of its members without requiring special leave to do so. Once a union accepts its role in a representative capacity or is bound by its constitution to represent its members it cannot remove itself from that role without following proper process particularly in instances where their members will be prejudiced from such withdrawal.

5.5 Member's Locus Standi to pursue a claim against the Union

In the matter between *Ngcobo NO and another v Food and Allied Workers Union*²³¹ the union sought to challenge the members' claim for damages on the basis that the members had an 'identity of interest'²³² with the union and that, in the absence of a specific provision in its constitution, the members could not sue the union. The court held that the union has legal personality separate from its members and officials.²³³ The nature of the relationship between the members as well as their rights and obligations are governed by their constitution. The union's constitution allows the union to provide legal assistance where it is in the best interests of the

²³⁰ Supra note 229 para 12

²³¹ *Ngcobo NO and another v Food and Allied Workers Union* (2012) 33 ILJ 1337 (KZD)

²³² Ibid at 1361

²³³ Ibid at 1363

union.²³⁴ The union had the necessary authority to conclude the agreement to provide legal assistance to the members.²³⁵ The court further held that whilst the union may have been acting in the interests of the plaintiffs as well as its own interests it did not prevent the conclusion of an agreement between the plaintiffs and the union in terms of which it would institute proceedings on their behalf in the Labour Court.²³⁶ The court rejected the union's defence that a constitutional provision was required before the members were permitted to sue the union. The court held that such a requirement would be an 'effective bar'²³⁷ to any member seeking to enforce a contract concluded with the union, which cannot be the case. The court ultimately found that the members did have *locus standi* to institute action against the union.²³⁸

5.6 Liability of trade unions for delictual claims by their members in pursuing or failing to pursue claims on their behalf

In the absence of a specific provision in its constitution, 'a trade union is not obliged to provide legal assistance to its members at its own cost to its members and could not be held liable to reimburse members for legal fees incurred.'²³⁹ However, a trade union is required to act in accordance with its mandate and in the best interests of its members; 'a failure to do so may render the union liable in delict to its members due to a breach of the duty of care.'²⁴⁰

In the matter of *Food & Allied Workers Union v Ngcobo NO & another*²⁴¹ the union undertook to lodge unfair dismissal disputes to the Labour Court on behalf of two employees who were unfairly dismissed, and they failed to do so. The union did not act as they had undertaken to and more than 19 months after their undertaking the union alleged that they were not obliged to assist the employees, as their attorney advised them that the employee's claim would fail and result in an adverse costs order. The employees claimed damages from the union and was successful in both the High Court and the Supreme Court of Appeals. The Supreme Court in dismissing the appeal held that the agreement which the union made with the employees constituted a mandate

²³⁴ Ibid at 1364-5

²³⁵ Ibid

²³⁶ Ibid 1352

²³⁷ Ibid at 1364

²³⁸ Ibid at 1365

²³⁹ Supra note 69 at 88; *Mokgata & others v Food & Allied Workers Union* (2007) 28 ILJ 2696 (T)

²⁴⁰ Supra note 69 at 88

²⁴¹ *Food & Allied Workers Union v Ngcobo NO & another* (2013) 34 ILJ 1383 (SCA)

which obliged the union to perform its functions 'faithfully, honestly and with care and diligence.'²⁴²

The union applied for leave to appeal to the Constitutional Court in *Food & Allied Workers Union v Ngcobo NO & another*²⁴³ the union accepted that it entered into an agreement with the members to provide legal assistance.²⁴⁴ The union's argument centered on the premise that it enjoyed 'special protection'²⁴⁵ in terms of the Constitution and its own constitution, which provided that 'the aims and objectives of the union include providing legal assistance to members and/or officials where it deems it in the interest of the union to do so.'²⁴⁶ The union further argued that their constitution 'must be read with its constitutional right to determine its own administration, programmes and activities'²⁴⁷ The Constitutional court held that a union's constitutional right to 'determine its own administration, programmes and activities' is not specific as to how the right is to be exercised nor does it provide 'immunity for damages'²⁴⁸ and that the union could not 'pursue its own interests with impunity.'²⁴⁹

The union further argued that as clause 5.11 of its constitution allowed for it to provide legal assistance to its members when it is in the interest of the union, then it was also entitled to withdraw the assistance when it ceased to be in its interest.²⁵⁰ The court in response to the union's argument in terms of clause 5.11 of its constitution held that:

'It does not imply a term into an agreement to provide legal assistance entitling the union to withdraw with impunity. The clause gives the union the freedom to contract to provide legal assistance, not the freedom not to perform its contracts. Even if the union could withdraw, it nonetheless had a duty to take that decision in good faith and to notify the employees promptly. These qualifications underlie the law of mandate: a mandatory must act in good faith, and may withdraw only if there is still time for the mandator to fulfil the mandate. The union did not do

²⁴² Ibid para 33

²⁴³ *Food & Allied Workers Union v Ngcobo NO & another* (2013) 34 ILJ 3061 (CC)

²⁴⁴ Ibid para 17

²⁴⁵ Ibid para 18

²⁴⁶ Ibid

²⁴⁷ Ibid

²⁴⁸ Ibid para 30

²⁴⁹ Ibid para 31

²⁵⁰ Ibid para 32

this. Rather, it seems to have cut the employees loose to protect itself from the unpalatable consequences of its failure to represent them properly.²⁵¹

The court took note of the fact that union's constitution provided that the union will take responsibility for the negligent action of those acting on its behalf and did not exclude the union itself from liability when they acted negligently.²⁵² The court held that this provision 'specifies the contrary: when those acting on its behalf are negligent, the union will take responsibility for them.'²⁵³ The court held that if the union was permitted to withdraw from a matter where it agreed to represent its members, it was still obliged to 'take such a decision in good faith'²⁵⁴ and inform the members timeously. It was also obliged to act in good faith and could only withdraw if the members could fulfill the mandate previously given to the trade union.²⁵⁵

A union has a duty of care in ensuring that it complies with its mandate, its constitution and that it acts in the best interests of its members. However a union cannot be held liable for the consequences flowing from an individual member's unauthorised actions in circumstances which exceed the union's mandate, whether acting alone or collectively.

In the matter of *SA Municipal Workers Union v Jada & others*²⁵⁶ the employees were successful with its damages claim against the union in the Magistrates Court. The cause of action arose from the employee's dismissal as a result of their participation in an illegal strike. The union appealed the lower court's decision in the Labour Court.²⁵⁷ The employees alleged that that the strike was 'instigated' by the union's shop steward, and therefore their participation and subsequent dismissal was the union's fault for failing to honor the 'duty of care' owed by the union.²⁵⁸ The court upheld the appeal, with costs, as it found that the employees were at all

²⁵¹ Ibid para 35

²⁵² Ibid 33

²⁵³ Ibid

²⁵⁴ Ibid 35

²⁵⁵ Ibid 35

²⁵⁶ *Municipal Workers Union v Jada & others* (2003) 24 ILJ 1344 (W)

²⁵⁷ Ibid at 1348

²⁵⁸ Ibid at 1349

material times aware that the strike was illegal.²⁵⁹ They appreciated the illegality of the strike yet chose to persist with that course of action and accordingly accepted the consequences that arose.²⁶⁰ The court further found that the industrial action was beyond the scope of the bargaining process and therefore the union did not owe the employees a duty of care in the circumstances. The court found that a union is a 'medium' through which members bargain and negotiate and members are responsible for their individual actions.

Section 158 (1) (e) of the Labour Relations Act gives the Labour Court power to preside over disputes between trade unions and their members relating to the interpretation of and non compliance with a union's constitution.²⁶¹ The union's right to represent its members is not unlimited and unions are expected to uphold its member's interests and constitutional rights in the exercise of their duties.²⁶²

²⁵⁹ Ibid 1353

²⁶⁰ Ibid

²⁶¹ Section 158 (1) (e) of the Labour Relations Act 66 of 1995

²⁶² Supra note 69 at 92

CHAPTER 6: A TRADE UNION'S LIABILITY FOR COST ORDERS

Section 162 of the LRA²⁶³ provides that a Labour Court may make an order for costs against a party to the dispute or their representative, 'according to the requirements of law and fairness.'²⁶⁴ The Court will take into account the costs incurred in matters that should not have appeared before it as well as the conduct of the parties in the matter before it. Further section 200 (2) of the LRA²⁶⁵ provides that a union is entitled to be a party to any proceedings if one or more of its members are a party to those proceedings. Therefore if a union is a party to the dispute section 162 of the LRA authorises a court to grant a cost order against a union.

If a union is not party to a dispute the only basis on which a court may make a costs order against it is costs *de bonis propis*.²⁶⁶ In the matter between *Shishava v West Rand Consolidated Mines Ltd*²⁶⁷ the court quoted the view of the learned authors Cameron Cheadle & Thompson in their book titled *The New Labour Relations Act*, which states that the discretion to order costs against a union official 'should be sparingly employed.'²⁶⁸ The reasoning which these learned authors adopt is that a union may in certain circumstances, being in a position of greater resource, knowledge and experience, ensure that justice is served by assisting individual litigants who are prejudiced by their lack of resources.²⁶⁹ Unions further may assist the court by properly presenting evidence, presenting proper argument and curbing proceedings.²⁷⁰ In these circumstances it would not be fair to penalise the union for their assistance.²⁷¹ The authors are further of the opinion that the discretion to award costs should only be exercised where the union are the real litigants and use the individual litigants as a front to avoid a costs order.²⁷² The court in this matter agreed with this position however differed on whether this should be the only

²⁶³ Section 162 of the Labour Relations Act 65 of 1995

²⁶⁴ Ibid

²⁶⁵ Section 200 (2) of the Labour Relations Act 65 of 1995

²⁶⁶ *National Union of Metalworkers of SA & others v Standard Brass, Iron & Steel Foundry Ltd t/a Malleable Castings* (1989) 10 ILJ 951 (IC) 958I

²⁶⁷ *Shishava v West Rand Consolidated Mines Ltd* (1991) 12 ILJ 1382 (IC) 1386 E-G

²⁶⁸ Ibid at 1386

²⁶⁹ Ibid

²⁷⁰ Ibid

²⁷¹ Ibid

²⁷² Cameron E, Cheadle H & Thompson C *The new Labour Relations Act -the law after the 1988 amendments* (1989)

factor on which a costs order can be awarded against a union.²⁷³ The court stated that a costs order will also be justified where a union conducts the litigation in an 'improper manner'.²⁷⁴

In the matter of *Moloi & another v Euijen & Another*²⁷⁵ the court in an *obiter*, in considering whether it would be competent for a court to order costs against the litigant as well as the representative, held as follows:

*'That would depend on whether the word 'or' in the phrase 'a party to the dispute or against any person who represented that party' is to be read conjunctively or disjunctively. There are difficulties in the way of a conjunctive reading. If the order were to impose joint and several liability (for the same costs) it might mean that the debtor against whom the successful party chooses to levy execution, pays the costs. This would fit ill with the purpose of a costs award de bonis propriis, which is to save the litigant from bearing the costs burden. However, I do not believe that the wording of section 162(3) precludes a court from ordering a representative to pay certain defined costs, or costs relating to a defined issue or costs wasted by a procedural irregularity, and from ordering the litigant to pay the rest. I should be distressed to be told that the legislature had by enacting section 162(3) intended to curtail the court's powers to fairly distribute a loser's costs in this way'*²⁷⁶

In the matter of *Simelane & others v Letamo Estate*²⁷⁷ the court in considering a claim for unfair dismissal of employees based on operational requirements found that the union had 'frustrated' the employer by its conduct.²⁷⁸ The further found that the union was a party to the dispute before it, that it was entitled to make a costs order against the union in terms of section 162 (3) of the LRA.²⁷⁹ The court accordingly granted a costs order against the union.²⁸⁰

In the matter of *Philander and Others v La Maison*²⁸¹ the Labour Court, having dismissed the applicant employees' claim for unfair dismissals following an unprotected strike, awarded a costs order against the union on the basis that the union supported the applicant's unlawful behavior

²⁷³ Ibid

²⁷⁴ Ibid

²⁷⁵ *Moloi & another v Euijen & Another* [2000] 5 BLLR 552 (LAC)

²⁷⁶ Ibid para 44

²⁷⁷ *Simelane & others v Letamo Estate* (2007) 28 ILJ 2053 (LC)

²⁷⁸ Ibid para 38

²⁷⁹ Ibid para 41

²⁸⁰ Ibid para 47

²⁸¹ *Philander and Others v La Maison* (2014) 35 ILJ 3222 (LC)

during the unprotected strike.²⁸²The court found that the union had compromised the employees' job security and accommodation and used their contributions to proceed with this matter in circumstances where the employees had no prospect of success.²⁸³ The court further found that the union's Secretary General did not care about its members interests.²⁸⁴ Based on these factors, the court found that the union was jointly and severally liable for costs.²⁸⁵

The union appealed the judgment *Philander and Others v La Maison*²⁸⁶ solely on the order of costs.²⁸⁷ On appeal it was held that the court's decision to grant a costs order against a party is 'discretionary'²⁸⁸ and an appeal court will not easily interfere in such a decision unless:

*'the court a quo acted capriciously, upon a wrong principle, in a biased manner, for unsubstantial reasons, or committed a misdirection or irregularity, failed to exercise its discretion, or exercised its discretion improperly or unfairly'*²⁸⁹

The appeal court found that the court *a quo* took into account the 'reckless conduct of the union'²⁹⁰ and 'the fact that the union endangered its members' livelihood by sanctioning and supporting their misconduct'²⁹¹ and found that court a quo did not act improperly or capriciously in the exercise of its discretion regarding costs.²⁹² The appeal court found that the union had no prospect of success on appeal.²⁹³

In the matter of *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Workers Union & others*²⁹⁴ the learned Judge stated that:

'This court must necessarily express its displeasure in the strongest possible terms against the misconduct that the individual respondents do not deny having committed, and against unions

²⁸² Ibid para 54

²⁸³ Ibid

²⁸⁴ Ibid

²⁸⁵ Ibid

²⁸⁶ *Philander and Others v La Maison* [2015] ZALCCT 30

²⁸⁷ Ibid para 1

²⁸⁸ Ibid para 20

²⁸⁹ Ibid para 18

²⁹⁰ Ibid para 24

²⁹¹ Ibid

²⁹² Ibid

²⁹³ Ibid para 29

²⁹⁴ Supra note 15

*that refuse or fail to take all reasonable steps to prevent its occurrence. Had the applicant not specifically confined the relief sought to an order for costs on the ordinary scale, I would have had no hesitation in granting an order for costs as between attorney and own client.*²⁹⁵

In the matter of *Verulam Sawmills (Pty) Ltd v Association of Mineworkers & Construction Union & Others*,²⁹⁶ where the union members had breached a picketing agreement concluded by the union and the employer and the union did not actively curtail the unlawful conduct of the striking members, the court relying on the principles set out in *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Workers Union & others* held that:

*'This court will not hesitate in such circumstances to grant a punitive costs order against the union concerned. This is consistent with the general principles applicable to the award of a punitive costs order (such as costs on an attorney and client scale), which include that such an order is warranted where the conduct of the party concerned is vexatious and unreasonable. The order is granted as a mark of the court's disapproval of the offending party's conduct — in this case, both the strikers and AMCU itself'*²⁹⁷

²⁹⁵ Ibid para 14

²⁹⁶ Supra note 82

²⁹⁷ Ibid para 22

CHAPTER 7: A TRADE UNIONS' LIABILITY FOR CONTEMPT OF COURT ORDERS

The Labour Court has exclusive jurisdiction to grant an interdict or to grant an order to restrain strike action or acts in furtherance of a strike, which do not comply with the provisions of the LRA. An interdict or an order to restrain is a court order and therefore compliance is peremptory. Where a person fails to comply with an order of court, that person can be found to be guilty of contempt of court.

Contempt of court is defined as 'the unlawful intentional violation of the dignity or repute of a judicial authority or the interference in a matter of justice, in a matter pending before it.'²⁹⁸ In the case of *S v Beyers*²⁹⁹ it was held that contempt of court is a criminal offence which can be prosecuted by civil or criminal proceedings.

The Constitution of the Republic of South Africa 1996, states that 'the courts are vested with judicial authority and that no person or organ of state may interfere with the functioning of the court.'³⁰⁰ Further 'a court order binds all persons and organs of state to which it applies.'³⁰¹ The rationale for the criminalisation of contempt of court orders finds credence in the necessity of our courts to maintain its authority and dignity in order to be effective. In the absence of consequences for the deliberate failure to obey a court order, court orders are rendered ineffective. It has been held in *Pheko and Others v Ekurhuleni Metropolitan Municipality*³⁰² 'continual non compliance with court orders and decisions would, inevitably, lead to a situation of constitutional crisis.'³⁰³

In the matter of *Fakie No v CCII Systems (Pty) Ltd*,³⁰⁴ the Constitutional Court, in considering the 'constitutional characterisation' of a contempt of court order, held that:

'It is a valuable mechanism. It permits a private litigant who has obtained a court order requiring an opponent to do or not do something (ad factum praestandum), to approach the court again, in

²⁹⁸ Johnathan Burchell *Principals of Criminal Law* 4th ed (2013) 838

²⁹⁹ *S v Beyers* 1968 (3) SA 70 (A)

³⁰⁰ S165 (1) and s 165 (3) of the Constitution of the Republic of South Africa 1996

³⁰¹ S165 (5) of the Constitution of the Republic of South Africa 1996

³⁰² *Pheko and others v Ekurhuleni Metropolitan Municipality (SocioEconomic Rights Institute of South Africa as amicus curiae)* (No 2) 2015 (6) BCLR 711 (CC)

³⁰³ *Ibid* para 26

³⁰⁴ *Fakie No v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA)

*the event of non-compliance, for a further order declaring the non-compliant party in contempt of court, and imposing a sanction. The sanction usually, though not invariably, has the object of inducing the non-complier to fulfill the terms of the previous order*³⁰⁵

A party, to whom a court order is applicable, has no discretion in the portions of the order it will comply with, nor can such party disregard the order on the assumption or belief that the order is incorrect. In *North West Star (Pty) Ltd (under judicial management) v Serobatse & another*³⁰⁶ it was held that:

*'Such a situation would be a license for people to disregard orders of courts simply because they do not agree with the court that such orders should have been issued. A society that would allow such would in no time be a society of chaos and lawlessness. To do so would sow in society a culture in terms of which people felt free to obey only those court orders with which they agreed or to obey only those laws which they like and to disregard those laws they do not like... such a principle has no place in our legal system'*³⁰⁷

In order to succeed with an application for contempt of court against a non-performing party, the following test, as applied in *Fakie No v CCII Systems (Pty) Ltd*,³⁰⁸ must be met:

*'The applicant must prove the requisites of contempt (the order; service or notice; non compliance; and wilfulness and mala fides) beyond reasonable doubt. But once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden in relation to wilfulness and mala fides: should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and mala fide, contempt will have been established beyond reasonable doubt'*³⁰⁹

Therefore in order to succeed with an application for contempt of court an applicant must prove the existence of a valid court order that the order has been served on the respondent and that there has been non-compliance of the order by the respondent. The burden of proof then shifts to the respondent who must adduce sufficient evidence to establish reasonable doubt regarding its

³⁰⁵ Ibid para 7-8

³⁰⁶ *North West Star (Pty) Ltd (under judicial management) v Serobatse & another* (2005) 26 ILJ 56 (LAC)

³⁰⁷ Ibid para 18

³⁰⁸ Supra note 304

³⁰⁹ Ibid para 42

willingness to defy the court order. The applicant need not prove the respondent's motive or state of mind, merely the existence of a valid court order, proper service and non compliance by the respondent. If the respondent does not adduce sufficient evidence to create reasonable doubt as to its willful defiance, it is likely that the court will find the respondent guilty of contempt. However, once the evidentiary burden shifts the respondent does not have to disprove willingness or *mala fides*, it merely has to adduce sufficient evidence to create reasonable doubt.³¹⁰ The consequences of being held in contempt of court may include the payment of a fine as determined by court, imprisonment in certain circumstances and any order which the court deems just and equitable.

Section 68 (1) of the LRA clothes the Labour Court with exclusive jurisdiction to grant an interdict against 'any person'. In accordance with section 97 of the LRA, a trade union acquires legal personality upon registration. Therefore a Labour Court may interdict a trade union compelling it to perform as ordered. It would not be difficult for an applicant to succeed with an application for contempt of a court order against individual participants identified in an unprotected strike, and such guilt will be established upon proof of the abovementioned factors. An application for contempt of a court order against a union may prove to be a more difficult task.

In the matter of *In2Food (Pty) Ltd v FAWU*³¹¹ the court found the union guilty of contempt of the court order in that they failed to stop the continuance of the unprotected strike by its members which had resulted in damages of more than R 16 000 000. The court authorised a fine against the union in the amount of R 500 000. On appeal in *FAWU v In2Food (Pty) Ltd*³¹² the Appeal Court, in rejecting the finding of the court *a quo*, held that the question of whether a union can be found guilty of contempt of a court order depends on whether there is proof of the union committing the breach, as opposed to the individual union members on strike.³¹³ Whilst a union may in certain circumstances be held vicariously liable for acts committed by their officials and its members, they cannot be vicariously guilty of contempt of a court order.³¹⁴ In this regard the

³¹⁰ Supra note 304 para 23

³¹¹ *In2Food (Pty) Ltd v FAWU* (2013) 34 ILJ 2589 (LC)

³¹² *FAWU v In2Food (Pty) Ltd* (2014) 35 ILJ 2767 (LAC)

³¹³ Ibid para 8

³¹⁴ Ibid para 12

court held that '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'³¹⁵

The Labour Appeal Court considered the court order, which required that the union and the employees be interdicted and restrained from continuing with their illegal and unprotected strike action and found that the wording of the order was too broad and vague. The court held that:

*'Bearing in mind the quasi-criminal sanction for a breach, it is to be expected from the text of an order that the party interdicted is left in no reasonable doubt as to what exactly is to be done or refrained from....An interdict order against a union should prudently state plainly what action is mandatory, and not elide the union's obligations with that of its members. The terminology of, 'continuing' the strike, whatever broad meaning might be attributed to that term, is, in my view, too vague to be useful in a context where quasi-criminal sanctions are at issue'*³¹⁶

The court in upholding the appeal did not dispute the sentiments of the court a quo regarding a union's duty to prevent unlawful behavior by its members, however, given the particular facts of the matter, the respondent was unable to show that that the union itself had been in breach of the court order. It held further that the order was too vague and it did not set out exactly what the union was required to do or refrain from.

In the matter of *Anglo American Platinum Ltd & Another v AMCU & Others*³¹⁷ the applicant sought an order *inter alia* that the union be found guilty of contempt of court for failing to comply with an interim order.³¹⁸ In dismissing the application, the court held that:

'There is an element of ambiguity in the order. Once there is ambiguity and ambivalence in an order, it will generally not be open to a court to make a finding of wilful non-compliance and mala fides, especially where the respondents rely, as they do in the present instance, on an

³¹⁵ Ibid para 12

³¹⁶ Ibid para 13

³¹⁷ *Anglo American Platinum Ltd & Another v AMCU & Others* (2014) 35 ILJ 2832 (LC)

³¹⁸ Ibid note 317: The interim order interdicted and restrained the union from instigating, inciting or engaging the second and further respondents in engaging, inciting or instigating any unlawful conduct interfering with or aimed at interfering with the business of the applicants, any unlawful conduct intimidating and/or preventing any of the applicants' employees, especially the employees involved in essential services, minimum services, maintenance services and other services critical to the Applicants' health and safety obligations, the general upkeep and operation of the mine from tendering their services to the Applicants.

*interpretation of an order that is not far-fetched or unreasonable and where their conduct is not in conflict with their understanding of the terms of order so understood*³¹⁹

In the matter of *Xstrata South Africa (Proprietary) Limited v Association of Mine Workers and Construction Union & others*³²⁰ the court granted an interim interdict against employees, ordering them to desist their unlawful behavior and participation in the alleged unprotected strike. The court also granted a specific order requiring the union to ensure that their members comply with the portions of the order which related to them. The applicant sought an order confirming the interim orders and further an order holding the union in contempt of what was referred to as the 'ensure compliance' order. The union opposed the application on the basis that the 'ensure compliance' order would place an obligation on the union for which there was no legal basis and further that the any order requiring the union to 'physically police' its members would result in 'disastrous consequences'. The court in confirming the 'ensure compliance order' held that unions are expected to take reasonable measures to ensure that their members comply with court orders.³²¹ Having confirmed the 'ensure compliance' order, the court considered the application to hold the union in contempt of court. The court found the union not guilty of contempt of court on the following basis. Firstly, the applicant failed to ensure proper service of the court order in which regard the court held that:

*'Where a Court has ordered that its order should be served on the respondents and other affected parties in a specific manner, it would be required of the applicant party to serve that order in the manner prescribed. There can be no deviations or half-measures in respect of the directive of the Court concerning the service of its orders, unless the applicant can show that it was not possible to effect service in the manner prescribed, or alternatively service in the manner prescribed by the Court was frustrated by some factors beyond its control. The reasoning behind this view is that the Court, more specifically in urgent applications, is guided by the applicant as to how service should be effected in order for compliance to follow, and furthermore, the Court ordinarily takes into account the circumstances of the application in deciding on the manner of service of its orders'*³²²

³¹⁹ Supra note 317 para 11

³²⁰ Supra note 13

³²¹ Ibid para 43

³²² Ibid para 53

The second basis on which the contempt of court application failed was the courts finding that the union did not willfully disregard the courts order. The court found that the fact that some union officials acted on the order indicated that the union itself did not willfully disregard the court order, even in circumstances where others might not have complied with the order. The court further found that the applicant could not 'specifically target' the union, particularly when it 'created the conditions for non compliance by not properly serving the court order.'³²³

In the matter between *Ciro Beverage Solutions v SATTAWU*³²⁴ the applicant sought orders declaring the individual members of the union to be in contempt of court. Despite the violent acts perpetrated in furtherance of the strike, the court found that the respondents were not guilty of contempt of court as the applicant did not succeed in proper service of the court order, albeit, service was partially in compliance with the court order. The court held that it would not be moved by 'maudlin sentimentality' and held that service of the court order is a 'critical element to satisfy.'³²⁵

In the recent judgment of *Pikitup Johannesburg (Pty) Ltd v SA Municipal Workers Union & another*³²⁶ the union and its general secretary were called upon to show cause why they should not be held in contempt of a court order. In terms of the court order, the union and the general secretary were interdicted from inciting and encouraging their members, including the other respondents, from continued participation in the unprotected strike as well as unlawful acts in furtherance of the strike.³²⁷ They were further directed to notify its members of the court order and to ensure their members compliance with the order.³²⁸ The court found that the union and their general secretary did not prove beyond a reasonable doubt that it did not willfully defy the court order³²⁹ and held the union liable for a fine of R 80 000 which was suspended for 24 months on certain conditions and the general secretary of the union liable for a fine of R 10 000 which was suspended for 24 months on certain conditions.³³⁰

³²³ Ibid para 58

³²⁴ ZALCJHB (12 Dec 2013) case number J2630/13

³²⁵ Ibid para 33

³²⁶ *Pikitup Johannesburg (Pty) Ltd v SA Municipal Workers Union & another* (2016) 37 ILJ 1710 (LC)

³²⁷ Ibid para 1

³²⁸ Ibid

³²⁹ Ibid para 37

³³⁰ Ibid para 40

CHAPTER 8: CONCLUSION

When exercising the constitutionally guaranteed right to strike, every person, including every trade union must be vigilant to ensure that the rights of employers and the public are not unlawfully infringed by the strike or conduct in furtherance of the strike. Therefore when any person, including a trade union, acts in a manner that is contrary to the object and purpose of a peaceful and democratic society the courts have demonstrated a willingness to attach liability to those actions.

The legislature has set out specific criteria which are not burdensome, to ensure that the right to strike is exercised within the bounds and protection of the law. It has been held that it is not difficult to ensure compliance with the requirements for a protected strike.³³¹ A court will not automatically find that a union is liable to compensate an employer who suffers loss as a result of an unprotected strike. However if an employer can prove that a trade union has instigated, supported and participated in an unprotected strike, or that they failed to take reasonable steps to intervene in an unprotected strike, then they will be found liable. A trade union has a 'collective bargaining relationship with an employer'³³² and therefore has a duty to ensure that its members comply with the LRA and a further duty to intervene when their members do not comply with the LRA.

Where a strike complies with the provisions of the LRA and it has acquired protected status, the immunity that comes from that protection is limited to lawful conduct. Violence and malicious damage to property during a protected strike cannot be condoned. In *FAWU obo Kapesi v Premier Foods Ltd t/a Blue Ribbon Salt River*³³³ it has been held that:

'It is certainly not acceptable to force an employer through violent and criminal conduct to accede to their demands. This type of vigilante conduct not only seriously undermines the fundamental values of our Constitution, but also serves to seriously and irreparable undermine future relations between strikers and their employer. Such conduct further completely negates the

³³¹ Supra note 59 para 51

³³² Ibid para 47

³³³ *FAWU obo Kapesi v Premier Foods Ltd t/a Blue Ribbon Salt River* (2010) 31 ILJ 1654 (LC)

*rights of non-striking workers to continue working, to dignity, safety and security and privacy and peace of mind.*³³⁴

Where the members of a union embark on a protected strike, the union has a duty to take steps to ensure that its members do not commit acts of violence or malicious damage to property. Where such conduct is identified the union should at the very least distance themselves from the conduct, take reasonable steps to mitigate any damage or loss and assist the employer in identifying the employees engaged in the unlawful conduct. A union can be held vicariously liable for the damage caused by their members if it can be proved that the union 'authorised, instigated or ratified' the conduct of their members.³³⁵

A strike in terms of the LRA limits the potential damage to an employer. This differs significantly from a gathering in terms of the RGA. Where a union organises a gathering in a public place in terms of the RGA, the potential for damage and affected persons is cast much wider. It is imperative that when considering section 17 and section 23 of the Constitution it must be borne in mind that these rights are qualified by the requirement that they are to be exercised peacefully at all times having due regard to the rights of others.

By its very nature, a strike or gathering is directed at getting a party to accede to a demand that it had previously refused. The reality is that strikes and gatherings will in most cases result in frustrated participants. When a union makes a decision to call on its members to participate in a gathering, particularly where members of the public are exposed to the gathering, it would be difficult for the union to rely on a defence that it did not or could not foresee riot damage. By calling for a gathering with the inherent risks of the potential for riot damage, the union will be held jointly and severally liable for the failure to take reasonable steps to prevent the damage.

Trade unions are often before the courts either as a party to a dispute or acting in a representative capacity. However unions are immune to the consequences that flow from their conduct in a dispute or their actions in taking legal steps in furtherance of its member's collective or individual interests. Nonetheless a court is empowered to make costs orders against a union and also find them guilty of contempt of court orders.

³³⁴ Ibid para 6

³³⁵ Supra note 11 para 37

Case law demonstrates that the courts are willing to make punitive costs orders against unions in matters concerning unlawful conduct perpetrated during protected strikes or matters involving participation in unprotected strikes. The risk of an adverse costs order should not deter unions from exercising its right nor should it be a limitation on the ability to represent its members, provided that the union exercises its duties in a reasonable and lawful manner.

Whilst a trade union can be found guilty of contempt of a court order, proof of all the elements required for an applicant to succeed is exacting. Applicants will have to prove the existence of a valid court order, proper service of the order and non compliance with the order by the union. At the very outset applicants should, in securing interdicts, ensure that their application papers are meticulously prepared leaving no room for ambiguity, either in the directives pertaining to service of the order or the wording of the interdict itself. The court's finding in *Xstrata South Africa (Proprietary) Limited v Association of Mine Workers and Construction Union & others*³³⁶ is authority for the position that a court can order a union to ensure compliance by its members, in circumstances envisaged by section 68 of the LRA. Anton Myburgh³³⁷ is of the opinion that an 'ensure compliance' order, in the matter of *Ciro Beverage Solutions V SATAWU*,³³⁸ would have aided the applicants in securing proper service.³³⁹ It may prove to be a useful tool for applicants and a safety net to incorporate an order requiring a union to ensure compliance with the courts orders and further to specify in exact terms what the union is to do to ensure compliance.³⁴⁰

In *Pikitup Johannesburg (Pty) Ltd v SA Municipal Workers Union & another*³⁴¹, the court made a noteworthy remark regarding a union's non compliance with a court order stating that:

'When prominent public figures, civil institutions like trade unions, organs of state or private corporate bodies which exercise economic power are selective in the respect they display for court orders, that kind of conduct tends to promote a view that compliance with court orders is a matter of preference rather than an unavoidable legal obligation. When persons or institutions in positions of power or influence express those sentiments, such conduct can powerfully affect

³³⁶ Supra note 13

³³⁷ Anton Myburgh 'Contempt of court in the context of strikes and violence' (2014) Vol 23 *CLL* 109

³³⁸ Supra note 324

³³⁹ Supra note 337 at 117-18

³⁴⁰ Ibid at 119

³⁴¹ Supra note 326

*public sentiment and in turn undermine the rule of law as a foundational principle of our constitutional order. We no longer labour under an undemocratic order where the legitimacy of certain laws and court orders made under them was questionable. Obviously that does not mean courts are above criticism. Moreover, parties who are aggrieved by a court's decision are not remediless and may seek leave to appeal*³⁴²

Trade unions are cautioned to take court orders seriously and ensure compliance by their members. Advocate Myburgh opines that 'unions would be well advised to take heed of these judgments, as the judicial net is clearly tightening around those of them who do not comply with court orders.'³⁴³

Limitations on the rights afforded by the Constitution are designed to ensure that every person has the full benefit and protection of the law. The contributions and value of trade unions in our democracy cannot be denied. Trade unions have from the dawn of its inception provided a useful tool to employees to promote and advance their right to dignity, equality and freedom in a democratic society. What has always been key to promoting a democratic society is the ability of the rights holder to exercise them without infringing on the rights of others. The courts have held that 'it is a fundamental value and an obligation of a democratic society that every right be exercised with due regard to the rights of others.'³⁴⁴

³⁴² Ibid para 27

³⁴³ Supra note 37 at 109

³⁴⁴ Supra note 11 para 22

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31 October 2016

Mrs Annerly Pearl Kannigan (207502047)
School of Law
Howard College Campus

Dear Mrs Kannigan,

Protocol reference number: HSS/1843/016M

Project title: The nature and extent of liability incurred by a trade union, in their role as representatives of their members

Full Approval – No Risk / Exempt Application

In response to your application received on 28 October 2016, the Humanities & Social Sciences Research Ethics Committee has considered the abovementioned application and the protocol have been granted **FULL APPROVAL**.

Any alteration/s to the approved research protocol i.e. Questionnaire/Interview Schedule, Informed Consent Form, Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through the amendment/modification prior to its implementation. In case you have further queries, please quote the above reference number.

PLEASE NOTE: Research data should be securely stored in the discipline/department for a period of 5 years.

The ethical clearance certificate is only valid for a period of 3 years from the date of issue. Thereafter Recertification must be applied for on an annual basis.

I take this opportunity of wishing you everything of the best with your study.

Yours faithfully

Dr Shenuka Singh (Chair)

/ms

Cc Supervisor: Professor Tamara Cohen
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Appendix A - 2