

The Role of the Labour Court in Collective Bargaining: Altering the Protected Status of Strikes on Grounds of Violence in *National Union of Food Beverage Wine Spirits & Allied Workers v Universal Product Network (Pty) Ltd* (2016) 37 ILJ 476 (LC)

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Abstract

This note explores the powers of the Labour Court as envisaged in the *Labour Relations Act* 66 of 1995 (LRA), where a protected strike disintegrates into violent riotous conduct. The legal status of protected strikes raises important questions of law, namely: whether the Labour Court has the authority to alter the legal status of a strike; the autonomy of collective bargaining; and the legal test which the Labour Court should apply when intervening. The court in *National Union of Food Beverage Wine Spirits & Allied Workers v Universal Product Network (Pty) Ltd* 2016 37 ILJ 476 (LC) dealt with this precise problem. There can be no doubt that South Africa is plagued by widespread strike violence which often occur during protected strikes. However, this contribution poses the question whether the Labour Court has not overstepped its mandated jurisdiction and it questions whether such alterations of the status of strikes would have a positive effect on the institution of collective bargaining.

Keywords

Authority of the labour court; collective bargaining; powers of the labour court; protected strikes; unprotected strikes; violent strikes.

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1 Introduction

Does the Labour Court have the judicial authority to declare otherwise protected strikes to be unprotected on the basis of violent industrial action or would this disrupt the fragile collective bargaining balance established by the *Labour Relations Act* 66 of 1995 (hereafter LRA)?¹ This composite question has divided commentators into two schools of thought. On the one hand Rycroft² supports the notion that strikes must be "functional" to collective bargaining and that violent industrial action may cause otherwise legitimate strikes to lose their protected status. On the other, Fergus³ contends that if labour courts should assume such authority, it may undermine the foundations of the constitutional right to strike and disturb the collective bargaining equilibrium.

Against the background of a South African labour market which is marred by strike violence,⁴ the Labour Court in *National Union of Food Beverage Wine Spirits & Allied Workers v Universal Product Network (Pty) Ltd*⁵ (hereafter *Universal Product Network*), in an otherwise well-reasoned decision, reached the questionable conclusion that it has the power to declare protected strikes unprotected on the grounds of violence. Even though the decision can be commended for cautioning against the abuse of interdicts in the intricate balance of collective bargaining, and for seeking alternative judicial remedy against strike-related violence, it is doubtful that the court reached the correct conclusion.⁶

This contribution sides with the point of view that the Constitutional Court would probably find such an expansion of the Labour Court's jurisdiction unacceptable within the current statutory framework. The authors traverse the current legislative framework, analyse the reasoning of *Universal Product Network*, and compares it against constitutional principles and

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¹ *Labour Relations Act* 66 of 1995 (hereafter LRA).

² Rycroft 2014 *IJCLLR* 199-204. See also Rycroft 2015 *ILJ* 11.

³ Fergus 2016 *ILJ* 1537-1548.

⁴ Ngcukaitobi 2013 *ILJ* 846-848; Chinguno 2013 *GLJ* 163; and Benjamin 2016 <http://www.cth.co.za/wp-content/uploads/2016/09/South-African-Labour-Law-A-Twenty-Year-Review.pdf> 23.

⁵ *National Union of Food Beverage Wine Spirits & Allied Workers v Universal Product Network (Pty) Ltd* 2016 37 *ILJ* 476 (LC) (hereafter *Universal Product Network*).

⁶ *Universal Product Network* para 45.

alternative judicial remedies. In essence, this contribution takes the debate further and explores areas that were left unanswered by Rycroft and Fergus.

2 The right to strike: The *Constitution*, 1996 and the *LRA*

Section 23(2) of the *Constitution of the Republic of South Africa*, 1996's (hereafter the *Constitution*, 1996) in no uncertain terms enshrines the principle that "[e]very worker has - ... (c) the right to strike". This section contains no other direct or implicit limitations to this right. This is contrary to other constitutional rights, such as the right to "[a]ssembly, demonstrate, picket and petition", which adds the prerequisite that such action should take place "peacefully and unarmed".⁷

Despite this seemingly limitless right to strike, this judicial entitlement does not go unchecked. This right competes with other constitutional rights. So for example, the *Bill of Rights* provides that "[e]veryone has the right to freedom and security of person, which includes the right - ... (c) to be free from all forms of violence from either public or private sources".⁸ There can be no doubt that otherwise seemingly legal strikes, which are tarnished by rampant violence,⁹ hold the potential of clashing with the right to freedom of person, and also quite likely with the right to property.¹⁰ It also goes without saying that the right to strike is also subject to the *Constitution*, 1996's limitation clause which provides that constitutional rights may only be limited to the extent that it is "justifiable in an open and democratic society".¹¹

Where does this leave the *Constitution*, 1996 and violent strikes? In what seems like a contradiction in any constitutional democracy which strives to adhere to the rule of law, it is fully accepted that striking workers may inflict damage on the adversary – the employer. As neatly pointed out by Cheadle,¹² this fundamental right has a "distinctive nature".¹³ Even though

⁷ Section 17 of the *Constitution of the Republic of South Africa*, 1996 (hereafter *Constitution*, 1996).

⁸ Section 12(1) of the *Constitution*, 1996.

⁹ See, for example, *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Workers Union* 2012 33 ILJ 998 (LC) paras 4-5 (hereafter *Tsogo Sun Casinos*); *Food & Allied Workers Union on behalf of Kapesi v Premier Foods Ltd t/a Blue Ribbon Salt River* 2012 33 ILJ 1779 (LAC) paras 4-5. In both cases the court acknowledged the occurrence of gratuitous violence that ranged from harassment, assault and arsonist attacks on non-striking employee houses to the shooting and killing of non-striking employees. The court lamented on this "state of lawlessness" which also affected members of the public.

¹⁰ Section 25(1) of the *Constitution*, 1996 provides that "[n]o one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property".

¹¹ Section 36(1) of the *Constitution*, 1996.

¹² Cheadle "Constitutionalising the Right to Strike" 70.

¹³ See above.

it "shares with some other human rights the right to exercise power, such as the right[s] to protest, ..., it differs markedly from those constitutional rights because it is a right to inflict harm – economic harm". There can be no qualms against this dictum. It is to be highlighted though, that it contains no indication that any level of personal or physical harm would be tolerated within a constitutional democracy which strives to promote the rule of law.¹⁴

The open-endedness of the right to strike is no constitutional flaw. As is the case with many other constitutional rights, they are generally stated without detailed definition. However, it does recognise that it will be interpreted taking account of international norms¹⁵ and it recognises that national laws could provide for legal regulation.¹⁶

The LRA confirms that it seeks to give effect to the *Constitution*, 1996 and South Africa's obligations incurred as member of the International Labour Organisation (hereafter ILO).¹⁷ Importantly so, the LRA adds that it seeks to "advance economic development, social justice, [and] labour peace" at the workplace.¹⁸ The LRA's definition of "strike" also does not limit the right to strike to peaceful action or to feats that only cause economic as opposed to physical harm. The LRA loosely defines a strike as workers' "concerted refusal to work ... for the purpose of remedying a grievance ... in respect of any matter of mutual interest".¹⁹ Although it may be argued that it goes without saying that it implies the requirement of functionality to collective bargaining, it is not expressly stated. In its stead, the LRA does establish an intricate collective bargaining balance through the levers of lock-outs and replacement labour;²⁰ dismissal of striking employees on the grounds of

¹⁴ Section 36(1) of the *Constitution*, 1996.

¹⁵ Section 39 of the *Constitution*, 1996 confirms that when interpreting the Bill of Rights, courts and tribunals "must" consider international law" and "may" consider foreign law. This entails in particular International Labour Organisation Conventions 87 and 98 and the manner in which these norms have been understood by the Committee on Freedom of Association and the Committee of Experts on the Application of Conventions and Recommendations.

¹⁶ So, for example, s 23(5) of the *Constitution*, 1996 provides that "[e]very trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining".

¹⁷ Sections 1(a)-(b) of the LRA.

¹⁸ Section 1(d) of the LRA. The LRA aims to achieve this through one of its many objectives, specifically, s 1(d)(iv) of the LRA which calls for the promotion of effective resolution of disputes through the Labour Court.

¹⁹ Section 213 of the LRA.

²⁰ Although not constitutionally entrenched, s 64 of the LRA give the employer a right to lockout workers in the instance of protected strikes and to replace striking workers with replacement labour in terms of s 76 of the LRA.

misconduct and operational requirements;²¹ and the consequences that meet protected and unprotected strikes.²²

The LRA limits employees' right to strike by imposing procedural requirements, such as obligatory conciliation, and prior written notice of the pending strike to the employer.²³ The LRA also imposes a number of substantive limitations on strikes. Workers may not take part in a strike if the issue in dispute is bound by a peace clause in a collective agreement; if the issue in dispute is subjected to compulsory arbitration (such as for essential services); or if the issue in dispute concerns a rights issue that a party can refer to be arbitrated or adjudicated upon.²⁴ The main consequences of a so-called "protected strike", are that a person so engaged does not commit a delict or breach of contract;²⁵ and a person cannot be dismissed for participating in a strike and lawful conduct that supports a protected strike.²⁶ Nonetheless, of importance to this discussion, is the fact that even if a strike is protected in the idiom of the LRA, employers are not left remediless as acts that constitute an offence are not immune from delictual action, breach of contract, civil proceedings and criminal proceedings.²⁷ It must also be highlighted that workers engaged in a protected strike may also be dismissed on grounds of misconduct and operational requirements.²⁸

The Labour Court has exclusive jurisdiction to interdict any person from participating in strikes that do not comply with the LRA.²⁹ Even though the LRA has been decriminalised to the extent that it makes no provision for criminal sanctions in respect of unprotected strikes, the same cannot be concluded for unlawful conduct in a protected or unprotected strike.³⁰ The Labour Court can order "just and equitable compensation" for any loss that can be ascribed to unprotected strikes.³¹ Amongst other factors, the Labour

²¹ See the discussion that follows.

²² See the discussion that follows.

²³ Section 64 of the LRA imposes the requirements of: referring a dispute to either the Commission for Conciliation, Mediation and Arbitration or a bargaining council for conciliation; the issuing of a certificate that confirms that the dispute remains unresolved; and 48 hours, or 7 days' notice to the employer, depending on whether the adversary is a private entity for the state.

²⁴ Section 65(1) of the LRA.

²⁵ Section 67(2) of the LRA.

²⁶ Section 67(4) of the LRA. However, it is to be noted that s 67(5) of the LRA does provide that this "does not preclude an employer from fairly dismissing an employee in accordance with the provisions of Chapter VIII for a reason related to the employee's conduct during the strike, or for a reason related to the employer's operational requirements".

²⁷ Section 67(8) of the LRA.

²⁸ Section 86(5) of the LRA.

²⁹ Section 168(1) of the LRA.

³⁰ *Code of Good Practice on Picketing* (hereafter the *Code on Picketing*).

³¹ Section 68(1)(b) of the LRA.

Court must take account of whether the strike was in response to unjustified conduct by the employer and whether "the interests of orderly collective bargaining" were advanced.³²

More rigorous restrictions have been included relating to pickets. Here, the LRA specifies that members and supporters of a protected strike may only picket "for the purpose of peacefully demonstrating"³³ in support of a protected strike.³⁴ Even though the *Code of Good Practice on Picketing* (hereafter the *Code on Picketing*) states that picketers may carry placards, chant slogans and sing and dance, they may not "commit any action which may be unlawful, including but not limited [to] any action which is, or may be perceived to be violent".³⁵ The *Code on Picketing* is also clear that "the police have the responsibility to enforce the criminal law" and to "arrest picketers for participation in violent conduct".³⁶

The LRA confers the Labour Court with wide powers, such as the making of any appropriate order, which includes the granting of urgent interim relief, a declaratory order, an award of damages and an order for costs.³⁷ However, even though it could be argued that these orders are sufficiently wide to include an interdict which prohibits a protected but violent strike,³⁸ or which declares a protected strike to lose legal protection, it is doubtful that it would pass constitutional muster. Such a provision has not been included in the broader scheme of the LRA and it will have to be implied as such.

3 Facts of *Universal Product Network*

The National Union of Food Beverage Wine Spirits & Allied Workers (hereafter the union) and Universal Product Network (Pty) Ltd (hereafter the employer) failed to reach an agreement over a list of demands in relation to terms and conditions of its members' employment. The union adhered to the LRA's procedural requirements and issued a strike notice to the

³² Section 68(1)(b)(i)-(iv) of the LRA.

³³ Section 69(1) of the LRA.

³⁴ Sections 69(11)-(14) of the LRA clothe the Labour Courts with explicit powers to intervene in unprotected pickets.

³⁵ Items (6) and (7) of the *Code on Picketing*.

³⁶ Item 7(3) of the *Code on Picketing*.

³⁷ Section 158 of the LRA.

³⁸ Both Rycroft 2014 *IJCLLIR* 208; and Fergus 2016 *ILJ* 1548 agree that the power to interdict a violent strike may be implicit in the powers of the court, but that it is nowhere explicitly stated.

employer on 6 October 2015.³⁹ Further to this, picketing rules were agreed upon and a protected strike commenced on 12 October 2015.⁴⁰

The employer lodged an urgent application for an *ex parte* interdict in relation to various acts of strike related misconduct and political interference.⁴¹ The Economic Freedom Fighters (hereafter EFF) became involved by waving anti-semitic Israeli banners and pro-Palestinian flags and they demanded that Woolworths should discontinue their business relationship with Israel.⁴² The urgent interdict was granted on 30 October 2015 and the rule nisi to show cause why it should not be made a permanent order was heard on 6 November 2015.⁴³

The trade union refuted claims of their involvement in either violence or political interference and contended that the strike remained protected as the EFF's involvement was purely a motion of solidarity with the workers.⁴⁴

The most significant issue before Van Niekerk J for the purpose of this contribution is whether the strike had ceased to be protected on account of violence and political interference in pursuit of workers' demands.⁴⁵

4 The finding of *Universal Product Network*

Universal Product Network judgement was cognisant of the fact that interim interdicts have the deceptive ability not to be truly interim in nature, but rather has a permanent impact on the dynamics of collective bargaining. Van Niekerk J quite correctly cautioned against any inappropriate interference by the Labour Court in the established power play balance in collective bargaining. With reference to interim interdicts, the court observed that "[i]nvariably, the order interferes with the power dynamics at play and, more often than not, its effect upon the exercise of a constitutional right is profound and the respondent's [union's] lack of alternative remedies acute".⁴⁶

³⁹ Section 64(1) of the LRA.

⁴⁰ Section 69 of the LRA.

⁴¹ Section 68(1) of the LRA provides that the Labour Court has the exclusive jurisdiction to entertain such an application in the case of any strike that does not comply with the requirement of the Act, *inter alia* taking into account the "interests of collective bargaining".

⁴² *Universal Product Network* paras 19-20.

⁴³ *Universal Product Network* paras 3-5.

⁴⁴ *Universal Product Network* paras 22-23.

⁴⁵ *Universal Product Network* para 2.

⁴⁶ *Universal Product Network* para 8. See also O'Regan 1988 *ILJ* 965. According to O'Regan little weight is attached to the legitimacy of a strike in interdict applications due to the substantive nature of the law which favours employers. Furthermore "in South Africa, applications for interdicts to restrain strikes will often not turn on the

In response to the employer's argument that the strike was unprotected for lack of procedural compliance, *Universal Product Network* analysed the Constitutional Court's judgement in *SA Transport and Allied Workers Union v Moloto*⁴⁷ (hereafter *Moloto*) which dealt with strike notices. The crisp question in that decision was whether it is necessary for every employee, which also includes non-union members, to issue a strike notice even though the trade union which bargains on behalf of the workers in the bargaining unit has already done so. With reference to *Moloto*, Van Niekerk J brushed the employer's contention that this was an unprotected strike aside and accepted that "the right to strike is protected in the Constitution as a fundamental right without express limitation and the constitutional rights conferred without express limitation should not be cut down by reading implicit limitations into them".⁴⁸

Applying the approach adopted by *Moloto*, the court concluded that the workers in this instance were engaged in a protected strike.⁴⁹ Having come this far with the constitutional line of reasoning, *Universal Product Network* turned to the question of whether the Labour Court could alter the protected status of a strike in the face of violence. Van Niekerk J's point of departure was that the Labour Court had on a number of occasions confirmed that "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".⁵⁰

In relation to this aspect, the court considered the Labour Appeal Court decision in *Edelweiss Glass & Aluminium (Pty) Ltd v National Union of Metal Workers of SA*⁵¹ (hereafter *Edelweiss*) where the court accepted the notion

question of balance of convenience, because of the nature of the substantive law". In support of this assertion see also Rycroft 2014 *IJCLLIR* 203-204; and Cohen and Le Roux "Liability, Sanctions and other Consequences of Strike" 154-155.

⁴⁷ *SA Transport and Allied Workers Union v Moloto* 2012 33 ILJ 2549 (CC) (hereafter *Moloto*).

⁴⁸ *Universal Product Network* para 26, with reference to *Moloto* para 53 and 74 where it was held that when considering s 64(1) of the LRA it should be interpreted to give "proper expression to the underlying rationale of the right to strike, namely, the balancing of social and economic power".

⁴⁹ *Universal Product Network* para 26.

⁵⁰ *Universal Product Network* para 30. The court relied on *Tsogo Sun Casinos* para 13 where it was held that "this court will always intervene to protect both the right to strike, and the right to peaceful picketing. This is an integral part of the court's mandate, conferred by the Constitution and LRA. But the exercise of the right to strike is sullied and ultimately eclipsed when those who purport to exercise it engage in acts of gratuitous violence in order to achieve their ends. When the tyranny of the mob displaces the peaceful exercise of economic pressure as the means to the end of the resolution of a labour dispute, one must question whether a strike continues to serve its purpose and thus whether it continues to enjoy protected status".

⁵¹ *Edelweiss Glass & Aluminium (Pty) Ltd v National Union of Metal Workers of SA* 2011 32 ILJ 2939 (LAC) (hereafter *Edelweiss*).

of the transmutation of protected strikes to legitimate strikes. Even though this matter did not involve a violent strike, it dealt with workers changing tack during collective bargaining. The union referred a dispute about the acquisition for organisational rights for conciliation before embarking on a protected strike. During the course of collective bargaining the workers changed their demand to one dealing with a thirteenth cheque and the employer argued that the strike had evolved to an unprotected strike. The Labour Appeal Court accepted that a protected strike can metamorphose to an unprotected strike, but only if the protected strike has been used as "leverage to achieve other objectives in respect of which no strike action could be taken".⁵² An example of such disputes about which a trade union cannot legitimately strike, is a rights issue that can be referred to arbitration or adjudication.⁵³ *Edelweiss* adopted a generous workers' friendly approach to the right to strike and concluded that the workers continued to be engaged in a protected strike as both issues about organisational rights and about a thirteenth cheque could be the subject of a protected strike.

Edelweiss only assisted *Universal Product Network* in so far as it referred to the transmutation for protected to unprotected strikes. However, in an unexpected leap, the court turned to another option when it comes to the metamorphosis of a protected strike into one that is unlawful. The court accepted Rycroft's "functionality test" and explained that the:

... proper approach, it would seem to me, is that proposed by Prof Rycroft ... [who] suggests that the court ask the following question: '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?' In answering this question, Prof Rycroft proposes that the court weigh the levels of violence and efforts by the union concerned to curb it. He explains that this is not an anti-union proposal; rather, he imagines a balancing counter-measure allowing unions to launch a similar court application for an order granting protected status to an otherwise unlawful strike if it is in response to unjustified conduct by the employer In my view, this is an eminently sensible approach to adopt.⁵⁴

Despite the fact that the court acknowledged the "practical difficulties" that could emerge when determining how much misconduct would have had to occur before the court intervenes,⁵⁵ and the fact that the employer in this instance still had the remedy of contempt of court to their avail,⁵⁶ the court

⁵² *Edelweiss* para 52.

⁵³ See the limitation in respect of s 65(1) of the LRA discussed above; and *Ceramic Industries Ltd t/a Betta Sanitary Ware v National Construction Building and Allied Workers Union (2)* 1997 18 ILJ 671 (LAC).

⁵⁴ *Universal Product Network* para 32.

⁵⁵ *Universal Product Network* para 32.

⁵⁶ *Universal Product Network* para 40.

did confirm that it has the authority to declare an otherwise protected strike to be unprotected on the grounds of violence.

When ultimately weighing the facts of the matter, *Universal Product Network* in an objective and even-handedly way held that the level and degree of violence coupled with the political interference did not tilt the balance towards a finding that the protected strike called by the trade union became unprotected.⁵⁷ However, despite this, it seem that the door has inevitably been opened by this decision for other Labour Court judges, who may be swayed towards decisions which place undue implied limitations on the constitutional right to strike, to overturn the protected status of strikes.

5 Analysis of the *Universal Product Network* judgement

5.1 Introduction

In the part that follows *Universal Product Network* is evaluated against a number of core issues, namely the constitutional perspective, intervention by means of interdicts during collective power play and the availability of alternative remedies. This is followed by a critique on the adoption of the functionality test way in the *Universal Product Network* judgement.

5.2 Constitutional perspectives

Hepple emphasises the fact that contrary to many countries of the world, the South Africa *Constitution*, 1996 provides that the right to strike is an independent right.⁵⁸ It is an individual right, exercised collectively, and it is not derived from other collective rights such as the right to freedom of association or the right to collective bargaining.⁵⁹ This confers a particular status to the right to strike.

In what is arguably one of the most significant Constitutional Court cases dealing with the right to strike, *National Union of Metalworkers of South Africa v Bader Bop (Pty) Ltd*,⁶⁰ (hereafter *Bader Bop*) the court laid down telling principles regarding imposing limitations on the right to strike. In this instance the members of a non-recognised minority union sought to enforce

⁵⁷ *Universal Product Network* para 45.

⁵⁸ Hepple "Freedom to Strike" 31-32. This is contrary to the situation in a country such as Germany. There, the Federal Constitution does not contain an explicit right to strike, but is an extension of the collective freedom of association. The author mentions that the result of this is that only trade unions can call for legal strikes in Germany.

⁵⁹ Hepple "Freedom to Strike" 31-32.

⁶⁰ *National Union of Metalworkers of South Africa v Bader Bop (Pty) Ltd* 2003 24 ILJ 305 (CC) (hereafter *Bader Bop*).

organisational rights by means of a strike, despite the fact that the LRA does not accord such rights to minority unions.

The employer lodged an application for an interdict against the strike and the Labour Appeal Court granted the interdict.⁶¹ In their appeal to the Constitutional Court, the trade union argued that either the LRA had to be interpreted in such a fashion that the fundamental right to strike was not infringed upon, or in the alternative, the provisions of the LRA which regulate organisational rights (and which limits the right to strike) had to be declared to be unconstitutional.⁶²

O'Regan J considered the ILO principles pertaining to the right to freedom of association and the constitutional right to strike,⁶³ and despite the LRA's neat structure relating to the granting of statutory organisational rights only to majority and sufficiently representative trade unions, it held that there was no explicit prohibition against minority trade unions engaging in strikes to gain non-statutory trade union rights.⁶⁴ Although some scholars opined that the Constitutional Court performed legal gymnastics to reach this conclusion as the LRA should be construed to be unconstitutional in this regard,⁶⁵ it is of importance to note that the court preferred to adopt the following approach: It asked the question "whether the Act is capable of an interpretation that ... avoid[s] limiting constitutional rights".⁶⁶ In other words, should there be a way of interpreting the LRA so that it does not limit the fundamental right to strike, that would be the Constitutional Court's preferred way of interpretation. Transplanted to *Universal Product Network*, the Constitutional Court will in all probability find that any interdict which overturns the protected status of a strike should be avoided if there is any other way of interpreting the LRA.

More guidance regarding the Constitutional Court's views on strikes can be gleaned from the more recent Constitutional Court decision *Transport & Allied Workers Union of SA on behalf of Ngedle v Unitrans Fuel & Chemical (Pty) Ltd*⁶⁷ (hereafter *Unitrans*). In this instance the court considered the

⁶¹ See *Bader Bop (Pty) Ltd v National Union of Metal and Allied Workers of SA* 2002 23 ILJ 104 (LAC).

⁶² *Bader Bop* para 12.

⁶³ *Bader Bop* para 34 relied on the fact that "freedom of association is ordinarily interpreted to afford unions the right to recruit members and to represent those members at least in individual workplace grievances". See also *Bader Bop* para 35, where the Court stated that the "second principle relates to the right of a union to take industrial action to pursue its demands".

⁶⁴ *Bader Bop* para 40.

⁶⁵ Chicktay 2007 *Obiter* 159.

⁶⁶ *Bader Bop* para 39.

⁶⁷ *Transport & Allied Workers Union of SA on behalf of Ngedle v Unitrans Fuel & Chemical (Pty) Ltd* 2016 37 ILJ 2485 (CC) (hereafter *Unitrans*).

question under which circumstances protected strikes could become unprotected. Although the matter did not deal with a violent strike, it is instructive that the court only identified three reasons.⁶⁸ Firstly, a protected strike can become unprotected should an employer fully remedy the grievance or comply with the demand that was at the centre of the strike. Secondly, should the trade union abandon the original demand and should they seek to achieve a different purpose that is not authorised. Thirdly, the parties could conclude an agreement that settles the dispute even though the employer has not yet fully complied with the trade union or workers' original demand. To this, the court added that "[a]bsent any of these methods of turning a protected strike into an unprotected strike, a protected strike remains protected".⁶⁹ When applying these principles to the facts of the case, the court once again adopted a generous approach regarding the right to strike which favoured the workers. The court held that the strike in this instance remained protected.

From the above decisions it is clear that the Constitutional Court will not readily imply limitations in the LRA which may restrict the fundamental right to strike. Furthermore, the court would be hesitant to include other contingencies that had not been identified in *Unitrans* that would have the effect of altering the protected status of a strike.

5.3 Interdicts in the process of collective bargaining

A media report by the South African Institute of Race Relations pointed out that between the years 1999 and 2012 there were 181 strike related deaths, 313 injuries and 3 058 people were arrested for public violence associated with strikes.⁷⁰ A 2015 Department of Labour Report noted a significant rise in unprotected strikes up from 48% in 2014 to at least 55% of the total strikes in 2015.⁷¹ More recently, a 2016 Department of Labour Report recorded that out of the 122 strikes, that year, 59% were unprotected.⁷² It is against this background that a number of South African and international scholars have been exploring acceptable limitations against strikes.⁷³ However, despite

⁶⁸ *Unitrans* paras 119-120. It must be noted that the Constitutional Court was of the assumption that the constitutionality of the LRA was not in question.

⁶⁹ *Unitrans* para 120.

⁷⁰ SAIRR 2013 <http://irr.org.za/reports-and-publications/media-releases/Strike%20violence.pdf/>. See also Benjamin 2016 <http://www.cth.co.za/wp-content/uploads/2016/09/South-African-Labour-Law-A-Twenty-Year-Review.pdf> 22-23.

⁷¹ DoL 2014 http://www.labour.gov.za/DOL/downloads/documents/annual-reports/industrial-action-annual-report/2015/industrialaction_2015.pdf.

⁷² DoL 2016 http://www.labour.gov.za/DOL/downloads/documents/annual-reports/industrial-action-annual-report/2016/industrialaction_2016.pdf.

⁷³ Botha 2016 *THRHR* 387 argues that the right to strike must be used as a method of last resort especially in consideration that most demands do not relate to the

this trend, scholars such as the eminent Lord Wedderburn has recognised that:

Without scrupulous care by the judiciary and sometimes even with it the interlocutory labour injunction can become a great engine of oppression against workers and their unions.⁷⁴

The LRA provides that the Labour Court may only grant an interdict which restrains a person from participating in a strike should the respondent be granted 48 hours' notice of the application.⁷⁵ However, the Labour Court may permit a shorter than 48 hours' notice period provided the respondent has received a reasonable opportunity to be heard and the applicant has shown compelling cause through the facts presented why such shorter time should apply.⁷⁶ In addition to this, a number of common-law requirements have to be met.⁷⁷ Firstly, there must be an identifiable *prima facie* right that has been infringed. Secondly, the conduct must reasonably cause irreparable harm. Thirdly, there must be no other readily available remedy available for the plaintiff to prevent the continuation of such harm. The interdict is designed to give urgent interim relief until a final court order can be adjudicated and ensure that unlawful conduct is restrained.⁷⁸

However, as mentioned, within the collective bargaining power dynamics the current interlocutory powers have inherent dangers that are often prejudicial to workers.⁷⁹ As noted by the *Universal Product Network* judgement,⁸⁰ when the return date for the final order is far removed from the initial application, the momentum of the strike would have been lost and the

negotiations or fall outside wage issues. See also Myburgh 2014 *CLL* 120 where he opines that the courts should be more inclined "to hold unions accountable for the unlawful conduct of their members and impose on them obligations to control their membership". See also Gericke 2012 *THRHR* 584-585 concludes that there is a need to revisit trade union liability in an effort to make trade unions and their members more accountable for their unlawful damaging actions; Rycroft "Role of Trade Unions in Strikes" 110-111 where the author advocates for responsible unionism during collective bargaining and the notion of "good faith bargaining".

⁷⁴ O'Regan 1988 *ILJ* 984 referred to this quotation by Wedderburn *Worker and the Law* 686 as far back as 1988.

⁷⁵ Sections 68(1)-(2) of the LRA.

⁷⁶ Sections 68(2)(a)-(c) of the LRA.

⁷⁷ Cohen and Le Roux "Liability, Sanctions and other Consequences of Strike Action" 154-155. See also Du Toit *et al Labour Law Relations* 358-359.

⁷⁸ Sections 68(1)-(2) of the LRA. See also Cohen and Le Roux "Liability, Sanctions and other Consequences of Strike Action" 154-155 and Du Toit *et al Labour Law Relations* 358-359.

⁷⁹ O'Regan 1988 *ILJ* 984. See also Rycroft 2014 *IJCLLIR* 203 where it is stated that "the interdict / injunction gives applicants - usually employers - a tactical advantage because the likelihood of a full trial is in most cases small, and the employer's widely expressed assertions of 'interference with business' or 'extreme violence' become *prima facie* evidence which the union has to disprove".

⁸⁰ *Universal Product Network* para 8.

collective bargaining scale would likely have become permanently tilted in favour of the applicant employer. This is because when granting an interdict which often occurs on an urgent basis, the threshold of evidence on the applicant employer is lower in light of the assumed urgency coupled with alleged violent strike misconduct.⁸¹

The *Universal Product Network* judgement must, however be commended for considering the facts objectively, by separating the corn from the chaff, and finding that in this instance the alleged violence did not justify a confirmation of the rule nisi. The judgement also cautioned against abusive and inappropriate interference by the Labour Court by means of interlocutory orders during the process of collective bargaining.⁸²

Nonetheless, it is disappointing that despite this, in the presence of alternative remedies available to the employer, that the court considered the possibility of the alteration of the protected status of a strike which would invariably have swung the scales in favour of the employer. This would have had the effect that all of the consequences of unprotected strikes referred to above would have become effective. It is submitted that the *Universal Product Network* judgement should rather have placed the focus on exiting legal remedies which are available during protected and unprotected strikes rather than seeking to imply into the LRA the authority on the Labour Court to declare protected strikes to be unprotected on the grounds of violence.⁸³ Agreement had been reached on picket rules and the employer would likely have had powerful arguments to rely on had there been a real threat of violent industrial action.

5.4 Existing judicial remedies against strike violence

The ILO cautions that member states should take care against permitting monetary claims, such as common-law damages claims against workers, that could have the potential to inhibiting freedom of association or that could potentially destroy unions.⁸⁴ Aligned to this, and as point of departure, the LRA provides that civil action based on delict or breach of contract may not be instituted against anyone for participation in a protected strike or

⁸¹ In *Universal Product Network* para 7 it is noted by the court that "the commonly employed practice of seeking interim relief in urgent applications has more to do with the lower threshold faced by an applicant and the prospect of a return day six or eight weeks later, by which time any final order is usually academic".

⁸² *Universal Product Network* para 8.

⁸³ As discussed below, despite the protected status of a strike, any offence (such as violence), remains unlawful conduct within the constitutional and legislative framework and such actions remain subject to delictual and contractual actions and could constitute a fair reason for dismissal. See also Manamela and Budeli 2013 *CILSA* 329.

⁸⁴ ILO *Freedom of Association* paras 658-670.

picket.⁸⁵ However, the LRA makes it clear that this immunity does "not apply to any act in contemplation or in furtherance of a strike or a lock-out, if that act is an offence".⁸⁶ Any strike related violence during a protected strike which causes physical damage to employers would undoubtedly constitute an offence and this would automatically entitle employers to institute civil action against the perpetrators of such violence.

Added to this, the LRA specifically provides for two additional court imposed remedies in respect of unprotected strike action. The first is the interdict (discussed above) and the second is an order for "just and equitable compensation" for any loss attributable to the strike or lock-out.⁸⁷ This remedy presupposes that trade unions should accept their responsibility of ensuring that their members engage in strike action that complies with the prerequisites of the LRA.⁸⁸ It is clear that this remedy does not equate to common law damages and it refers to an amount which is tempered by the dictates of fairness.

In *Algoa Bus Co (Pty) Ltd v Transport Action Retail & General Workers Union*⁸⁹ the Labour Court considered such a claim for compensation in circumstances where a trade union did nothing to encourage its members not to proceed with an unprotected strike despite the fact that an interdict had been issued against workers to continue with the strike. The employer had sustained losses of just more than R10 million rand,⁹⁰ and taking the perilous financial situation of the trade union into account, and its ability to continue to represent its members, the Labour Court awarded the employer compensation in the amount of approximately R1,4 million rand.

Apart from these judicial remedies, the LRA empowers employers to dismiss workers engaged in both protected, and unprotected strikes should their behaviour constitute misconduct.⁹¹ From the above, it is clear that unlawful conduct, which includes intimidation, assault and damage to property will attract both civil and criminal liability. It is against this background that, even though Manamela and Budeli deplore strike related

⁸⁵ Sections 67(2) and (6) of the LRA.

⁸⁶ Section 67(8) of the LRA.

⁸⁷ Section 68(1)(b) of the LRA.

⁸⁸ Cohen and Le Roux "Liability, Sanctions and other Consequences of Strike Action" 155.

⁸⁹ *Algoa Bus Co (Pty) Ltd v Transport Action Retail & General Workers Union* 2015 36 ILJ 2292 (LC). The amount had to be paid in monthly instalments of R5 280 by the trade union and R214,50 by each employee to be deducted from their salaries.

⁹⁰ *Transport & Allied Workers Union of SA v Algoa Bus Co Pty (Ltd)* 2015 36 ILJ 2148 (LC).

⁹¹ Sections 67(5) and 68(5) of the LRA. It should, however, be noted that such conduct must still adhere to the requisites of fair procedures, which include ultimatums and adherence to *audi alteram partem*.

violence, they argue that the LRA has established a careful balance of rights, obligations and remedies and should rights and duties be disregarded the LRA provides the necessary remedies to address protected and unprotected strike violence.⁹²

Despite the existence of a number of judicial remedies, commentators have suggested that Labour Court should adopt a more strict approach. Faced with the difficulty of identifying specific perpetrators of violence in a mob, Myburgh⁹³ suggests that the Labour Court should relax the admission rules of hearsay evidence that corroborates and aides in the identification of perpetrators of violent conduct. To this he adds that the Labour Court should be more uncompromising in upholding the dismissal of workers engaged in unlawful misconduct during strikes and that this can be achieved through the strict legal application of item 6 of the *Code of Good Practice: Dismissal*.⁹⁴ Manamela and Budeli also emphasise the fact that when considering the dismissal of employees engaged in violent strikes the transgressions should be proven by the employer on a balance of probabilities and not beyond all reasonable doubt. They mention that it leaves scope for the application of the criminal doctrine of "common purpose".⁹⁵

In sum, strikes that are not in compliance with the LRA are unprotected and any violence in protected or unprotected strikes is unlawful. The LRA provides that interdicts may be granted during the process of unprotected strikes. This is but one of the existing remedies that can potentially assist employers and to maintain peace during tumultuous collective bargaining negotiations. The other remedies range from delictual claims, breach of contract, claims for equitable compensation and criminal proceedings. However, before the courts will grant an interdict, or an order which declares a protected strike to be unprotected, it is submitted that the courts should first consider whether there are no available remedies. It is suggested, at the very least, that this much will be required by the Constitutional Court whenever the question about the limitation of the right to strike arises.

6 Critique on the functionality test

Mindful of the scourge of violent strikes in South Africa, the *Universal Product Network* judgement adopted Rycroft's functionality test which entails that the Labour Court could assume the power to alter the protected

⁹² Manamela and Budeli 2013 *CILSA* 324-336.

⁹³ Myburgh 2013 *CLL* 6.

⁹⁴ Myburgh 2013 *CLL* 8. Item 6 of the *Code of Good Practice: Dismissal* sets out the appropriate procedures to be followed in relation to the dismissal of workers engaged in misconduct during strike action.

⁹⁵ Manamela and Budeli 2013 *CILSA* 327.

status of a strike to unprotected action on the basis of violence.⁹⁶ It entails the weighing up of the level of violence against the efforts of the trade union to curb it in order for a court to determine whether a strike's protected status is still functional to collective bargaining.

Rycroft originates his argument on the premise that there is an inseparable link between strikes and functional collective bargaining. He finds justification for this on three grounds. Firstly, the *Constitution of the Republic of South Africa* 200 of 1993 provided that "workers have the right to strike for the purposes of collective bargaining".⁹⁷ Secondly, strikes must be orderly. This is implied by the procedural requirements established by the LRA which relate to compulsory mediation and notification periods before striking workers are protected from delictual actions, dismissals, contractual breaches and civil liability.⁹⁸ And, thirdly the strike must not involve misconduct. This he infers from the fact that employees engaged in misconduct can be dismissed irrespective of whether the strike is protected or not.⁹⁹

He further argues that the South African courts have recognised that strikes may lose their protected status should it no longer be functional to collective bargaining. He relies on two cases in particular which confirm this. In *Afrox Ltd v SACWU 2*¹⁰⁰ it was held that strikes can lose their protected status should strikers abandon their demand or where the employer concedes to the workers' demand and the grievance falls away.¹⁰¹ This is a similar approach to the one adopted more recently by the CC in the *Unitrans* case.¹⁰²

He then makes the point that it is clear "that it is possible to argue that there can arise a point where a protected strike's protection is lost. So far in our law this mainly relates to the *reason* of the strike".¹⁰³ It is submitted that up to here, his argument is pure, but he then leaps to the conclusion that this can be extended to strikes which involves violence.

⁹⁶ *Universal Product Network* para 32.

⁹⁷ Section 27(4) of the *Constitution of the Republic of South Africa* 200 of 1993. However, in a significant development the *Constitution*, 1996 removed this link and the right to strike and the right to engage in collective bargaining were established as two separate and independent rights.

⁹⁸ Rycroft 2014 *IJCLLIR* 202 refers to the "golden formula" which entails that certain procedural "steps must be taken and certain requirements met before strikers are protected from the civil and contractual liability that could arise from the strike".

⁹⁹ Rycroft 2014 *IJCLLIR* 202. See also s 67 of the LRA.

¹⁰⁰ *Afrox Ltd v SACWU 2* 1997 18 ILJ 406 (LC).

¹⁰¹ Rycroft 2014 *IJCLLIR* 207.

¹⁰² See the discussion in para 5.2 above.

¹⁰³ Rycroft 2014 *IJCLLIR* 207.

Without establishing a link between the reason for the strike and violence as stratagem to increase pressure, he refers to the second case, *Tsogo Sun Casinos Pty(Ltd) t/a Montecasino v Future of South African Workers' Union* where vehicles were damaged and passengers were dragged from their vehicles and assaulted. In this decision, the court made the obiter finding that that:

[w]hen the tyranny of the mob displaces the peaceful exercise of economic pressure and the means to the end of the resolution of a labour dispute, one must question whether a strike continues to serve its purpose and thus whether it continues to enjoy protected status.¹⁰⁴

It is submitted that both Rycroft and *Universal Product Network* may have sought to reach a bridge too far by linking the falling away of the "underlying reason for a strike", which according to the Constitutional Court justifies the alteration of the protected status of a strike, to violence as a strategy to enforce a demand. Our argument is simply this: In an instance where workers demand higher wages in an attempt to establish a more equitable distribution of profits, and their attempts by peaceful means are unsuccessful, the reason for the strike could remain the same irrespective should the workers' actions turn to violent means. There is, in other words, no unseverable link between the grievance in dispute, and the mechanism by means of which it is attained. This does not make violent strike action acceptable, but it does not alter the fact that the demand has not been withdrawn, or that the grievance had been resolved.

There seems merit in Fergus' critique levelled against Rycroft (and *Universal Product Network*) in so far as she finds a different historical foundation for the so-called functionality test. Contrary to the way in which this test is currently being referred to, it was a notion that was developed to justify why workers have the right not be dismissed during strikes. She confirms this poignant point (albeit in the pre-constitutional era) by referring to the Labour Appeal Court decision in *Black Allied Workers Union v Prestige Hotels CC t/a Blue Waters Hotel*¹⁰⁵ (hereafter *Blue Waters Hotel*) where it was succinctly held that the

... right to strike is important and necessary to a system of collective bargaining. It underpins the system – it obliges the parties to engage thoughtfully and seriously with each other. ... If an employer facing a strike could merely dismiss the strikers from employment by terminating their employment contracts then the strike would have little or no purpose. ... The strike would cease to be functional to collective bargain and instead it would

¹⁰⁴ *Tsogo Sun Casinos* para 13.

¹⁰⁵ *Black Allied Workers Union v Prestige Hotels CC t/a Blue Waters Hotel* 1993 14 ILJ 963 (LAC) (hereafter *Blue Waters Hotel*).

be an opportunity for the employer to take punitive action against the employees concerned.¹⁰⁶

We further agree with Fergus' questioning of Rycroft in promoting the "functionality principle" as the means of finding legal justification of containing violent conduct in strikes and to justify judicial intervention.¹⁰⁷ Our previous analysis has made it clear that there is no constitutional or legislative authority that instructs that a strike must be "functional to collective bargaining" in order to be lawful.¹⁰⁸ In our view, as long as the original demand deals with a matter which is not prohibited by the LRA, such as disputes of right which are eligible to be arbitrated or adjudicated, all strikes about matters about mutual interest are by their very nature functional to collective bargaining.

A further obvious shortcoming of the *Universal Product Network* judgement in adopting the functionality test is that it fails to set out how the court would determine the acceptable degrees of unlawful conduct permissible before a strike may be declared unprotected.¹⁰⁹ Moreover, it does not allude to recent failed attempts by NEDLAC to amend the LRA to empower the Labour Court to suspend a strike where the striking employees did not comply with picketing rules.¹¹⁰ This serves as indication that the legislature was not in favour of taking action towards extending the powers of the Labour Court to place limits on strikes.

To what extent is the functionality test applicable against the current collective bargaining structure established by the LRA? Even though it is understandable that - against the backdrop of lawlessness in strikes - the Labour Court may be tempted to become more intrusive in collective bargaining,¹¹¹ the courts should be cautioned not to overstep its statutory powers by altering the legal status of strikes. This is because the Labour Court should be vigilant not to assume particular powers into its jurisdiction where it is not explicitly stated and where this has the potential of imposing an unacceptable constitutional limitation on the fundamental right to strike.¹¹² However, the assumption that the removal of the protected status of a strike is the only or the most effective remedy against strike violence must be dispelled.

¹⁰⁶ *Blue Waters Hotel* paras 972A-D.

¹⁰⁷ Fergus 2016 *ILJ* 1538.

¹⁰⁸ Fergus 2016 *ILJ* 1540-1545.

¹⁰⁹ Fergus 2016 *ILJ* 1546.

¹¹⁰ See clause 9 of the *Labour Relations Amendment Bill* [B16-2012]; Rycroft 2015 *ILJ* 12-15; and Fergus 2016 *ILJ* 1548.

¹¹¹ Myburgh 2013 *CLL* 2.

¹¹² Fergus 2016 *ILJ* 1548.

7 Concluding remarks

Taking account of the stance adopted by the Constitutional Court in cases like *Bader Bop* and *Unitrans* it is predicted that this pinnacle court will make short thrift of the adoption of the functionality test. Both these cases were mindful of the fact that the constitutional right to strike operates as an independent right, which is not derived from other constitutional rights, such as the rights to freedom of association or the right to engage in collective bargaining. On the facts, both of these cases provided the right to strike with a wide meaning which is not susceptible to implied limitations which have not been catered for expressly in the LRA.

The authors of this contribution are not unsympathetic towards attempts by commentators and the courts to curb violent strikes which undoubtedly hold the potential to erode the fundamental rights to security of persons and property as enshrined in the *Constitution*, 1996. However, remedies will have to be sought in other places than in permitting the Labour Court to influence the collective bargaining balance by changing protected status of strikes. This would only be doable once the social partners have persuaded the legislature to amend the LRA to that effect. Until such time, those effected by violent strikes will have to make do with the current remedies contained in the wording of the LRA. In the interim, it may mean that the Labour Court may have to be more bold when providing existing remedies to victims of violent strikes, by ordering interdicts against violence (rather than the strike), by awarding significant claims for just and equitable compensation against unlawful strikes and, notwithstanding it being ineffectual at present, ordering enforcement by the police.

Briefly summed up, the LRA is a comprehensive legislative framework supported by a number of *Codes of Good Practice* that proffer various remedies of addressing violent conduct in strikes.¹¹³ The LRA explicitly highlights the procedure to be followed when securing legal protection of a strike and consequences of a strike not in compliance with the Act. Moreover, the powers of the Labour Court range from granting of interdicts, orders of just and equitable compensation to declaratory orders. The LRA does not rule out the possibility of delictual action and breach of contract; or fair dismissal and civil proceedings for protected strike conduct that constitutes an offence. Furthermore, criminal acts remain offences regardless of the protected status of strikes thereby warranting criminal sanctions. However, the LRA does not seem to permit the expansion of the

¹¹³ See the *Code of Good Practice: Dismissal* and the *Code on Picketing*.

interlocutory powers of the Labour Court into the alteration of the legal status of a strike.

The South African government and the various social partners are not oblivious to the concerns plaguing the labour market.¹¹⁴ The on-going minimum wage discussions¹¹⁵ and the Ekurhuleni Declaration are testament to the intentions of government and society. Admittedly, more needs to be done, but collectively. There is an intrinsic equity balance that must always be sought in collective bargaining to reduce strikes.

The recognition and protection of the right to strike is a proactive affirmation by the *Constitution*, 1996 to balance the inherently unequal bargaining power that exists in industrial relations. The role of the Labour Court needs to be re-evaluated to ascertain whether the court can play a constructive role in ensuring that the permissible economic harm inflicted by strikes is not undermined.

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¹¹⁴ See NEDLAC 2015 <http://new.nedlac.org.za/wp-content/uploads/2014/10/Terms-of-Reference1.pdf> 4 where it is stated that it "attempts to address low wages and wage inequalities to contribute to a more equitable wage structure"; and also "address excessive conflict and protracted and violent strikes in our labour relations, and promote the better functioning of our labour market institutions, including collective bargaining". The Ekurhuleni Declaration is aimed at contributing to a more equitable and stable labour relations environment.

¹¹⁵ Deakin 2017 *ILJ* 1-25.

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List of Abbreviations

CILSA	Comparative and International Law Journal of Southern Africa
CLL	Contemporary Labour Law
DoL	Department of Labour
EFF	Economic Freedom Fighters
GLJ	Global Labour Journal
IJCLLIR	International Journal of Comparative Labour Law and Industrial Relations
ILJ	Industrial Law Journal
ILO	International Labour Organisation
LRA	Labour Relations Act 66 of 1995

NEDLAC	National Economic Development and Labour Council
SAIRR	South African Institute of Race Relations
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg