

# Revisiting the liability of trade unions and/or their members during strikes: Lessons to be learnt from case law

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## OPSOMMING

### 'n Herbesinning oor vakbonde en/of hul lede se aanspreeklikheid tydens stakings:

#### Lesse te leer uit die positiewe reg

Die omvang van vakbonde se aanspreeklikheid vir skade berokken aan hul lede (werknemers), werkgewers en selfs aan derde partye wat buite die vakbond-lidmaatskap-verhouding of die diensverhouding staan, word in hierdie artikel ondersoek. Dit is algemeen bekend dat stakings en protesoptrede deur vakbonde en werknemers nie altyd op 'n vreedsame of 'n wetsgehoorsame wyse plaasvind nie, ongeag of die staking aan die vereistes vir 'n beskernde staking voldoen of nie. Geweld, intimidasie, liggaamlike beserings en skade aan eiendom dui op gebrekkige dissipline en kontrole in vakbondgeledere. Sowel 'n statutêre as 'n deliktuele remedie het in die praktyk vorm aangeneem. Eisers wat tydens stakings skade gely het en die omvang daarvan kan bewys kan skadevergoeding eis. In hierdie artikel is die klem op die statutêre toepassingsgebied van die fundamentele reg om te staak en toepaslike regspraak oor die aangeleentheid.

## 1 INTRODUCTION

The decision to strike is rooted in one of the most powerful international labour rights in the arena of employment equality.<sup>1</sup> The exercising and the impact of social and economical power to get the upper hand in the settlement of disputes in the workplace, have for many decades been the exclusive domain of employers and management.

Disputes regarding any matter of mutual interest between the parties can be resolved by collective bargaining and if negotiations reach a deadlock, employees may use collective action to counterbalance the bargaining power of employers.<sup>2</sup> After the enactment of the Final Constitution,<sup>3</sup> "every worker" has

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1 See International Labour Organisation (hereafter ILO) Conventions 87 and 98 which afford every worker the right to associate and organise and engage in orderly collective bargaining.

2 S 213 of the LRA and s 1 of the Basic Conditions of Employment Act 75 of 1997 do not define the meaning of a "dispute". It only states that "[a] dispute includes an alleged dispute". However, s 213 defines "issue in dispute" as being "in relation to a strike . . . the demand, the grievance, or the dispute that forms the subject matter of the strike". Furthermore s 213 defines a "collective agreement" as "a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions, on the one hand and on the other hand (a) one or more employers; (b) one or more registered employers organisations; or (c) one or more employers and one or more employers' organisations". Finally, s 213 defines a "strike" and

the “right to strike” in response to section 23(5) of the Constitution<sup>4</sup> while the Labour Relations Act,<sup>5</sup> regulates the right of employees to legally challenge the power of the employer without fear of dismissal. “Compared with strike action under the previous dispensation . . . court[s] should regard unprotected strike action coupled with serious misconduct in a very serious light . . . and should not readily come to the assistance” of strikers who disregard the advice and repeated warnings of their employer and senior union officials that their behaviour constitutes an unprotected strike.<sup>6</sup> The right to strike is not an absolute right. Section 36 of the Constitution allows the right to strike to be limited in terms of law of general application. Section 65(1) of the LRA clearly states that “no person may take part in a strike [or lock-out] or in any conduct in contemplation or furtherance of a strike [or lock-out]” in four instances:

- (a) where a collective agreement prohibits a strike in respect of the issue in dispute;
- (b) where an agreement requires the issue in dispute to be arbitrated;
- (c) where the a party may exercise their right to refer the specific issue in dispute for arbitration or to be adjudicated by the Labour Court; or
- (d) where the employee is engaged in essential or maintenance services.

It is accepted that the financial harm caused by a strike serves as a counterweight to ensure that the employer remains at the bargaining table until the relevant issues are resolved and the demands of employees are being met to the satisfaction of both parties.<sup>7</sup> However, in some instances financial harm is brought about not only by withholding labour, whether legal (protected by law) or illegal (unprotected by law), but also through the unlawful conduct of strikers during a protected strike.<sup>8</sup> Noting this difficulty regarding dismissals in the context of collective bargaining, Qotoyi and Van der Walt responded as follows:

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states its purpose as “remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee”.

3 See s 23(2)(c) of the Constitution of the Republic of South Africa, 1996 (hereafter the Constitution).

4 See s 64 of the LRA which supports the purpose of the Act (s 1) to give effect to and regulate the rights conferred by the Constitution and the obligations incurred by the Republic as a member state of the ILO.

5 66 of 1995 (hereafter the LRA). Although the main focus of this article is on the right to strike, mention will also be made to the right to engage in peaceful protest action in accordance with s 77 of the LRA. See para 6 *infra*. According to s 213 of the LRA a “‘protest action’ refers to a partial or complete concerted refusal to work, or the retardation or obstruction of work, for the purpose of promoting or defending the socio-economic interests of workers, but not for the purpose referred to in the definition of strike”.

6 See *NUFAWU of SA v New Era Products (Pty) Ltd* 1999 ILJ 869 (IC) 877 para 41 and see text on this case at para 5 2 *infra*.

7 In *VNR Steel (Pty) Ltd v NUMSA* 1995 ILJ 1483 (LAC) it was stated that “by withholding their labour, the employees hope to bring production to a halt, causing him to lose business and to sustain overhead expenses without the prospect of income, in the expectation, that should the losses be sufficiently substantial, the employer will accede to their demands”.

8 Bruun and Hepple “Economic policy and labour law” in Hepple and Veneziani (eds) *The transformation of labour law in Europe* (2009) 31 are of the view that “labour law is judged not only by the protection it might offer to individual workers, but also by how it interacts with the functioning of the labour market and the economy”. Therefore the interests of both employer and employee should be included in the scope and the manner in which the law is interpreted and applied. See s 23(1) of the Constitution and *NEHAWU v*

“This poses serious challenges when it comes to balancing the interests of the employer to run an enterprise efficiently and in some cases even to resort to dismissal to ensure the survival, profitability and efficiency of the enterprise against the employees’ right to employment.”<sup>9</sup>

At present, striking employees are protected against dismissal as long as they adhere to the provisions of the LRA<sup>10</sup> and exercise their right collectively and lawfully under the control of a registered trade union.<sup>11</sup> However, as an exception to the general rule that an employee engaged in a protected strike may not be dismissed, an employee may be dismissed on grounds of misconduct during such a strike.<sup>12</sup> In addition, trade union members could forfeit their legal protection and face dismissal by their employer.<sup>13</sup>

The article commences with a brief discussion of the legal framework regarding a protected strike, followed by the main discussion, namely, a trade union’s liability for damage caused during violent strike actions and the Constitutional Court’s precedent-setting ruling confirming a union’s liability for damage caused during strikes.

## 2 DEVELOPMENT OF THE RIGHT TO STRIKE

The ideal character of dispute resolution and the whole process of collective bargaining between employers and employees need to reflect peaceful negotiations and the settlement of interest differences. With regard to this goal, the LRA clearly states that the Act strives “to advance economic development, social justice, labour peace and [above all] the democratisation of the workplace by fulfilling the primary objects of the Act”.<sup>14</sup>

In essence “democracy means participation”<sup>15</sup> which reflects on the collective engagement of employees to exercise their Constitutional right to associate freely, to organise, to participate as members of a trade union in the activities of that trade union and to collective bargaining.<sup>16</sup> The right to strike is the direct outcome of the way in which the LRA gives “effect to obligations incurred by the Republic as a member state of the International Labour Organisation”.<sup>17</sup>

*UCT 2003 ILJ 95 (CC) 99I-J re the meaning of “everyone” and the right of employers to fair labour practices.*

9 Qotoyi and Van der Walt “Dismissals within the context of collective bargaining” 2009 *Obiter* 63 68.

10 See ss 4(1), 4(2), 64, 67(4) and 187(1)(a) of the LRA.

11 In *Volkswagen SA (Pty)Ltd v Brand NO* 2001 *ILJ* 933(LC) the court referred to the distinction between strike action and collective misconduct.

12 For the employer’s statutory remedy see ss 67(6) and 68(1)(b) of the LRA re a strike not in compliance with the Act as well as the Labour Court’s exclusive jurisdiction “to order payment of just and equitable compensation for any loss attributable to the strike or conduct”.

13 See s 68(5) regarding an employer’s remedy to dismiss employees for participating in a strike or conduct not complying with the Act (based on ss 64 and 65) which “may constitute a fair reason for dismissal” in accordance with the Code of Good Practice: Dismissal in Schedule 8 of the LRA.

14 See s 1 of the LRA.

15 Hepple “The role of trade unions in a democratic society” 1990 *ILJ* 645 646.

16 See s 23(2)(c) and (4) of the Constitution.

17 See s 1 of the LRA regarding the purpose of the Act which is amongst other aspects of labour, to advance the “democratisation of the workplace”. See s 1(b) of the LRA, the long title of the Act and Convention 87 of 1984 and Convention 98 of 1949 with regard to the internationally acknowledged right to associate freely and the right to collective

The primary role of trade unions is to serve the interests of their members, as the weaker bargaining party, who need the collective voice of a stronger party to uphold the members' rights. "It is, above all, not merely the sense of being ruled by law, but also of being able to shape the law by which one is ruled."<sup>18</sup> Democracy reaches its goal when workers can engage in lawful activities to let their voices be heard and participate in decisions that shape their future.

It is apparent from the definition of a strike that such collective action should reflect the following *three essential characteristics* in order to be statutorily lawful and protected against dismissal:<sup>19</sup>

- (a) Firstly, the decision to *withhold labour* should entail the following:<sup>20</sup>
  - (i) the partial or complete refusal to work;
  - (ii) the retardation of work;
  - (iii) the obstruction of work; and
  - (iv) the abovementioned includes any voluntary or compulsory overtime work.
- (b) Secondly, any action taken by employees or past employees should reflect a *collective exercise*<sup>21</sup> of the right of one or more employers.
- (c) Thirdly, the *purpose of the strike* should be for any one of the following matters:
  - (i) to remedy a grievance;
  - (ii) to resolve a dispute; or
  - (iii) to compel the employer to comply with or accede to a demand of employees in respect of any matter of mutual interest between the employer and the employees.<sup>22</sup>

The focus on the abovementioned components originated from and falls within the framework of an employee's right to associate and organise in trade unions and to engage in collective bargaining.<sup>23</sup> Although the right to strike is constitutionally guaranteed, it is not an absolute right and should not be viewed in isolation. It may under certain circumstances, be limited in terms of section 36 of the Constitution.<sup>24</sup>

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bargaining. The restriction placed on the right to associate freely by the closed shop principle in South Africa and specifically on the opposite of the right, namely the right not to associate or join a trade union, is acknowledged but will not be discussed in this article.

18 Hepple 1990 *ILJ* 645 646.

19 See s 213 of the LRA (emphasis added).

20 See ss 64–77 of the LRA for the additional requirements for a protected strike and secondary strikes.

21 See *Ngewu v Union Co-op Bark & Sugar Co* 1983 *ILJ* 41 (N) and *Schoeman v Samsung Electronics SA (Pty) Ltd* [1997] 10 *BLLR* 1364 (LC).

22 See s 213 of the LRA for a complete definition of a strike.

23 *Supra* fn 1. See *SACWU v BHT Water Treatments (Pty)Ltd* 1994 *ILJ* 141 (IC) where the IC held that "the right to strike exists as a necessary result of the right to associate and to bargain".

24 See ss 7 and 36 of the Constitution regarding the limitations on the rights in the Bill of Rights. S 65 of the LRA limits the right to strike in essential or maintenance services and lays down conditions which may prohibit a party to take part if bound by collective agreements, other agreements or specific legislative conditions, prohibiting and limiting strikes.

Employees are entitled to exercise their fundamental right to strike in a collective capacity as members of a registered trade union. Consequently, it is the trade union that takes control and organises such an action. It is in this respect that every trade union, as “an association of employees, whose principal purpose is to regulate relations between employees and employers, including employers’ organisations”<sup>25</sup> exercises its fundamental right in accordance with section 23(4) and (5) of the Constitution. Of particular interest in this regard is the right<sup>26</sup> of trade unions to determine its own constitution<sup>27</sup> and rules, and to plan and organise its administration and lawful activities, for example to organise strike action for its members.<sup>28</sup>

Another aspect of trade unions’ involvement in serving the interests of their members, whether during a protected strike or not, is their involvement in politics.<sup>29</sup> This is an area in which a trade union could display various degrees of power. It can even demonstrate a competitive nature towards other trade unions, reflecting the impact of its role in the history of securing democratic rights for workers. It is therefore understandable that the degree of a trade union’s political involvement is closely linked to the history of its role as a political force in serving the political objectives and democratic rights of its members in the workplace and society at large.<sup>30</sup> A “political” strike would thus affect the protection provided to strikers as its main focus would not reflect an employment dispute between employees and their employer. A protest action would for that reason be the proper instrument to obtain protection in accordance with the LRA, as its primary object is to promote or defend “the socio-economic interests of workers, but not for a purpose referred to in the definition of strike”.<sup>31</sup> In *Jumbo Products v NUMSA* the court held that a strike “is for the ultimate good of society and accordingly a court should be slow to interfere with the process of industrial action”.<sup>32</sup> However, a court should interfere when “the union fails to show that it had any legitimate interest of [its members] in mind”.<sup>33</sup>

It can therefore be said that an unlawful act for which the union can be held liable during strike or protest actions<sup>34</sup> could be distinguished by either a wrongful commission or an omission. A union could negligently or intentionally advise its members to enter into, or proceed with, an unprotected strike causing the employer and union members (based on the “no work no pay principle”) serious financial harm. If a union for example fails to implement a policy of

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25 See s 213 of the LRA and s 8(a)–(e) re the rights of trade unions.

26 See s 8(a)(b) of the LRA.

27 See *NEWU v Mtshali* [2003] 3 BLLR 337 (LC) where the union sought to amend its constitution to allow membership to work seekers. Such amendment was held to be impermissible as union membership is an exclusive right of persons defined by s 213 of the LRA as “employees”.

28 In *KZN Furniture Manufacturer’s Association v National Union of Furniture & Allied Workers of South Africa* [1996] 8 BLLR 964 (N) 966 the court held that a union’s failure to give members adequate notice of a ballot amounted to a material irregularity which rendered the strike illegal. Although a union is not compelled to adhere meticulously to the provisions of its constitution, a union is obliged to do so when its constitution contains the requirements of s 65(2)(b) of the LRA.

29 Hepple 1990 *ILJ* 645 649.

30 *Ibid.*

31 See s 213 of the LRA for the definition of “protest action”.

32 1996 *ILJ* 859 (W) 878.

33 *Ibid.*

34 See the definition of protest action in s 213 of the LRA and in para 1 *supra*.

“action without violence” in its constitution, or after implementation fails to adhere to or enforce such a policy by not acting in a pro-active manner to ensure that vital precautionary measurements for a “violence free strike or protest action” have been taken, would it not be contradictory of and in conflict with its mission to protect and advance the interests of its members? The sole purpose of obtaining membership of trade unions is after all to improve the employees’ work and living standards by means of collective action.

### 3 LEGAL CONSEQUENCES OF A STRIKE

One of the essentials of a strike is “the partial or complete refusal to work, or the retardation or obstruction of work by persons who are employed by the same or different employers”.<sup>35</sup> It is therefore lawful that this “protected refusal” to fulfil contractual obligations by employees should amount to the temporary suspension of their contracts of employment and the employment relationship during the period of a protected strike.<sup>36</sup> The LRA clearly states that a protected striker (employee) “does not commit a delict or a breach of contract” by participation in the strike or by “taking part in any conduct in contemplation or furtherance of a protected strike”.<sup>37</sup> Grogan AJ emphasised that the purpose of a strike “is to enable workers to induce pressure to bear on their employers by the withdrawal of their labour in order to induce them to comply with some work related demand”.<sup>38</sup> In addition to the purpose of a strike, Basson J added that “the aim of a strike is to persuade the employer through the peaceful withholding of work to agree to their demands”.<sup>39</sup>

It is therefore clear that an employer may not dismiss an employee who lawfully exercised his or her right to participate in a protected strike or any lawful conduct in furtherance of a protected strike.<sup>40</sup> The term “legal” or “protected” strike is sometimes used alternatively to refer to a strike which complies with the requirements of sections 67–68 of the LRA. Van Jaarsveld argues that the latter term represents “a misnomer as the consequences of the act (protection) are confused with the act itself”.<sup>41</sup> Accordingly, it would have been more accurate to refer to a strike which complies with the Act as a legal strike, instead of referring to an aspect of the consequences of a legal strike, such as “protection” against dismissal.<sup>42</sup>

Be that as it may, an employer would be entitled to dismiss an employee if that employee participated in any unlawful conduct during a protected strike.<sup>43</sup> The LRA refers to unlawful conduct in general terms by using the term “misconduct”. The legislator intentionally refrained from defining the concept of

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35 See s 213 of the LRA for the definition of a “strike”.

36 See *FGWU v Minister of Safety & Security* 1999 ILJ 1258 (LC) 1264 para 19.

37 See s 67(2)(a)(b) of the LRA.

38 See *FGWU v Minister of Safety & Security* 1999 ILJ 1258 (LC) 1264 para 18 and *CEPPWAWU v Metrofile (Pty) Ltd* 2004 ILJ 231 (LAC) 246 para 53 regarding employees’ right to engage in a form of power play to influence an employer to extend an offer of better labour conditions.

39 See *FAWU obo Kapesi v Premier Foods Ltd t/a Blue Ribbon Salt River* 2010 JOL 25623 (LC) para 6.

40 See s 67(4) of the LRA.

41 Van Jaarsveld *et al Principles and practice of labour law* (2011) para 916.

42 *Ibid.*

43 See s 67(5) of the LRA.

“misconduct” to permit for the unique differences of each case.<sup>44</sup> The Act is, however, clear that there are only three reasons for a substantively fair dismissal of which serious misconduct by an employee is acknowledged as a fair reason.<sup>45</sup> If the employer should dismiss striking employees who participated in a protected strike and failed to prove any serious misconduct on their, or made a dismissal based on operational reasons resulting from a prolonged strike, such a dismissal would constitute an automatically unfair dismissal.<sup>46</sup>

Another important aspect provided for by the legislator regarding the protection of employees’ right to strike, concerns the conduct of trade unions. Generally speaking, it is safe to accept that union members rely on their union to comply with the provisions in its own constitution. If a trade union should fail “to comply with a provision in its constitution requiring it to conduct a ballot of those of its members in respect of whom it intends to call a strike”,<sup>47</sup> such an act should not affect the protection provided by the LRA or constitute a ground for any litigation.

It goes without saying that no civil legal proceedings may be instituted against any employee or official of a registered trade union, on the ground of their participation in a protected strike or ‘protest action’ in accordance with section 77 of the LRA, or in any *lawful* conduct which serves the purpose of administering or advancing a protected strike or a peaceful protest action.<sup>48</sup> However, in terms of section 67(8) of the LRA if any act in the furtherance of a strike constitutes a criminal offence, the employer or third party has the right to institute civil action against any person involved in the strike.<sup>49</sup>

The success of a plaintiff who sues the union for damages arising from unlawful conduct during a protected or unprotected strike depends on whether the claimant can prove on a balance of probabilities that the union or its members involved in unlawful conduct, can incur delictual liability.<sup>50</sup> A union cannot be prosecuted for criminal actions of its members. Incidents where strikers or protesters, as individuals, meet the requirements of a criminal offence could result in prosecution by the state in a criminal court. The onus would then be on the state to prove beyond reasonable doubt that ordinary citizens, in their capacity as striking or protesting member(s) of a trade union, committed a criminal offence such as the assault, rape or murder of fellow union members or members of the public. Be that as it may, the Labour Court in *Lomati Mill Barberton (A division of Sappi Timber Industries) v Paper Printing Wood & Allied Workers Union*<sup>51</sup> left no doubt as per Landman J, that the Labour Court has exclusive jurisdiction over every kind of unlawful act committed during a protected strike, constituting both of criminal offences and delicts.

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44 See s 1 of Schedule 8, Code of Good Practice: Dismissal of the LRA.

45 See s 188(1)(a)(i) and (2) of the LRA.

46 See ss 187(1)(a) and 67(4) and (5) of the LRA.

47 See s 67(7) of the LRA.

48 See s 67(6) of the LRA. With reference to the meaning of “peaceful” protest action see *Garvis v SA Transport and Allied Workers Union* 2010 ILJ 2521(WCC) *infra* para 6 as well as the judgment on appeal.

49 See s 67(8) of the LRA.

50 For a discussion of a case involving a delictual claim by an employer against a trade union based on the common law doctrine of vicarious liability, see *Mondi Ltd (Mondi Kraft Division) v CEPPAWU* 2005 ILJ 1458 (LC) para 5 7 *supra*.

51 1997 ILJ 178 (LC) 184.

Another issue worth mentioning, which falls within the scope of a union's liability for damages incurred by an employer during an unprotected strike or protest action, concerns the aspect of fairness during the dismissal of a selected group of union members, while others who participated in the same unprotected industrial action, go scot-free. The "parity principle" as a subdivision of the principle of fairness, which requires similar cases to be treated similarly, was introduced by the case of *Henred Fruehauf Trailers (Pty) Ltd v National Union of Metalworkers of SA*.<sup>52</sup> In this case the Labour Appeal Court rejected the employer's selection criteria, which singled out a specific group of employees involved in a go-slow, to be dismissed as "[a] totally arbitrary and patently unfair reason for selecting a small number of miscreants from a collective whole".<sup>53</sup> A different view was taken by the same court in *SA Commercial Catering & Allied Workers Union*<sup>54</sup> regarding the application of the "parity principle" and the requirement of consistency. The court took the view that "fairness is a value judgment" and that "too much emphasis" on the "parity principle" could be a tall order in cases where a *bona fide* decision resulted in the dismissal of a group of strikers while others for example receive final warnings. "The best that one can hope for is *reasonable consistency* [as] consistency is not a rule unto itself."<sup>55</sup>

A final comment on a statutory remedy or sanction at the disposal of an employer faced with an unprotected strike or a protest action is provided in terms of section 68(5) of the LRA. The consequence of "unprotected" industrial action (including strikes and protest actions) taken by employees, or unlawful conduct in contemplation or furtherance of such action, "may constitute a fair reason for a dismissal". An alternative sanction falls within the discretion of an employer who prefers to take disciplinary action short of dismissal. A written final warning could be issued in the application of fairness to those who have resumed employment or against those who acted in furtherance of an unprotected strike or protest action.<sup>56</sup>

#### 4 THE RIGHT TO STRIKE ENTAILS A DUTY – THE FLIP SIDE OF THE COIN

The nature of workers' right to peaceful protesting has its roots in Convention 87 of 1948 and Convention 98 of 1949 of the ILO. Article 2 of Convention 87 states and confirms that employees and employers are the bearers of this right which can be exercised according to "their own choosing without previous authorisation" subject only to "the rules of the organisation concerned".

As stated before, in South Africa collective action taken by union members (employees) is acknowledged by section 23 of the Constitution as a fundamental right of "everyone" and largely regulated by the LRA. As such any contractual provision entered into between employer and employee, "that directly or indirectly contradicts or limits any provision" regarding the right to strike in the Act, shall be invalid and unenforceable, unless permitted by the Act.<sup>57</sup> In

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52 1992 ILJ 593 (LAC).

53 See the *dictum* 599–600.

54 [1999] 8 BLLR 741 (LAC).

55 *Idem* para 29, emphasis added.

56 See the The Code of Good Practice: Dismissal Schedule 8 of the LRA regarding the fairness of dismissals.

57 S 7(4) of the LRA.



addition, a trade union as “the organisation concerned”<sup>58</sup> has the right to determine its own constitution and rules subject to Chapter VI of the LRA.<sup>59</sup>

It is perhaps apposite at this stage, without labouring the point, to emphasise that the right to strike which involves the withdrawal of labour and the concomitant financial harm, can never be exercised in isolation with the focus solely on trade union members’ right to strike.

“Industrial action in the form of a strike is an extremely serious matter which may be accompanied by irrevocable or irremediable results. It can place the viability of the industry in jeopardy, the continued employment of workers at risk and can prejudice the livelihood of dependent persons. Consequently, strike action should only be undertaken with the highest degree of circumspection and responsibility.”<sup>60</sup>

The conduct of trade union members pertaining to a strike could detrimentally affect the rights of parties outside the parameters of a dispute, to earn a living in conditions devoid of damage to their property and person.<sup>61</sup> It is therefore strongly submitted that trade union members’ conduct pertaining to a strike should *involve the duty* to refrain from any unlawful conduct such as serious misconduct in the form of intimidating fellow strikers, threats regarding the personal safety of fellow strikers, their family or their possessions, as well as any unlawful conduct resulting from the aforementioned threats. Unlawful conduct such as serious intentional injuries and damage to property at the hands of fellow trade union members and in the worst scenario, conduct resulting in the death of fellow strikers or their family, has occurred in South Africa.<sup>62</sup>

The responsibility to handle differences in a respectful manner which would communicate an open channel for discussions lies at the heart of conflicts between the employer and the union and its members. Both parties bear the responsibility to maintain good relations and employers should guard against displaying a “hostile attitude as the root cause” of the mishandling of events.<sup>63</sup> It is with regard to particularly “violent and senseless” conduct of the strikers in *FAWU obo Kapesi v Premier Foods Ltd t/a Blue Ribbon Salt River*<sup>64</sup> that Basson J remarked as follows:

“This strike was marred with the most atrocious acts of violence on non-striking employees. The individuals who perpetrated these acts clearly had no respect for human life, the property of others and the rule of law. What make matters worse is the fact that it appears from the evidence that the police and the criminal justice system have dismally failed these defenceless non-striking employees. Although criminal charges were laid against certain individuals, nothing happened to these charges. The non-striking employees were completely at the mercy of vigilante elements who did as they pleased and who had no regard for the life and property of defenceless individuals.”

58 See a 2 of Convention 87 of 1948.

59 S 8(a)(i), s 95(5)(p)(q) and the regulations on guidelines issued in terms of s 95(8) LRA.

60 See *MAWU v BTR Sarmcol* 1987 ILJ 815 (IC) 816 835.

61 See *Mzeku v Volkswagen SA* 2001 ILJ 771 (CCMA) 781H-I where the employer, although not involved in the dispute between union officials and members, suffered immense harm as a consequence of the unprotected strike. See *NUFAWSA v New Era Products (Pty) Ltd* 1999 ILJ 869 (LC) *infra* regarding employees on an unprotected strike who damaged the property of the employer and assaulted non-striking employees.

62 Case law and judgments on this issue follow in para 5 *infra*.

63 See *FAWU & v Mnandi Meat Products & Wholesalers CC* 1995 ILJ 151(IC) 162.

64 2010 JOL 25623 para 5.

A strike is regulated by the LRA in terms of the legality of the procedure, the issue in dispute and those employees who may not participate in a strike.<sup>65</sup> Recourse to employers is afforded only in the form of dismissals of employees who were engaged in unlawful behaviour provided that such a dismissal does not constitute an automatic unfair dismissal.<sup>66</sup> Employers are not limited to dismissal. They can also claim compensation in terms of section 68(1)(b) and the protection provided by section 67(6) is lifted in terms of section 67(8) if “any act in contemplation or furtherance of a strike . . . is an offence”. The Act does not mention, regulate or prohibit any specific unlawful conduct of members during a strike, whether protected or unprotected, which could harm employees, the employer or third parties. Such behaviour which would constitute an infringement of an employer’s or the public’s right and is dealt with by the courts in terms of the law of delict and/or prosecuted by the state, in terms of criminal law. Employers could turn to the LRA, in terms of a general code pertaining to dismissals in Schedule 8 of the Code of Good Practice: Dismissal, in accordance with the relevant sections of the Act.<sup>67</sup> The key principle reflected by the Code is the primary factor of respect in the conduct between employees and employers<sup>68</sup> reflecting exclusively on the employer’s behaviour, as the stronger party during the process of dismissal.

## 5 COURT DECISIONS REGARDING UNLAWFUL STRIKES – LESSONS AND PRINCIPLES

### 5.1 *National Union of Furniture & Allied Workers Union of SA v New Era Products (Pty) Ltd*

In this case, the court focused on the fundamental right to strike under the ‘new’ labour dispensation “in the light of these relatively generous stipulations to enable employees to embark on [a] protected strike action”.<sup>69</sup> Employees were dismissed on account of their participation in an unprotected strike disregarding numerous warnings and ultimatums. The court compared the pre- and post-constitutional era’s with the current requirements for a protected strike in accordance with section 64 of the LRA. “[T]he Labour Court should regard unprotected strike action coupled with serious misconduct in a very serious light” and should therefore “not readily come to the assistance” of unprotected strikers who ignored repeated warnings and ultimatums to resume employment. The court held that serious damage to “the very workbenches which provided daily work for the employees was destructive action which invited serious censure from the court”. The court concluded that the general approach of the unprotected strikers to ignore the advice of officials regarding the legality of the strike, the various assaults launched by some of the strikers and the destruction of the employer’s property, “disentitled” the strikers from any protection by the court.<sup>70</sup>

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65 See ss 64, 65 and 68 of the LRA re the general limitations on the right to strike as well as s 36 of the Constitution.

66 See ss 187 and 67(4) and (5) of the LRA. In *Prestige Hotel v SACCAWU* [1997] 8 BLLR 1078 (LC) an interdict was granted against strikers engaged in misconduct.

67 See s 187(1) and Schedule 8, Code of Good Practice: Dismissal s 2(2) and (3) regarding fair reasons for dismissal.

68 S 1(3).

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

70 877 878.

Section 68 of the Act leaves no doubt about an employer's recourse to "any conduct in contemplation or furtherance of a strike" that does not "comply" with the Act. "The Labour Court has exclusive jurisdiction to grant an interdict or an order to restrain" employees from participating in a strike or any unlawful conduct related to the strike. In addition the Labour Court's jurisdiction includes the "order of payment of just and equitable compensation for any loss" incurred by the employer which can be attributed to the unlawful conduct of trade union members persisting to disregard the legal advice of their union. In such instances the union would not incur liability for the unlawful actions of their members, that do not comply with the Act.

## 5.2 *National Union of Mineworkers v Goldfields Security Ltd*

A peaceful wildcat strike occurred at the mine in reaction to the transfer of guards and their replacement with "better qualified and trained security officers".<sup>71</sup> The unprotected strike entitled the employer to a substantively fair dismissal of the guards who failed to report for work in terms of the common law, due to a breach of contract and in terms of non-compliance with section 68(5) of the LRA, on account of being guilty of misconduct.<sup>72</sup> The aggrieved employees had other options to their disposal to solve their grievance such as to use the prescribed grievance procedure, or to refer the dispute for conciliation without the additional option of the right to strike in terms of the LRA. In addition the Labour Court might deliver judgment on the subject; or a bargaining council or the CCMA, might adjudicate the matter.<sup>73</sup>

This case illustrates employers' obligation not only to take the necessary steps to ensure procedural fairness regarding their right to dismiss unprotected strikers but to take vital precautionary steps by engaging in consultations with trade unions before the implementation of unilateral decisions, which might cause severe harm to the employment relationship and result in labour unrest. As stated by Landman J in his judgment, what is required is timely consultations with the union on the issue of the sensitive transfer to maintain "good industrial relations practice" which is "partly about perceptions".<sup>74</sup>

GFS did not follow the Code of Good Practice: Dismissals procedure to ensure fairness to the strikers. "The aim and object of a fair process in the case of . . . unprocedural and impermissible strikes is to comply with the constitutional commitment to fair labour practices including the preservation, within the limits of the law and equity, of job security".<sup>75</sup> The Code advised the intervention of a union official to assist in matters where dismissals can be avoided as "a real and genuine effort" on the employer's side.<sup>76</sup>

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71 *NUM v Goldfields Security Ltd* 1999 ILJ 1553 (LC).

72 1555.

73 1556 1558.

74 1560.

75 *Ibid.*

76 1561. In *PPWAWU v Metrofile (Pty) Ltd* 2001 ILJ 2466 (LC) the court confirmed that a shop steward is a union's designated representative of its members at the workplace regarding workplace issues as well as disciplinary procedures in terms of s 202(1) of the LRA.

### 5.3 *Coin Security Group (Pty) Ltd v Adams*

In this case, employees participated in a strike which they believed to be protected. The strikers were warned of the fact that their *bona fide* belief in the legality of the strike was incorrect and as such unprotected in terms of section 65(1)(c) of the LRA. The strike took place over alleged discrimination and/or the enforcement of a collective agreement. The union decided that a strike would be the better choice, as arbitration or adjudication would be “too slow”.<sup>77</sup> The union’s shop stewards did not attempt to stop the illegal blockade at the premises by their members, nor did they disapprove of the members’ obstruction of vehicles to the premises which prevented the continuation of business.<sup>78</sup> The court held that “the strikers must bear the risk that their union is wrong and their employer’s right”.<sup>79</sup>

The right to strike can only be exercised in a collective manner, involving adherence to the relevant provisions of the Act by union officials and their members to “plan and organise its administration lawful activities”.<sup>80</sup> The parties jointly run the risk of bearing the consequences of their decision to engage in an unprotected strike. Union members face fair dismissals and unemployment while a union not only loses members but the credibility of employees and the employer. Such behaviour would not contribute to a stable employment environment.

### 5.4 *Mzoku & v Volkswagen SA (Pty) Ltd*<sup>81</sup>

In this case, an unprotected strike occurred primarily as a result of a division between old and newly elected shop stewards within their council, and also between the latter party and local officials of NUMSA and not because of a conflict with the employer.<sup>82</sup> The way NUMSA dealt with the problems regarding the suspension of shop stewards for allegedly breaching NUMSA’s constitution resulted in an unprotected strike and dismissal of its members for failing to comply with a fair ultimatum. The strikers persevered with their unprotected strike contrary to their union’s advice. They breached a collective agreement and a court order and caused their employer financial damage of millions of Rand, jeopardising an international contract of immense value while endangering the employment security of many employees.<sup>83</sup> The unprotected strikers furthermore displayed conduct that amounted to serious, deliberate and wilful misconduct without any justification that it was reasonable or legitimate with regard to an employer’s conduct. The dismissal of 1 336 employees took place “after all reasonable efforts had been exhausted” by the union and the employer to persuade the unprotected strikers to return to work prior to the dismissal.<sup>84</sup> The union’s attitude “from a very early stage of the strike was that it regarded the strike as illegal, unprocedural and . . . unjustified”. It tried to persuade the strikers to end the unprotected strike or face, not only their own dismissal but the possible cancellation of the Golf 4 international export contract

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77 *Coin Security Group (Pty) Ltd v Adams* [2000] 4 BLLR 371 (LAC) 372.

78 381.

79 378.

80 See ss 8(b) and 4(2)(a) of the LRA.

81 2001 ILJ 1575 (LAC).

82 See *Mzoku v Volkswagen SA (Pty) Ltd* 2001 ILJ 771 (CCMA) 774F–G.

83 781H–I.

84 793G–H. See *Mzoku v Volkswagen SA (Pty) Ltd* [2001] 8 BLLR 857 (LAC) 873 para 50.

as well as the loss of thousands of jobs of employees not on strike at the plant and in the region.<sup>85</sup>

The court noted that the dismissal of the workers were substantively and procedurally fair. The employer adhered to the *audi alteram partem* rule. NUMSA acted on behalf of its members and the employee delegation represented the workers during the hearing.<sup>86</sup> The commissioner had erred in his finding that dismissal of those employees who failed to resume their duties “would have been fair in every respect had the employer followed a fair procedure”.<sup>87</sup> In view of the commissioner’s finding, the court concluded that “reinstatement and re-employment were not competent remedies”. The Act provided the remedy of compensation in order that employers “will still have a reason to comply with fair procedures”.<sup>88</sup> No claim was instituted against the union for damages suffered.

A union should leave no stone unturned to act in the best interest of its members and the labour market in general. It should hasten to resolve internal disputes as a matter of vital urgency. The price to be paid as illustrated in the *Mzeku* case where property, lives and international contracts were at stake is an example of how unprotected and unlawful conduct in the furtherance of an unprotected strike could turn into a national disaster.

### 5.5 SA Municipal Workers Union v Jada

Union members, all local government employees, embarked on an unprotected strike in terms of section 65(1)(c) read with section 46(1)(a) of the LRA. The right of union members to take legal action against their union and a union’s obligation towards members embarking on an unprotected strike was considered in this case after union members were dismissed.<sup>89</sup>

The dismissed employees instituted a delictual claim for damages against a union official, alleging that he breached his constitutional duty of care to ensure that the strikers did not participate in an unprotected strike which resulted in their dismissal. The court had reservations as to whether union members may sue their trade union simply on the basis of their status as an independent juristic entity.<sup>90</sup>

The crux of this judgment as per Horwitz AJ is that members, who knowingly embark on an unprotected strike, “should not benefit from their criminal conduct” which resulted in their dismissal and financial loss. Such an action for damages would be in conflict with public policy.<sup>91</sup> The maxim of *volenti non fit iniuria* operated as a defence against the members’ claim for damages as they consented to the risk of financial loss.<sup>92</sup> The court held that the members had

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85 Paras 49 50 51.

86 Para 52.

87 Para 78.

88 Paras 78 79.

89 See *SAMWU v Jada* 2003 6 SA 294 (W) 298F–H. A member’s right to sue a union was considered in *NUM v Geffens Diamond Cutting Works (Pty) Ltd* 2008 ILJ 1227 (LC) 1236 where the court suggested that if there “should there be any irregularity that took place detrimental to the individual applicant’s interest, then the only recourse in this regard would be against UASA” and not against the employer. In *Mangaung Local Municipality v SAMWU* [2003] 3 BLLR 268 (LC) the court stated that a union’s liability for damages arises if a union fails to take proactive steps to end an unprotected strike.

90 *SAMWU v Jada* supra 301G 302A–D.

91 303D–E.

92 303G–H.

failed to prove that the trade union owed them a duty of care in circumstances where the members' unprotected strike fell "beyond the scope of their union's collective bargaining process".<sup>93</sup>

#### **5 6 *Mondi Ltd (Mondi Kraft Division) v Chemical Energy Paper Printing Wood & Allied Workers Union***<sup>94</sup>

Mondi's employees engaged in a protected strike which caused damages to the employer as a result of the unlawful switching off of machinery at its mill. Mondi claimed damages from the trade union due to the loss of production. The Labour Court confirmed its jurisdiction over conduct constituting a criminal offence and a delict during a protected strike.<sup>95</sup> Mondi contended that CEPPWAWU was vicariously liable for delicts of its members which had been committed with support and encouragement of the members of the shop-stewards council at Mondi.

The Labour Court first had to establish whether a relationship existed between the "actual culprit" and the trade union that Mondi alleged to be the liable party, "to see if it falls within the class that the law regards as imposing liability upon an innocent party".<sup>96</sup> The court excluded an employment relationship between a union and the persons who committed the delict. The court held that the only other basis for liability could be that of agency. Mondi failed to discharge the onus to prove its allegations "that the union as principal, authorised, instigated or ratified the commission of the delict".<sup>97</sup>

The lesson to be learnt from this case has been confirmed by the Labour Court. A principal cannot be held vicariously liable "for [the] unauthorised acts of his agent even if the act was ancillary to carrying out the mandate".<sup>98</sup> The court concurred with the judgment in *Heatons Transport (St Helens) Ltd v Transport & General Workers Union*<sup>99</sup> which confirmed that the requirements for a union's liability as a principal, rests on proof that an agent acted within his authority on behalf of the principal.<sup>100</sup>

#### **5 7 *SA Transport & Allied Workers Union v Maxi Strategic Alliance (Pty) Ltd***<sup>101</sup>

This case is a clear example of how a union, who might have raised genuine grievances on behalf of the employees, damaged their members' cause by their aggressive, un-cooperative behaviour and the dishonest manner<sup>102</sup> in which they

93 302C–E.

94 2005 ILJ 1458 (LC).

95 The LC's jurisdiction re conduct constituting delictual and criminal offences during a protected strike was confirmed by Landman J taking a "broad and purposive view" of the LRA in *Lomati Mill Barberton (A division of Sappi Timber Industries) v Paper Printing Wood & Allied Workers Union* 1997 ILJ 178 (LC) 184. The LC confirmed that such conduct is not protected.

96 See *Mondi supra* 1470.

97 *Ibid.*

98 *Ibid.*

99 [1972] 3 All ER 101 (HL).

100 See *Mondi supra* 1471.

101 2009 ILJ 1358 (LC).

102 See *BIFAWU v Mutual and Federal Insurance Company Ltd* [2006] 2 BLLR 118 (LAC) where the court held that a dismissal was not automatically unfair as a shop steward was dismissed for dishonesty and not for participation in union activities.

prosecuted their claim.<sup>103</sup> The court distinguished between three categories of employees who participated in an unprotected strike.

- (a) The first category of *strikers participated voluntarily* in the strike whilst behaving in a belligerent, uncooperative manner. These employees failed to react to an ultimatum to return to work and refused to accept advice from their union, thereby abandoning the right to a hearing and an appeal. The court upheld the dismissal of these members.<sup>104</sup>
- (b) The second category of strikers was *intimidated into participation* and prevented from working. These members received final written warnings because they were found to be less culpable as they did not want to strike.
- (c) The third group was the shop stewards who participated in the unprotected strike.

The first and third category of employees received a fair ultimatum to return to work and to obtain advice from their union. Their dismissals were upheld.<sup>105</sup> Union members who intimidated the second category of employees and prevented them from working were interdicted and dismissed after disciplinary hearings were held in their absence. The court found them guilty of misconduct and consequently upheld their dismissals. The court furthermore rejected the union officials' and some of the employees' denial that they were on strike.<sup>106</sup>

The fact that "everyone has a right to fair labour practices", includes the fundamental right to strike. This inevitably emphasises the flip side of the "rights" coin, namely, the responsibility to exercise that right in conformity with legislation. A trade union should respect the scope of their member's rights in their capacity as administrators and legal advisors. They play a vital role in ensuring that their members' participation in the decision-making process result in a meaningful contribution in terms of a protected strike. As well, they undertake to advance the standard of living of their members by promoting collective bargaining. Unlawful "belligerent" conduct during strikes, the intimidation by union officials and dishonest behaviour in court are unacceptable in light of their duty to protect the interests of their members in the workplace. Fair dismissals do not serve this purpose.

### 5 8 *SA Post Office Ltd v CWU*<sup>107</sup>

The key element of this judgment is the basis for a union's representation of its members and its role in the collective bargaining process.

As a voluntary association not for gain,<sup>108</sup> an independent trade union's<sup>109</sup> relationship with its members<sup>110</sup> is governed by its constitution, to which each

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103 See *Mondi supra* 1362.

104 *Ibid.*

105 *Ibid.*

106 *Ibid.*

107 [2010] 1 BLLR 84 (LC).

108 See s 95(5)(a) of the LRA.

109 See s 95(2)(a)(b) of the LRA. A union who is supposed to act in the best interest of its members but is suspected of loyalty to the employer, cannot be considered as an independent union, but is appropriately called a "sweatheart-union". See *NUM v Goldfields Security Ltd supra* 1230 para 18 where the union's independence and loyalty to act in members' best interest was challenged by dismissed employees.

110 See s 95(5)(b)(c)(d) and (6) of the LRA.

member voluntarily submits when taking up membership.<sup>111</sup> In return for membership fees,<sup>112</sup> members expect their union to bargain on their behalf with their employer and to act in their best interest when required to do so.<sup>113</sup>

The court supported the view of Grogan<sup>114</sup> which underlines the *crux* of this judgment. A union's authority to conclude an agreement on behalf its members' is based on the principle of "majoritarianism".<sup>115</sup> Union leaders act as representatives and not as agents of members because they have the constitutional authority to do so. They conclude binding decisions which may not necessarily support all members or other related structures, but may nevertheless be enforceable because the majority of member's interests are served.<sup>116</sup>

As such a settlement agreement entailing the cancelling of a strike was binding even though one of the union's branches did not accept the agreement. This turned out to be of no significance as the agreement was enforceable on the principle of "majoritarianism" serving the interest of the majority of parties concerned.<sup>117</sup>

## 6 A UNION'S LIABILITY UNDER THE REGULATION OF GATHERINGS ACT<sup>118</sup> AND THE CONSTITUTION

### 6.1 A precedent-setting judgment

In *Garvis v SA Transport and Allied Workers Union*<sup>119</sup> a claim for damages was instituted against SATAWU as the organisers of a prolonged march or "a gathering" in terms of the Regulation of Gatherings Act. The regulations provides

"for civil liability to ensue to an organisation or trade union under whose auspices a gathering is conducted and requires of such trade union or organisation to prove all three elements of section 11(2) in order to escape liability for 'riot damage' as it is described in the Act".<sup>120</sup>

However, the court had to decide a constitutional point prior to and separately from the claim for damages in this action.<sup>121</sup>

111 See s 95(5)(b) of the LRA.

112 See s 95(f) of the LRA.

113 See *Blyvooruitzicht Gold Mining Company Ltd v Pretorius* [2000] 7 BLLR 751 (LAC) para 12 where the court stated that a union representing the interests of members, acts as their spokesperson not as an agent of any member. A union's obligations during collective bargaining is based on principles of representative governance and not on those of agency. For a contrasting view of the aforementioned principle during the collective bargaining process, see *Mhlongo v FAWU* [2007] 2 BLLR 141 (LC) para 14 where the court supported the view that a union did not represent members as an agent, but rather on the principles of majoritarianism. A settlement agreement was binding on all the members regardless of some individual members' alleged withdrawal of the union's mandate prior to the conclusion of the collective agreement. The majority's interests preside over the individual's interests.

114 *Workplace law* (1998) 203.

115 See Grogan *Collective labour law* (2007) 40.

116 See *SA Post Office Ltd v CWU* [2010] 1 BLLR 84 (LC) 90 para 23.

117 93 para 33.

118 205 of 1993.

119 2010 ILJ 2521(WCC).

120 See *Garvis supra* para 6. The purpose of s 11 is to protect rights, promote order, the rule of law and to deter mob violence (para 41).

121 Paras 9–10. The constitutionality of s 11(1 and 2)(b) of Act 205 of 1993 was in question.



The march was characterised as of a “volatile milieu”. It was labelled as hostile, giving rise to approximately 50 deaths due to strike-related violence in addition to “previous instances of damage to council and private property”.<sup>122</sup> The damage was definitely foreseeable in terms of the common law.<sup>123</sup>

In his judgment Hlophe JP referred to section 17 of the Constitution. Rights are conditional and can only be exercised in a “peaceful” manner.<sup>124</sup> The constitutional right of SATAWU as the organisers of the gathering to a *peaceful gathering* are being balanced against the constitutional rights of members of the public, especially during such demonstrations, “to human dignity, to be free from all forms of violence and the right not to be arbitrarily deprived of property”.<sup>125</sup>

A union’s fundamental right in terms of section 17 places an obligation on it to ensure a “peaceful” gathering without the risk of riot damage to persons and property. The liability of a union in the circumstances is a necessary, reasonable and justifiable imposition in an open and democratic society based on human dignity, equality and freedom to protect the rights of the public.<sup>126</sup>

No order as to costs were made on the issue decided namely whether the words “and was not reasonably foreseeable”, in section 11(2)(b) of the Regulation of Gatherings Act were inconsistent with section 17 and/or section 23 of the Constitution and therefore invalid. Hlophe JP relied on Ncobo J’s view in *Affordable Medicines* that “a discretion that must be exercised judicially having regard to all the relevant considerations”. An unsuccessful litigant in constitutional litigation ought not to pay costs in terms of a general rule adhered to by the court, for raising an issue in the public’s interest.<sup>127</sup>

The Supreme Court of Appeal<sup>128</sup> upheld the judgment of the court *a quo* and dismissed the appeal. The court confirmed

“that the chilling effect of s 11(2)(b) described on behalf of the Union is not only unsubstantiated but is contradicted by the police and the City of Cape Town, who presented unchallenged evidence that in their extensive experience the provisions of the Act have not deterred people from public assembly and protest”.

Evidence to the contrary seems to be true. The court concluded by stating:

“[T]he chilling effect that the provisions of the Act should rightfully have is on unlawful behaviour that threatens the fabric of civilised society and which undermines the rule of law. In the past the majority of the population was subjected to the tyranny of the state. We cannot now be subjected to the tyranny of the mob.”

## 6 2 Constitutional validity of section 11 (2) of the Regulation of Gatherings Act 205 of 1993

In a precedent-setting judgment on the validity of section 11(2) the Constitutional Court<sup>129</sup> upheld the ruling of the High Court that section 11(2) of the Regulation of the Gatherings Act is constitutionally valid. Section 11(2) provides a limited defence for the organiser in a case where the organiser of a gathering can be held

122 *Garvis* para 41.

123 Para 51.3.

124 Para 51.1.

125 Para 46 (emphasis added). See ss 10, 12, 25 and 36 of the Constitution.

126 *Garvis* paras 48 51.2.

127 Para 56.

128 See *SATAWU v Garvis* (007/11) [2011] ZASCA 152 (27 September 2011) para 50.

129 *SATAWU v Garvis (City of Cape Town as Intervening Party & Freedom of Expression Institute as amicus curiae)* [2012] JOL 28986 (CC).

liable for riot damage<sup>130</sup> resulting from that gathering. The liability is based on section 11(1) of the Act. Section 11(1) and (2) provide as follows:

- “(1) If any riot damage occurs as a result of-
- (a) a gathering, every organisation on behalf of or under the auspices of which that gathering is held, or, if not so held, the convener;
  - (b) a demonstration, every person participating in such demonstration, shall subject to subsection (2), be jointly and severally liable for that riot damage as a jointly wrongdoer contemplated in Chapter II of the Apportionment of Damages Act, 1956 (Act 34 of 1956), together with any other person who is liable therefore in terms of this subsection.
- (2) It shall be a defence to a claim against a person or organisation contemplated in subsection (1) if such a person or organisation proves-
- (a) that he or it did not permit or connive at the act or omission which caused the damage in question; and
  - (b) that the act or omission in question did not fall within the scope of the objectives of the gathering or demonstration in question and was not reasonably foreseeable; and
  - (c) that he or it took all reasonable steps within his or its power to prevent the act or omission in question: Provided that proof that he or it forbade an act of the kind in question shall not by itself be regarded as sufficient proof that he or it took all reasonable steps to prevent the act in question.”

The court had to decide on two crucial issues pertaining to this matter. Firstly, does section 11(2) create “a real defence that meets the constitutional requirement of rationality?” Assuming that the answer reflects a rational defence, could it be said that the defence “nevertheless limits the right contained in section 17 of the Constitution and, if so, whether that limitation is justifiable[?]”<sup>131</sup>

The court per Mogoeng CJ confirmed that “gatherings by their very nature do not always lend themselves to easy management” and that “the somewhat unusual defence created for an organisation facing a claim for statutory liability appears to have been made deliberately tight”. Extraordinary measures are needed to prevent potential unforeseen harm.<sup>132</sup> The court in addition stated that the word “and” between paragraphs (b) and (c) of section 11(2) *must* (own emphasis) be interpreted in accordance with its ordinary meaning and *must* (own emphasis) read together to support the purpose of the provision and the rational outcome thereof.<sup>133</sup> The court emphasised with regard to the prevention of riot damage that is reasonably foreseeable, that “organisations are required to be alive to the possibility of damage” and to ensure “that reasonable steps [within their power] are continuously taken” to prevent any “reasonably foreseeable harm-causing act or omission” during the protest action, “from the beginning of the planning of the protest action until the end of the protest action”.<sup>134</sup> The court concluded that section 11(2) is rational.<sup>135</sup>

130 S1 of the Act defines riot damage as follows: “any loss suffered as a result of any injury to or the death of any person, or any damage to or destruction of any property, caused directly or indirectly by, and immediately before, during or after, the holding of a gathering.”

131 See *SATAWU v Garvis* paras 4 and 26.

132 Para 38.

133 Paras 40–41.

134 Paras 44, 45 and 47.

135 Para 50.

The second issue addressed by the court is whether section 11(2) limits the important right to freedom of assembly.<sup>136</sup> The court noticed that the “generous wording” of section 17 of the Constitution “promises the people of South Africa” the right to assemble, to demonstrate, to picket and to present petitions in an unarmed and peaceful manner.<sup>137</sup> The court substantiated the right with a promise linked to “our own history” and the justification of “that promise” on an international level.<sup>138</sup> However, the holders of the right has an obligation to exercise the right in a *peaceful* (own emphasis) manner or forfeit constitutional protection under the right, if they have no intention of fulfilling this duty. “The mere legislative regulation of gatherings to facilitate the enjoyment of the right to assemble peacefully and unarmed . . . may not in itself be a limitation.”<sup>139</sup> The limitation of the right of many peaceful protesters and of organisations lies firstly in the significant increase in the cost of compliance with the requirement of a “peaceful” protest action and secondly, in the liability for riot damage to holders of the right with peaceful intent.<sup>140</sup>

The court justified the significance of the purpose of the limitation imposed by section 11 on the right to demonstrate peacefully. “It is to protect members of society, including those who do not have the resources or capability to identify and pursue the perpetrators of the riot damage for which they seek compensation.”<sup>141</sup> The creation of liability on the part of trade unions, as organisers of protest actions, is to ensure that the right to physical integrity, to live and to sources of livelihood of the vulnerable are protected and respected when exercising the right to a peaceful protest action.<sup>142</sup>

## 7 CONCLUSION

Trade unions are invaluable institutions in modern democratic society. Their administrative and legal skills are priceless in the collective bargaining process; and so is the degree of accuracy and commitment to their responsibilities and obligations to serve the interests of their members, to preserve their dignity and to better their conditions of employment and standard living. They provide an essential counterbalance to the power of management during negotiations. They are the vigilant custodians, not only of their members’ interests but of the economy, the labour market and society at large. They guard over the rights of their members in the workplace and play a significant role in maintaining the dignity and interests of minority groups and previously disadvantaged members of a society. Fair and justified dismissals due to unlawful behaviour and/or unprotected strikes are not serving the interests of employees in a country that is still deeply deprived of employment opportunities and divided by poverty.

It is therefore only fair to consider the detrimental effects caused by officials neglecting their duties in terms of their constitution and the provisions of the LRA, and to consider the liability of trade unions in view of the valuable contributions that are expected of and received from trade unions in general.

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136 Paras 63 and 66. The court emphasised the “inherent power and value of freedom of assembly and demonstration” as “a very important right in any democratic society”.

137 Paras 51–52.

138 Para 53.

139 Para 55.

140 Paras 56–57.

141 Para 67.

142 *Ibid.*

A lack of accountability in the decisions and actions taken by trade unions may end in financial loss and unemployment for members. Legal protection is available to vulnerable members whose rights are infringed by a trade union in terms of international obligations, collective agreements, fundamental rights, statutory rights and the common law. Special tribunals and courts have jurisdiction to adjudicate disputes between a union and its members, or to hold a union liable for damages sustained by members in cases where a union failed to comply with its statutory duties to act in the best interest of its members as their representative.

To emphasise the views of Basson J:

“It is certainly not acceptable to force an employer through violent and criminal conduct to accede to their demands. This type of vigilante conduct not only seriously undermines the fundamental values of our Constitution, but only serves to seriously and irreparably undermine future relations between strikers and their employer. Such conduct further completely negates the rights of non-strikers to continue working, to dignity, to safety and security and privacy and peace of mind.”<sup>143</sup>

Lastly, it is submitted that trade unions should seek the assistance of the South African Police to assist in the prevention of damage during strikes, to ensure law and order and to take decisive action to prevent criminal activities instead of displaying the role of passive bystanders during “a violent disturbance of the peace by a crowd”.<sup>144</sup>

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143 *FAWU obo Kapesi v Premier Foods Ltd t/a Blue Ribbon Salt River* [2010] JOL 25623 (LC) para 6.

144 Refer to the meaning of the word “riot” in the *Concise Oxford Dictionary* (2002).