Secondary strikes and their proportional impact on both the primary and secondary employer

1 Introduction

The right to strike is protected in terms of section 23(2)(c) of the Constitution of the Republic of South Africa, 1996 (the Constitution). The Labour Relations Act 66 of 1995 (the LRA) regulates this right in terms of its section 64. The LRA defines a strike in section 213 and goes further to provide for a secondary strike (also known as a "sympathy strike") in section 66. Given the concept of secondary strike as provided for in the LRA, an ordinary strike is usually referred to as a "primary strike" (Du Toit, Godfrey, Cooper, Giles, Cohen, Conradie and Steenkamp *Labour Relations Law: A Comprehensive Guide 6ed* (2015) 361; Van Niekerk, Smit (eds), Christianson, McGregor and van Eck *Law@work* (2019) 465). A primary strike is by employees who have a dispute with their employer, which relates to "matters of mutual interest or terms and conditions of employment" (Manamela "Matters of mutual interest for purposes of a strike – *Vanachem Vanadium Products (Pty) Ltd v National Union of Metalworkers of South Africa* 2014 9 BLLR 923 (LC)" 2015 *Obiter* 791-800; *NUMSA obo Members v SAA* 2017 38 *ILJ* 1994 (LAC)). These employees engage in strike action to pursue their demands or grievances which are directed against their employer (Grogan *Collective Labour Law* 3ed (2019) 292). A secondary strike is by employees in support of other employees who are engaged in a strike against their employer. Employees of the secondary employer therefore support striking employees of the primary employer, even though they have no material interest in the matter that gives rise to the primary strike. This is based on the assumption that if a business is connected to another one, then if employees of the former engage in strike action, the strike will have an impact on the functioning of the latter, which will be forced to accede to demands by its employees.

The right to strike is not absolute and therefore can be limited in line with section 36 of the Constitution. Amongst others, for a primary strike to be protected, certain procedural requirements prescribed by section 64 of the LRA should be met. Similarly, a secondary strike must meet certain procedural requirements to be protected. On face value, the use of a secondary strike by secondary employees against their employer seems unfair and unreasonable (*Firestone SA (Pty) Ltd v NUMSA* 1992 13 *ILJ* 345 (T) paras 349C-D; *Barlows Manufacturing Co Ltd v MAWU* 1988 9 *ILJ* 995 (IC) para 1005I). Actually, the secondary employer has nothing to do with the dispute between the primary strikers and their employer. Although a secondary strike may directly or indirectly increase the pressure on the primary employer to accede to the demands of its employees, it will understandably have some negative impact on the secondary employer. For this reason, this analysis will consider the right

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to strike as far as it relates to a secondary strike; requirements for the protection of a secondary strike, however, with specific focus on the requirement that the nature and extent of the secondary strike must be reasonable concerning the possible effect it may have on the business of the primary employer. This requirement will also be discussed as far as the secondary strike may have an impact on the secondary employer. The development of the law based on case law, in this regard, will also be considered until the recent case of *Association for Mineworkers and Construction Workers Union v AngloGold Ashanti Limited t/a AngloGold Ashanti* 2022 43 *ILJ* 291 (CC) (hereafter *AMCU v AngloGold Ashanti* (CC)).

2 Protection of the right to strike and secondary strikes

The right to strike is protected through international and domestic law. Conventions adopted by the International Labour Organisation (ILO) are the basis of international labour law. South Africa initially joined the ILO in 1919, however, it withdrew its membership because of its apartheid practices, only to rejoin in 1994 (Manamela and Budeli "Employees' right to strike and violence in South Africa" 2013 XLVI *CILSA* 314). In 1996, South Africa ratified Conventions 87 of 1948 (Freedom of Association and Protection of the Right to Organise) and 98 of 1949 (the Right to Organise and Collective Bargaining) which relate to freedom of association and collective bargaining. Although these conventions do not directly address the issue of strikes, the ILO Committee on Freedom of Association has indicated that the right of employees to strike is an important element of the right to freedom of association and has interpreted the two conventions as implying the right to strike (Committee of 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; ILO General Survey, "Freedom of association and collective bargaining" 1994, para 136). It must further be noted that the ILO Committee on Freedom of Association has stated that the general prohibition of sympathy strikes could lead to abuse and that workers should be able to engage in such action provided the initial strike they are supporting is lawful (ILO *Freedom of association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO* 5ed (2006) 112).

International labour standards played an important role in developing labour rights in the Constitution and labour laws. Section 23(2)(c) of the Constitution provides for workers' right to strike and the LRA regulates it. The Labour Relations Act 28 of 1956 (LRA, 1956) did not define or regulate secondary strikes. It was, therefore, upon the courts to come up with the rules to regulate such strikes (*Barlows Manufacturing Co Ltd v MAWU* 1990 11 ILJ 35 (IC) para 42F; *Metal Box SA v NUMSA* 1993 14 *ILJ* 152 (IC)).

It must be acknowledged that in the absence of the protection of the right to strike, trade unions and their members become powerless when engaging in collective bargaining with employers. According to Sachs, the

fundamental rights of workers are those which enable them to fight for and defend their rights (Sachs "The Bill of Rights and worker rights: an ANC perspective" in Patel (ed) *Workers rights: from apartheid to democracy – what role for organized labour* (1994) 47). The discussion that follows will focus on the regulation of secondary strikes under the LRA.

3 The regulation of secondary strikes under the LRA

3 1 Definition and essential elements of a secondary strike

To qualify as a strike, the action employees are engaged in, must be in line with the statutory definition of a strike. Section 213 of the LRA defines a strike as

> the partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee …

An action which does not comply with this definition may be regarded as a breach of contract with certain legal consequences. A lawful strike will be seen as a suspension of the contract, instead of a breach of contract (*FGWU v Minister of Safety & Security* 1999 20 *ILJ* 1258 (LC) para 19; Grogan (2019) 204).

In terms of the definition of a strike, to qualify as a strike action, persons who are or have been employed by the same employer or by different employers must be involved. It is submitted that the phrase "employed by the same employer or by different employers" in the definition of strike, allows for actions such as secondary strikes since employees employed by different employers are involved.

The LRA defines a secondary strike in its section 66(1) as

> a strike, or conduct in contemplation or furtherance of a strike, that is in support of a strike by other employees against their employer, but does not include a strike in pursuit of a demand that has been referred to a council if the striking employees, employed within the registered scope of that council, have a material interest in that demand.

Different from a primary strike whose purpose is "to remedy a grievance or resolve a dispute in respect of any matter of mutual interest between the employer and employee"; a secondary strike is "a strike or conduct in contemplation or furtherance of a strike that is in support of a strike by other employees against their employer". The phrase "in support of a strike by other employees against their employer" has been interpreted to mean that secondary strikers must be employed by a different employer from that of the employees whom they seek to support (*CWIU v Plascon Decorative (Inland) (Pty) Ltd* 1998 12 BLLR 1191 (LAC); *Afrox v SACWU* 1997 18 *ILJ* 399 (LC); *SACTWU v Free State and Northern Cape Clothing Manufacturers' Association* 2002 1 BLLR 27 (LAC); *CEPPWAWU v*

CTP 2013 34 *ILJ* 1966 (LC)). A secondary strike must therefore be aimed at furthering or supporting a primary strike. Thus, for a secondary strike to occur, there must be a primary strike emanating from a dispute between primary employees and their employer. Evidently, there must be two different groups of employees engaging in two different strikes, who are employed by two different employers. The target of the secondary strike must not be the employer of employees who intend to engage in a secondary strike (*SA Airways v SATAWU* 2006 27 *ILJ* 1034 (LC) paras 19–21), but the employer of employees engaged in a primary strike. According to Cooper, the term "secondary" emphasises the relationship between the two employers (Cooper "Sympathy Strikes" 1995 *ILJ* 759). This is so because the impact of the secondary strike will depend on the relationship between the two employers. In *Afrox v SACWU*, a dispute was referred to the Commission for Conciliation, Mediation and Arbitration (CCMA) regarding the employer's decision to introduce staggered shifts in the Pretoria West branch. Workers at this branch engaged in a strike and were later joined by members of SACWU from other branches. The employer contended that the strike by all other employees besides the Pretoria West branch was unprotected because they had not complied with the procedure for a secondary strike. The court found that because the strikers were all employed by the same employer, there was no secondary strike. Similarly, in *CWIU v Plascon Decorative* 1999 20 *ILJ* 321 (LAC), the issue in dispute regarded the wages for employees in the "C category", however, employees in other wage categories joined the strike. The employees were therefore employed by the same employer and the action could not amount to a secondary strike. This was further emphasised in *Early Bird Farm v FAWU* 2004 25 *ILJ* 2135 (LAC), where the court found that employees engaged in one division who supported a wage demand by other employees in another division were also engaged in a primary strike as their employer was the same.

A secondary strike, however, does not include a strike in pursuit of a demand that has been referred to a council if the striking employees, employed within the registered scope of that council, have a material interest in that demand. The phrase "material interest" in the definition has been interpreted to mean that which has "specific effect and value" for the secondary strikers (*Barlows Manufacturing Co Ltd v MAWU* at 1006A).

For a secondary strike to take place, just like with a primary strike, there must be a refusal to work by employees employed by the secondary employer. Therefore, there must be a partial or complete retardation or obstruction of work by employees (Grogan (2019) 293); however, the action need not take the same approach or form as the primary strike. Under the LRA 1956, the Appellate Division of the Supreme Court found in *SA Breweries v FAWU* 1989 10 *ILJ* 844 (A) paras 10-11) that the definition of "work" referred only to work that employees were contractually obliged to do and therefore that the refusal to work voluntary overtime did not constitute a strike in terms of the definition. Currently, under the LRA, it is clear that work in the definition of strike

includes overtime work, whether voluntary or compulsory (*Ford Motor Co of SA (Pty) Ltd v NUMSA* 2008 29 *ILJ* 667 (LC) para 15). However, this does not include illegal work (*Simba (Pty) Ltd v FAWU* 1997 5 BLLR 602 (LC) para 15). In *Imperial Cargo Solutions (Pty) Ltd v SATAWU* 2017 38 *ILJ* 2479 (LAC), it was held that there was no strike where employees refused to do ancillary duties that they had been required to do in terms of a collective agreement that had been cancelled (para 22).

The refusal to work must also be concerted. Although the Constitution grants every individual worker the right to strike, it can only be exercised collectively (*Schoeman v Samsung Electronics Pty (Ltd)* 1997 10 BLLR at 1364).

3 2 Procedural requirements for the protection of a secondary strike

3 2 1 General requirements

Given the nature and the effects of a secondary strike, the LRA prescribes a specific procedure to be followed for such a strike to be protected. First, section 66(2)(a) of the LRA requires that the primary strike must be protected. In other words, the primary strike must be in line with the definition of strike; there must be no limitations in terms of section 65 of the LRA and the strike must comply with the procedural requirements. These include that the matter must have been referred to conciliation by a bargaining council with jurisdiction or to the CCMA (*Tiger Wheels Babelegi t/a TSW International v NUMSA* 1999 20 *ILJ* 677 (LC); *De Beers Consolidated Mines v NUM* 2008 29 *ILJ* 2755 (LC)); 30 days must have passed since the referral or a certificate must have been issued of the non-resolution of the dispute; and proper notice of 48 hours must have been given to the employer (*Ceramic Industries Ltd t/a Betta Sanitary Ware v National Construction Building & Allied Workers Union* 1997 18 *ILJ* 671 (LAC)). These requirements must be complied with unless exceptions provided in section 64(3) of the LRA apply. If the primary strike does not comply with the above procedural requirements, the secondary strike will not be protected, even if the strike complies with requirements in section 66(2) of the LRA.

Secondly, section 66(2)(b) of the LRA requires that seven days' notice must have been given to the secondary employer before the commencement of the secondary strike (*Equity Aviation Services (Pty) Ltd v SATAWU* 2009 10 BLLR 933 (LAC); *SA Airways (Pty) Ltd v SATAWU* 2010 3 BLLR 321 (LC)). In case the secondary strike relates to dismissals for operational reasons, fourteen days' notice must be given to the secondary employer before the commencement of the strike (s 189A(11)(c) of the LRA). Where the employer is part of a corporate group, notice to the holding company will be enough (*Sealy of SA (Pty) Ltd v PPWAWU* 1997 18 *ILJ* 392 (LAC)). The giving of the notice is to allow the secondary employer time to take steps to influence the primary employer, if at all possible. Secondary strikers need not refer any dispute

to a bargaining council or the CCMA; what is needed is that they should notify their employer of the looming strike (Du Toit (2015) 361-362).

Thirdly, and most importantly for this analysis, section 66(2)(c) of the LRA states that the nature and extent of the secondary strike must be reasonable concerning the possible direct or indirect effect that it may have on the business of the primary employer.

If the requirements discussed above are met, striking employees will enjoy all the immunities afforded to primary strikers (s 67 of the LRA). A secondary employer may, however, apply to the Labour Court for an interdict to prohibit or limit a secondary strike that contravenes the provisions of the LRA (s 66(3) of the LRA). Employees may also incur liabilities imposed by section 68 of the LRA if they take part in an unprotected secondary strike.

Interestingly, in *Chubb Guarding SA (Pty) Ltd v SATAWU* 2005 11 BLLR 1062 (LC), the court found that it was imperative in the case of a secondary strike to comply with the procedures stated in a collective agreement in order to meet the reasonableness requirement in terms of section 66(2)(c) of the LRA (para 11). In *Transnet v SATAWU* 2013 34 *ILJ* 1281 (LC), there was a violent nationwide transport strike. SATAWU served notice on Transnet of a secondary strike by 42 000 workers at Transnet Freight Rail and Transnet Port Terminals. Transnet approached the Labour Court for an interim order interdicting the nationwide secondary strike. The court found that while the union had met the requirements of section 66(2)(b) of the LRA, the parties had concluded a collective agreement regulating secondary strikes. The agreement required the union to include in the strike notice the reasons why it believed that the secondary strike would be protected. It was found that the union could not choose only to comply with the requirements of the LRA and ignore the collective agreement (para 25). The court, however, was not satisfied that it could interdict the secondary strike for this reason alone (para 32).

The discussion which follows will focus on the above-mentioned third requirement relating to the reasonability of the nature and extent of a secondary strike. This requirement is a bit complex, more so that there have been different interpretations of it by dispute resolution institutions. This requirement is often the subject of scrutiny in courts as secondary employers at times use it to prevent secondary strikes from taking place.

3 2 2 Reasonable possible direct or indirect effect of the nature and extent of a secondary strike

The main purpose of this requirement is to ensure that a secondary strike is utilised only to exert pressure on the secondary employer who can influence the outcome of the primary strike (Grogan (2019) 298; Garbers, le Roux, Strydom (eds), Basson, Christianson and Germishuys-Burchell *The New Essential Labour Law Handbook* 7ed (2019) 478). This requirement is imperative because it allows for some control over the use

of secondary strikes. It puts some restrictions on the use of secondary strikes and plays a crucial role in determining the legitimacy of this type of strike (Norton "When is a secondary strike reasonable? The connections between separate employers" 2008 *CLL* 22). The requirement ensures that employees of the secondary employer do not engage in a strike to the detriment of their employer, whereas the strike does not have a reasonable possible direct or indirect effect on the primary employer. It is, therefore, significant for the trade union or employees who want to engage in a secondary strike to show that the secondary strike may have a possible direct or indirect effect on the business of the primary employer. It has been held that such an effect must be of a commercial or economic nature because a mere inconvenience to the secondary employer will not be sufficient (*Hextex v SACTWU* 2002 23 *ILJ* 2267 (LC) para 34). Over the years, this requirement has proved to be problematic to courts as in some of the findings, courts focused only on the impact of the secondary strike on the primary employer, while in others the focus was also on its effect on the secondary employer. Understandably, secondary employers often seek to interdict secondary strikes, based on the fact that they have no possible direct or indirect effect on the business of the primary employer, to avoid possible unnecessary harm to their businesses. The discussion that follows will first consider some court cases, which focused on the possible direct or indirect effect on the primary employer.

In *Sealy v PPWAWU*, employees of Mondi Paper went on strike. Thereafter, PPWAWU gave notice of a secondary strike at five other employers, including Sealy SA Pty (Ltd) and Softex Mattress (Pty) Ltd. The employers approached the Labour Court to stop the union and its members from participating in the secondary strike due to failure to meet provisions of section 66(2)(c) of the LRA. The court found that the relationship between Mondi Paper and four of the employers was weak because they did not operate in the same sector as Mondi Paper. Although they had Anglo American as a mutual shareholder, the extent of the effect of the secondary strike was very low and therefore the court granted the interdict in favour of the four employers. The court was satisfied that there was a connection between Softex Mattress and Mondi Paper and therefore that the secondary strike would have an effect on Mondi Paper's business to influence the primary strike.

A connection or *nexus* between the secondary employer and the primary employer is imperative in order for a secondary strike to have some possible effect on the primary employer. According to Van Niekerk *et al,* this suggests a proportionality principle, which begs for an enquiry into the nature and extent of the proposed secondary strike and whether the strike is capable of having any effect on the business of the primary employer and the nature and extent of that effect. The determination must thus be made by balancing the reasonableness of the nature and extent of the secondary strike against its effect on the primary employer (Van Niekerk *et al* (2019) 467).

In *Samancor Ltd v NUMSA* 1999 11 BLLR 1202 (LC), the court used a two-phase approach in dealing with the "reasonableness" of a secondary strike (paras 30-31). It first determined whether the secondary strike would affect the business of the primary employer, based on the fact that the secondary employer provided around 80% of raw materials to the primary employer and was also its partner and it found that there would indeed be an effect. It secondly determined whether the nature and extent of the secondary strike were reasonable concerning its effect on the primary employer's business and it found that it would have been reasonable for the secondary strikers to have targeted only the divisions of the secondary employer which produced raw materials used by the primary employer.

In *Billiton Aluminium v NUMSA* 2001 ZALC 193 the company wanted to interdict a strike by its employees in support of a primary strike at Samancor. Billiton argued that the strike would be unreasonable when its potential effect was evaluated in relation to its own business. The court found that the words "on the business of the primary employer" focused on the effect of the secondary strike on the primary employer (para 19). According to the court, the costs of the strike on Billiton by its workers outweighed any benefit to the strikers at Samancor (para 22). Remarkably, the court rejected the proportionality test concerning the effect of the secondary strike on the secondary employer as it would put a limitation on the right to strike (para 10).

Also, in *Hextex v SACTWU*, the court held that the reasonableness of a secondary strike should be evaluated based on the effect of the secondary strike on the business of the primary employer (para 19). In this case, the meaning of the word "possible" was interpreted to mean "likely" or "capable of existing …" (para 22).

In *Coca-Cola Fortune v FAWU* 2010 31 *ILJ* 1855 (LC), FAWU gave notice to the company that its members would engage in a strike in support of the primary strike at Amalgamated Beverage Industries (ABI). Coca-Cola Fortune, however, argued that it had no links with ABI or any of its subsidiaries and that since there was no primary strike at Coca-Cola Africa, a secondary strike by Coca-Cola Fortune workers was uncalled for. The court, however, concurred with the union that no contractual link was required, as the only issue was whether the "indirect effect" of the proposed secondary strike would be reasonable (para 13). FAWU stated that if a nationwide shortage of Coca-Cola drink was created, there was a "credible possibility" that Coca-Cola Africa might exert pressure on ABI to address the dispute with its workers. The court found that the effect was too weak to warrant a secondary strike and confirmed the interim order stopping the proposed strike by Coca-Cola Fortune employees (para 15).

The discussion will now consider some court cases, which focused on the possible direct or indirect effect on the secondary employer.

In *SALGA v SAMWU* 2007 28 *ILJ* 2603 (LC), SAMWU sent a letter to SALGA which is an employers' organisation on 1 June 2007, in which it

stated that it was considering engaging in a secondary strike in support of a wage demand made by public servants and that the proposed strike was to be a one-day strike on 13 June 2007. In this case, the court acknowledged that the LRA permits secondary strikes but found that the right to engage in a secondary strike is not unlimited (para 9). It evaluated the connection between the municipality and the national and provincial spheres of government, and the cooperative system of government established by the Constitution. The court held as follows (para 16):

> [W]hether or not a secondary strike is protected is determined by weighing up two factors – the reasonableness of the nature and extent of the secondary strike (this is an enquiry into the effect of the strike on the secondary employer and will require consideration, *inter alia*, of the duration and form of the strike, the number of employees involved, their conduct, the magnitude of the strike's impact on the secondary employer and the sector in which it occurs) and secondly, the effect of the secondary strike on the business of the primary employer, which is in essence an enquiry into the extent of the pressure that is placed on the primary employer.

The court found that SAMWU was successful in meeting the requirement that the nature and extent of the secondary strike were reasonable concerning its effect on the business of the national government (para 23). This finding was upheld by the Labour Appeal Court (*SALGA v SAMWU* 2011 32 *ILJ* 1886 (LAC)), where it was stated that because municipalities provide different functions from the provincial and national spheres of government, a strike by municipal workers in support of a nationwide strike by public servants would have satisfied the requirements of the LRA (para 15). Different from what was said in *Billiton Aluminium v NUMSA* and *Hextex v SACTWU*, the judge argued that the reasonableness test had to be considered in relation to the impact the strike may have on both the primary employer and the secondary employer (para 12).

In *Clidet No 957 (Pty) Ltd v SAMWU* 2011 3 BLLR 225 (LC), the Labour Court stated that to establish whether a secondary strike is permissible a two-phase enquiry should be made, first, the enquiry should be into the effect of the strike on the secondary employer, giving regard to, amongst others, the duration and form of the secondary strike, the number of employees involved, the degree of the strike's impact on the secondary employer, etc.; second, the enquiry should be into the likely effect of the secondary strike on the primary employer's business (para 7). Given the fact that in this case, the primary and secondary employer provided different services to a business managed by a third party, it was difficult to imagine how one service provider could put pressure on the other.

In *AngloGold Ashanti Ltd v AMCU* 2019 40 *ILJ* 1552 (LC), members of AMCU employed by Sibanye engaged in a strike for improved terms and conditions of employment in November 2018. The strike continued for some time and in February 2019, AMCU gave notice in terms of section 66(2) of the LRA to several employers in the mining sector that its members employed by those employers would embark on a secondary

strike. Ten of those employers approached the Labour Court (supported by Sibanye which argued that the secondary strike would not affect it at all) for an interdict to prevent AMCU and its members from engaging in the strike because the strike did not meet the requirements of a protected secondary strike. The court found that the strike was unprotected (para 16). The following was stated regarding the proportionality test (para 17):

> Section 66(2) of the LRA places emphasis on the effect that the secondary strike may have on the business of the primary employer and this is a factor that requires consideration in determining the reasonableness of the strike. This entails an enquiry into the nature and extent of the secondary strike, which involves an enquiry into *its impact on the secondary employer* [my emphasis]. It also entails an enquiry into the possible direct or indirect effect that the secondary strike may have on the business of the primary employer. Ultimately, it is a proportionality assessment aimed at determining *whether the harm caused by the secondary strike to the secondary employer is in proportion to the effect or impact on the business of the primary employer* [my emphasis]. If the harm caused to the secondary employer is in proportion to the effect of the secondary strike on the business of the primary employer, the secondary strike satisfies the requirements of s 66(2)(c) of the LRA …

The finding of the Labour Court was upheld on appeal by the Labour Appeal Court in *AMCU v AngloGold Ashanti Limited t/a Anglogold Ashanti* 2020 41 *ILJ* 2763 (LAC). It must, however, be noted that although the dispute giving rise to the primary strike was resolved, AMCU was granted leave to appeal to the Constitutional Court for purposes of interpreting section 66 of the LRA about the reasonableness of a secondary strike in relation to its effect. It was therefore, in *AMCU v AngloGold Ashanti* (CC), where the majority held in its interpretation of section 66(2)(c) of the LRA, that a secondary strike must affect the primary employer, however, concerning the secondary employer, the secondary strike must be reasonable (par 85). The Constitutional Court held that proportionality and reasonableness are shields to safeguard secondary employers because they (secondary employers) do not have the same procedural requirements, which safeguard them such as conciliation, which is required for purposes of a primary strike (para 68). The court interpreted "reasonable in relation to" in section 66(2)(c) of the LRA to import proportionality in the assessment of reasonableness (para 88). The proportionality test therefore has application in the evaluation of the reasonableness of the possible effect a secondary strike might have on the business of a secondary employer. In this case, Pillay stated as follows regarding secondary strikes at para 99:

> Secondary strikes that wreak macro-economic havoc, bring industry to a standstill, jeopardise job security, cause commodity prices to collapse and investors to take flight, would render the secondary strikes unreasonable.

The earlier court findings discussed above demonstrated that initially courts were inclined to consider only the possible direct or indirect impact of the secondary strike on the primary employer; however, later findings showed that courts moved towards considering also the impact on the secondary employer. It is apparent from all the cases that some

form of connection should exist between the primary employer and the secondary employer, for employees to engage in a secondary strike and for such a strike to have a possible direct or indirect impact on the employers involved. Furthermore, the proportionality test is necessary to determine both the possible impact the strike might have on the primary employer and the possible harm it might cause to the secondary employer. In cases where this is distant, the secondary strike should be regarded as disproportionate; however, where there is a connection, the secondary strike should be regarded as proportionate.

The word "possible" in section 66(2)(c) of the LRA, implies something which is not actual but is probable. The strike should therefore be capable of having an effect, even if it is not direct, hence there should be interconnectedness between the two employers. It is submitted that proportionality or reasonableness in relation to secondary employers is pivotal as it limits the right to participate in secondary strikes in line with the limitation clause (s 36 of the Constitution), to balance the rights of employees, the primary employer, and the secondary employer. This is also important because it is in line with section 1 of the LRA which provides that the purpose of this Act is to advance economic development, social justice, labour peace and the democratisation of the workplace. The effects of power-play through industrial action between the parties should therefore not cripple the business of the secondary employer.

4 Conclusion

Employees' right to strike is protected in terms of international law, the Constitution and the LRA. However, this right may be limited in line with section 36 of the Constitution. In terms of the LRA, employees may engage in a secondary strike, however, the Act sets restrictions on this right by amongst others, prescribing procedural requirements in section 66(2) and in particular subsection (c). It is inherent in this section to seek to ensure that on the one hand, the secondary strike affects the primary employer and on the other hand, that it does not unreasonably cause harm to the secondary employer. The strike should affect the primary employer, yet not be disproportionately detrimental to the secondary employer. If the latter happens, the secondary employer has a remedy in section 66(3) of the LRA, which permits it to apply to the Labour Court for an interdict. The proportionality principle should therefore be used in evaluating the reasonableness and legitimacy of a secondary strike (Norton 2008 *CLL* 22). Section 66(2)(c) of the LRA seems to be a way of escape for secondary employers in cases where they are not satisfied with compliance with any of the provisions of section 66(2) of the LRA by their employees and trade unions. The provisions of section 66(2)(c) of the LRA are important, especially to the secondary employers; as a trade union or its members may easily meet the first two requirements, then engage in a secondary strike which might have less impact on the primary employer and yet be detrimental to the secondary employer and its employees who are not part of the trade union which intends to

engage in a secondary strike. It is submitted that the limitation by this provision is necessary. It is also a reasonable and justifiable limitation taking into consideration the interests of others. It will be useless for employees employed by the secondary employer to engage in a strike, which will harm their employer and possibly cause them to lose jobs while not affecting the primary employer. The harm experienced by the secondary employer should be proportional to the possible direct or indirect effect the strike may have on the primary employer (Seady and Thompson "Strikes and Lockouts" in Thompson and Benjamin *South African Labour Law* (2020) 328; Garbers (2019) 478). It will therefore be upon the Labour Court to determine the extent of the reasonable possible direct or indirect effect of the secondary strike when dealing with applications in terms of section 66(3) of the LRA. The wording of section 66(2)(c) of the LRA allows for some flexibility which permits that each case be considered on its merits. Fairness and reasonableness require that the interests of the secondary employer and the possible harm which may befall it be considered when interpreting provisions of section 66(2)(c) of the LRA. It is proposed that section 66 of the LRA should be amended to make the above clear to the parties involved and to elude preventable litigation. It is indeed unreasonable to expect secondary employers to carry the financial burden of strikes, which do not have a link with matters of mutual interest or terms and conditions of employment between them and their employees, on the basis that its employees are striking in support of other employees employed by a different employer. This will be contrary to the purpose of the LRA as stated above. The decision by the Constitutional Court in *AMCU v AngloGold Ashanti* is to be welcomed as it assures secondary employers that their interests will be considered before a secondary strike can take place based on the reasonableness and the proportionality principle. It has now been clarified that not only the possible impact of the secondary strike on the primary employer will be considered, but also its reasonable impact on the secondary employer.

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