

THE IMPACT OF VIOLENCE DURING STRIKE ACTION ON PROTECTED STRIKES

By

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DECLARATION

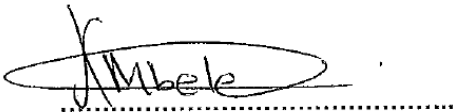
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In accordance with Rule G4.6.3, I hereby declare that the above-mentioned thesis is my own work and that it has not previously been submitted for assessment to another University or for another qualification.

A handwritten signature in black ink, appearing to read 'X Mbeleni', is written over a horizontal dotted line. The signature is enclosed within a hand-drawn oval.

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Date: 24 March 2017

Port Elizabeth

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I would first like to thank the Lord for his continued Blessings and grace by providing me with strength, wisdom and ability to complete this thesis.

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Xolani Mbeleni
Grahamstown

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1 INTRODUCTION

1.1 Background

The history of strike action in South Africa has been characterised by the prohibition on strikes and exclusion of black workers from labour legislation and violence. In the apartheid era strikes were illegal. To begin with, the Railway Regulation Act of 1908 prohibited white railway employees from striking and criminalised all forms of strike action.¹ Subsequently, the Industrial Disputes Prevention Act of 1909 was enacted to regulate strike action by introducing conciliation procedures but the Act only applied to white workers and thus excluded from its scope, black workers.² However, despite the exclusion of black workers from the said act, there was a major strike action by white industrial workers from 1913 to 1914.³ In the aftermath of World War one, further strikes ensued in the gold mining industry with black workers commencing strike action in the period between 1918 up to 1920.⁴ This was followed by the strikes of 1922 by white workers which collectively became known as the Rand Revolt or Rand Rebellion where more than 200 workers were killed in the violence which ensued.⁵

In 1924 the legislature enacted the Industrial Conciliation Act 11 of 1924 (ICA), which provided for the creation of industrial councils, with powers of negotiation and wage determination and the registration of trade unions.⁶ The ICA however, excluded from its ambit, civil servants, agricultural workers, domestic workers and contract Africans.⁷ The rights of black workers continued to be limited, in particular the Labour Relations Act 28 of 1956, which criminalised strikes by black workers. Despite such criminalisation, black workers continued to engage in industrial action, which became more frequent in the beginning of the 1970's.⁸

The 1979, amendments to the ICA resulted in the inclusion of black workers in the ambit of the Act's dispute resolution mechanisms as well as the recognition of black

¹ Myburgh "100 Years of Strike Law" 2004 25 *Industrial Law Journal* 962 962.

² Myburgh 2004 *Industrial Law Journal* 963.

³ *Ibid.*

⁴ Hirson "The General Strike of 1922" 1993 3 *Searchlight South Africa* 63 67.

⁵ Coal "Control and Class Experience in South Africa's Rand Revolt of 1922" 1999 19 *Comparative Studies of South Asia, Africa and the Middle East* 31 31.

⁶ Myburgh 2004 *Industrial Law Journal* 963.

⁷ Myburgh 2004 *Industrial Law Journal* 964.

⁸ *Ibid.*

trade unions.⁹ In the current constitutional dispensation, industrial action has been decriminalised and is entrenched in section 23 of the Constitution of South Africa which provides for the right to strike. In line with the Constitution, the Labour Relations Act 66 of 1995 (LRA) as amended provides in section 64(1) that every employee has the right to strike.

The right to strike, like any other right, has limitations and these are provided for in section 64 and 65 of the LRA.¹⁰ Apart from the limitations in section 64 and 65, the LRA has a number of implicit limitations on the right to strike.¹¹ For the purposes of this study two implicit limitations are noteworthy. First, the strike must be orderly¹² and Second, the strike must not involve misconduct.¹³

Despite the entrenchment of the right to strike, South Africa continues to witness violent strikes. Such violence during strike action can be attributed to the deficiencies in the South African bargaining system, the use of replacement labour and the contact between striking and non-striking employees.¹⁴ In addition, strike violence can be attributed to worker frustration¹⁵ and income inequality, high levels of unemployment and poverty.¹⁶

⁹ Myburgh 2004 *Industrial Law Journal* 964.

¹⁰ Section 64 requires the issue giving rise to the strike to have been referred to a council or to the Commission as required by the Act; the issuing of a certificate stating that the dispute remains unresolved; or the lapse of a period of 30 days, since the referral was received by the council or the Commission. The section also requires a 48 hours' notice of the commencement of the strike in writing to be delivered to the employer. Section 65 prohibits the taking part in a strike where the workers are bound by a collective agreement that prohibits a strike or lock-out in respect of the issue in dispute; where the workers are bound by an agreement that requires the issue in dispute to be referred to arbitration; where the issue in dispute is one that a party has the right to refer to arbitration or to the Labour Court in terms of the LRA; where the workers are engaged in- an essential service; or a maintenance service. In addition the section prohibits, subject to a collective agreement, workers to take part in a strike if they are bound by - any arbitration award or collective agreement that regulates the issue in dispute; or any determination made in terms of section 44 by the Minister that regulates the issue in dispute; or any determination made in terms of the Wage Act and that regulates the issue in dispute, during the first year of that determination.

¹¹ Rycroft "Can a Protected Strike Lose Its Status?" 2012 33 *Industrial Law Journal* 821 822.

¹² Rycroft 2012 *Industrial Law Journal* 823.

¹³ *Ibid.*

¹⁴ Tenza "An Investigation Into the Causes of Violent Strikes in South Africa: Some Lessons From Foreign Law and Possible Solutions" 2015 19 *Law Democracy & Development* 211.

¹⁵ Brassey "Labour Law After Marikana: Is Institutionalized Collective Bargaining in SA Wilting? If So, Should We Be Glad or Sad?" 2013 24 *Industrial Law Journal* 823 829.

¹⁶ Ngcukaitobi "Strike Law, Structural Violence and Inequality in the Platinum Hills of Marikana" 2013 34 *Industrial Law Journal* 836 846.

Considering the continued occurrence of violent strikes, this research examines the impact of violence during protected strikes. In this regard the matter of *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Workers Union*¹⁷ is noteworthy and sets the tone of this research paper. In this case workers were engaged in a protected strike.¹⁸ The strike subsequently turned out to be violent, with workers blocking roads, throwing bricks at the Police, assaulting patrons and damaging their cars.¹⁹ The employer obtained an urgent interdict against the striking employees.²⁰ On the return date the court expressed its displeasure in the conduct of the striking employees and on the Union for failing to take reasonable steps in order to prevent the violence.²¹ Van Niekerk J stated the following:

“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.”²²

Rycroft argues that it is the above statement in the court’s decision which:

“opens a door to argue that a strike marred by misconduct loses its protected status. This in turn means that the protection from dismissal falls away and the strikers can be sued for financial loss.”²³

In light of this background this research will investigate the legal consequences of violence during protected strikes.

1 2 Problem statement

This research investigates the following research problem: what is the impact of violence during strike action on protected strikes?

¹⁷ (2012) 33 ILJ 998 (LC).

¹⁸ *Tsogo Sun Casinos v Future of SA Workers Union* (2012) 33 ILJ 998 (LC)1000

¹⁹ *Tsogo Sun Casinos v Future of SA Workers Union* 1001

²⁰ *Tsogo Sun Casinos v Future of SA Workers Union* 1000

²¹ *Tsogo Sun Casinos v Future of SA Workers Union* 1003.

²² *Tsogo Sun Casinos v Future of SA Workers Union* 1004

²³ Rycroft 2012 *Industrial Law Journal* 826.

1 3 Research questions

This research will investigate the following three main questions:

- i. What is the legal framework governing the right to strike?
- ii. How does the LRA regulate violence during protected strikes?
- iii. What are the legal implications of violence during strikes?

1 4 Hypothesis

During protected strikes workers are protected from civil and delictual liability and dismissal for taking part in a strike. The situation is different when workers resort to violence. At the minimum, the workers may be dismissed for misconduct during the strike or for operational requirements of the business / employer. In certain circumstances the strike may lose its status as a protected strike and expose the workers and union to claims for damages incurred by the employer.

1 5 Research objectives

This research has five important objectives. First, to outline the legal frame work regulating the right to strike. Outlining this legal framework is important in that it will provide an understanding of both the right to strike and the concept of a protected strike. it is crucial to understand what a protected strike is because the concept underlies the entire research. Without understanding it, it will be impossible to answer the main research question.

Second, to investigate the causes of violence during protected strikes. An examination of the causes of violence enables the study to suggest possible solutions to end violent strike action in future. After all the LRA envisages in section 1, labour peace and an effective resolution of disputes.

Third, to examine how the LRA regulates the use of violence during protected strikes. An understanding of how the LRA regulates violent strike action is important since the LRA is an important piece of legislation which governs South African labour relations. It is important to obtain guidance on how the law regulates such conduct.

Fourth, to ascertain the courts' approach towards violence during strikes. The courts' approach helps us understand how the courts will deal with strike violence during

protected strikes. It is also noteworthy that case precedents in this regard will be of importance when faced with similar acts of violence during strike action. Fifth, to examine the legal implications of violence during protected strikes. This objective directly answers the main research question and this will enable the study to offer possible recommendations in the final chapter of this study.

1 6 Thesis statement

Various consequence flow from the use of violence during protected strikes. Employees who resort to violence while taking part in a protected strike may be dismissed for misconduct²⁴ or for the operational requirements of the employer.²⁵ Employees together with their union may be required to pay for the costs incurred by the employer where the employer approaches the court to interdict the violent conduct of strikers.²⁶ Trade unions have a responsibility to ensure that their members act responsibly when exercising right to strike, in order to avoid delictual liability for losses incurred by the employer provided that the employer can prove vicarious liability.²⁷ Workers who engage in acts of violence during a protected strike risk that the strike may lose its status as a protected strike.²⁸

1 7 Literature review

The common law position on the consequences of taking part in a strike is different from the position under the LRA. In *Atlas Organic Fertilizers v Pikkewyn Ghwano*²⁹ the court noted that under the common law a person who takes part in a strike may be held liable for breach of contract and losses incurred by the employer where the employer can prove delictual liability.³⁰

²⁴ *National Democratic Change & Allied Workers Union v Cummins Emission Solutions (Pty) Ltd* (2014) 35 ILJ 2222 (LC) 2234.

²⁵ Section 67(5) of the LRA; *SA Chemical Workers Union v Afrox Ltd* (1999) 20 ILJ 1718 (LAC) 1725.

²⁶ *SA Airways Technical (SOC) Ltd v SA Transport & Allied Workers Union* (2014) 35 ILJ 1638 (LC); *Ekurhuleni Metropolitan Municipality v SA Municipal Workers Union* (2011) 32 ILJ 1686 (LC); *Verulam Sawmills (Pty) Ltd v Association of Mineworkers & Construction Union* (2016) 37 ILJ 246 (LC).

²⁷ *Food & Allied Workers Union v In2Food (Pty) Ltd* (2014) 35 ILJ 2767 (LAC); *Mondi Ltd (Mondi Kraft Division) v Chemical Energy Paper Printing Wood & Allied Workers Union* (2005) 26 ILJ 1458 (LC); *South African Transport & Allied Workers Union & Congress of South African Trade Unions v Jacqueline Garvis* 2012 (8) BCLR 840 CC.

²⁸ *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Workers Union* 998.

²⁹ (1981) 2 SA 173 (T).

³⁰ *Atlas Organic Fertilizers v Pikkewyn Ghwano* 202G.

The LRA however, prohibits the dismissal of employees who take part in a protected strike³¹ and workers are also protected from delictual or contractual liability.³² The court in *Chemical Energy Paper Printing Wood & Allied Workers Union v Metrofile (Pty) Ltd*,³³ however, warned that taking part in a protected strike does not give workers the right to engage in misconduct.³⁴ Where workers engage in misconduct the employer may institute disciplinary proceedings during the strike against the striking employees.³⁵

Section 67(5) of the LRA also permits the employer to dismiss an employee because of the operational requirements of the business. When it comes to the impact of violence during strikes and dismissal for operational requirements, two cases are worth noting. First, *Food & Allied Workers Union obo Kapesi v Premier Foods Ltd t/a Blue Ribbon Salt River*³⁶ (Kapesi 1) in the Labour Court. In *Kapesi 1* the court held that where the misconduct of the striking workers causes the business to cease to be economically viable, the employer may commence the section 189 process and retrench the workers under the banner of operational requirements.³⁷

Second, *Food & Allied Workers Union obo Kapesi v Premier Foods Ltd t/a Blue Ribbon Salt River*³⁸ (Kapesi 2) in the Labour Appeal Court. On appeal, the Labour Appeal Court In *Kapesi 2* held that the employer must prove that the workers selected for the retrenchments had committed acts of violence in order to satisfy the requirement that the selection criteria was fairly and objectively applied.³⁹

Viewed together, the *Kapesi* cases show that when faced with strike misconduct such as violence, an employer must institute disciplinary action against those employees. The avenue of retrenchment must only be used when the employer can prove that the economic viability of his business has been affected by the conduct of the striking employees.

³¹ S 67(4) of the LRA.

³² S 67(6) of the LRA.

³³ (2004) 25 ILJ 231 (LAC).

³⁴ *Chemical Energy Paper Printing Wood & Allied Workers Union v Metrofile* 246.

³⁵ *Ibid.*

³⁶ (2010) 31 ILJ 1654 (LC).

³⁷ *FAWU obo Kapesi v Premier Foods Ltd t/a Blue Ribbon Salt River* 38; 66.

³⁸ (2012) 33 ILJ 1779 (LAC).

³⁹ *FAWU obo Kapesi v Premier Foods Ltd t/a Blue Ribbon Salt River* 33.

Brassey proposes that damages claims be brought against workers who engage in violent conduct during strikes.⁴⁰ He further proposed that Unions which fail to control their members must be deregistered.⁴¹ Holding the union accountable for damages caused by workers during violent strikes does not seem to be an easy task. In *Mondi Ltd v CEPPWAWU*,⁴² workers who were engaged in a protected strike switched off the employer's machinery resulting in the employer incurring damages of R673 000. The employer claimed the damages from the Union on the basis of vicarious liability. The court held that the employer had to prove that the Union acted in common purpose by authorising the switching off of the machines and to identify the employees involved.⁴³ The employer failed to prove both and thus the court held that the Union could not be held vicariously liable.⁴⁴

In a controversial judgment, the Constitutional Court came to a different decision. In *South African Transport & Allied Workers Union & Congress of South African Trade Unions v Jacqueline Garvis*⁴⁵ the court imposed strict liability on the organisers of a strike for damage caused to the property of others. Woolman in a critical commentary of the *Garvis* case disapproves the notion of imposing strict liability for any damage caused to property or through violence during a strike.⁴⁶ He argues that such a stance goes against the established principles of the right to freedom of assembly.⁴⁷

An employer may also apply for an interdict against employees who commit acts of violence during a protected strike. The Union may be directed through an order of the Labour Court or High Court to take reasonable steps directed at stopping the violent acts by its members.⁴⁸

Whether employees who engage in violent behaviour during a protected strike should be protected from civil and delictual liability or dismissal is a controversial question. Workers who take part in a protected strike are generally protected from civil liability

⁴⁰ Brassey 2013 *Industrial Law Journal* 834.

⁴¹ *Ibid.*

⁴² (2005) 26 ILJ 1458 (LC).

⁴³ *Mondi Ltd v CEPPWAWU* 1470.

⁴⁴ *Mondi Ltd v CEPPWAWU* 1472.

⁴⁵ 2012 (8) BCLR 840 CC.

⁴⁶ Woolman "You Break it, You Own it: South African Assembly Jurisprudence after *Garvis*" 2015 9 *ICL Journal* 548.

⁴⁷ Woolman 2015 *ICL Journal* 564.

⁴⁸ Manamela and Budeli "Employees' right to strike and violence in South Africa" 2013 46 *Comparative & International Law Journal of South Africa* 308 325.

and dismissal for taking part in a strike. This literature review revealed that this is not always the case especially where employees' violence causes patrimonial loss to the employer or results in the business losing its economic viability.

The literature review also reveals that the employer has to choose the appropriate route to deal with the strike violence. Depending on the impact of the violence the employer may choose to retrench the employees or to subject them to a disciplinary hearing. The question of who should be held liable for the damages suffered by the employer is also a contentious one. Even more so is the question of what kind of liability should be imposed in cases where it is found that the union is liable. All in all, this literature review shows that violence during protected strikes has multifaceted consequences on the employees and their Unions.

1 8 Significance of the study

It is hoped that this study will provide a paradigm of best practice which can be followed in future by striking workers.

1 9 Methodology

This research is mainly desktop research. Legislation, Case law, and journal articles will be consulted. The most important piece of legislation will be the LRA because it provides for the statutory regulation of the right to strike. The jurisprudence of the Labour Court will be examined in so far as it relates to violence during protected strikes. Decisions of Bargaining Councils and the Labour Appeal court will however not be ignored as they are also crucial to this study. Peer reviewed journal articles will provide an important critical commentary of the provisions of the LRA and cases relating to violence during protected strikes.

1 10 Scope and limitations of the study

The study will confine itself to violence during protected strikes.

1 11 Delineations

The study does not concern itself with violence during unprotected strikes.

1 12 Chapter outline

Chapter two outlines the legislative framework governing the right to strike in South Africa. This chapter is important in that it provides the context in which the main research question should be understood. An important aspect of this chapter is its discussion of the concept of a protected strike in terms of the LRA and the immunities which flow from taking part in a protected strike.

Chapter three examines the notion of violence during protected strikes. This will be done by outlining the nature and causes of violence during protected strikes, the objective being to suggest possible solutions to the violence. the chapter will also identify and discuss the provisions of the LRA on the use of violence during protected strikes. What follows is a critical analysis of cases on the use of violence during protected strikes in order to ascertain the attitude of the courts on the matter.

Chapter four will explore the main research question of this study namely; the legal consequences of violence during protected strikes. The chapter rests on the assumption that the use of violence in a protected strike has legal consequences. It is therefore the objective of this chapter to identify those consequences if any and discuss them in detail.

Chapter five concludes the study by providing a summary of the study and its findings.

2 THE LEGAL FRAMEWORK GOVERNING PROTECTED STRIKES

2.1 Introduction

This chapter outlines the law relating to protected strikes and intends to create a better understanding of the concept of protected strikes as outlined in the Labour Relations Act 66 of 1995 (LRA) and various decisions of our Labour Courts. The concept of protected strikes is important because it forms the backbone of this research and the core research theme namely, the impact of violence during protected strikes.

The discussion intends to highlight the importance of the right to strike, through the consideration of the nature and extent of the meaning of strike in terms of the LRA. This will be done by evaluating the elements of the definition as provided by the LRA. The study will proceed and investigate the concept of a protected strike. In so doing, the study will explore the requirements for a strike to be regarded as “protected” and consequently outline the extent of the protection afforded to strikers who partake in such protected strike. To conclude the chapter, a summary of the findings of the chapter will be provided.

2.2 The importance of the right to strike

In articulating the importance of the right to strike, the Constitutional Court in *NUMSA v Bader Bop (Pty) Ltd*⁴⁹ held that:

“The right to strike is an important component of a successful collective bargaining system. In interpreting the rights in section 23, therefore, the importance of those rights in promoting a fair working environment must be understood.”⁵⁰

In *Black Allied Workers Union v Prestige Hotels CC t/a Blue Waters Hotel*⁵¹ the Labour Appeal Court explained the importance of the right to strike in the following terms:

“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.”⁵²

⁴⁹ 2003 2 BCLR 182 (CC).

⁵⁰ *NUMSA v Bader Bop (Pty) Ltd* para 13.

⁵¹ (1993) 14 ILJ 963 (LAC).

⁵² *Black Allied Workers Union & Others v Prestige Hotels CC t/a Blue Waters Hotel* 972.

In considering the above mentioned dictums by the Constitutional and Labour Appeal Court, it can be seen that the right to strike is an important mechanism of collective bargaining available to employees. It compels the employer to meaningfully engage with its employees during the collective bargaining process. Having highlighted the importance of the right to strike, it is important to define what a strike means.

2 3 Defining a strike

The Constitutional Court in the *Certification of the Constitution of the Republic of South Africa, 1996*⁵³ held that a strike is “the primary mechanism through which workers exercise collective power and the right to strike enables workers to bargain effectively with their employers”⁵⁴ The statutory definition of a strike is found in section 213 of the LRA. Section 213 defines a strike as:

“The partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee, and every reference to "work" in this definition includes overtime worked, whether it is voluntary or compulsory.”

In considering the said definition, it is important to analyse certain aspects forming the basis for the definition. The next section will explain such elements of the definition.

2 3 1 The partial or complete concerted refusal to work

There must be a refusal to work, accompanied with a threat not to resume work until the concerns raised are met by the employer. Where the workers’ demand is not coupled with a threat not to resume work until their demand is met the conduct concerned cannot be said to be a strike.⁵⁵ In *The Media Workers Association of SA v Facts Investors Guide (Pty) Ltd*⁵⁶ the employees in question stopped working in order to discuss with the managing director the intended changes to their conditions of employment.⁵⁷ The managing director refused to attend the discussion, issued an ultimatum and upon the expiry of the ultimatum dismissed the employees for taking

⁵³ 1996 4 SA 744 (CC).

⁵⁴ *Certification of the Constitution of the Republic of South Africa* para 66.

⁵⁵ *Lebona v Trevenna* (1990) 11 ILJ 98 (IC) 103.

⁵⁶ (1986) 7 ILJ 313 (IC).

⁵⁷ *The Media Workers Association of SA v Facts Investors Guide (Pty) Ltd* 316G.

part in an unprotected strike.⁵⁸ The court held that there was no strike because the refusal to work was not shown to have been intended to continue until a demand was met.⁵⁹

An example of a “retardation or obstruction of work” can be found in *National Union of Mineworkers v Chrober Slate*.⁶⁰ In this case, workers responsible for excavating slate from a quarry refused to release the slate for processing until the employer provided them with a front end loader.⁶¹ The employer, after issuing two ultimatums dismissed the workers.⁶² From the time they demanded the front end loader until the time they were dismissed they had continued to work but simply refused to release the slate so that other workers up the chain could process it.⁶³ Since they refused to release the slate until their demand was met, their conduct was held to amount to an obstruction and/or retardation of work.⁶⁴

2 3 2 Persons who are or have been employed

In terms of section 213 of the LRA an employee is defined as:

- i. any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and
- ii. any other person who in any manner assists in carrying on or conducting the business of an employer, and "employed" and "employment" have meanings corresponding to that of "employee"

Section 200A of the LRA provides a deeming provision to assist in defining an employee. A presumption is created that despite the form of contract a person who earns below a certain gazetted amount is an employee if that person is subject to the control or direction of another or is a part of the employer’s organisation, or has worked for another for an average of 40 hours per month for the past three months, or is

⁵⁸ *The Media Workers Association of SA v Facts Investors Guide (Pty) Ltd* 316I.

⁵⁹ *The Media Workers Association of SA v Facts Investors Guide (Pty) Ltd* 318B.

⁶⁰ (2008) 29 ILJ 388 (LC).

⁶¹ *National Union of Mineworkers v Chrober Slate* 390E.

⁶² *National Union of Mineworkers v Chrober Slate* 390H.

⁶³ *National Union of Mineworkers v Chrober Slate* 396E.

⁶⁴ *National Union of Mineworkers v Chrober Slate* 396E.

economically dependent on another, or works for only one person, or if the other person provides the tools of trade.

Clearly defining an employee is not as easy as it may seem. From the definitions above independent contractors are not regarded as employees. It is also noteworthy that members of the National Defence Force, the National Intelligence Agency and the South African Secret Service are excluded from the ambit of the LRA.⁶⁵

“Have been” denotes employees who were once employed by the employer but are no longer employed as such at the time of the strike.⁶⁶ According to Grogan AJ in *Food & General Workers Union v Minister of Safety & Security*,⁶⁷ former employees can thus in certain instances have a dispute in respect of a matter of mutual interest with their employer.⁶⁸ For a strike to continue after the dismissal of the strikers the following must be present:

- i. The strikers must be engaged in a protected strike
- ii. The strikers must have been dismissed for striking
- iii. Their conduct after dismissal must amount to a continuation of the original strike⁶⁹

2 3 3 The same employer or by different employers

The same employer denotes that the striking workers employed by one employer or company. This also applies to an employer with different branches all over the country or province.

“By different employers” envisages an industry wide strike. The court, however, in *Barlows Manufacturing Co v Metal & Allied Workers Union*⁷⁰ emphasised that in an industry wide strike, there must be a sufficient link between the different employers who may be affected by the strike action and the union(s) whose members will be

⁶⁵ Section 2 of the LRA.

⁶⁶ See *National Automobile & Allied Workers Union* (now known as *National Union of Metalworkers of SA*) v *Borg-Warner SA (Pty) Ltd* (1994) 15 ILJ 509 (A) 517 where Van den Heever JA held that:

“Employee’ must clearly include persons referred to in the definition of ‘strike’ who would certainly not qualify as such under the common law - amongst others ex-employees to be persuaded to once again provide their labour, as much as ex-employees who want their jobs back.”

⁶⁷ (1999) 20 ILJ 1258 (LC).

⁶⁸ *Food & General Workers Union v Minister of Safety & Security* 1263.

⁶⁹ *Food & General Workers Union v Minister of Safety & Security* 1265.

⁷⁰ (1988) 9 ILJ 995 (IC).

taking part in the strike.⁷¹ In that vein it cannot be said that there is a link between the strike action by workers of the mining industry in support of the demands by workers of the fishing industry.⁷²

2 3 4 A grievance or a dispute

A grievance or dispute must exist before workers may embark on a strike. The term “issue in dispute” is defined in section 213 of the LRA as “the demand, the grievance or the dispute that forms the subject matter of the strike.” A dispute is said to exist where the parties express differing views or adopt different positions over a particular issue.⁷³ A dispute can be defined as ‘the expression by the parties, opposing each other in controversy, of conflicting views, claims or contentions’.⁷⁴ In addition a dispute must ‘denote at least the positive state of the parties having disagreed.’⁷⁵

2 3 5 In respect of any matter of mutual interest

The LRA does not define what is meant by “any matter of mutual interest”. Botha⁷⁶ notes that:

“the term is broad enough to include disputes of interest or disputes of right inter alia, such matters include issues relating to the terms and conditions of employment, such as employee remuneration, service benefits and compensation.”⁷⁷

While both disputes of rights and interests may suffice, an unlawful demand however cannot be regarded as a matter of mutual interest.⁷⁸ Such was the case in *TSI Holdings v NUMSA*⁷⁹ where the strikers wanted a supervisor to be dismissed at all costs and without a hearing. The Labour Appeal Court held that such a demand was

⁷¹ *Barlows Manufacturing Co v Metal & Allied Workers Union* 1014.

⁷² *Ibid.*

⁷³ *City of Johannesburg Metropolitan Municipality v SA Municipal Workers Union* (2011) 32 ILJ 1909 (LC) 1913. See also: *Leoni Wiring Systems (East London) (Pty) Ltd v National Union of Metalworkers of SA* (2007) 28 ILJ 642 (LC).

⁷⁴ *SACCAWU v Edgars Stores Ltd* (1997) 18 ILJ 1064 (LC) 1348.

⁷⁵ *Estate Bodasing v Additional Magistrate, Durban* 1957 (3) SA 176 (D) 180H.

⁷⁶ Botha “In Search of Alternatives or Enhancements to Collective Bargaining in South Africa: Are Workplace Forums a Viable Option?” 2015 18 *Potchefstroom Electronic Law Journal* 1812.

⁷⁷ Botha 2015 *Potchefstroom Electronic Law Journal* 1813.

⁷⁸ See *City of Johannesburg Metropolitan Municipality v SAMWU* [2009] 5 BLLR 431(LC).

⁷⁹ (2006) 27 ILJ 1483 (LAC).

unlawful in that dismissing the supervisor without affording him a fair hearing was a violation of his rights.⁸⁰

2 3 6 Between employer and employee

The dispute between the striking workers and their employer must arise from the employment relationship between the parties.⁸¹ The LRA does not define the term employer. In most instances it is easy to identify an employer but this may not always be the case especially in temporary employment services. Where a person provides a temporary employment service for a client, the person whose services has been procured for the client is the employee of that temporary service provider and the temporary service provider is that person's employer.⁸²

2 3 7 Overtime

One of the controversial questions in strike law is whether refusal to work voluntary overtime constitutes a strike. This question was considered by the court in *Ford Motor Co of SA (Pty) Ltd v National Union of Metalworkers of SA*.⁸³ The employees in this case refused to work overtime as requested by their employer.⁸⁴ The employer sought an interdict against the intended strike action as it argued that the overtime was essential for its operational requirements.⁸⁵ The court held that where there is a contractual term in the workers contract requiring them to work overtime, a refusal to work voluntary overtime would constitute a strike.⁸⁶ The court accordingly granted the interdict citing that the employer would suffer damage if the strike is allowed to continue.⁸⁷

A similar conclusion was reached by the court in *Gobile v BP Southern Africa (Pty) Ltd*.⁸⁸ Employees in this case refused to work overtime and on public holidays. The employer sought an interdict ordering the appellant and two other workers from refusing to work. The employer argued that such conduct was in breach of their

⁸⁰ *TSI Holdings v NUMSA* 1497D.

⁸¹ *Maluleka v Ntseke of the Brushes & Cleaners Union* (1993) 14 ILJ 160 (IC) 163.

⁸² Section 198(2) of the LRA.

⁸³ (2008) 29 ILJ 667 (LC).

⁸⁴ *Ford Motor Co of SA (Pty) Ltd v National Union of Metalworkers of SA* 669A.

⁸⁵ *Ford Motor Co of SA (Pty) Ltd v National Union of Metalworkers of SA* 670C.

⁸⁶ *Ford Motor Co of SA (Pty) Ltd v National Union of Metalworkers of SA* 673A.

⁸⁷ *Ford Motor Co of SA (Pty) Ltd v National Union of Metalworkers of SA* 674C.

⁸⁸ (1999) 20 ILJ 2027 (LAC).

contract of employment and amounted to an unprotected strike.⁸⁹ The court held that although there was no express demand to remedy a grievance, the employees' conduct amounted to a strike because it was calculated to force the employer to accede to the employees' view of what their obligations in terms of their contract were.⁹⁰

Having discussed the elements of the definition of a strike it is important to establish what a protected strike is. This is important since the subject matter of this study relates to a specific type of strike; a protected strike. Without an understanding of a protected strike the research question cannot be answered effectively. In the section which follows particular attention will be placed on what steps workers should follow in order for their actions to constitute a protected strike.

2 4 What is a protected strike?

The LRA provides employees with the right to strike if they follow the requirements of section 64. Firstly, section 64 1 (a) of the LRA requires would be strikers to refer the issue in dispute to a council or to the Commission. Secondly, a 48 hours' written notice of the commencement of the strike must be given to the employer.⁹¹ The notice must be given only after a certificate of non-resolution has been issued by the Bargaining Council or Commission or if a period of 30 days has lapsed since the matter was referred.⁹² Alternatively, in terms of section 64(3) (b), the employees may follow the procedure laid down in a collective agreement in order for their intended strike to be protected.

Workers intending to strike may thus follow the procedure laid down in section 64 of the LRA or the procedure laid down in a collective agreement (if any). They do not necessarily have to follow one route in order for their strike to be a protected. In *Columbus Joint Venture t/a Columbus Stainless Steel v National Union of Metalworkers of SA*⁹³ the court held that it may happen that the strikers, while trying to comply with a collective agreement, may in fact comply with the requirements of

⁸⁹ *Gobile v BP Southern Africa (Pty) Ltd* 2028A.

⁹⁰ *Gobile v BP Southern Africa (Pty) Ltd* 2028H.

⁹¹ Section 64 1 (b) of the LRA.

⁹² Section 64 1 (a) of the LRA.

⁹³ (1998) 19 ILJ 279 (LC).

section 64 of the LRA.⁹⁴ In that case their strike would be a protected strike.⁹⁵ Simply put therefore, a protected strike is one which complies with the requirements of the LRA. These requirements will be examined in the section below.

2 5 The requirements for protection

2 5 1 Referral to bargaining council or Commission for conciliation

In *Afrox Ltd v SA Chemical Workers Union*,⁹⁶ the court emphasised that the striking employees need not be the ones who referred the issue in dispute to the bargaining council or Commission.⁹⁷ It suffices that the subject matter of their strike has been referred and that they have complied with the other requirements in terms of the LRA. The court had before it a situation where the striking employees were employees of the same employer but in different branches.⁹⁸ In such a case once the requirements for a protected strike are met the union is free to call out its members to strike starting with a small number and gradually increasing the numbers.⁹⁹

Similar sentiments were expressed in *Barlows Manufacturing* where the court held that the employees need not have submitted the issue in dispute themselves.¹⁰⁰ Moreover the LRA remains silent on who must submit the issue in dispute bargaining council or Commission all what is required is that the issue be submitted.¹⁰¹

Minor defects on the referral form may not always result in the referral being null and void. This was stated by the court in *City of Johannesburg Metropolitan Municipality v SA Municipal Workers Union*.¹⁰² In this matter, the Union did not fill in the part on the referral form on which it was required to state the required outcome of the conciliation.¹⁰³ The employer contended that the omission resulted in the referral being defective.¹⁰⁴ The court held that a “formalistic” or “technical” approach may obstruct

⁹⁴ *Columbus Joint Venture t/a Columbus Stainless Steel v National Union of Metalworkers of SA* 281.

⁹⁵ *Ibid.*

⁹⁶ (1997) 18 ILJ 399 (LC).

⁹⁷ *Afrox Ltd v SA Chemical Workers Union* (1997) 18 ILJ 399 (LC) 403.

⁹⁸ *Afrox Ltd v SA Chemical Workers Union* 404.

⁹⁹ *Ibid.*

¹⁰⁰ *Barlows Manufacturing Co v Metal & Allied Workers Union* 1008.

¹⁰¹ *Barlows Manufacturing Co v Metal & Allied Workers Union* 1009.

¹⁰² (2008) 29 ILJ 650 (LC).

¹⁰³ *City of Johannesburg Metropolitan Municipality v SA Municipal Workers Union* (2008) 29 ILJ 650 (LC) 655A.

¹⁰⁴ *City of Johannesburg Metropolitan Municipality v SA Municipal Workers Union* 655 B.

the speedy resolution of labour disputes.¹⁰⁵ What is required therefore is that the issue in dispute and what the parties require to be conciliated must be stated in clear terms.

2 5 2 48 hours' notice

The purpose of the 48 hours' notice was explained in *Ceramic Industries Ltd t/a Betta Sanitary Ware v National Construction Building & Allied Workers Union*¹⁰⁶ in the following terms:

“Its purpose is to warn the employer of collective action, in the form of a strike, and when it is going to happen, so that the employer may deal with that situation... The specific purpose of warning employers of a proposed strike may have at least two consequences for the employer. The employer may either decide to prevent the intended power play by giving in to the employee demands, or may take other steps to protect the business when the strike starts.”

Considering that the notice is meant to forewarn the employer of the imminent strike the employer must be thus afforded time to put contingency plans in place so that its interests are protected during the strike. This may include seeking replacement labour so that the business may continue to run during the strike. It is noteworthy that in terms of section 76 of the LRA an employer whose business has been designated as a maintenance service may not make use of replacement labour. The employer may also accede to the demands of the employees to avoid the negative consequences which may result from the strike.

In *Transnet Ltd v SA Transport & Allied Workers Union*¹⁰⁷ the employer had many depots across the country. The union gave the employer a notice of an intended strike. The notice however, did not indicate whether the strike will take place at a particular branch or at all the branches of the employer. The court held that the notice given by the Union to the employer was defective because it did not indicate the place of the intended strike.¹⁰⁸ The court emphasised that the failure to indicate the place of the intended strike had resulted in the employer not being able to make contingency plans for the strike.¹⁰⁹ As a result, the object of the LRA, in particular section 64(1)(b), was

¹⁰⁵ *City of Johannesburg Metropolitan Municipality v SA Municipal Workers Union* 655H.

¹⁰⁶ (1997) 18 ILJ 671 (LAC).

¹⁰⁷ (2011) 32 ILJ 2269 (LC).

¹⁰⁸ *Transnet Ltd v SA Transport & Allied Workers Union* 2273.

¹⁰⁹ *Ibid.*

not achieved by the notice.¹¹⁰ In light of the court's pronouncements, it is essential that the notice must indicate the place of the intended strike especially where the employer has more than one branch.

2 6 The scope of protection

The LRA affords several protections to workers who take part in a protected strike. Firstly, workers are protected from claims arising from breach of contract. Section 67(2) provides that taking part in a protected strike does not constitute a breach of contract.

Secondly, employees have the right to be paid in kind. Section 67(3) states that the employer must during a protected strike continue to pay an employee if his remuneration includes payment in kind for example accommodation, food and other basic amenities of life.

Thirdly, employees are protected against dismissal. Section 67(4) precludes an employer from dismissing a striking employee for participating in a protected strike. In terms of section 187(1)(a), a dismissal for taking part in a protected strike is automatically unfair. Section 5(1) of the LRA further prohibits discrimination against an employee for exercising any right conferred by the LRA.

Fourthly, strikers are also protected against civil liability. Section 67(6) prohibits the institution of civil legal proceedings against an employee who takes part in a protected strike. Finally, employees have the right not to be interdicted or compelled to work. The Labour Court has no power to interdict a protected strike or to compel workers engaged in a protected strike to work.¹¹¹

2 7 Conclusion

This chapter provided the legal framework relating to protected strikes, by highlighting the importance of the right to strike. The right to strike is an integral part of collective bargaining and more importantly, it is a useful mechanism available to employees, without which employees would not have much bargaining power.

¹¹⁰ *Transnet Ltd v SA Transport & Allied Workers Union* 2274.

¹¹¹ *Afrox Ltd v SA Chemical Workers Union* 402.

The definition of a strike provided for by the LRA has several elements. The elements are namely; the partial or complete concerted refusal to work; by persons who are or have been employed; by the same employer or by different employers; a grievance or a dispute; in respect of any matter of mutual interest; between employer and employee; and overtime.

Furthermore, the concept of a protected strike was considered and analysed. This was done by explaining the requirements of a protected strike as provided for in the LRA. For a strike to be protected it must comply with the procedure laid down in section 64 of the LRA. Alternatively they may follow the procedure laid down in a collective agreement to which they are party to (if any).

The chapter outlined the scope of protection afforded to workers who take part in a protected strike. The LRA affords several protections to strikers. First, workers are protected from claims arising from breach of contract. Second, employees have the right to be paid in kind. Third, employees are protected against dismissal. Fourth, strikers are also protected against civil liability. Finally, employees have the right not to be interdicted or compelled to work.

The next chapter will investigate the notion of violence during protected strikes. The main objective is to understand the nature and causes of violence during protected strikes. It is hoped by so doing, the study can be able to provide solutions on how to prevent the occurrence of violence during protected strikes. In addition the chapter will discuss the provisions of the LRA relation to the use of violence during strikes and will also ascertain the courts' attitude towards violence. This will be done in order to draw pertinent lessons from such pronouncements.

3 VIOLENCE DURING PROTECTED STRIKES

3 1 Introduction

The previous chapter examined the right to strike in South Africa as provided for in the Labour Relations Act 66 of 1995 (LRA). Particular attention was placed on the meaning of and the legal implications for taking part in a protected strike. This chapter examines the notion of violence during protected strikes and will outline the causes of violence during protected strikes with the aim of providing possible solutions to curb such violence. The chapter proceeds in discussing the provisions of the LRA which impact on the use of violence during protected strikes. A critical discussion of various cases on violence during protected strikes will be made in order to ascertain the attitude of the courts on the matter. A summary of the findings will conclude the chapter.

3 2 The nature of violence during protected strikes

Four types of violence can be identified in case law dealing with violence during protected strikes namely; assault, intimidation, blocking entrances of the employer's business premises and damage to property. To illustrate the nature of violence during protected strikes the following two cases will be discussed below.

Firstly, in *Verulam Sawmills (Pty) Ltd v Association of Mineworkers & Construction Union*,¹¹² the respondent union called a protected strike over wages and from the first day of the strike workers resorted to violence by carrying weapons, prohibiting non-strikers from accessing the premises of the employer, damaging a company vehicle and removing commuters from public transport.¹¹³

The court observed that where strikers engage in violent conduct, they exert illegal pressure on the employer and gain an illegal advantage in the industrial action.¹¹⁴ If an employer under those circumstances refuses to heed to the demands of the strikers

¹¹² (2016) 37 ILJ 246 (LC).

¹¹³ *Verulam Sawmills (Pty) Ltd v Association of Mineworkers & Construction Union* (2016) 37 ILJ 246 (LC) 249.

¹¹⁴ *Verulam Sawmills (Pty) Ltd v Association of Mineworkers & Construction Union* 254.

while the violence is on-going, the strike will last longer and the objective of the LRA of promoting an orderly system of collective bargaining is defeated.¹¹⁵

Secondly, in *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Workers Union*,¹¹⁶ the employees took part in a protected strike in which picketing rules were agreed upon between the union and the employer. During the strike action the workers breached the picketing rules and engaged in acts of violence.¹¹⁷ The strikers damaged property, blocked access to the employer's business premises, emptied rubbish bins into the streets, burnt tyres, damaged vehicles, assaulted persons near the premises of the employer and threw bricks at members of the South African Police Service (SAPS).¹¹⁸

The court expressed its disapproval of the conduct of the strikers stating that the right to strike is tarnished when its exercise is accompanied by violence.¹¹⁹ The court awarded costs to the employer and had the employer not asked for costs on the ordinary scale the court would not have hesitated to award costs on an attorney and client scale.¹²⁰

The frequent occurrence of the conduct described in the abovementioned cases during protected strikes has led to the Labour Court decision in *Ram Transport SA (Pty) Ltd v SA Transport & Allied Workers Union*,¹²¹ where Van Niekerk J made the following remarks:

“Regrettably, intimidation, assault and damage to property have come to characterize strikes to the extent that they appear to be considered an inevitable consequence and an integral component of the exercise of the right to strike.”¹²²

These remarks confirm that intimidation, assault and damage to property are common forms of violence which characterise industrial action in South Africa. What is disturbing is the observation that violence is viewed as inextricably linked to the

¹¹⁵ *Verulam Sawmills (Pty) Ltd v Association of Mineworkers & Construction Union* 254.

¹¹⁶ (2012) 33 ILJ 998 (LC).

¹¹⁷ *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Workers Union* (2012) 33 ILJ 998 (LC) 1000.

¹¹⁸ *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Workers Union* 1001.

¹¹⁹ *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Workers Union* 1004.

¹²⁰ *Ibid.*

¹²¹ (2011) 32 ILJ 1722 (LC).

¹²² *Ram Transport SA (Pty) Ltd v SA Transport & Allied Workers Union* (2011) 32 ILJ 1722 (LC) 1727.

exercise of the right to strike. In other words, it is the striking workers' view that for industrial action to be effective, it must be accompanied by violence. Having examined the nature of violence during protected strikes, it is also important to consider the causes of such violence in order to suggest possible solutions.

3 3 The causes of violence during protected strikes

Five causes of violence are identified namely; the lack of a ballot requirement in our bargaining system; contact between striking and non-striking employees; the use of replacement labour during strikes; the belief that demands will only be acceded to by the employer if accompanied by violence¹²³ and social inequality.¹²⁴ These shall be examined in turn below.

3 3 1 The lack of a ballot requirement

The ballot requirement was a system under section 65(2)(b) of the Labour Relations Act 28 of 1956, whereby all members of a workers' union eligible to vote were required to vote for or against proposed strike action. The purpose of the ballot requirement was to enable union members to have a say in whether a strike must commence or not and by so doing prevent industrial action which did not enjoy the support of the majority of the workers.¹²⁵ The rationale behind balloting was violence is likely to occur where the strike does not enjoy the support of the majority.¹²⁶

In other words violent strike action was believed to be caused by the commencement of strikes where the majority of the workers are not in favour of such strike action. Violence during strikes which do not enjoy the support of the majority of workers is closely linked to violence which occurs between striking and non-striking workers discussed in the section below.

¹²³ Tenza "An Investigation into the Causes of Violent Strikes in South Africa: Some Lessons from Foreign Law and Possible Solutions" 2015 19 *Law Democracy & Development* 211 212.

¹²⁴ Ngcukaitobi "Strike Law, Structural Violence and Inequality in the Platinum Hills of Marikana" 2013 34 *Industrial Law Journal* 836 846.

¹²⁵ Tenza 2015 *Law Democracy & Development* 215.

¹²⁶ *Ibid.*

3 3 2 Contact between striking and non-striking employees

Violence in this context takes place in the form of intimidation of non-striking workers by striking workers and often turns the workplace into a “war zone”.¹²⁷ Belief in the justness of their cause, however, does not give striking workers the right to attack their non-striking counterparts.¹²⁸ In other words, whatever reasons striking workers have for striking should not be justification for the intimidation of their non-striking colleagues.

In *National Union of Metalworkers of SA on behalf of Rowls and Pailprint (Pty) Ltd*,¹²⁹ the applicant employees’ were dismissed for carrying weapons during a protected strike in contravention of picketing rules.¹³⁰ The picketing rules were drafted in order to prevent violence during strikes.¹³¹ Lyster C in the arbitration award made under the auspices of the Commission for Conciliation Mediation and Arbitration (CCMA), found that the prohibition of weapons during industrial action as provided for in the picketing rules was meant to prevent the intimidation of non-striking workers.¹³² It was further held that the employer was justified in establishing such a rule especially considering that during a previous strike non-striking workers who had reported for duty were intimidated by striking workers yielding sticks.¹³³

The significance of this case is that it confirms that violence in the form of intimidation is likely to occur where there is contact between striking and non-striking employees. There can however, be no justification for intimidating non-striking workers; the courts regard such conduct as unacceptable. Similarly, as shall be seen in the discussion below, the use of replacement labour, coupled with contact between replacement labour and striking employees also sparks violence during protected strikes.

¹²⁷ Selala “The Right to Strike and the Future of Collective Bargaining in South Africa: An Exploratory Analysis” 2014 3 *International Journal of Social Sciences* 115 121.

¹²⁸ *Metal & Allied Workers Union v Siemens Ltd* (1986) 7 ILJ 547 (IC) 552.

¹²⁹ (2015) 36 ILJ 2931 (CCMA).

¹³⁰ *National Union of Metalworkers of SA on behalf of Rowls and Pailprint (Pty) Ltd* (2015) 36 ILJ 2931 (CCMA) 2933.

¹³¹ *National Union of Metalworkers of SA on behalf of Rowls and Pailprint (Pty) Ltd* 2934.

¹³² *National Union of Metalworkers of SA on behalf of Rowls and Pailprint (Pty) Ltd* 2942.

¹³³ *Ibid.*

3 3 3 The use of replacement labour during strikes

During industrial action, employers may seek the services of replacement workers in order to continue production during a strike. Replacement labour as the name suggests, refers to workers recruited to provide labour during a strike in place of the striking workers. Section 76 of the LRA however, prohibits the use of replacement labour where a part of the employer's business has been designated as a maintenance service.

Violence often arises because striking employees view this as an attempt by the employer to undermine the collective bargaining process in that he will not negotiate faithfully because with replacement labour at his disposal he does not feel the economic pressure of the strike.¹³⁴ Where there is no meaningful negotiation, striking employees seem to resort to violence as the answer to their grievances, as discussed in the next section.

3 3 4 Belief that demands will only be acceded to if accompanied by violence

The belief held by employees that their demands will only be acceded to by the employer if they are accompanied by violence has been described as a myth and lacking any basis.¹³⁵ Instead, economic pressure rather than violence is what is required to force the employer to accede to employees' demands.¹³⁶

3 3 5 Social conditions

Apart from the reasons mentioned above, violence during strikes has also been attributed to unemployment, high poverty levels and income inequality.¹³⁷ Whatever the cause, violence undermines labour peace and meaningful negotiation.¹³⁸ When negotiating, both parties must treat each other with respect even if the negotiations have degenerated.¹³⁹ Labour peace and orderly collective bargaining require parties to "eschew violence and conduct themselves with dignity and decorum."¹⁴⁰ It is

¹³⁴ Tenza 2015 *Law Democracy & Development* 220.

¹³⁵ Tenza 2015 *Law Democracy & Development* 224.

¹³⁶ *Ibid.*

¹³⁷ Ngcukaitobi 2013 *Industrial Law Journal* 846.

¹³⁸ *Adcock Ingram Critical Care v Commission for Conciliation, Mediation & Arbitration* (2001) 22 ILJ 1799 (LAC) 1803.

¹³⁹ *Adcock Ingram Critical Care v Commission for Conciliation, Mediation & Arbitration* 1803.

¹⁴⁰ *Metal & Allied Workers Union v Siemens Ltd* 553.

important therefore in the interests of labour peace to consider possible solutions to prevent violence during protected strikes.

3 4 Possible solutions to curb violence

Considering the various causes of violence identified in the previous section, it is only logical to suggest a number of possible solutions to violence during protected strikes. This study presents four possible solutions namely; balloting, criminal and civil sanctions, intervention of the courts and responsible unionism.

3 4 1 Balloting

When balloting was introduced under the 1956 LRA it was regarded as the answer to violent industrial action but despite its introduction violent strikes never ceased. One may thus question the effectiveness of balloting as a solution. It suffices to say balloting did not work because of the political situation at that time; violence, strike action and politics were inextricably linked.¹⁴¹ Political violence has ceased and as such balloting if re-introduced may be effective in curbing strike violence.¹⁴²

One scholar argues however, that the ballot requirement will not reduce violence during strikes.¹⁴³ She argues that what is required is a legislative solution which takes into account the social realities of income inequality, unemployment and poverty.¹⁴⁴ Her argument seems to have been made in light of the assertion that unequal social conditions are responsible for violence during strikes. Dismissing balloting as a solution outright as she does is unwarranted, considering that there is no single cause of violence during protected strikes.

3 4 2 Criminal and civil sanctions

Section 67(2) of the LRA provides immunity from delictual action to strikers who partake t in protected strikes. Section 67(6) provides immunity against civil action for participating in a protected strike and in terms of section 67(8), both immunities do not apply to conduct in contemplation or in furtherance of a strike which constitutes an

¹⁴¹ Tenza 2015 *Law Democracy & Development* 215.

¹⁴² *Ibid.*

¹⁴³ Ngcukaitobi 2013 *Industrial Law Journal* 848.

¹⁴⁴ Ngcukaitobi 2013 *Industrial Law Journal* 847.

offence. It is noteworthy that while the courts shun the use of violence during strikes, they have often discouraged the invoking of criminal law in the bargaining process referring to it as an option of last resort.¹⁴⁵ It is hoped that the imposition of criminal and civil sanctions, where strikers engage in violent conduct during protected strikes, may act as a deterrent.

3 4 3 Intervention of the courts

The courts in South Africa have no automatic right to stop protected strike action, they are however empowered to interdict violent strikes upon application. Although empowering the courts to stop protected strike action may require an amendment to the Bill of Rights since the right to strike is entrenched in the constitution, it is believed it will help bring an end to protracted strike action accompanied by violence.¹⁴⁶

3 4 4 Responsible unionism

Responsible unionism requires workers unions to act responsibly by always taking into account their legal and moral obligations when bargaining or negotiating because they wield great social, economic, and political power.¹⁴⁷ In the context of this discussion, responsible unionism requires that unions discourage the use of violence during strikes and control its members whom partake in industrial action and thus ensuring that they do not engage in acts of violence. Where unions do not act responsibly, by failing to control their members engaged in violent action, they must be with de-recognised and lose the statutory privileges which come with being a registered union.¹⁴⁸ The possible solutions listed above, however, should be viewed in the context of how the LRA regulates strike violence.

¹⁴⁵ *Adcock Ingram Critical Care v Commission for Conciliation, Mediation & Arbitration* 1803.

¹⁴⁶ Tenza 2015 *Law Democracy & Development* 228.

¹⁴⁷ Botha "Responsible Unionism during Collective Bargaining and Industrial Action: Are we Ready Yet?" 2015 48 *De Jure* 328 341.

¹⁴⁸ Brassey "Labour Law After Marikana: Is Institutionalized Collective Bargaining in SA Wilting? If So, Should We Be Glad or Sad?" 2013 34 *Industrial Law Journal* 823 834.

3 5 The regulation of strike violence under the LRA

Section 1 of the LRA provides that the purpose of the LRA is to, *inter alia*; promote labour peace; orderly collective bargaining and the effective resolution of labour disputes. As highlighted in chapter two, section 67(2) of the LRA provides that by taking part in a protected strike, a person does not commit a delict or breach of contract. In other words, a person who takes part in a protected strike is immune from civil or delictual liability. It is trite that the immunity does not extend to persons who engage in acts of violence such as intimidation, assault, damage to property and disrupting the business of the employer during a protected strike. This means that where striking workers engage in acts of violence during a protected strike civil and delictual action may be instituted against such employees for any damages resulting from such conduct.

The question of which court has jurisdiction to hear claims for damages in delict for acts of violence committed during protected strikes was considered in *Mondi Ltd (Mondi Kraft Division) v Chemical Energy Paper Printing Wood & Allied Workers Union*.¹⁴⁹ The applicant company instituted a claim for delictual damages against the respondent union for damages suffered as a result of the alleged unlawful acts of the union members.¹⁵⁰ The union was sued on the basis that it was vicariously liable for the actions of its members.¹⁵¹ One of the issues which the court had to decide was whether it had jurisdiction to hear a delictual claim arising out of a protected strike.¹⁵² The union argued that the High Court had jurisdiction over the matter and not the Labour Court.¹⁵³

In this regard, the court dismissed the union's argument and held that it was not logical for the legislature to allow the Labour Court to hear delictual claims in unprotected strikes and yet oust its jurisdiction in delictual claims arising out of a protected strike.¹⁵⁴ It was held further, that if the legislature had intended to oust the jurisdiction of the

¹⁴⁹ (2005) 26 ILJ 1458 (LC).

¹⁵⁰ *Mondi Ltd (Mondi Kraft Division) v Chemical Energy Paper Printing Wood & Allied Workers Union* (2005) 26 ILJ 1458 (LC) 1460.

¹⁵¹ *Ibid.*

¹⁵² *Mondi Ltd (Mondi Kraft Division) v Chemical Energy Paper Printing Wood & Allied Workers Union* 1463.

¹⁵³ *Mondi Ltd (Mondi Kraft Division) v Chemical Energy Paper Printing Wood & Allied Workers Union* 1464.

¹⁵⁴ *Mondi Ltd (Mondi Kraft Division) v Chemical Energy Paper Printing Wood & Allied Workers Union* 1467.

Labour Court in delictual claims arising from a protected strike, it would have done so expressly.¹⁵⁵ Consequently, the court held that it had jurisdiction to hear delictual claims where the strike concerned was a protected one.

Employees who take part in a protected strike may be dismissed for misconduct during the strike or on the basis of the operational requirements of the employer in terms of section 67(5) of the LRA. This means that where employees engage in acts of violence during a protected strike they may be dismissed for misconduct. Where the conduct of the strikers results in the business of the employer ceasing to be economically viable, the employer may dismiss the striking employers for operational requirements in accordance with section 189 of the LRA.

Through examining our courts' attitude towards violence during strikes in the discussion below, we may be able to ascertain how the courts' contribute towards the LRA's objectives of promoting labour peace; orderly collective bargaining and the effective resolution of labour disputes.

3 6 The courts' approach towards violence during strikes

Our courts have on more than one occasion expressed dismay at the way the South African workforce seems to regard violence during strikes as a normal occurrence.¹⁵⁶ The Labour Courts' approach towards violence during strikes was aptly stated in *National Union of Metalworkers of SA v Lectropower (Pty) Ltd*¹⁵⁷ as follows:

“Employees who misconduct themselves during a strike, protected or unprotected, ought not to expect this court to come to their assistance in any subsequent litigation, let alone order their reinstatement..... This court should express its disapproval of any acts of misconduct committed during the course of a strike and which impact materially and

¹⁵⁵ *Mondi Ltd (Mondi Kraft Division) v Chemical Energy Paper Printing Wood & Allied Workers Union* 1468.

¹⁵⁶ *Ram Transport SA (Pty) Ltd v SA Transport & Allied Workers Union* 1727. See also: De Kock SM in *Buthelezi v Labour for Africa (Pty) Ltd* (1991) 12 ILJ 588 (IC) 597.

¹⁵⁷ (2014) 35 ILJ 3205 (LC).

negatively on the rights of the employer and those employees who elect not to participate in the strike.”¹⁵⁸

The courts will thus seldom order the reinstatement of employees who are dismissed for strike misconduct during protected industrial action as a sign of its disapproval of the strikers conduct. This is significant in that violence during strikes is a serious form of misconduct as shall be seen below.

The courts' attitude in *Chemical Energy Paper Printing Wood & Allied Workers Union v Metrofile (Pty) Ltd*¹⁵⁹ was that taking part in a protected strike does not authorise strikers to engage in acts of violence. In this case, workers took part in a protected strike and during the strike the workers blockaded the entrances of their employer's premises and were engaged in acts of violence such as intimidation, eviction of and assaults on non-strikers.¹⁶⁰ The employer obtained an urgent interdict to stop the workers from engaging in such conduct.¹⁶¹ Despite the interdict, the violence did not abate and the employer dismissed the workers.¹⁶² The employer however, did not dismiss all workers who committed acts of violence, resulting in the court reinstating the dismissed workers on the basis that workers who commit similar acts of misconduct should be treated the same.¹⁶³

Two employees however, were not reinstated on the basis of that they had additional charges against them, relating to acts such as throwing a stone at a non-striker and firing gun shots in the air.¹⁶⁴ The courts remarks on the fairness of the dismissal of the two workers are noteworthy. The court held that violence during a strike is “completely unacceptable and should not be countenanced.”¹⁶⁵ The court held further, that the

¹⁵⁸ *National Union of Metalworkers of SA v Lectropower (Pty) Ltd Ltd* (2014) 35 ILJ 3205 (LC) 3215. See also Van Niekerk J in *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Workers Union* 1003 “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.”

¹⁵⁹ *Chemical Energy Paper Printing Wood & Allied Workers Union v Metrofile (Pty) Ltd* (2004) 25 ILJ 231 (LAC).

¹⁶⁰ *Chemical Energy Paper Printing Wood & Allied Workers Union v Metrofile (Pty) Ltd* (2004) 25 ILJ 231 (LAC) 244.

¹⁶¹ *Chemical Energy Paper Printing Wood & Allied Workers Union v Metrofile (Pty) Ltd* 236.

¹⁶² *Chemical Energy Paper Printing Wood & Allied Workers Union v Metrofile (Pty) Ltd* 239.

¹⁶³ *Chemical Energy Paper Printing Wood & Allied Workers Union v Metrofile (Pty) Ltd* 244.

¹⁶⁴ *Chemical Energy Paper Printing Wood & Allied Workers Union v Metrofile (Pty) Ltd* 245.

¹⁶⁵ *Ibid.*

right to take part in a protected strike should not be taken as permission to commit acts of misconduct.¹⁶⁶

Similar sentiments were expressed by the CCMA in *Labour Equity General Workers Union of SA on behalf of Siphon and Qutom Farm*.¹⁶⁷ The applicants in this case were farmworkers employed by the respondent farm. During a protected strike the workers were engaged in acts of violence which included barring entry and exit to the employer's premises.¹⁶⁸ The workers were dismissed for strike violence and they referred their matter to the CCMA. One of the issues before the Commissioner was whether dismissal was an appropriate sanction.¹⁶⁹ The Commissioner consequently held that violence during a strike was a serious offence and the right to strike does not include the right to engage in acts of misconduct by disrupting the business of the employer.¹⁷⁰ To permit such acts, it was held, is to promote anarchy and violates the right of the employer to undisturbed trade during strike action.¹⁷¹

The position seems to be the same even at the bargaining council level. In *National Union of Metalworkers of SA on behalf of Mhlanga and Geneva Ad (Pty) Ltd*,¹⁷² the applicant employees took part in a protected strike and during the strike they engaged in various acts of violence including intimidation and carrying dangerous weapons.¹⁷³ The employees were dismissed and referred their matter for arbitration. The issue to be decided was whether their dismissal were substantively fair. The arbitrator dismissed the argument raised by the workers that carrying weapons was a cultural practice, citing the prohibition of carrying weapons in public in our law.¹⁷⁴ The arbitrator

¹⁶⁶ *Chemical Energy Paper Printing Wood & Allied Workers Union v Metrofile (Pty) Ltd* 246. See also: *SA Airways Technical (SOC) Ltd V SA Transport & Allied Workers Union* (2014) 35 ILJ 1638 (LC) 1646 where Prinsloo AJ held that "The right to engage in collective bargaining and to participate in protected strike action, is not a licence to engage in unlawful conduct."

¹⁶⁷ *Labour Equity General Workers Union of SA on behalf of Siphon and Qutom Farm* (2012) 33 ILJ 2499 (CCMA).

¹⁶⁸ *Labour Equity General Workers Union of SA on behalf of Siphon and Qutom Farm* (2012) 33 ILJ 2499 (CCMA) 2502.

¹⁶⁹ *Labour Equity General Workers Union of SA on behalf of Siphon and Qutom Farm* 2501.

¹⁷⁰ *Labour Equity General Workers Union of SA on behalf of Siphon and Qutom Farm* 2504.

¹⁷¹ *Ibid.*

¹⁷² *National Union of Metalworkers of SA on behalf of Mhlanga and Geneva Ad (Pty) Ltd* (2012) 33 ILJ 1992 (BCA).

¹⁷³ *National Union of Metalworkers of SA on behalf of Mhlanga and Geneva Ad (Pty) Ltd* (2012) 33 ILJ 1992 (BCA).

¹⁷⁴ See: *National Union of Metalworkers of SA on behalf of Mhlanga and Geneva Ad (Pty) Ltd* 2005 where Stapelberg A said the following: "The applicants' attempts to make it into a 'cultural thing' is not acceptable. If it were merely an acceptable cultural thing, then the government would not continue to criminalize or prohibit it in legislation such as the Dangerous Weapons Act and the

held further, that the Constitution is undermined where the right to strike is exercised in a manner which violates other rights such as the right to freedom of movement, security and the right to life by resorting to violence and intimidation.¹⁷⁵

On one occasion, the courts have been sympathetic to workers resorting to violence in a protected strike. In *Buthlezi v Labour for Africa (Pty) Ltd*,¹⁷⁶ the applicants were employed by the respondent labour broker, Labour for Africa. The applicants called upon their employer to negotiate wages and other terms and conditions of employment.¹⁷⁷ The employer refused to negotiate with the workers' union even after the court had intervened.¹⁷⁸ The workers then took all the steps required in terms of the LRA for them to engage in a protected strike. The workers were then dismissed for taking part in the strike and they challenged their dismissal before the Industrial Court. The employer contended that the workers had come to court with dirty hands and that they should be denied a remedy because they had, during the strike intimidated the employer's customers and assaulted non-striking employees.¹⁷⁹

The court accepted that the strikers had engaged in acts of violence but refused to deny them a remedy on that basis. The court noted that strikes in South Africa are often characterised by violence but the nature, extent, duration and cause of such violence is what the courts will consider in exercising its discretion whether or not to deny the applicants a remedy.¹⁸⁰ In that vein, the court attributed the violence to the 'scam' by the employer which led to the workers losing their jobs and remarked that the workers anger and frustration was thus understandable.¹⁸¹

After considering the circumstances of the strikers, the court found it appropriate to grant them a remedy of reinstatement.¹⁸² As a mark of disapproval of the strikers conduct, the order was not made fully retrospective.¹⁸³ The courts are therefore of the

Gatherings Act. If it was merely a cultural thing, NUMSA would not have agreed on a national level with SEIFSA not to allow it. The mere fact that in spite of that agreement a NUMSA official is attempting to justify this blatant breach of the law and of its own agreement on the same basis is staggering."

¹⁷⁵ *National Union of Metalworkers of SA on behalf of Mhlanga and Geneva Ad (Pty) Ltd* 2006.

¹⁷⁶ *Buthlezi v Labour for Africa (Pty) Ltd* (1991) 12 ILJ 588 (IC).

¹⁷⁷ *Buthlezi v Labour for Africa (Pty) Ltd* (1991) 12 ILJ 588 (IC) 591.

¹⁷⁸ *Buthlezi v Labour for Africa (Pty) Ltd* 596.

¹⁷⁹ *Buthlezi v Labour for Africa (Pty) Ltd* 597.

¹⁸⁰ *Ibid.*

¹⁸¹ *Buthlezi v Labour for Africa (Pty) Ltd* 598.

¹⁸² *Ibid.*

¹⁸³ *Buthlezi v Labour for Africa (Pty) Ltd* 599.

view that denying workers who engage in acts of violence a remedy would not always be appropriate in all cases. The court's decision must not however, be interpreted to mean that it condones violence during strikes.¹⁸⁴

3 7 Conclusion

The notion of violence during protected strikes was examined with the aim of ascertaining the nature of violence, causes of violence, possible solutions to violence, the regulation of violence under the LRA and the courts' attitude towards violence during protected strikes.

Four types of violence during protected strikes can be identified through case law namely assault, intimidation, blocking entrances of the employer's business premises and damage to property. The courts have noted with deep concern that assault, intimidation and damage to property during protected strikes is seen by strikers as an integral part of the right to strike. This is a troubling observation and one which runs contrary to the objects of the LRA especially that of promoting labour peace.

Five causes of violence can be identified namely; the lack of a ballot requirement in our bargaining system; the use of replacement labour during strikes; contact between striking and non-striking employees; a belief that demands will only be acceded to by the employer if accompanied by violence; and social inequality. There is thus no single cause of violence and this means that any solution to violence has to be multifaceted. Accordingly four possible solutions were identified namely; balloting, criminal and civil sanctions, intervention of the courts and responsible unionism. The chapter examined how the LRA regulates strike violence during protected industrial action and found that in general strikers taking part in a protected strike are immune from civil, delictual and criminal action arising from taking part in a strike. This immunity falls away when strikers engage in deliberate acts of violence. This is also confirmed by our courts' attitude towards violence during protected strikes.

Firstly, our courts emphasise that taking part in a protected strike is not a licence to engage in acts of violence. Secondly, violence during protected strikes is a serious act of misconduct. Thirdly, the courts will not hesitate to refuse a remedy to strikers who

¹⁸⁴ *Buthelezi v Labour for Africa (Pty) Ltd* 598.

engage in acts of violence. Finally, violence during protected strikes will not be tolerated by the courts. In rare instances the courts will show sympathy to striking workers who engage in violence during protected strikes. With these considerations in mind, the next chapter examines the legal implications of violence during protected strikes.

4 THE IMPACT OF VIOLENCE DURING PROTECTED STRIKES

4 1 Introduction

The author has outlined the nature and causes of violence during protected strikes. It has been revealed that the courts shun the use of violence during protected strikes. This chapter discusses the central theme of this study namely; the legal consequences of violence during protected strike action in South African Labour Law. The findings of this chapter will form the basis of the discussion in the following chapter; of the conclusions and recommendations of the study.

4 2 Dismissal for operational requirements

Dismissal for operational requirements is one of the accepted grounds for dismissal in South African Law. Under common law, the employer can give redundant employees a notice. The 1956 LRA and Labour Court used part 11 of ILO convention 158 as a guideline where employers have a right to terminate employment based on operational requirements.

Section 67(5) of the Labour Relations Act 66 of 1995 (LRA) by providing that an employer may dismiss employees who take part in a protected strike for operational reasons puts beyond any doubt that the protection against dismissal of workers who take part in a protected strike falls away where their conduct or the strike itself causes any serious economic hardship to the employer.¹⁸⁵ An employer may thus dismiss employees taking part in a protected strike where the conduct of the strikers or the strike itself causes serious economic hardship to the employer provided the requirements of the LRA are met.¹⁸⁶

The dismissal of workers taking part in a protected strike on the basis of operational requirements has been subject of discussion. Part of the debate concerns the possibility that the employer may label the dismissal as one based on operational requirements whereas the real reason for dismissal is the workers' participation in the

¹⁸⁵ *SA Chemical Workers Union v Afrox Ltd* (1999) 20 ILJ 1718 (LAC) par 1725.

¹⁸⁶ *SA Chemical Workers Union v Afrox Ltd* par 1726.

protected strike.¹⁸⁷ The secondly the timing of the dismissal.¹⁸⁸ In considering, at what point an employer is supposed to invoke the economic harm rationale and dismiss the striking workers?

In taking advancing this argument the following sub-topics will be briefly examined

4 2 1 Proof of irreparable economic hardship

In order for an employer to dismiss striking workers on the basis of operational requirements it must prove that it has suffered irreparable economic hardship as a result of the strike.¹⁸⁹ The court's duty under those circumstances is to consider the employer's reasons and other factors in order to establish whether the dismissal of employees for economic reasons has any basis or not. The court in *National Union of Metalworkers of SA v Boart MSA (Pty) Ltd*,¹⁹⁰ thus dismissed the employer's contention that it had dismissed the striking employees for economic reasons emanating from the strike because the company could not establish that the economic hardship was a result of the strike.¹⁹¹ The real reason for dismissal was thus not the operational requirements of the employer.

4 2 2 Timing of dismissal

Assuming that in a particular protected strike the conduct of the employees characterised by violence is causing serious economic harm to the employer, the question is at what point is the employer supposed to dismiss on the basis of operational requirements? The question of the timing of the dismissal was considered in *Hotel Liquor Catering Commercial & Allied Workers Union v Awerbuch's Bargain House (Pty) Ltd*.¹⁹² After negotiations between the applicant union and the employer over wages had failed, the workers embarked on a protected strike.¹⁹³ The strikers,

¹⁸⁷ Basson "Some Recent Developments in Strike Law" 2000 *South African Mercantile Law Journal* 119 128.

¹⁸⁸ Basson *South African Mercantile Law Journal* 129.

¹⁸⁹ *Black Allied Workers Union v Prestige Hotels CC t/a Blue Waters Hotel* (1993) 14 ILJ 963 (LAC) 973.

¹⁹⁰ (1995) 16 ILJ 1469 (LAC).

¹⁹¹ *National Union of Metalworkers of SA v Boart MSA (Pty) Ltd* (1995) 16 ILJ 1469 (LAC) 1479.

¹⁹² (1995) 16 ILJ 163 (IC).

¹⁹³ *Hotel Liquor Catering Commercial & Allied Workers Union v Awerbuch's Bargain House (Pty) Ltd* (1995) 16 ILJ 163 (IC) 167. The employer however contended that the strike was illegal because the union did not comply with the requirement of a written strike notice, 48 hours before commencement of the strike and deficiencies in the manner the ballot was conducted. The court

without permission from the employer picketed in front of the premises of the employer and were intimidating clients.¹⁹⁴ Complaints were also received from neighbouring employers claiming that the conduct of the strikers was affecting their businesses.¹⁹⁵

The court found that the conduct of the strikers had resulted in the employer suffering serious economic loss; the public embarrassment of the employer and the violation of the employer's right to conduct business in an organised manner.¹⁹⁶ As such the court said it would have been unfair to expect the employer not to take action until it could be shown that the business was at the brink of "economic extinction" or "irreparable economic hardship."¹⁹⁷ The dismissal of the employees was held to be fair.¹⁹⁸ In light of the pronouncements of the court the employer need not wait until its business is on the verge of collapse before it can dismiss the striking employees on the basis of economic requirements. The pronouncements of the court seem plausible considering the possibility that a company may not be able to recover from the economic hardship if it waits until it is on the verge of collapse.

4 3 Dismissal for misconduct

Violence during a protected strike may lead to dismissal for misconduct. While an employer is in terms of section 67(4) of the LRA prohibited from dismissing employees who take part in a protected strike, an employer is in terms of section 67(5) of the LRA not precluded from dismissing a striking employee for reasons relating to his or her conduct during a protected strike.

An employee dismissed for misconduct during a strike may challenge his dismissal. Where the employer manages to prove the misconduct, the courts are known to show no leniency to the employee concerned when deciding whether dismissal was the appropriate sanction. *National Democratic Change & Allied Workers Union v Cummins*

without deciding on whether the strike was indeed illegal as contended, remarked that the legality of the strike under the circumstances could be attacked.

¹⁹⁴ *Hotel Liquor Catering Commercial & Allied Workers Union v Awerbuch's Bargain House (Pty) Ltd* par 168.

¹⁹⁵ *Hotel Liquor Catering Commercial & Allied Workers Union v Awerbuch's Bargain House (Pty) Ltd* 173.

¹⁹⁶ *Hotel Liquor Catering Commercial & Allied Workers Union v Awerbuch's Bargain House (Pty) Ltd* 174.ditto

¹⁹⁷ *Hotel Liquor Catering Commercial & Allied Workers Union v Awerbuch's Bargain House (Pty) Ltd* 173.ditto

¹⁹⁸ *Hotel Liquor Catering Commercial & Allied Workers Union v Awerbuch's Bargain House (Pty) Ltd* 174.ditto

Emission Solutions (Pty) Ltd,¹⁹⁹ is a case in point. In this matter workers taking part in a protected strike intimidated non-strikers and were dismissed by the employer.²⁰⁰ They, however, contended that they were dismissed for merely taking part in a protected strike but evidence led before the court showed that they were dismissed for misconduct in relation to intimidation.²⁰¹ The court held that violence is a serious form of misconduct and the appropriate sanction is usually dismissal.²⁰² After considering all the evidence the court held that the dismissal of the workers for misconduct was fair.²⁰³

The same sternness in approach to strike violence was adopted in *National Union of Metalworkers of SA on behalf of Mhlanga and Geneva Ad (Pty) Ltd*.²⁰⁴ The arbitrator was called upon to decide whether the dismissal of the employees for the intimidation of non-strikers was substantively fair.²⁰⁵ It was observed that strike intimidation is a serious form of misconduct in that the individual is approached by “faceless masses, the mob, the group” at once and that is more threatening than being faced by one person.²⁰⁶ In dismissing the employees’ the learned Judge held:

“..strike intimidation has a devastating effect on the trust relationship with the employer, as well as with the co-workers who are the victims and as such, in spite of any other mitigating circumstances that may exist, it is insufficient to prevent dismissal, and that dismissal is an appropriate sanction under the circumstances.”²⁰⁷

Both cases display that the courts will not hesitate to uphold the dismissal of strikers for misconduct during protected strikes.. In this regard it is apparent that the courts considers strike violence , in particular intimidation as a serious form of misconduct. Striking employees who commit acts of violence should therefore know that their conduct will not be tolerated by the courts and may lead to their dismissal.

¹⁹⁹ (2014) 35 ILJ 2222 (LC).

²⁰⁰ *National Democratic Change & Allied Workers Union v Cummins Emission Solutions (Pty) Ltd* (2014) 35 ILJ 2222 (LC) 2224.

²⁰¹ *National Democratic Change & Allied Workers Union v Cummins Emission Solutions (Pty) Ltd* 2230.

²⁰² *National Democratic Change & Allied Workers Union v Cummins Emission Solutions (Pty) Ltd* 2234.

²⁰³ *National Democratic Change & Allied Workers Union v Cummins Emission Solutions (Pty) Ltd* 2235.

²⁰⁴ (2012) 33 ILJ 1992 (BCA).

²⁰⁵ *National Union of Metalworkers of SA on behalf of Mhlanga and Geneva Ad (Pty) Ltd* (2012) 33 ILJ 1992 (BCA) 1994.

²⁰⁶ *National Union of Metalworkers of SA on behalf of Mhlanga and Geneva Ad (Pty) Ltd* 2006.

²⁰⁷ *National Union of Metalworkers of SA on behalf of Mhlanga and Geneva Ad (Pty) Ltd* 2007.

4 3 1 Parity principle and identification of perpetrators of violence

It is regrettable that in most instances perpetrators of violence go unpunished because of the failure by the employer to identify the employees concerned and the failure to obtain credible evidence to prove the allegations in court (for instance because of the unwillingness of witnesses to testify).²⁰⁸ Where the employer cannot identify the perpetrators of violence the employer may however dismiss all the workers on the basis of doctrine of common purpose. This again will be difficult because the employer has to prove that each of the striking workers associated themselves with the conduct of the perpetrators of such violence.²⁰⁹

Accordingly the court in *Food & Allied Workers Union on behalf of Kapesi v Premier Foods Ltd t/a Blue Ribbon Salt River*,²¹⁰ upheld the appeal against the dismissal of employees on the basis of operational requirements, who had taken part in a violent protected strike.²¹¹ The court held that the selection criteria used by the employer to dismiss was not a fair and objective one since the employer could not establish that the employees selected actually committed the acts of violence or misconduct.²¹²

In some instances employees rely on the principle of selective dismissal to evade liability. This does not always yield positive results as illustrated by the case of *Consol Ltd and Chemical Energy Paper Printing Wood & Allied Workers Union on behalf of Hlongwane*.²¹³ where employees were dismissed for various acts of misconduct during a protected strike including assault and damage to property.²¹⁴ On appeal the union on behalf of the dismissed strikers argued that the dismissal was unfair because they were selectively dismissed while the employer argued that it dismissed only those it

²⁰⁸ Brassey "Labour Law after Marikana: Is Institutionalized Collective Bargaining in SA Wilting? If So, Should We Be Glad or Sad?" 2013 34 *Industrial Law Journal* 823 829.

²⁰⁹ Manamela and Budeli "Employees' Right to Strike and Violence in South Africa" 2013 46 *Comparative & International Law Journal of South Africa* 308 327.

²¹⁰ (2012) 33 ILJ 1779 (LAC).

²¹¹ *Food & Allied Workers Union on behalf of Kapesi v Premier Foods Ltd t/a Blue Ribbon Salt River* (2012) 33 ILJ 1779 (LAC) 1782.

²¹² *Food & Allied Workers Union on behalf of Kapesi v Premier Foods Ltd t/a Blue Ribbon Salt River* 1787.

²¹³ (2001) 22 ILJ 1938 (ARB).

²¹⁴ *Consol Ltd and Chemical Energy Paper Printing Wood & Allied Workers Union on behalf of Hlongwane* (2001) 22 ILJ 1938 (ARB) 1940.

could identify; those who were engaged in serious misconduct and those against whom there was sufficient evidence available to institute disciplinary action.²¹⁵

In order for the union to succeed with its defence of selective dismissal, it had to prove that the employer by taking disciplinary action against the employees was motivated by bad faith, improper motives or a discriminating policy.²¹⁶ It was further held that the company was justified in instituting disciplinary action against the employees it could identify, engaged in serious misconduct and where sufficient evidence was available.²¹⁷ It was held that the dismissal was fair .

4 4 Disciplinary action while strike is in progress

Item 4(1) of the Code of Good Practice: Dismissal requires the employer to conduct a hearing before an employee can be dismissed. The question is when should a disciplinary enquiry be held in the case of misconduct committed during a protected strike? In *Chemical Energy Paper Printing Wood & Allied Workers Union v Metrofile (Pty) Ltd*,²¹⁸ the Labour Appeal Court was called upon to consider an appeal against the judgment of the court a quo *where it was held that the dismissal of striking workers was substantive fair*.²¹⁹ During the strike the employees had engaged in various acts of violence including intimidation and blocking access to the employer's premises.²²⁰ The Labour Court's reasoning was that the employer was supposed to have waited for the strike to come to an end before instituting a disciplinary hearing.²²¹ The Labour Appeal Court's however concluded :

“An employer has the right to institute disciplinary action at any time against employees engaging in misconduct particularly of a criminal nature as was the situation in this case. At the end of the day employees engaging in protected strike action need to know that they may only engage in legitimate activities intended to advance the course of their protected strike. Fairness also demands that an employer should not wait for a strike to end to institute disciplinary action for strike-related misconduct. By its nature illegitimate strike-related misconduct

²¹⁵ *Consol Ltd and Chemical Energy Paper Printing Wood & Allied Workers Union on behalf of Hlongwane* 1941.

²¹⁶ *Consol Ltd and Chemical Energy Paper Printing Wood & Allied Workers Union on behalf of Hlongwane* 1944.

²¹⁷ *Consol Ltd and Chemical Energy Paper Printing Wood & Allied Workers Union on behalf of Hlongwane* 1944.

²¹⁸ (2004) 25 ILJ 231 (LAC).

²¹⁹ *Chemical Energy Paper Printing Wood & Allied Workers Union v Metrofile (Pty) Ltd* (2004) 25 ILJ 231 (LAC) par 235.

²²⁰ *Chemical Energy Paper Printing Wood & Allied Workers Union v Metrofile (Pty) Ltd* par 236.

²²¹ *Chemical Energy Paper Printing Wood & Allied Workers Union v Metrofile (Pty) Ltd* par 246.

if unchecked, affords strikers an unwarranted advantage. Due to the illegitimacy of the misconduct it cannot be expected of an employer to tolerate it indefinitely.”²²²

Consequently, the court set aside the decision of the Labour Court and held that in view of the misconduct by the striking workers the employer was entitled to conduct disciplinary hearings during the strike against the workers.²²³ The employer therefore, need not wait until the strike is over before it can institute disciplinary action against an employee.

4 5 Costs

Where an employer approaches the court to interdict the violent conduct of strikers taking part in a protected strike the question is who should bear the costs of the application? This was considered in *SA Airways Technical (SOC) Ltd V SA Transport & Allied Workers Union*.²²⁴ The employees in this case took part in a protected strike and during that strike they blocked entrances and exits of the employer’s business premises and intimidated non-strikers in contravention of picketing rules that had been agreed upon by the employer and the union.²²⁵ Days later, the strike became more violent with the striking workers destroying property, burning tyres and assaulting non-striking employees and members of the public which prompted the employer to seek an interdict against the conduct of the strikers.²²⁶

An interim order was granted and on the return date the respondent union opposed the matter only on the aspect of costs which the employer sought against it.²²⁷ In coming to its decision the court had to take into account the conduct of the striking employees and their union in not complying with the agreed picketing rules.²²⁸ The court held that had there been compliance with picketing rules, the employer would not have incurred costs approaching the court for an order and therefore it was only fair that the union pay the costs.²²⁹

²²² *Chemical Energy Paper Printing Wood & Allied Workers Union v Metrofile (Pty) Ltd* 246.

²²³ *Chemical Energy Paper Printing Wood & Allied Workers Union v Metrofile (Pty) Ltd* 247.

²²⁴ (2014) 35 ILJ 1638 (LC).

²²⁵ *SA Airways Technical (SOC) Ltd V SA Transport & Allied Workers Union* (2014) 35 ILJ 1638 (LC) 1640.

²²⁶ *SA Airways Technical (SOC) Ltd V SA Transport & Allied Workers Union* 1641.

²²⁷ *SA Airways Technical (SOC) Ltd V SA Transport & Allied Workers Union* 1641.

²²⁸ *SA Airways Technical (SOC) Ltd V SA Transport & Allied Workers Union* 1645.

²²⁹ *SA Airways Technical (SOC) Ltd V SA Transport & Allied Workers Union* 1646.

In *Ekurhuleni Metropolitan Municipality v SA Municipal Workers Union*,²³⁰ the employer obtained an interim interdict ordering its striking employees from engaging in various acts of misconduct during a protected strike.²³¹ On the return date the employer sought to confirm the interim order but the strike was already over and the conduct complained of had abated.²³² The court for that reason declined to confirm the rule nisi but held that the union must pay for the costs incurred by the employer in obtaining the interim order and for preparing a replying affidavit for the matter before the court.²³³

The courts will also not hesitate to award costs on an attorney and client scale as a mark of disapproval of the strikers' misconduct²³⁴ as was the case in *Verulam Sawmills (Pty) Ltd v Association of Mineworkers & Construction Union*.²³⁵ In this case the striking employees of the applicant employer contravened picketing rules by engaging in various acts of misconduct during a protected strike.²³⁶ The court found that the breach of the picketing rules which the parties had agreed upon was material and as a result the employer had to approach the court for relief in order to prevent the employees from engaging in the violent and unlawful conduct.²³⁷ Consequently the court awarded a punitive costs order against the union and the workers.²³⁸

The court's reasoning in *SA Airways Technical, Ekurhuleni Metropolitan Municipality* and *Verulam Sawmills* show that the courts will not hesitate to award costs where the violent conduct of the strikers prompts the employer to approach the court for relief. The award of costs in favour of the employer seems to be motivated by the disapproval of the court of the deliberate breach of picketing rules and violence in general. In any case it would not make sense for the employer to bear the costs of the application

²³⁰ (2011) 32 ILJ 1686 (LC).

²³¹ *Ekurhuleni Metropolitan Municipality v SA Municipal Workers Union* (2011) 32 ILJ 1686 (LC) 1687.

²³² *Ekurhuleni Metropolitan Municipality v SA Municipal Workers Union* 1691.

²³³ *Ekurhuleni Metropolitan Municipality v SA Municipal Workers Union* 1695.

²³⁴ See also: *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Workers Union* (2012) 33 ILJ 998 (LC) 1004 where the court said the following: "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 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."

²³⁵ (2016) 37 ILJ 246 (LC).

²³⁶ *Verulam Sawmills (Pty) Ltd v Association of Mineworkers & Construction Union* (2016) 37 ILJ 246 (LC) 249.

²³⁷ *Verulam Sawmills (Pty) Ltd v Association of Mineworkers & Construction Union* 256.

²³⁸ *Ibid.*

when the employees decide to resort to violence to advance their cause instead of acting within the confines of peaceful bargaining.

4 6 Vicarious liability of union

The Constitutional Court has held that a union is accountable to its members for failing to prosecute a member's interests in litigation.²³⁹ The liability of a union for the conduct of its members during a protected strike, however, is a controversial issue. It is noteworthy that the Labour Appeal Court in *Food & Allied Workers Union v In2Food (Pty) Ltd*,²⁴⁰ confirmed that a union may be held accountable for the violent conduct of its members during a strike. The members of the union in this matter took part in an unprotected strike which was characterised by violence.²⁴¹ The employer sought and obtained an interdict restraining the union and its members from engaging in acts of violence and continuing with the strike action, the violence and the strike however continued.²⁴² The employer approached the Labour Court for an order that the union and its members were in contempt of the court's order, the court agreed and imposed a fine of R500 000 on the union which it blamed for not taking steps to discourage its members from continuing with the violence.²⁴³

The Labour Appeal Court held that what is required to establish liability is proof that the strike and violence took place as a result of an agreement between the union and its members.²⁴⁴ The court however upheld the appeal because the employer failed to establish the breach of the court order by the union.²⁴⁵ What is important however is the court's endorsement of the principle of union liability for the unlawful actions of its members²⁴⁶ which was stated in the court *a quo* as follows:

"The time has come in our labour relations history that trade unions should be held accountable for the actions of their members. For too long trade unions have glibly washed their hands of the violent actions of their members."²⁴⁷

²³⁹ *FAWU V Ngcobo NO* (2013) 34 ILJ 3061 (CC).

²⁴⁰ (2014) 35 ILJ 2767 (LAC).

²⁴¹ *Food & Allied Workers Union v In2Food (Pty) Ltd* (2014) 35 ILJ 2767 (LAC) 2769.

²⁴² *Food & Allied Workers Union v In2Food (Pty) Ltd* 2769.

²⁴³ *Food & Allied Workers Union v In2Food (Pty) Ltd* 2770.

²⁴⁴ *Food & Allied Workers Union v In2Food (Pty) Ltd* 2771.

²⁴⁵ *Food & Allied Workers Union v In2Food (Pty) Ltd* 2774.

²⁴⁶ *Food & Allied Workers Union v In2Food (Pty) Ltd* 2774.

²⁴⁷ *In2Food (Pty) Ltd v Food & Allied Workers Union* (2013) 34 ILJ 2589 (LC).

The case of *Mondi Ltd (Mondi Kraft Division) v Chemical Energy Paper Printing Wood & Allied Workers Union*,²⁴⁸ is important in that it outlined what an employer has to prove in order to establish the vicarious liability of a union where its members are engaged in violent conduct during a protected strike. In this case the employer instituted a claim for delictual damages against the respondent Union on the basis of vicarious liability for damages incurred as a result of the unlawful switching of its machinery by members of the union.²⁴⁹ The court held that the employer had to prove a wrongful act committed by the employee, for which the union is legally liable and which caused the employer to suffer foreseeable loss. Second, the employer had to prove that the act concerned is an offence. The employer must also prove that the union is guilty on the doctrine of common purpose.²⁵⁰ The union should have authorised or ratified the commission of the delict.²⁵¹ The court held that the employer failed to prove the vicarious liability of the union because nothing linked the union to the acts allegedly giving rise to the delictual claim, consequently the case was dismissed.²⁵²

In a controversial judgment the Constitutional Court in *South African Transport & Allied Workers Union & Congress of South African Trade Unions v Jacqueline Garvis*,²⁵³ the court imposed strict liability on the organisers of a strike for damage caused to the property of others.²⁵⁴ Woolman in a critical commentary of the case disapproves the notion of imposing strict liability for any damage caused to property through violence during a strike and argues that such a stance goes against the established principles of the right to freedom of assembly.²⁵⁵

²⁴⁸ (2005) 26 ILJ 1458 (LC).

²⁴⁹ *Mondi Ltd (Mondi Kraft Division) v Chemical Energy Paper Printing Wood & Allied Workers Union* (2005) 26 ILJ 1458 (LC) 1460.

²⁵⁰ *Mondi Ltd (Mondi Kraft Division) v Chemical Energy Paper Printing Wood & Allied Workers Union* 1468.

²⁵¹ *Mondi Ltd (Mondi Kraft Division) v Chemical Energy Paper Printing Wood & Allied Workers Union* 1470.

²⁵² *Mondi Ltd (Mondi Kraft Division) v Chemical Energy Paper Printing Wood & Allied Workers Union* 1472.

²⁵³ 2012 (8) BCLR 840 CC.

²⁵⁴ *South African Transport & Allied Workers Union & Congress of South African Trade Unions v Jacqueline Garvis* 2012 (8) BCLR 840 CC.

²⁵⁵ Woolman "You Break it, you Own it: South African Assembly Jurisprudence after Garvis" 2015 9 *ICL Journal* 548 564.

4 7 Interdict

An employer may apply to the court to interdict the violent conduct of strikers taking part in a protected strike. The pronouncements made by the court in *Woolworths (Pty) Ltd v SA Commercial Catering & Allied Workers Union*,²⁵⁶ regarding the granting of interdicts where violence erupts during protected strikes are noteworthy. In this case the employer was granted an interim interdict restraining its striking employees from intimidating, assaulting and harassing its customers and non-striking employees and interfering with the smooth running of its business.²⁵⁷ On the return date the union denied that its members took part in any acts of violence and the rule could not be confirmed because of the failure by the employer to identify the names of the strikers.²⁵⁸ For the purposes of this study, however, what is important is the courts confirmation that the Labour Court will not hesitate to grant interdicts where strikers resort to violence during strikes.²⁵⁹

4 7 1 Proper identification of strikers

Despite the readiness to come to the aid of the employer where violence has erupted in a strike, the courts will not grant interdicts where the striking employees are not named or properly identified. Again the case of *Woolworths (Pty) Ltd v SA Commercial Catering & Allied Workers Union* is instructive. The court refused to confirm the rule because the employer failed to properly identify the employees who were taking part in the violent strike.²⁶⁰ The court remarked that it could not grant an order covering all the employees and stores of the employer just because the employer could not identify the strikers.²⁶¹

A similar conclusion was reached by the court in *Makhado Municipality v SA Municipal Workers Union*.²⁶² In this case the employer obtained an interim order restraining its striking employees from engaging in various acts of misconduct during a protected strike.²⁶³ The court observed that the identity of the employees who allegedly were

²⁵⁶ (2006) 27 ILJ 1234 (LC).

²⁵⁷ *Woolworths (Pty) Ltd v SA Commercial Catering & Allied Workers Union* (2006) 27 ILJ 1234 (LC)1235.

²⁵⁸ *Woolworths (Pty) Ltd v SA Commercial Catering & Allied Workers Union* 1237.

²⁵⁹ *Woolworths (Pty) Ltd v SA Commercial Catering & Allied Workers Union* 1236.

²⁶⁰ *Woolworths (Pty) Ltd v SA Commercial Catering & Allied Workers Union* 1237.

²⁶¹ *Woolworths (Pty) Ltd v SA Commercial Catering & Allied Workers Union* 1236.

²⁶² (2006) 27 ILJ 1175 (LC).

²⁶³ *Makhado Municipality v SA Municipal Workers Union* (2006) 27 ILJ 1175 (LC) 1177.

responsible for the violence was not stated in the employer's papers.²⁶⁴ Reference was made to various cases²⁶⁵ where the courts have cautioned that no relief will be granted against unidentified respondents unless a strong case is put forward for such relief.²⁶⁶ The court held that while some leniency may be afforded to an employer in an application for an interim order on an urgent basis an order for final relief on the return date requires the employer to satisfy the requirements for such final relief.²⁶⁷ In this case the employer had failed to do so and the rule nisi was discharged.²⁶⁸

4 8 Loss of protected status of strike

The court in *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Workers Union*,²⁶⁹ questioned the logic of continuing to regard a strike as protected where the strike is characterised by violence.²⁷⁰ These remarks may justify an argument that where strikers engage in violence during a protected strike the strike may lose its status as a protected strike.²⁷¹ Considering the fact that LRA contains no provision for a protected strike to lose its status as a result of violence, the question is how will this happen?²⁷² An urgent application can be made by the employer in terms of section 158(1)(a)(iv) of the LRA for an order declaring the strike unprotected because of the misconduct of the strikers.²⁷³

4 9 Conclusion

The use of violence during protected strike has legal consequences. Employees who resort to violence during a protected strike may be dismissed on the basis of the operational requirements of the employer. The employer has to prove that the misconduct of the striking workers has resulted in the irreparable economic collapse

²⁶⁴ *Makhado Municipality v SA Municipal Workers Union* 1180.

²⁶⁵ *Ex parte Consolidated Fine Spinners & Weavers Ltd* (1987) 8 ILJ 97 (D); *Mondi Paper (A Division of Mondi Ltd) v PPWAWU* (1997) 18 ILJ 84 (D); *Great North Transport (Pty) Ltd v TGWU* [1998] 6 BLLR 598 (LC); *Polyoak (Pty) Ltd v Chemical Workers Industrial Union* (1999) 20 ILJ 392 (LC).

²⁶⁶ *Makhado Municipality v SA Municipal Workers Union* 1181.

²⁶⁷ *Makhado Municipality v SA Municipal Workers Union* 1182.

²⁶⁸ *Ibid.*

²⁶⁹ (2012) 33 ILJ 998 (LC).

²⁷⁰ *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Workers Union* (2012) 33 ILJ 998 (LC) 1004.

²⁷¹ Rycroft "Can a Protected Strike Lose Its Status?" 2012 33 *Industrial Law Journal* 821 826.

²⁷² *Ibid.*

²⁷³ Rycroft 2012 *Industrial Law Journal* 826.

of the business. The employer, however, need not wait until its business is on the verge of collapse before it can dismiss its workers.

Striking workers may also be dismissed for acts of misconduct during the strike. Our courts' attitude is that where strikers use violence during the course of a protected strike, dismissal is the appropriate sanction. Acts of violence such as intimidation are viewed as serious acts of misconduct justifying dismissal. The employer must always keep the parity principle in mind when dismissing employees for strike misconduct. The principle requires that employees who committed similar acts of misconduct must be treated the same. In other words if the employer decides to dismiss its employees for strike misconduct it must dismiss all those who are guilty of such misconduct. Where it selectively dismisses employees engaged in the same or similar acts of misconduct such dismissal may constitute an unfair dismissal.

Before dismissing an employee the Code of Good Practice: Dismissal, requires the employer to conduct a hearing. There has been uncertainty regarding when a disciplinary hearing should be held in the case of misconduct committed during the course of a protected strike. The matter was settled by the Labour Appeal Court in *Chemical Energy Paper Printing Wood & Allied Workers Union v Metrofile (Pty) Ltd* where it was held that there is no need to wait until the strike is over before the employer can institute disciplinary proceedings against employees allegedly taking part in acts of misconduct during a protected strike.

More often the employer has to approach the court for an order to interdict violent conduct by striking workers. The employer will thus incur costs for bringing such an application before the court. The courts under those circumstances seem to be willing to grant and order of costs in favour of the employer on the normal scale. Where however, the conduct of the strikers is a deliberate violation of agreed picketing rules, the courts will not hesitate to award costs on an attorney and client basis as a sign of its disapproval of such conduct.

Where the violence of striking workers results in damage to property, the union may be held accountable for such damage on the basis of vicarious liability. In order for the employer to succeed in such a claim, he has to prove the following: a wrongful act committed by the employee; authorised or ratified by the union; which constitutes an

offence; for which the union is legally liable on the doctrine of common purpose; and which caused the employer to suffer foreseeable loss.

In response to strike violence the employer may apply for an interdict to stop such violence. The courts will readily grant such interdicts provided that the strikers taking part in that violence are properly identified in the papers. The courts will thus not grant relief where the employer does not place the identity of the strikers on record. The employer must thus take every reasonable effort to ensure that it obtains the identity of the employees taking part in the strike violence.

Another consequence of resorting to violence during protected strikes is the possibility of the strike losing its status as a protected strike. While there is no case before the courts where a strike was held to have lost its status, the court in *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Workers Union* questioned the logic of keeping the strike protected where the strike is marred by violence. It remains to be seen whether our courts will adopt such an approach.

5 CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

Various pieces of legislation in South Africa criminalised strike action²⁷⁴ and as a result, violence often characterised industrial action.²⁷⁵ In the current constitutional dispensation, workers now have the right to strike under section 23 of the Constitution. This constitutionally entrenched right has two important limitations, firstly the strike must be orderly, secondly the strike must not involve acts of misconduct.²⁷⁶ Despite the entrenchment of the right to strike, industrial action in South Africa continues to be characterised by violence.

5.2 Conclusions

This study sought to investigate the impact of violence during protected strikes in South Africa acknowledging that the issue of violent strikes is not unique to South Africa other countries also experience strikes accompanied by violence, five key objectives were identified and investigated. The first objective was to outline the legal framework regulating the right to strike. Besides being entrenched in the Constitution, the right to strike is given more expression in section 64(1) of the Labour Relations Act 66 of 1995 (LRA). A strike is defined in section 213 of the LRA as:

“The partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee, and every reference to “work” in this definition includes overtime worked, whether it is voluntary or compulsory.”

The definition applies to strikes in general. A protected strike, however, is one that complies with the provisions of section 64 of the LRA. Section 64 of the LRA requires would be strikers to first refer the issue in dispute to a council or to the Commission for Conciliation Mediation and Arbitration for conciliation. If the issue in dispute is not resolved to that effect. Thereafter the union must issue 48 hours’ notice of the commencement of the strike must be to the employer. The notice may also be given

²⁷⁴ The Railway Regulation Act of 1908; Labour Relations Act 28 of 1956.

²⁷⁵ For instance The Rand Revolt of 1922. Coal “Control and Class Experience in South Africa’s Rand Revolt of 1922” 1999 19 *Comparative Studies of South Asia, Africa and the Middle East* 31 31.

²⁷⁶ Rycroft “Can a Protected Strike Lose Its Status?” 2012 33 *Industrial Law Journal* 821 822.

if the period of 30 days has lapsed since the matter was referred to the Council or CCMA. Alternatively, in terms of section 64(3) (b), the employees may follow the procedure laid down in a collective agreement in order for their intended strike to be protected. Workers intending to strike may thus either follow the procedure laid down in section 64 of the LRA or the procedure laid down in a collective agreement (if any).

Protected strike enjoy protections that are enjoyed by the strikes by the LRA section 67(2) protects them from claims of breach of contract by the employer. The striking employees have the right to continue being paid in kind if their remuneration includes payment in kind. Workers taking part in a protected strike are also protected from dismissal for taking part in the protected strike. Section 67(6) prohibits the institution of civil legal proceedings against an employee who takes part in a protected strike. Finally, employees have the right not to be interdicted or compelled to work. The Labour Court has no power to interdict a protected strike or to compel workers engaged in a protected strike to work.²⁷⁷

The second objective was to investigate the causes of violence during protected strikes and five causes of violence can be have been established by this research. Firstly, the lack of the ballot requirement in our bargaining system.²⁷⁸ Under the ballot system members of a trade union are required to vote for or against proposed industrial action.²⁷⁹ The ballot system ensured that a strike does not take place without the support of the majority of workers and thereby minimise strike violence.²⁸⁰ it is conceded that balloting under the 1956 LRA did not result in the end of violence but this was because at that time violence, strike action and politics were inextricably linked.²⁸¹ Political violence has ceased and as such balloting if re-introduced may be effective in curbing strike violence.²⁸²

Secondly, contact between striking and non-striking employees.²⁸³ Striking employees often intimidate and assault their non-striking counterparts and this result in a volatile

²⁷⁷ *Afrox Ltd v SA Chemical Workers Union* (1997) 18 ILJ 399 (LC) 402.

²⁷⁸ Tenza "An Investigation into the Causes of Violent Strikes in South Africa: Some Lessons from Foreign Law and Possible Solutions" 2015 19 *Law Democracy & Development* 211 212.

²⁷⁹ See section 65(2)(b) of the Labour Relations Act 28 of 1956. The ballot system was not incorporated into the LRA of 1995.

²⁸⁰ Tenza 2015 *Law Democracy & Development* 215.

²⁸¹ Tenza 2015 *Law Democracy & Development* 215.

²⁸² Tenza 2015 *Law Democracy & Development* 215.

²⁸³ Tenza 2015 *Law Democracy & Development* 212.

situation at the employer's premises.²⁸⁴ There, however, can be no justification whatsoever for violence against non-striking workers.²⁸⁵

However the study propose that to eliminate this, continuous education before and during strike is necessary. Sharing of intelligence between law enforcement agencies, unions and employers on the escalation of the safety of employee's both striking and none striking.

Thirdly, the use of replacement labour during strikes.²⁸⁶ During strike action an employer whose business has not been designated as a maintenance, service may seek the services of replacement workers to continue production during the course of a strike.²⁸⁷ Where replacement labour is used violence often occurs because of the suspicion by striking employees that the strike will not exert any pressure on the employer since production is continuing as normal.²⁸⁸

Fourthly, striking workers often belief that their demands will only be acceded to by the employer if accompanied by violence²⁸⁹ This belief, however, has no basis and it is important to emphasise that economic pressure instead of violence is what is required to force the employer to accede to the employees' demands.²⁹⁰ Trade Union leadership have a responsibility, to act responsibly , control their members during strike action and discourage the use of violence or risk being de-registered and lose the statutory privileges, which come with being a registered union.²⁹¹

Finally, violence may also be caused by social conditions such as unemployment, high poverty levels and income inequality.²⁹² In order to end violence during strikes a legislative solution which takes into account the social realities of income inequality,

²⁸⁴ Selala "The Right to Strike and the Future of Collective Bargaining in South Africa: An Exploratory Analysis" 2014 3 *International Journal of Social Sciences* 115 121.

²⁸⁵ *Metal & Allied Workers Union v Siemens Ltd* (1986) 7 ILJ 547 (IC) 552.

²⁸⁶ Tenza 2015 *Law Democracy & Development* 212.

²⁸⁷ Section 76 of the LRA prohibits the use of replacement labour where a part of the employer's business has been designated as a maintenance service.

²⁸⁸ Tenza 2015 *Law Democracy & Development* 220.

²⁸⁹ Tenza 2015 *Law Democracy & Development* 212.

²⁹⁰ Tenza 2015 *Law Democracy & Development* 224.

²⁹¹ Brassey "Labour Law After Marikana: Is Institutionalized Collective Bargaining in SA Wilting? If So, Should We Be Glad or Sad?" 2013 34 *Industrial Law Journal* 823 834.

²⁹² Ngcukaitobi "Strike Law, Structural Violence and Inequality in the Platinum Hills of Marikana" 2013 34 *Industrial Law Journal* 836 846.

unemployment and poverty is required.²⁹³ Government, business and labour need to conclude negotiation of the minimum wage in South Africa across sectors urgently.

The third objective was to examine how the LRA regulates the use of violence during protected strikes. Primarily, the purpose of the LRA is to, inter alia; promote labour peace; orderly collective bargaining and the effective resolution of labour disputes.²⁹⁴ Acts of violence therefore infringe upon the objectives of the LRA, which provides certain protection to participants in a protected strike is immune from civil or delictual liability.²⁹⁵ The Labour Court has jurisdiction to hear delictual claims arising from a protected strike.²⁹⁶

Employees who partake in a protected strike cannot be dismissed.²⁹⁷ Where employees engage in acts of violence during a protected strike they may be dismissed for misconduct in terms of section 67(5). Where the conduct of the strikers results in the business of the employer ceasing to be economically viable, the employer may dismiss the striking employers for operational requirements in terms of section 189 of the LRA.

The fourth objective was to ascertain the courts' approach towards violence during strikes. The courts will thus seldom order the reinstatement of employees dismissed for strike misconduct during protected industrial action.²⁹⁸ Taking part in a protected strike does not authorise strikers to engage in acts of violence.²⁹⁹ The right to strike does not include the right to engage in acts of misconduct by disrupting the business of the employer, if this tendency of violence during strike action is not addressed it will promote anarchy and violates the right of the employer to undisturbed trade during strike action.³⁰⁰ The Constitution is undermined where the right to strike is exercised in a manner which violates other rights such as the right to freedom of movement,

²⁹³ Ngcukaitobi 2013 *Industrial Law Journal* 847.

²⁹⁴ Section 1 of the LRA.

²⁹⁵ Section 67(2) of the LRA.

²⁹⁶ *Mondi Ltd (Mondi Kraft Division) v Chemical Energy Paper Printing Wood & Allied Workers Union* (2005) 26 ILJ 1458 (LC) 1467.

²⁹⁷ Section 67(4) of the LRA.

²⁹⁸ *National Union of Metalworkers of SA v Lectropower (Pty) Ltd Ltd* (2014) 35 ILJ 3205 (LC) 3215.

²⁹⁹ *Chemical Energy Paper Printing Wood & Allied Workers Union v Metrofile (Pty) Ltd* (2004) 25 ILJ 231 (LAC) 246.

³⁰⁰ *Labour Equity General Workers Union of SA on behalf of Siphon and Qutom Farm* (2012) 33 ILJ 2499 (CCMA) 2504.

security and the right to life by resorting to violence and intimidation.³⁰¹ Strikes in South Africa are often characterised by violence but the nature, extent, duration and cause of such violence is what the courts will consider in exercising its discretion whether or not to deny the applicants a remedy.³⁰² In *Buthlezi v Labour for Africa (Pty) Ltd*,³⁰³ the court attributed the violence to the ‘scam’ by the employer, which led to the workers losing their jobs and remarked that the workers’ anger, and frustration was thus understandable.³⁰⁴

The fifth objective was to examine the legal implications of violence during protected strikes. In terms of section 67(5) of the LRA striking employees may be dismissed for the operational requirements of the employer. The employer must prove that it has suffered irreparable economic hardship because of the strike in order to dismiss striking workers based on operational requirements.³⁰⁵ The LRA and our courts are very strict when they are dealing with this kind of dismissal in order to ensure that employers are not taking advantage of this provision and dismiss employees simple because they participated in a strike.³⁰⁶ Where the employer dismisses striking employees on this ground, it need not wait until the business is on the brink of collapse before dismissing them.³⁰⁷

Again, in terms of section 67(5) of the LRA an employer may dismiss a striking employee for reasons relating to his or her conduct during a protected strike. The use of violence during a protected strike is a serious form of misconduct that warrants dismissal of the concerned employees.³⁰⁸ Where strikers resort to violence, the courts will not hesitate to confirm the dismissal of the concerned employees.³⁰⁹

³⁰¹ *National Union of Metalworkers of SA on behalf of Mhlanga and Geneva Ad (Pty) Ltd* (2012) 33 ILJ 1992 (BCA) 2006.

³⁰² *Ibid.*

³⁰³ *Buthlezi v Labour for Africa (Pty) Ltd* (1991) 12 ILJ 588 (IC).

³⁰⁴ *Buthlezi v Labour for Africa (Pty) Ltd* 598.

³⁰⁵ *Black Allied Workers Union v Prestige Hotels CC t/a Blue Waters Hotel* (1993) 14 ILJ 963 (LAC) 973.

³⁰⁶ Basson “Some Recent Developments in Strike Law” 2000 *South African Mercantile Law Journal* 119 128.

³⁰⁷ *Hotel Liquor Catering Commercial & Allied Workers Union v Awerbuch's Bargain House (Pty) Ltd* (1995) 16 ILJ 163 (IC) 173.

³⁰⁸ *National Democratic Change & Allied Workers Union v Cummins Emission Solutions (Pty) Ltd* (2014) 35 ILJ 2222 (LC) 2234.

³⁰⁹ *National Union of Metalworkers of SA on behalf of Mhlanga and Geneva Ad (Pty) Ltd* (2012) 33 ILJ 1992 (BCA).

The dismissal of striking workers for misconduct requires that the employer firstly be able to identify the alleged offenders. In most instances however the perpetrators of violence go unpunished because of the failure of the employer to identify the employees and the unwillingness of co-workers to testify against the alleged perpetrators.³¹⁰

Secondly, a disciplinary hearing must be conducted. Item 4(1) of the Code of Good Practice: Dismissal requires the employer to conduct a hearing before dismissing an employee. Again, here the employer need not wait until the strike is over before instituting proceedings.³¹¹

Where an employer approaches the court to interdict the violent conduct of strikers taking part in a protected strike the employees and their union may bear the costs of the application.³¹² The courts may even grant a costs order on an attorney and client scale as a sign of disapproval of the use of violence during a protected strike.³¹³

A union may be held accountable for the violent conduct of its members during a protected strike.³¹⁴ An employer has to prove the following in order to establish the vicarious liability of a union: a wrongful act committed by the employee; authorised or ratified by the union; which constitutes an offence; for which the union is legally liable on the doctrine of common purpose; and which caused the employer to suffer foreseeable loss.³¹⁵

The employer may interdict the violent conduct of strikers taking part in a protected strike, by making an application to court. While the courts will not hesitate to grant

³¹⁰ Brassey "Labour Law after Marikana: Is Institutionalized Collective Bargaining in SA Wilting? If So, Should We Be Glad or Sad?" 2013 34 *Industrial Law Journal* 823 829.

³¹¹ *Chemical Energy Paper Printing Wood & Allied Workers Union v Metrofile (Pty) Ltd* (2004) 25 ILJ 231 (LAC) 247.

³¹² *SA Airways Technical (SOC) Ltd V SA Transport & Allied Workers Union* (2014) 35 ILJ 1638 (LC) 1646.

³¹³ See: *Verulam Sawmills (Pty) Ltd v Association of Mineworkers & Construction Union* (2016) 37 ILJ 246 (LC).

³¹⁴ *Food & Allied Workers Union v In2Food (Pty) Ltd* (2014) 35 ILJ 2767 (LAC) 2774.

³¹⁵ *Mondi Ltd (Mondi Kraft Division) v Chemical Energy Paper Printing Wood & Allied Workers Union* (2005) 26 ILJ 1458 (LC) 1468.

such interdicts the employer, however, has to properly identify or provide the names of the striking workers engaged in the violence.³¹⁶

A final possible consequence of the use of violence during a protected strike is that the strike may lose its status as a protected strike. There is no judgement that has expressly ruled that violence may render protected strike to be unprotected however, the tone of Labour Court judges does not rule out this possibility in future ³¹⁷

5 3 Recommendations

This study found and makes the following recommendations and possible solutions.

Strikers must engage in protected strikes in order to enjoy the full benefits of the law that flow from participating in such strikes. Failure to do so undermines the rule of law and order, constitution and collective bargaining process.

Economic pressure is what is required to force the employer to accede to the employees' demands. Strike action [withdrawal of labour] is one instrument that can best achieve this not using violent tactics, trashing of cities, vandalism and damage to property, assaults and intimidation.

Violence is never a solution to the employees' demands especially in a protected strike. Considering the various consequences that flow from the use of violence, employees must desist from using violence during strikes.

In as much Violence is used by strikers as tool to attain their goals it is however not the right tool, workers must exercise the right to strike peacefully, and respect the rights of other people including none striking workers and employers. Engaging in violence as means to get publicity support must be rejected and courts must be empowered to stop violent strike actions by amending labour laws to provide Labour Court with this power.

³¹⁶ *Woolworths (Pty) Ltd v SA Commercial Catering & Allied Workers Union* (2006) 27 ILJ 1234 (LC) 1236.

³¹⁷ *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Workers Union* (2012) 33 ILJ 998 (LC) 1004.

Proper Regulation of replacement workers. This must be regulated to avoid clashes and violence, as it creates more frustration to the strikers which lead to violent conduct.

Right to strike remains cornerstone of the collective bargaining process in South Africa, Strikes that are characterised by violence by strikers are detrimental to the foundations upon which labour relations in this country are founded as expressed by Tenza.

We need to learn lessons from violent strikes of 2006 Public servants , 2007 security guards strikes and the deadly 2012 Marikana strike which led to massacre of striking mine workers in a democratic South Africa.

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