

# The promotion of orderly collective bargaining and effective dispute resolution, the dynamic labour market and the powers of the Labour Court (2)\*

Monray Marsellus Botha

*BLC LLB LLM BCom (Hons) MCom LLD, Advanced Diploma in Insolvency and Practice, Advanced Diploma in Corporate Law, Advanced Diploma in Alternative Dispute Resolution*

*Associate Professor and Head: Department of Mercantile Law, University of Pretoria*

Wilhelmina Germishuys

*BCom LLB LLM*

*Attorney, Notary Public and Conveyancer*

*Senior Lecturer, Department of Mercantile Law, University of South Africa*

## 3 2 Evaluating functionality: Emphasis on violent strikes as one of the possible forms of dysfunctional strikes

The failure to heed orders prohibiting strike violence and the perpetuation thereof in the context of a protected strike skews collective bargaining power and takes on a form of economic duress.<sup>118</sup> The pressure placed on the employer as a result of the violence and not as a result of the strike, forces the employer to reach agreement. This means that the employer is placed under economic duress to conclude a wage agreement that does not reflect the forces of supply and demand, but the force of violence.<sup>119</sup> The effect of this is definitely not to advance economic development in accordance with the purpose of the LRA.

Strikes that are marred by this type of violence and unruly conduct are extremely detrimental to the legal foundations upon which South African labour relations are founded.<sup>120</sup> The aim of a strike is to persuade the employer to agree to workers' demands through the peaceful withholding of their labour. It is acknowledged that a certain degree of disruptiveness may be expected, but it certainly is not acceptable to force an employer through violence and criminal conduct to accede to workers' or trade union demands.<sup>121</sup> The economic pressure

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\* See 2017 *THRHR* 351 for part 1.

118 Myburgh "The failure to obey interdicts prohibiting strikes and violence (the implications for labour law and the rule of law)" (2013) 23 *CLL* 1 4.

119 *Idem* 4.

120 *Food & Allied Workers Union on behalf of Kapesi v Premier Foods Ltd t/a Blue Ribbon Salt River* (2010) 31 *ILJ* 1654 (LC) para 6.

121 *Ibid.*

meant to be put on the employer as a result of a strike is sufficient and functional to collective bargaining.

This also applies to pickets that exceed the bounds of peaceful persuasion or incitement in support of a strike. When a picket becomes coercive and disruptive of the business of third parties it ceases to be reasonable and lawful.<sup>122</sup>

The notion that lawful strikes must be “functional to collective bargaining” has been under the spotlight for quite some time.<sup>123</sup> In this discussion the authors deal predominantly with violence during strike action as *one of the causes* that may result in a strike no longer being functional to collective bargaining. This should not be understood to mean that only violent strikes are dysfunctional to collective bargaining, or that the notion of functionality is the only recourse when dealing with violent strikes. The functionality requirement simply is looked at as one of the possibilities that may be available.<sup>124</sup> In determining whether a strike remains functional to collective bargaining emphasis should be placed on the function/purpose of both strikes and collective bargaining and the attainment thereof. There is also a different view, regarding the implications of the use of the “functionality requirement”. In this regard Fergus expresses a different opinion on the implications of the use of the “functionality requirement”:

“Yet, this purported ‘requirement’ has significant implications for both the nature of collective bargaining and the rights of workers to strike, which are not inevitably addressed by its proponents. Where the notion that strikes are functional to collective bargaining is misconstrued or construed too broadly, these implications are aggravated. The chequered history of the judiciary in the pre-constitutional era highlights its negative impact on workers’ rights only too well, not least of all because of the latitude the concept gave the courts to interfere with the ordinary mechanisms of collective bargaining as well as political protests.”<sup>125</sup>

In light of the above argument it is notable that “we no longer labour under an undemocratic order where the legitimacy of certain laws and court orders made under them was questionable”.<sup>126</sup> It seems rather trivial more than twenty years into our constitutional democracy to base an argument on specific misconstrued notions of the chequered judiciary of the pre-constitutional era. Where this seems to be the main argument (or criticism) against the “functionality requirement”, reconsideration might very well be in order in our present constitutional democracy and in the context of the current problems our labour relations system is faced with (very different from 20 years ago). Another difficulty presented by this argument is the point of departure that the Labour Court and Labour Appeal

122 *Shoprite Checkers (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration* (2006) 27 ILJ 2681 (LC) para 30.

123 See, in this regard, also the judgment in *BAWU v Prestige Hotels CC t/a Blue Waters Hotel* 1993 ILJ 963 (LAC) 971J–972A (a pre-1995 case) where the court illustrated that: “[A] law[ful] strike is by definition functional in collective bargaining. The collective negotiations between the parties are taken seriously by each other because of the awful risk they face if a settlement is not reached. Either of them may exercise its right to inflict economic harm upon the other. In that sense the threat of a strike or lock-out is conducive and functional to collective bargaining.”

124 For an alternative to the functionality requirement, see Fergus “Reflections on the (dys)functionality of strikes to collective bargaining: Recent developments” (2016) 37 ILJ 1537–1538.

125 *Idem* 1538.

126 *Pikitup* para 27.

Court judges will misconstrue a notion (the “functionality requirement”) which is central to labour law. It leaves one wondering, if our specialist labour courts are not qualified to judge and provide us with a fair interpretation in this regard, who is? Our unfortunate pre-constitutional history is by no means disputed; what is submitted, however, is that our (model) Constitution is ideally designed for the very purpose of addressing the above concerns and problems.

Fergus expresses the following opinion in this regard:

“[T]here is ostensibly neither judicial nor legislative authority for the contention that only strikes which are ‘functional to collective bargaining’ – at least all in the sense that they must accord with the court’s view of what is functional at any given time and in any given industry – are lawful. The conclusion that the functionality principle no longer forms part of South African law is consistent with the rule that constitutional rights should be limited as little as possible, the LRA’s endorsement of that principle and the ILO committees’ historical acknowledgement of the right to strike as an integral part of the collective bargaining process.”<sup>127</sup>

It seems rather superficial to acknowledge the widely-accepted fact that the right to strike is an integral part of collective bargaining – if it is argued that a strike (despite being an integral part thereof) need not be functional to effective collective bargaining and the purpose thereof. The purpose of a strike relates very closely to that of collective bargaining.<sup>128</sup>

It appears that little regard is shown for “the court’s view of what is functional at any given time and in any given industry”.<sup>129</sup> It is unclear on what basis it is presumed that our specialist Labour and Labour Appeal courts are not competent and/or sufficiently informed to determine whether a strike is functional to collective bargaining. It is submitted that the court is in the best position to intervene and provide solutions in the best interest of all parties involved in situations of chaos, taking into consideration socio-economic and other circumstances.

Fergus’s notion that the right to strike, like all other constitutional rights, should be limited as little as possible is supported. This, however, should by no means be seen as a prohibition on justifiability.<sup>130</sup> Any law that governs the exercise of the right to strike must establish a balance between the interests it seeks to promote and the interests its exercise may threaten.<sup>131</sup> The fact that the strike provisions in the LRA regulate a fundamental human right is of critical importance to its interpretation and application by our courts. Therefore, where it is possible to interpret the LRA in a manner consistent with the right to strike, a court should opt for this interpretation rather than interpreting the LRA against the right to strike.<sup>132</sup> This does not mean that where the legislature intends legislation

127 Fergus (2016) 37 *ILJ* 1544.

128 See also s 213 of the LRA in this regard.

129 Should any party regard it as necessary such party is free to provide the court with information relevant to what it may regard as a very specialised industry by way of an expert witness.

130 See s 65 of the LRA for limitations on the right to strike as well as s 36 of the Constitution.

131 Grogan *Collective labour law* (2014) 193.

132 *National Union of Metalworkers of SA v Bader Bop (Pty) Ltd* (2003) 24 *ILJ* 305 (CC) para 37. The Bill of Rights must be interpreted in accordance with s 39(1) of the Constitution. S 39(1) provides as follows: “When interpreting the Bill of Rights, a court, tribunal or forum – (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and

to limit rights, and where legislation does so clearly but justifiably, such an interpretation may not be preferred in order to give effect to the clear intention of the legislature.<sup>133</sup> Should this be the case, one will be required to persuade the court with a clear and thorough argument that such an interpretation indeed was a proper interpretation and that any limitation in this regard was justifiable as contemplated by section 36 of the Constitution.<sup>134</sup>

It is agreed that the law and courts are not customarily prone to intrude in the various interests at stake. This is a result of the notion that the resolution of interest disputes is better left to collective bargaining rather than litigation. It should, nonetheless, be kept in mind that one of the functions of labour legislation is to regulate collective bargaining in such a way as to give effect to the purpose of the LRA. If minimal interference by the courts is necessitated for such purpose to be attained in the face of lawless chaos to the detriment of all parties involved, it is submitted that such interference could fit comfortably within the LRA's purpose of "regulation of collective bargaining".

An opponent to the "functionality requirement" further refers to "the ILO committees' historical acknowledgement of the right to strike as an integral part of the collective bargaining process" in support of her argument that the "functionality principle" no longer forms part of South African law.<sup>135</sup> It should be noted that although the right to strike is an essential element of trade union rights<sup>136</sup> and an essential means available to all workers and their organisations for the promotion and protection of their economic and social interests,<sup>137</sup> the ILO nevertheless recognises that strikes may be restricted by law. Such a restriction will be justified where public safety is concerned, provided that adequate alternatives such as mediation, conciliation and arbitration offer a solution to affected workers.<sup>138</sup> The fundamental right to strike is not absolute<sup>139</sup> and should be exercised in line with other fundamental rights of other citizens and employers.<sup>140</sup> Provision accordingly is made for the imposition of legitimate pre-conditions on the right to strike, which may include the giving of strike notices,

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(c) may consider foreign law." Van Niekerk and Smit 29 point out that section 39 "places an obvious premium on the value of international law in relation to the interpretation of the Bill of Rights" and while a court "may have regard to comparable foreign case law, it must have regard to public international law".

133 *Ibid.*

134 *Ibid.* It is trite that the rights contained in the Bill of Rights are not absolute, and may be limited by s 36(1) of the Constitution which provides that rights may be limited "only in terms of a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom".

135 Fergus (2016) 37 *ILJ* 1544.

136 Committee on Freedom of Association, Second Report (1952), Case No 28 (Jamaica), in Sixth Report of the International Labour Organisation to the United Nations (Geneva), Appendix 5, 181, para 27.

137 1983 Report of the Committee of experts para 2000.

138 *ILO General Survey* (fn 2 above) para 164.

139 See, in this regard, the *Chamber of Mines* case para 50 where the court confirmed that the right to strike is by its nature not absolute and may be justifiably be limited in certain situations because "a strike is not an end in itself" but rather "primarily a means to end an effective collective bargaining system in which workers are able ultimately to exercise power in order to influence the terms and conditions of employment".

140 See Gernigon *et al ILO principles concerning the right to strike* ILO Geneva (2000) 42.

the holding of ballots and recourse to compulsory conciliation and arbitration.<sup>141</sup> According to the ILO Committee on Freedom of Association, restrictions on the right to strike should be limited to cases where strike action ceases to be peaceful.<sup>142</sup> Strikes are further regarded as acceptable only if they are embarked upon with the aim of promoting the economic, social and occupational interests of workers.<sup>143</sup> This gives rise to the possible imposition of limitations in a case where it becomes clear that a strike is starting to have a contrary result, and more so if the position is deteriorating.<sup>144</sup> Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>145</sup> expressly protects the right to strike for the purpose of collective bargaining.<sup>146</sup>

The right to freedom and security of the person as well as the right to trade and property<sup>147</sup> should be taken into account in instances where there is a blatant disregard for the rule of law, where the strike loses its protected status, or where it becomes dysfunctional to collective bargaining. It is submitted that these rights, when considered in accordance with the requirement of fairness, could outweigh the rights of strikers who disregard the constitutional rights of their fellow South Africans and the rule of law.<sup>148</sup> These strikers in essence act against the spirit of the LRA and the level of violence should not even be a determining factor when limiting the rights of such striking workers. Some proponents have added that the limitations in section 65(1) of the LRA should be extended:

“It is possible, for example, to extend the limitations on the right to strike as provided for by section 65(1) of the LRA and extend the scope of peace obligations/ clauses where strike action is limited by subjecting a dispute during the duration of a collective agreement to a particular dispute resolution procedure (for example, arbitration) or where an embargo or moratorium is placed on trade unions not to take part in strike action if they, for example, did not follow the procedures to comply with protected strike action, or if they did embark on protected strike action and were guilty of misconduct or the strike action became violent. When principles such as ‘only as a last resort’ or ‘not at the expense of the public good’ are applied more strictly it might curb the prevalence of embarking on unprotected strikes when stricter liabilities are imposed and prevent workers from turning violent during a protected strike.”<sup>149</sup>

141 Manamela and Budeli “Employees’ right to strike and violence in South Africa” 2013 *CILSA* 317.

142 *ILO General Survey* paras 173–174.

143 Manamela and Budeli 2013 *CILSA* 317.

144 This should also be viewed in light of the hardship suffered by strikers, especially where it becomes evident that a demand cannot be met and “no work no pay” will yield no positive results.

145 Adopted in 1950 and entering into force in 1953.

146 A 6(4) of the European Social Charter. It further provides that, with the view to ensuring that the right to collective bargaining be exercised effectively, the contracting parties undertake to protect “the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into”. See also s 27(4) of the interim Constitution: Workers shall have the right to strike for the purpose of collective bargaining.

147 See ss 22 and 25 of the Constitution.

148 This would in essence result in a weighing up of rights as envisioned by s 36 of the Constitution.

149 Botha “Can the *ultima ratio* and proportionality principles possibly curb unprotected industrial action in South Africa?” 2016 *THRHR* 369 388–389.

Botha suggests that “[a]lthough the spirit of section 64 indicates that strike action may be exercised only as a last resort and should support lawful demands, stricter application of the ‘*ultima ratio*’ and proportionality principles is called for”<sup>150</sup> and that “the Labour Court should intervene when it appears that the strike is no longer functional or that the trade union has no interest in trying to resolve the dispute and reach an agreement.”<sup>151</sup> Along this line of thinking he suggests the following:

“When workers and their trade unions embark on industrial action, the strike should meet the following criteria in context of whether the strike action is proportional: (1) the strike action should be suitable to the demands being made (the employer must be able to meet the demands); (2) the strike must be necessary and used as measure of last resort where all other measures have failed; and (3) the strike must be reasonable taking into account the rights and interests directly and indirectly affected by the strike action (proportionality *strictu sensu*). It is proposed that section 64 of the LRA be amended to incorporate an onus of proof where the trade union or employer (depending on the format of industrial action) would justify that the action taken is a last resort and that it is proportionate. It should be mentioned that what constitutes a last resort will depend on the circumstances and facts of each case: for example, if the demands are unrealistic and the trade union negotiates in bad faith and knows that the employer can never meet its demands in order to use strike action as a weapon it cannot really be said that it is then used as a last resort.”<sup>152</sup>

### 3.3 Liability of trade unions

The time has come that trade unions should be held accountable for the actions of their members as trade unions have glibly washed their hands off the violent actions of their members for too long.<sup>153</sup> These actions by unions “undermine the very essence of disciplined collective bargaining and the very substructure of our labour relations regime”.<sup>154</sup>

There is a duty upon trade unions to take all reasonable steps to prevent violence, damage to property and other unlawful acts during strike action.<sup>155</sup> Should such duty not be adhered to, the Labour Court may be approached for a mandatory order, directing the union to intervene and to take all reasonable steps to stop unlawful acts.<sup>156</sup> The possibility of placing trade unions under a greater obligation of educating their members to ensure adequate knowledge and understanding

150 Botha emphasises the following: “The principle of proportionality is directly linked to the *ultima ratio* principle, especially when it is considered in context of employment and labour law. The right to strike and participation in protest action does not come without limitations. Concepts such as *necessity* and *reasonableness* have been used by the courts to underwrite the concept of proportionality” (373).

151 *Idem* 387.

152 *Idem* 387–388.

153 *In2Food (Pty) Ltd v Food & Allied Workers Union* (2013) 34 *ILJ* 2589 (LC) 2591H–2592B.

154 *Ibid.*

155 See Cohen *et al Trade unions and the law in South Africa* (2009) 81. See also *FAWU* (LAC) para 18–19; *In2Food (Pty) Ltd* 2591H–2592B; *FAWU v Ngcobo* (2013) 34 *ILJ* 3061 (CC). In this case, FAWU was liable to its own members for failure to prosecute the members’ interests properly in litigation. Rycroft “Being held in contempt for non-compliance with a court interdict: *In2food (Pty) Ltd v FAWU & Others*” (2013) 34 *ILJ* 2589 (LC), (2013) 34 *ILJ* 2499.

156 Manamela and Budeli 2013 *CILSA* 325.



of the right to strike, limitations on the right to strike as well as consequences that will follow the abuse of the right to strike, seem appropriate. Unions should further ensure that union members understand the reasons for such limitations and the fact that courts need to follow an uncompromising approach to people who do not exercise their right to strike responsibly. This is in light of the rights of other citizens who are also deserving of protection where their fundamental rights are threatened by unlawful and violent conduct during strikes. A proper understanding of the right, as well as the requirement that rights should be exercised responsibly, should be actively promoted by trade unions.<sup>157</sup>

In this context it is worth taking cognisance of *Pikitup Johannesburg (Pty) Ltd v SA Municipal Workers Union*,<sup>158</sup> where the court made mention of a large crowd of people, many of whom were wearing SAMWU T-shirts or hats, who arrived at the court a few minutes before the hearing, and proceeded to upend concrete rubbish bins into the street and to strew the rubbish across the road. Some of the participants then entered the court and sat in the public gallery. This demonstration was clearly either intended as a display of contempt for the court proceedings or an attempt to intimidate the court. The court was not prepared to proceed until the crowd outside the court had been dispersed and instructed the union to ensure that their officials attended to this. Within 15 minutes the group had dispersed.<sup>159</sup>

“I mention this incident only because it demonstrated, amongst other things, that whatever the union leadership might suggest about criminal elements sabotaging or undermining the actions of members and the union, acts of public vandalism are also committed by persons wearing union garb, who are able to be swayed by union leadership to behave in an orderly fashion when required to do so. The suggestion that the union has no ability to influence the conduct of members is somewhat exaggerated.”<sup>160</sup>

Where the trade union has a collective bargaining relationship with the employer, and its members embark on an unprotected strike – of which the union is aware but in which it has, without just cause, failed to intervene – the union will be held liable in terms of section 68(1)(b) to compensate the employer for any loss incurred as a result of the strike.<sup>161</sup>

South Africa has one of the most progressive labour legislation regimes in the world which provides for dispute resolution processes.<sup>162</sup> Trade unions and their members must make use of these processes instead of resorting to violence. Lawlessness and acts of violence should not be permitted to result in the abuse and pollution of the right to strike. It is the responsibility of trade unions to ensure that their members conduct themselves properly during strikes, whether protected or not.<sup>163</sup>

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157 *Ibid.*

158 (2016) 37 ILJ 1710 (LC).

159 *Pikitup* para 23.

160 *Ibid.*

161 *Mangaung Local Municipality v SAMWU* [2003] 3 BLLR 268 (LC). See also Cohen *et al* (fn 126 above) 84.

162 See “Regulating labour relations” available at <http://bit.ly/2hIFBNe>, accessed on 3 June 2013.

163 Manamela and Budeli 2013 *CILSA* 335–336.

### 3.3.1 Secret pre-strike ballots

Unions must make provision in their constitutions for pre-strike ballots.<sup>164</sup> There were attempts to include a provision that makes a secret pre-strike ballot compulsory during the amendment talks prior to the Labour Relations Amendment Act<sup>165</sup> coming into effect. These attempts were not successful. Instead, section 67(7) of the LRA remains unchanged as a result of the legislature bowing to trade union pressure during its consideration of the 2014 amendments. In accordance with this provision, the fact that no pre-strike ballot took place will not constitute a cause of action resulting in the strike losing its protection. This will be the case irrespective of whether the trade union's constitution provides for a pre-strike ballot. It is unfortunate that the requirement in the 1956-LRA that made such ballots mandatory was not included in the current LRA. Pre-strike ballots seem to be an obvious and sensible method to be used in limiting the power of militant minorities in unions to force reluctant members to strike.<sup>166</sup>

### 3.3.2 Regulation of Gatherings Act

Section 17 of the Constitution grants everyone the right to peacefully assemble, demonstrate, picket and present petitions. These rights are limited by section 11(1) of the Regulation of Gatherings Act,<sup>167</sup> which provides that if any riot damage occurs as a result of a gathering or demonstration, the organisation or convener responsible for such gathering or demonstration and every participant to such demonstration shall be jointly and severally liable together with any person who unlawfully caused or contributed to the damage.

Section 11(2) of this Act, however, makes provision for a defence against such claims, which includes proving that the organisation did not permit or connive at the act by which the damage was caused, that the act did not fall within the scope of the objectives of the gathering or demonstration, that it was not reasonably foreseeable and that all reasonable steps within its power were taken to prevent the act in question.

The union, being responsible for the decision to assemble, should also be responsible for any reasonably foreseeable damage arising from such assembly.<sup>168</sup> This is in accordance with the purpose of section 11(2) which is to protect the safety and property of the public from foreseeable possibility of damage.

In light of the above, it is clear that trade unions can be held liable for violent conduct during strike action.<sup>169</sup> Taking into consideration the high levels of

164 S 95(5)(p) of the LRA. See also *National Union of Metalworkers of SA v Jumbo Products CC* (1991) 12 *ILJ* 1048 regarding guidelines laid down by the court for conducting a strike ballot by trade unions. See also *KwaZulu Natal Furniture Manufacturers' Association v National Union of Furniture & Allied Workers of South Africa* 1996 8 *BLLR* 964 (N).

165 6 of 2014.

166 Grogan *Collective labour law* 2014) 217.

167 Act 205 of 1993.

168 *South African Transport and Allied Workers Union v Garvas* (CCT 112/11) [2012] ZACC 13, 2012 8 *BCLR* 840 (CC), [2012] 10 *BLLR* 959 (CC), (2012) 33 *ILJ* 1593 (CC), 2013 1 SA 83 (CC) (13 June 2012).

169 In *SATAWU v Garvas*, a march organised by SATAWU in terms of the Regulation of Gatherings Act 205 of 1993 resulted in people being killed and property being damaged. The respondent claimed damages from the union in terms of s 11 of the Regulation of Gatherings Act. SATAWU denied liability and challenged the constitutionality of s 11(2)(b)

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violent strikes prevailing in South Africa, the effective application by our courts of such liability is a necessity. This necessity is further corroborated by the negative impact of strike violence on the international image and on the economy of South Africa as investors may be hesitant to do business in the country.<sup>170</sup>

Having regard to the Constitutional Court judgment in *SA Transport & Allied Workers Union v Garvas*,<sup>171</sup> one would believe that the Labour Court should be inclined to more substantial compensation awards for losses attributable to unprotected strikes and conduct in connection therewith under section 68(1)(b) of the LRA.<sup>172</sup>

### 3.4 Labour Court's approach to unprotected strikes

There is a school of thought to the effect that the Labour Court should start to take an uncompromising approach in upholding the dismissal of unprotected strikers.<sup>173</sup> It is submitted that this is the purpose of distinguishing between protected and unprotected strikes. Such thinking seems to be merited by the mere fact that legislation regulating strikes exists. The legislative purpose of defining boundaries for *protected* strike action as opposed to strike action that is *unprotected* is to provide protection to the former. If non-compliance with these statutory requirements has no consequences, there is no incentive to comply.<sup>174</sup>

Item 6 of the Code of Good Practice: Dismissal states that participation in an unprotected strike, like any other act of misconduct, not always warrants dismissal. Regard has to be had to the multi-faceted test for the fairness of the sanction of dismissal set in *Sidumo v Rustenburg Platinum Mines Ltd.*<sup>175</sup> It is clear that a wholly inflexible test cannot be sustained. Myburgh SC is of the opinion that the Labour Court will adopt a strict approach in cases where strikers breach the substantive limitations in section 65 on the right to strike and have made little or no attempt to comply with the procedural requirements as set out in section 64. Further, that the Labour Court will regard the disobedience of court orders by employees taking part in unprotected strike action as a severely aggravating

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as being inconsistent with the constitutional right to assemble, demonstrate and picket. The matter went all the way to the Constitutional Court which found that the section was not unconstitutional and that the right to assemble and demonstrate is constitutionally protected and guaranteed only in as far as it is exercised peacefully. See also Gericke "Revisiting the liability of trade unions and/or their members during strikes: Lessons to be learnt from case law" 2012 *THRHR* 566–585 and Botha "Responsible unionism during collective bargaining and industrial action: Are we ready yet? *De Jure* 2015 328–350 where the *Garvas* case and the implication of the case as well as the liability of trade unions for damage during gatherings are discussed in detail.

170 See "Warning on the effect of violent strikes to the economy" available at <http://bit.ly/2hi0xpx>, last accessed on 3 June 2013. See also "The economic impact of Marikana" available at <http://bit.ly/2hA35s2>, last accessed on 3 June 2013 and "Worsen South Africa's economic situation-Aveng CEO", available at <http://bit.ly/2hsVo3J>, accessed on 3 June 2013.

171 2012 33 *ILJ* 1593 (CC) (hereafter *Garvas*).

172 Myburgh "The failure to obey interdicts prohibiting strikes and violence (the implications for labour law and the rule of law)" (2013) *CLL* 8.

173 Myburgh (2013) *CLL* 8.

174 Such an approach will also ensure knowledge and consistent application of the rule relating to misconduct (Sch 8 to the LRA: Code of Good Practice: Dismissal).

175 (2007) 28 *ILJ* 2405 (CC).

factor.<sup>176</sup> This is necessary in the face of the distressing fact that court orders are not invariably treated with “the respect they ought to command”.<sup>177</sup> This vexatious tendency may be effectively combated only by the courts indicating a distinct reluctance to condone non-compliance by providing assistance to the perpetrators who are not entitled thereto.<sup>178</sup> We agreed with Myburgh SC that a strict approach is necessary to ensure obedience to court orders as this is foundational to a state based on the rule of law. Non-compliance should be penalised, even more so where a trade union that ought to have known better and acted responsibly was involved.<sup>179</sup>

### 3.5 Re-evaluating the role of the courts

The courts have been faced with challenges in instances where trade unions no longer pursue the settlement of legitimate demands relating to matters of mutual interest,<sup>180</sup> but pursue violence and political matters. Violence during both protected and unprotected strikes is unacceptable, not functional to collective bargaining and is discouraged in terms of both international and national labour laws.

Therefore, it must be reiterated that to turn a blind eye to dysfunctional strikes despite the fact that the LRA sets out not only to promote “labour peace”, but also “orderly collective bargaining” and “the effective resolution of labour disputes”, seems rather disingenuous. If a strike becomes violent and no longer pursues legitimate or lawful demands, the court should intervene as “violent and unruly conduct is the *antithesis of the aim of a strike*, which is to persuade the employer through the *peaceful withholding* of work to agree to the union’s demands”.<sup>181</sup> In this context, due cognisance must be taken of the judgment in *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Workers Union*,<sup>182</sup> where the court held:

“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

176 Myburgh 2013 *CLL* 8.

177 Conradie JA in his minority judgment in *Steve’s Spar* para 120 (already quoted in part above).

178 *Ibid.*

179 *Ibid.* Emphasised by Myburgh 2013 *CLL* 9.

180 Matters of mutual interest are not defined by the LRA and have been interpreted widely by the courts. See Botha fn 72 above. Botha points out with reference to the latter cases as follows: “In both *Pikitup* and *Vanachem* the Courts reiterated the fact that a wide interpretation should be applied. From the discussion above it is also clear that matters of mutual interest can include health and safety issues as well as demands for insourcing, payment of risk allowances, training of artisans, to mention only a few. It is clear that these demands must not only be lawful but also must be of mutual advantage or benefit to the employer and its employees. An approach that favours the common good of the enterprise cannot be utilized. What can be done is to apply an approach where matters of mutual interest concern the employment relationship or exclude disputes concerning socio-economic interests of workers, or purely political disputes. It is, however, also possible for demands of a socio-economic or political nature to be linked to the workplace”: 2015 *Obiter* 208. See also Manamela 2012 *SA Merc LJ* 107.

181 *National Union of Food Beverage Wine Spirits & Allied Workers v Universal Product Network (Pty) Ltd* (2016) 37 *ILJ* 476 (LC) para 30; own emphasis.

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

Constitution and the LRA. But the exercise of the right to strike is sullied and ultimately eclipsed when those who purport to exercise it engage in acts of gratuitous violence in order to achieve their ends. When the *tyranny of the mob displaces the peaceful exercise of economic pressure*<sup>183</sup> as the means to the end of the resolution of the labour dispute, one must question whether a strike continues to serve its purpose and thus whether it continues to enjoy protected status.”<sup>184</sup>

Rycroft<sup>185</sup> correctly points out (which view is also supported in *National Union of Food Beverage Wine Spirits & Allied Workers v Universal Product Network (Pty) Ltd*)<sup>186</sup> that when dealing with violence and misconduct during strikes that the following question should be asked by the court: “Has misconduct taken place to an extent that the strike no longer promotes functional collective bargaining, and is therefore no longer deserving of its protected status?”

### 3 5 1 *An analysis of recent case law and the Labour Court’s recent responses to violent industrial action*

In the current industrial relations climate, violence and strikes being called over unattainable and unlawful demands that do not amount to matters of mutual interest are becoming somewhat of a regular occurrence. The boundaries of strike action are continuously being pushed. The Labour Court is responsible for and has the jurisdiction to interdict unprotected strikes and strike violence.<sup>187</sup> These orders (interdicts) by the Labour Court are enforceable by way of contempt of court orders.<sup>188</sup>

It is not only the litigant’s private interest in securing compliance with court orders, but also the broader public interest in obedience to court orders that move the court to grant enforcement.<sup>189</sup> This is important to avoid disregarding of court orders from sullyng the court’s authority and from detracting from the rule of law.<sup>190</sup> The rule of law forms part of the foundations of our constitutional democracy.<sup>191</sup>

In a number of recent judgments dealing with violent strikes, unions have managed to escape the effect of contempt of court orders mainly on technical grounds. It seems to be clear from these judgments, however, that the judicial net is tightening around those who are prepared to run the risk of disobeying court orders.<sup>192</sup> These judgments are worth taking heed of and some are discussed briefly below.

The employees in *PTAWU obo Khoza v New Kleinfontein Goldmine (Pty) Ltd*<sup>193</sup> were fairly dismissed for participating in an unprotected strike in breach of the wage agreement as prohibited by section 65(1)(a).<sup>194</sup> This was after the

183 Emphasis added.

184 *Tsogo Sun Casinos* para 13.

185 See “What can be done about strike related violence”, available at <http://bit.ly/2gvXyh0>, last accessed on 10 December 2016.

186 (2016) 37 *ILJ* 476 (LC) para 32 (hereinafter *Universal Product Network*).

187 Ss 157(1) and 158(1) of the LRA.

188 S 163 of the LRA.

189 *Fakie v CCII Systems (Pty) Ltd* 2006 4 SA 326 (SCA) para 8.

190 *Ibid.*

191 *North West Star* paras 63–64.

192 Myburgh “Contempt of court in the context of strikes and violence” (2014) 23 *CLL* 109.

193 (2016) 37 *ILJ* 1728 (LC) (hereafter *New Kleinfontein Goldmine*).

194 *New Kleinfontein Goldmine* paras 49–66.

employer sent two notices to the union and SMS messages to all employees well before commencement of the strike, including good reasons why the anticipated strike will be unprotected.<sup>195</sup> Despite this, and the fact that “the union had plenty of time to reflect on the wisdom of pursuing the strike”, it elected to “press ahead regardless”<sup>196</sup> and not heed warnings which referred to the prospect of dismissal if they persisted with the strike.<sup>197</sup> The employer issued two ultimatums, both of which were ignored, before approaching the Labour Court for an urgent interim interdict. The interim order declared the strike unprotected and interdicted the union and its members from continuing with the strike and restrained the union from encouraging or inciting their members to continue participating in the strike. The court order was distributed along with a third ultimatum, both of which were ignored. The union in contravention of the court order “chose to blindly continue with the strike when it must have realised that this was a strike which could not be made lawful”.<sup>198</sup> The union made no attempt to persuade strikers to return to work or to engage with the employer as to why they might have believed that the strike was protected or why they ought to have taken the warnings seriously.<sup>199</sup> “This evidence must also be understood in the context of the undisputed evidence that the reaction of workers to the news of the interdict and the invitation to return to work was one of violent rejection.”<sup>200</sup> After their dismissal, the dismissed strikers engaged in violence and acts of intimidation and assault on non-strikers, leaving the employer with no choice but to once again approach the court for another interdict.<sup>201</sup>

It is clear from the above that the employer went to great lengths to ensure that both the employees and their union were aware of the fact that the strike would be unprotected. The fact that these severely aggravating factors,<sup>202</sup> including non-compliance with section 65’s substantive limitations and the disobedience of a court order, were “acknowledged” by the court did not prove to be of much assistance to the employer.

The employer in *New Kleinfontein Goldmine* further suffered an undisputed loss in net income of close to R10m as a result of the two-day strike.<sup>203</sup> The employer, from the onset, indicated its willingness to accept an amount of compensation equal to 30% of the actual loss it had suffered, on terms of payment as the court saw fit.<sup>204</sup> The employer warned the union (in writing) that violent and intimidatory behaviour will not be protected in terms of the LRA or the Constitution.<sup>205</sup> Further, that it would seek *inter alia* an interdict, damages and punitive costs against the union and its members.<sup>206</sup> It referred the union to *South African*

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195 *Idem* paras 18 20.

196 *Idem* para 66.

197 *Idem* para 55.

198 *Idem* para 72.

199 *Idem* paras 54 and 67.

200 *Idem* para 67.

201 *Idem* para 37.

202 Refer to earlier discussion in this regard; Myburgh (2013) *CLL* 8.

203 “When viewed against the undisputed losses suffered by the company as a result of the unlawful action, the duration of the strike is put in perspective”: *New Kleinfontein Goldmine* para 70.

204 *Idem* para 44.

205 *Idem* para 75.

206 *Idem* para 75.

*Transport and Allied Workers Union v Garvas*<sup>207</sup> and warned that it would be held liable for damages if it decided to proceed with the unprotected strike.<sup>208</sup> Despite the employer's written warning of specific action that would be taken against the union, the Labour Court noted the following: "Prior to and during the strike, no express reference was made to PTAWU being liable for a claim for compensation in terms of sections 68(1)(b) of the LRA." And "the issue of liability for compensation under section 68(1)(b) was only raised with it after the event, at a stage when PTAWU could not have done anything to minimise its exposure to such liability".<sup>209</sup> It is worth noting that the employer, despite the fact that there was no legal obligation on it, provided the union with a detailed, unambiguous warning of, *inter alia*, specific remedies that would be pursued. Further, section 68 of the LRA does not in any manner require the aggrieved party to notify the non-compliant party of its intention to seek compensation in terms of this section. Section 68 provides for a remedy in response to an unprotected strike. The union was warned numerous times of the fact that the strike was unprotected.

In his comment on the *New Kleinfontein Goldmine* case, PAK le Roux writes that the need for such a warning is less evident where it is clear that the strike will be unprotected and it is self-evident that the employer will suffer loss.<sup>210</sup> It is submitted that this is exactly why there was no need for such a warning in the *New Kleinfontein Goldmine* case, even more so here, where the existing warning made mention of the LRA, but failed the presumed requirement of specific reference (at a specific time) to section 68(1)(b) of the LRA.

The court in *New Kleinfontein Goldmine* further held that "there is no evidence of what steps, if any, were ever taken to recover the lost production to mitigate the loss, by for example working additional shifts *albeit* perhaps incurring abnormal extra overtime costs". It is uncertain on what basis the court took this into consideration as it is neither a requirement nor a factor to be taken into account when a claim for compensation is made in terms of section 68 of the LRA. In this context, it is worth noting that mention was nevertheless made of the use of replacement labour.

The court's mere acknowledgement of the significant economic impact of the strike on the employer proved to be of no assistance to the employer. The court further held:

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207 [2011] BLLR 1151 (SCA). In this case, the union was held liable for damage done by its members in the course of an unruly march.

208 *New Kleinfontein Goldmine* para 75.

209 *Idem* para 79. See also para 39: "On 19 June 2012, the mine notified the union that it had suffered production losses as a result of the strike and that it would be claiming compensation from PTAWU in terms of section 68(1)(b) of the LRA. The same letter notified the union that the company intended instituting legal action against the union for damages arising from damages to mine property sustained as a result of the conduct of union members after the strike had been interdicted by the Labour Court." Para 79: "I am also concerned that the issue of liability for compensation under section 68(1)(b) was only raised with it after the event, at a stage when PTAWU could not have done anything to minimise its exposure to such liability. Had it been made aware of the potential liability faced at an earlier stage that might well have concentrated the minds of the union leadership to consider more seriously the wisdom of persisting with the strike action."

210 PAK le Roux "Strikes and the courts – An update" August 26(1) 2016 *Protection, damages and alternative remedies*.

“There is no justification why, when simple mechanisms exist to regularise a strike, economic damage can be inflicted on an employer, without those mechanisms being invoked and thereby ensure a reasonable opportunity to resolve the dispute is created. Had the union more diligently pursued the organisational rights demands to their logical conclusion using the dispute mechanisms available, it might well have achieved those aims possibly without even having to resort to industrial action.”<sup>211</sup>

The court pointed out that the union might have achieved its aims without resorting to industrial action, thus that the strike was unnecessarily resorted to. The court went to great lengths to scrutinise the financial position of the union. It even took into account the assumed negative impact of the loss of members as a result of the fair dismissals for participation in an unprotected strike in which the union was directly involved.

It is submitted that the court’s decision to dismiss the employer’s claim for compensation in light of the specific circumstances of this case not only is unfounded but also unfair.

Another matter brought before the Labour Court was that of *Pikitup Johannesburg (Pty) Ltd v SA Municipal Workers Union*.<sup>212</sup> This was an application of a limited scope and was solely concerned with whether the union and/or alternatively its Deputy Regional Secretary were guilty of contempt of court.<sup>213</sup> The interim order placed the following specific obligations on the union and its officials:<sup>214</sup>

- (a) To prevent the union and its officials from promoting participation in, or conduct in support of the unprotected strike;
- (b) to compel the union, its officials and shop stewards to inform SAMWU members of the contents of the interim court order; and
- (c) to take immediate positive steps to ensure that SAMWU’s members complied with the order.

Identified shop stewards, office bearers and a union official took no steps to discourage or prevent conduct in contravention of the court order – on the contrary – they played prominent roles in encouraging such conduct. Public statements promoting strike action, in direct contravention of the court order were made by prominent SAMWU staff, among which the SAMWU National Spokesperson and the Deputy Regional Secretary.<sup>215</sup> This included a press statement issued by SAMWU Head Office, appearing on the SAMWU (public) website including the statement: “We will therefore be intensifying our strike action at Pikitup . . . we will bring Gauteng province to a standstill.”

211 See also *New Kleinfontein Goldmine* para 72: [W]here the strike could have been a lawful one if procedures are followed, and given that those procedural pre-requisites are not onerous, there is no reason why a failure to follow them should be readily condoned.” And para XX: “While unions cannot escape liability simply because it would be onerous financially, it is important that compensation claims are not used as a device to cripple a union’s ability to operate or to deal it a terminal blow.”

212 (2016) 37 ILJ 1710 (LC).

213 *Pikitup* para 5. The personal liability (for contempt of court) of other union officials, shop stewards of union members who participated in the unprotected strike, was not considered.

214 *Idem* para 6.

215 *Pikitup* paras 13 15.



This statement (among others) conveyed both that the union endorsed the strike and supported its continuation. None of the statements contained the slightest hint about the existence of the court order prohibiting the very conduct the respondents were promoting.<sup>216</sup> There was no denial that such statements were indeed made by the individuals concerned. The Deputy Regional Secretary did nothing to indicate that the contents of the statement were inaccurate or dangerously misleading, or to correct the statement which was in the public domain for all to read as the official position of the union.<sup>217</sup> The court noted that it was obvious that the statements in question would encourage participants to continue with the strike and that the actions of these union officials plainly were in breach of the court order.<sup>218</sup> The union as an organisation – completely indifferent as to whether its actions were in breach of the court order or not – did nothing to repudiate or distance itself from any of these utterances.<sup>219</sup> The union's failure to make any effort to try and invoke the statutory dispute mechanisms for resolving the dispute suggests a worrying disdain for the procedures provided for in the LRA. The procedures for embarking on lawful strike action are simple, not onerous and designed to ensure a proper opportunity for conciliation before any need arises to resort to industrial action.<sup>220</sup>

The court also took into account the fact that the strike was a matter of significant public interest impacting on the provision of fundamental sanitary services in the largest metropolitan area in the country.<sup>221</sup> The conduct of the strikers openly flouted the court order on a dramatic scale.<sup>222</sup> The court in *Pikitup* referred to an earlier judgment of the Labour Appeal Court in *North West Star (Pty) Ltd (Under Judicial Management) v Serobatse* where it made a similar observation with reference to non-compliance with court orders:

“The correct principle is that, if a court has issued an order against you and you are unhappy with it, you must take that decision to a court higher than the one that issued such order and which has competent appellate or review jurisdiction and seek to have such order set aside. If there is no such court, for example, where there is no appeal or review available against that court or against such order or if the court which issued the order is the court of final jurisdiction in such matters or is the highest court in the land, *then you have no choice but must simply comply with the order.*<sup>223</sup> A person cannot say: ‘I don’t like this court order; it is wrong; therefore I will not comply with it.’ If we want to deepen our democracy, promote the rule of law, discourage selfhelp and encourage those who have disputes to take them to the courts of the land and not to seek to resolve them through physical fights or violence, the whole society must frown upon anyone who disobeys an order of court or who, either by word or deed, encourages or incites another or others to disobey an order of Court.”<sup>224</sup>

216 *Idem* para 33.

217 *Idem* para 35.

218 *Idem* paras 32 33.

219 *Idem* para 34.

220 *Idem* para 36.

221 *Idem* para 25.

222 *Idem* para 25.

223 Own emphasis.

224 *North West Star (Pty) Ltd (Under Judicial Management) v Serobatse* (2005) 26 ILJ 56 (LAC) para 18: “Upholding the submission made by counsel for the appellant would make a mockery of the Constitution and the rule of law that forms part of the foundations of our constitutional democracy. It would be a licence for people to disregard orders of

In *Pikitup* the court noted with concern that when trade unions as prominent public figures, which exercise economic power, are selective in the respect they display for court orders, such conduct can powerfully affect public sentiment and, in turn, undermine the rule of law as a foundational principle of our constitutional order.<sup>225</sup>

The purpose of contempt proceedings concerning the unlawful and intentional refusal or failure to comply with an order of court is twofold; firstly, and usually the issue of greater concern, is to ensure compliance with the order and, secondly, the imposition of a penalty in order to vindicate the court's authority following the disregard of its order.<sup>226</sup> In determining the appropriate remedy, the fact that the contempt related to an order for which the time for compliance has passed was taken into account.<sup>227</sup> The court was primarily concerned with imposing a salutary penalty as a mark of disapproval of the respondent's disregard for the authority of the interim order.<sup>228</sup> The court noted that, had it to deal with the non-compliance of the interim order, a period of incarceration of the Deputy Regional Secretary would have been appropriate to consider failing immediate compliance.<sup>229</sup> The union had to take primary responsibility for its failure to prevent its officials from acting contrary to the interim order and the penalty should be designed to deter a repetition of such conduct. The Deputy Regional Secretary's omission to correct the flagrant breach of the order also is deserving of severe censure.

The court in determining an appropriate penalty was also mindful of the scale of the disruption caused by the unprotected strike action in which SAMWU claimed 4 000 members were involved.<sup>230</sup>

The union (first respondent) was found guilty of being in contempt of the interim order by encouraging its members through the actions of its officials to continue to participate in the unprotected strike.<sup>231</sup>

The Deputy Regional Secretary of SAMWU (second respondent) was found guilty of being in contempt of the interim order by failing to take any appropriate steps to correct the statement which was in breach of the order.<sup>232</sup>

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courts simply because they do not agree with the court that such orders should have been issued. A society that would allow such would in no time be a society of chaos and lawlessness. To do so would sow in society a culture in terms of which people felt free to obey only those court orders with which they agreed or to obey only those laws which they like and to disregard those laws they do not like. I have no doubt in my mind that such a principle has no place in our legal system." The Labour Appeal Court in *Pikitup* regarded the stress placed in this decision on the importance of complying with court orders as quoted by the Labour Court worthy of repetition.

225 *Pikitup* para 27.

226 *Idem* para 25.

227 *Idem* para 38.

228 *Ibid.*

229 *Ibid.*

230 *Ibid.*: "However, the period in respect of which the findings of contempt were made ended on 3 December 2015 which has inclined me to impose much lower fines than would probably have been the case if the period of continued disruption after the confirmation of order was also under consideration."

231 *Idem* para 40.

232 *Ibid.*

SAMWU and its Deputy Regional Secretary were ordered to pay fines of R80 000 and R10 000 respectively. The payment of such fines was to be suspended for a period of 24 months from the date of the order on condition that the respondents are not found guilty of contempt of any order of the court during that time.<sup>233</sup>

The court took into account the fact that the employer's costs in the matter arose because of the flagrant disregard of the court's order by the respondents and the court found no reason why the employer should bear any of those costs.<sup>234</sup> On this basis, SAMWU and its Deputy Regional Secretary were held to be jointly and severally liable for the employer's costs on an attorney and own client scale, the one paying the other to be absolved.<sup>235</sup>

Although the *Pikitup* case differs from the matter in *New Kleinfontein Goldmine* in the sense that Pikitup is a public entity which might not be affected to the same extent by the same financial considerations that would apply to a private business facing such prolonged strike action, it is nevertheless submitted that the order in *Pikitup* is much more appropriate than that in *New Kleinfontein Goldmine* if considered against the circumstances in the respective matters.

The employer in *Algoa Bus Company v SATAWU*<sup>236</sup> sued the union and employees for a financial loss of R465 000 it incurred during an unlawful strike. The court held that while employers are entitled to claim compensation for losses actually suffered during an unlawful strike, the amount awarded need not necessarily be full compensation for such loss. The reason for such a finding is unclear. The effect thereof is loss and hardship for the innocent (complying) party. It leaves one wondering on what basis in law it can be expected from the innocent party to suffer damages resulting from the non-compliant party's unlawful conduct.<sup>237</sup> In *Algoa Bus Company* the court ordered the union and employees to pay the company only R100 000 in monthly instalments of R50.

In *Betafence South Africa (Pty) Ltd v NUMSA*<sup>238</sup> the Constitutional Court once again raised its concern with reference to the contemptuous (and routine) disregard for court orders because strikers "simply do not like them".<sup>239</sup> The Constitutional Court noted the fact that this contemptuous approach towards court orders is often aggravated and encouraged by unions.<sup>240</sup> Where employees (in the face of anarchy and mayhem) refuse to heed court orders even on the advice of their union leaders, the invariable conclusion seems to be justified that the non-compliance by the employees indeed was both "wilful and *mala fide*".<sup>241</sup>

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233 *Ibid.*

234 *Idem* para 39.

235 *Idem* para 40. See also para 39: "The employer's costs in this matter arose because of the flagrant disregard of this Court's order by the respondents and the Court found no reason why the employer should bear any of those costs."

236 2010 2 BLLR 149 (LC) (hereafter *Algoa Bus Company*). See also *Rustenburg Platinum Mines Ltd v Mouthpeace Workers Union* (2001) 22 ILJ 2035 (LC).

237 *Algoa Bus Company* para 77: The employer had notified the union immediately after obtaining the interdict that it could be held liable for damages suffered as a result of the strike. In that instance the strike persisted for another five days without any intervention by the union to attempt to curtail it, despite that warning.

238 C194/2016 (15 September 2016). See the earlier discussion of the *Betafence* case with reference to s 64 of the LRA.

239 *Betafence* para 54.

240 *Ibid.*

241 *Ibid.*

The Constitutional Court expressed its concern for our constitutional democracy and the need for our courts to adopt a stern approach with the level of contempt which has reached “a point where if unchecked, the rule of law will become meaningless”.<sup>242</sup> The Constitutional Court confirmed that no amount of frustration with the employer’s alleged conduct is able to mitigate this level of contempt towards court orders. The Constitutional Court went a step further by expressing the need to show its displeasure with the fact that the union consented to the order only to flagrantly disobey it leaving this court, to infer that it was misled and its process was abused.<sup>243</sup>

Given the circumstances and the fact that employees did not contest the fact that they were in contempt of court and only pleaded leniency, the court was of the view that an appropriate and heavy penalty should be imposed.<sup>244</sup>

Although the court did regard the potential prejudice that a cost order might have on the continued collective bargaining relationship, the fact that there are limits to this labour law principle was clearly expressed.<sup>245</sup> This is true especially in circumstances where a court order obtained *by consent* was wilfully and in bad faith disobeyed and where scant regard was paid to any meaningful relationship they might have had with the employer. It was not that notwithstanding such a relationship it would be remiss of the court “not to show its displeasure if its orders are ignored with impunity”.<sup>246</sup>

The court, *inter alia*, found the employees to be in contempt of court and collectively ordered them to pay a fine of R1 million. The order, with reference to payment, like in *Pikitup*, was suspended for a period of 24 months provided the employees were not found guilty of contempt of any order of the court.

It was held that inasmuch as a cost order would have been appropriate, it is trite that costs in court proceedings entail legal costs in the strict sense – therefore SEIFSA (who represented the employer) was found not to be entitled to costs.<sup>247</sup>

It is submitted that if the law had been applied better in some of the above cases more so than others, it could have aided in the reinforcement of the rule of law and the provision of legal certainty. More substantial compensation awards will attach a bigger risk to non-compliance and will promote orderly collective bargaining and effective resolution of labour disputes. It is obvious in light of these findings that a greater financial disincentive in the current climate would be appropriate.<sup>248</sup> It is in light of judgments like these that it might be worth investigating

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242 *Idem* para 55: “This cannot bode well for our constitutional democracy, and only a stern approach by the courts can stop this slippery slope.”

243 *Idem* para 56. See also para 58: Despite a criminal case having been opened with the SAPS with regard to violence that occurred during the strike, the employees denied having engaged in any violent or unlawful conduct.

244 *Idem* para 61.

245 S 162 of the LRA empowers the court to make an appropriate cost order upon consideration of the requirements of law and fairness.

246 *Betafence* para 62. “The Applicant however as a member of SEIFSA was represented by an official of that Association in these proceedings. Inasmuch as a cost order would have been appropriate given the circumstances of this case, it is trite that costs in court proceedings entail legal costs in the strict sense. SEIFSA therefore is not entitled to costs in these proceedings” (para 63).

247 *Ibid.*

248 Myburgh (2013) *CLL* 9; Manamela and Budeli 2013 *CILSA* 330.

the legislature's intention behind compensation and how it was intended to differ from common-law damages. Of particular relevance in this regard is section 68(1)(b)(iv) of the LRA which provides the Labour Court with exclusive jurisdiction, when awarding compensation in the case of an *unprotected* strike or lock-out, to take into account the financial position of the employer, trade union or employees respectively. To take into account the financial position of the (compliant) party who suffered the loss as a result of the other party's unprotected industrial action seems appropriate. The problem arises where the party who participates in *unprotected* industrial action is allowed to use its own financial position as a mitigating factor to the detriment of the compliant party. It is submitted that both employers and unions (like legal subjects in all other spheres of society) should take responsibility for their own actions with regard to their own particular financial circumstances. It creates untenable situations where a trade union (or an employer) is allowed to hide behind its own well-known financial position not only to escape liability or responsibility, but to push responsibility onto the party who went to great lengths to comply with its legal obligations.

#### 4 CONCLUDING REMARKS: A NEW APPROACH?

The LRA creates a regulatory framework for orderly collective bargaining and the effective resolution of labour disputes. It is within this framework of collective *laissez-faire* that industrial society is shaped by the forces of labour and capital. The courts, as a general rule, should refrain from intervening in collective bargaining.<sup>249</sup> This general rule, however, is applied on the assumption that all parties involved will "behave like civilised citizens"<sup>250</sup> by allowing the forces of supply and demand to result in a collective agreement effective of economic development as intended by the LRA.

The extent to which the Labour Court may interfere in the process of collective bargaining to bring it within the ambit of the regulatory framework provided for in the LRA will depend on the specific circumstances of each case. If a strike becomes violent and no longer pursues legitimate or lawful demands in accordance with the purpose and objects of the LRA, the Labour Court should be able to intervene when called upon to do so by an affected party. By facilitating the regulation of collective bargaining where needed, the Labour Court will be giving effect to not only the purpose of the LRA, but also to the constitutional right to fair labour practices. In this context, it should be kept in mind that one of the primary objects of the LRA is to give effect to and *regulate* the fundamental rights conferred by section 23 of the Constitution. Section 23 of the Constitution provides for everyone's right to fair labour practices and the enactment of national legislation to *regulate* collective bargaining.

Representativeness is another issue of particular importance in South African labour relations – revisiting the majoritarian model and consideration of the 1956 pluralist model may yield some positive results for the state of labour relations in South Africa. The pluralist model grants recognition to more than one trade union provided that it is sufficiently represented in a particular bargaining unit. Depending on the specific circumstances in each situation, more emphasis may be

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249 See Fergus 2016 *ILJ* 1537–1538.

250 *Xtrata SA (Pty) Ltd v AMCU* J1239/13 para 34.

placed on the bargaining unit as opposed to the workplace where proper justification for such an interpretation exists. Such an interpretation might have avoided much of the disastrous consequences at Marikana.

Strike action is intended to be used as a *tool* in the process of collective bargaining in order to achieve the effective resolution of a dispute by way of collective agreement<sup>251</sup> – which also is the purpose of collective bargaining. It is submitted that strike action in compliance with the LRA, its purpose and objectives, cannot give effect to its own function without at the same time promoting effective collective bargaining. It is on this basis that a protected strike that gives effect to the purpose of both the LRA and the Constitution by definition is functional to collective bargaining. The converse is true about strike action which neither advances the purpose nor fulfils the primary objects of the LRA. Such strikes cannot be said to be functional to either the purpose or the objects of the LRA. The aim of a strike is to persuade the employer through the peaceful withholding of their labour, to agree to workers' demands. The economic pressure put on the employer as a result of the strike is sufficient and functional to collective bargaining.

It is for exactly this reason that a strike that does not (amongst others) promote orderly collective bargaining and the effective resolution of labour disputes cannot be said to be functional to orderly collective bargaining as one of the primary objects of the LRA. If the right to strike is exercised in accordance with the primary objects of the LRA and the Constitution, such a strike will be functional to collective bargaining. Whether the Labour Court will, in future, favour such an interpretation only time will tell. The fact is that the common purpose of strike action and collective bargaining cannot be denied. If regard is had to the purpose of collective bargaining and the contribution of strikes to the attainment of such purpose, it is submitted that the functionality requirement may be put to good use. It is by no means suggested that the functionality principle is the flawless solution to all problems, however, after taking into consideration the current state of labour relations in South Africa we do believe that a deeper examination of the notion of functionality will be a step into the right direction. This is not with reference to violent strikes alone, but with reference to all forms of dysfunctional strikes. The fact that violent strikes may be dealt with in more than one manner is acknowledged in this article. The manner in which it is dealt with is not as important as the urgent need to deal with it.

The fact that constitutional rights should be limited as little as possible also is acknowledged in this article. This applies to (amongst others) the right to strike, the right to freedom and security of the person and the right to property. This should, however, by no means be seen as a *carte blanche* for strikers to disregard and with impunity infringe upon the constitutional rights of others. It is ludicrous to think that one can blatantly disregard the very same legislation you are quick to seek protection from.<sup>252</sup> It is for this reason that the Labour Court in some of its recent judgments, where the "tyranny of the mob" displaced the peaceful exercise of economic pressure, questioned the continued protected status of the strike.<sup>253</sup> This is based on the constitutional understanding that a strike is for the

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251 *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Workers Union* (2012) 33 ILJ 998 (LC) para 13.

252 *New Kleinfontein Goldmine* para 55.

253 *Tsogo Sun* para 13. See also Rycroft (2013) 34 ILJ 827.



purpose of effective peaceful and orderly collective bargaining.<sup>254</sup> “If behaviour during the strike is destructive of that purpose then the protected status has been jeopardised.”<sup>255</sup> The law is founded on the assumption that as good citizens we share substantive moral conceptions of the good, and that we are concerned with maintaining the integrity of the legal system.<sup>256</sup> Strikes that are marred by violence and unruly conduct are extremely detrimental to the legal foundations upon which South African labour relations are built.<sup>257</sup> Disobedience of court orders risks rendering our courts impotent and judicial authority a mere mockery.<sup>258</sup> The effectiveness of court orders is determined substantially by the assurance that they will be enforced.<sup>259</sup>

It is further clear from the state of labour relations discussed above that “more drastic measures and sanctions should be imposed to curb the prevalence of unprotected strike action and violence during protected and unprotected strike action”.<sup>260</sup> The authors support the view that the courts should have greater powers to allow for intervention where there is a disregard for the rule of law, and where strikes become violent or otherwise dysfunctional to collective bargaining. These powers could include the extension of courts’ jurisdiction to suspend strike action where strikers do not adhere to picketing rules. The authors do not support the view taken by some opponents of the use of the functionality principle who suggest that “[w]hether strike violence has escalated to such an extent that judicial intervention is mandatory is debatable”.<sup>261</sup> This is a dangerous stance to take, especially taking into account the violence of some strikes and the total disregard for the rule of law and compliance with court orders. As advocated above, the courts should under these circumstances be granted further discretion to give greater “bite” to their orders, and non-compliance should not be taken lightly. In this context, the sentiments of the Constitutional Court in *Pheko v Ekurhuleni Metropolitan Municipality (No 2)* should be noted:

“The rule of law, a foundational value of the Constitution, requires that the dignity and authority of the courts be upheld. This is crucial, as the capacity of the courts to carry out their functions depends upon it. As the Constitution commands, orders and decisions issued by a court bind all persons to whom and organs of state to which they apply, and no person or organ of state may interfere, in any manner, with the functioning of the courts. It follows from this that disobedience towards court orders or decisions risks rendering our courts impotent and judicial authority a mere mockery. The effectiveness of court orders or decisions is substantially determined by the assurance that they will be enforced.”<sup>262</sup>

It is proposed that a more robust approach should be adopted by the Labour Court and that principles such as (dys)functionality and proportionality of strikes should be taken into account, especially when there is a blatant disregard for the rule law, either when a protected strike turns violent or when employees embark

254 Rycroft (2013) 34 *ILJ* 827.

255 *Ibid.*

256 Van Niekerk J said this in his SASLAW keynote address “Marikana: The perspective of the Labour Court” 2012 SASLAW National Conference, 27 November 2012.

257 *Food & Allied Workers Union on behalf of Kapesi v Premier Foods Ltd t/a Blue Ribbon Salt River* (2010) 31 *ILJ* 1654 (LC) para 6.

258 *Pheko v Ekurhuleni Metropolitan Municipality (No 2)* [2015] ZACC 10.

259 *Ibid.*

260 Botha 2016 *THRHR* 388.

261 Fergus 2016 *ILJ* 1150.

262 *Pheko* para 1.

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on unprotected strike action and compliance orders are not adhered to. Stricter application of existing laws will deter perpetrators from disregarding the rule of law and they will exercise their fundamental rights with care. Otherwise, limitations will have to be imposed and stricter sanctions regarding civil and criminal liability could become a reality.