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Protracted strikes and statutory intervention in South Africa's labour relations landscape

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Abstract

Introduction This article provides both historical and contemporary characteristics of strike actions that have defined the collective bargaining arena of South Africa's labour relations landscape.

Problem investigated Contemporary labour legislation appear to overtly protect striking workers and their labour unions from accountability. The constitutionally established principle of 'voluntarism' in the collective bargaining practice prohibits government from intervening in protected strike actions even when such strikes become protracted, violent, and economically crippling.

Purpose of the article The article primarily reviews and analyses extant literature and existing legislation in South Africa that inhibits government's ability to intervene in protracted strikes. Based on the review and analysis of secondary data, informed propositions are formulated and presented.

Methodology The conceptual article employs qualitative research strategy using secondary data analysis to arrive at informed propositions.

Propositions Firstly, there should be compulsory interest arbitration and pre-strike balloting. Secondly, there should be judicial review of the status of procedural strikes that have turned violent. Thirdly, there should be an uncompromising attitude by the courts when adjudicating cases that involve the dismissal of workers found guilty of misconduct during strikes, and labour unions should be held accountable for the violent conduct of their striking members.

Value of the article This article provides a theoretical basis upon which existing legislation guiding the conduct of strikes in South Africa could be reviewed by labour and legislative authorities.

Key phrases

collective bargaining; dispute resolution; interest arbitration; labour relations; strike actions

1. INTRODUCTION

The labour relations system in most democratic and advanced economies around the world recognises strike action as an essential element in the principle of collective bargaining between employers and the labour unions who represent workers. Collective bargaining without the right to strike has been described as 'collective begging' (Brand 2011:11). It is in consideration of the inherently skewed relationship in terms of social and economic powers between the owners of capital (capitalist) and the proletariats (workers) that the Constitution of the Republic of South Africa, 1996 (hereafter 'the Constitution'), under the democratic dispensation, consciously provided workers with the right to strike (section 23(2)(C)). Section 17 expressly grants 'everyone' the right to picket peacefully and unarmed.

These provisions are intended to leverage the social and economic powers of both parties in the conduct of collective bargaining. This is fundamentally important as equilibrium will not be achieved in collective bargaining practice without a freedom to strike (Davies & Friedland, cited in Brand 2011:11).

The constitutionally inspired Labour Relations Act No. 66 of 1995 (hereafter 'the LRA') gives explicit expression to "every employee's right to strike" (section 64(1)). Sections 67 and 69(7) of the Act also prohibits the dismissal of striking workers and further protects them from civil litigation that may arise in the course of a strike. The constitutional provision in itself was derived from the International Labour Organisation (ILO) Conventions 87 and 98 (freedom of association and collective bargaining, respectively), which was ratified by South Africa's government. The exercise of employees' rights to strike, as enshrined in the LRA, do however have certain procedural limitations (Basson, Christianson, Dekker, Garbers, Le Roux, Mischke & Strydom 2009:317; Grogan 2014:436-437; Van Niekerk, Christianson, McGregor, Smit & van Eck 2012:404).

The aim of this article is to provide the necessary impetus upon which pragmatic and statutory propositions that could assist government in effectively managing socially and economically crippling strikes would be made. This aim is partly informed by the concerns raised by the former South Africa's minister for mineral resources (Ngoako Ramatlhodi) regarding government's inability to end the protracted strike embarked upon by members of the Association of Mineworkers and Construction Union (AMCU) in 2014 (Van Vuuren & Burkardt 2014:Internet). In order to achieve this aim, the article employed a descriptive

research design using the ontological paradigm (Bryman & Bell 2011:40; 20). This involved a review of related literature and legislation that regulate the conduct of collective bargaining and strike action in South Africa.

2. THE RIGHT TO STRIKE

While South African legislature has sanctioned strikes as a means of balancing economic and social powers between the employer and employees (through their unions), it appears that there is also an inherent (un)intention in the statutory definition of a strike that makes its exercise economically paralysing to the employer (Van Niekerk *et al*. 2012:400). This may perhaps also account for the violent nature of most strike actions in South Africa post-1994. 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 purposes of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee, and every reference to work in this definition includes overtime work, whether it is voluntary or compulsory."

This statutory definition confers the right on employees to withdraw their economic powers from the employer by downing their tools in the event of an unresolved labour conflict between the parties. Even though strikes have been described as a fundamental, basic, and human right (Van Niekerk *et al*. 2012:400), they should be exercised within certain limitations that are substantive and procedural in nature. For example, Section 65 of the LRA prohibits strike action under the following conditions:

- if the issue in dispute is regulated by a collective agreement, arbitration award, or wage determination (s 65(3);
- if there exists a binding agreement by the parties to refer the issue in dispute to arbitration (s 65(1)(a) or (b);
- if the LRA confers the right to refer the matter in dispute to arbitration or the Labour Court on either of the disputing parties, with the exception of some trade union rights (s 65(3)); or
- if employees are engaged in an essential or a maintenance service (s 65(1)(d).

Apart from the substantive limitations on the right to strike, the LRA (s 64(1)) also stipulates certain procedural requirements for a strike to be 'protected'. These procedures include the following:

- the dispute must be referred to the Commission for Conciliation, Mediation, and Arbitration (CCMA), or a Bargaining Council with jurisdiction (if applicable) for conciliation;
- attempt must be made by the CCMA or Bargaining Council to resolve the dispute by conciliation;
- if the dispute is unresolved within a prescribed number of days, the conciliator must issue a certificate stating that the issue is unresolved; and
- the party intending to go on strike or lock-out must give a notice of strike to the other party within a stipulated number of days.

Associated with the considerations of both the substantive and procedural limitations to the right to strike are the concepts of 'protected' and 'unprotected' strikes and the implications thereof. A simple description of a protected strike is one that has complied with both substantive and procedural requirements of a strike, as contemplated in the LRA (Grogan 2014:436-437).

In this instance, employees who participated in the strike are protected from civil litigation that could arise from a breach of contract, delict (civil liability), or dismissal (except for misconduct during the strike), as a result of participation in a strike (McGregor, Dekker, Budeli, Manamela, Manamela & Tshoose 2012:183).

On the contrary, an 'unprotected' strike is one that has failed to comply with statutory provisions. Although participants in an unprotected strike are protected from criminal sanctions, they are still exposed to the prospect of dismissal and are liable to compensation claims by their employer for losses sustained as a consequence of the strike (McGregor *et al*. 2012:196). Unlike a protected strike, an unprotected strike may also be interdicted by the Labour Court.

3. DISPUTES AND DISPUTE RESOLUTION PROCEDURES UNDER THE LRA

The CCMA was established in terms of section 112 of the LRA to provide an institutional platform for dispute settlement between employers and employees through the process of conciliation and arbitration, and to assist in the conduct of labour relations. Disputes that are not resolved through internal settlement procedures, or by Bargaining Councils or accredited private agencies, are referred to the CCMA for conciliation first, before such disputes can be referred for arbitration or adjudication (Grogan 2014:500).

Although the LRA has no clear statutory definition of a dispute, a dispute is generally described as an unresolved disagreement or conflict between an employer or employer organisations and their employees or unions about a matter of mutual interest that escalates to the level that requires an unbiased third party to intervene to resolve the conflict (Van Niekerk *et al*. 2012:430). In general terms, labour disputes are classified as disputes of 'right' and 'interest'. However, different legal authorities (e.g. Basson *et al*. 2009:357; Van Niekerk *et al*. 2012:431-433) have argued that the LRA does not expressly distinguish between different types of rights according to those classifications.

A dispute of right means a dispute about the interpretation or application of a subsisting right in terms of a legislative, collective, or any enforceable agreement, a common law, a contract of employment, or customary practices in the workplace (Basson *et al*. 2009:356). Examples of disputes of this nature can include unfair dismissal, unfair labour practice, unfair discrimination, and breach of a contract of employment; all of which are regulated by existing statutes. Such disputes may be settled through negotiation or conciliation; otherwise, the final recourse is arbitration (CCMA and/or Bargaining Council) or adjudication (the Courts).

On the contrary, a dispute of interest is that which is not yet in existence, but to which a party would like to become entitled in a definite future time (Basson *et al*. 2009:355). Unlike in a dispute of right, the intended right is not yet in existence in terms of a legislation, collective agreement, or contract of employment, but the party intends to create such a right.

This category of rights will include, for example, demand for higher wages and improved conditions of service, such as reduced working hours, improved leave days, the employer introducing of day care facilities at the workplace, etc. Disputes of interest can be resolved

through negotiations between the employer and employee, through conciliation by the CCMA or a Bargaining Council with jurisdiction, or through strike action. The dispute resolution procedure is depicted in Figure 1.

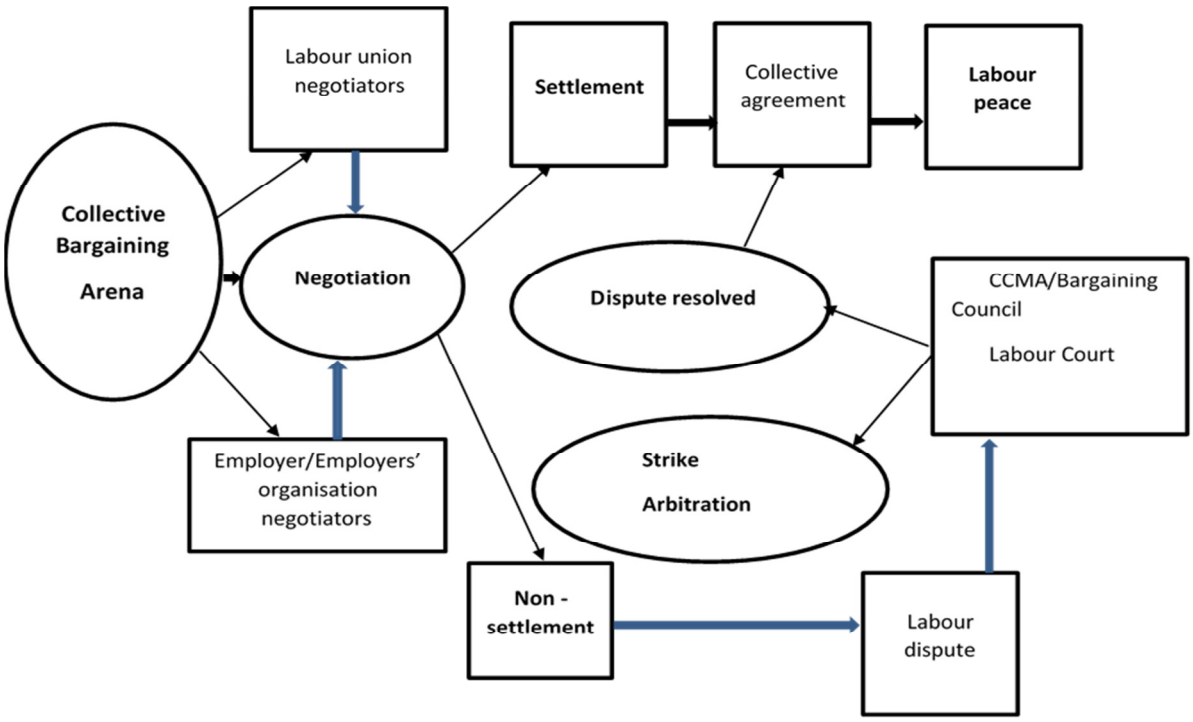

FIGURE 1: Graphic representation of the collective bargaining procedure

Source: Conceptualisation by the author

4. COLLECTIVE BARGAINING AND DISPUTE RESOLUTION PROCEDURES

At the beginning of every negotiating period, employers meet with trade unions (through their respective representatives) to negotiate new wages, conditions of service, and any other matters that are of mutual interest to both parties.

Traditionally, trade unions open negotiations by presenting their demands, while employers respond by making offers (Bendix 2015:449); thus setting in motion the negotiating tactics by both parties. Most often, settlements are not achieved at the first meeting of a negotiation,

which necessitates an adjournment of proceedings to enable representatives of the parties to consult and obtain revised mandates from their principals. The process of negotiation continues, and in most cases, this process is protracted and traditionally positional or distributive, until either a settlement or non-settlement on the subjects of negotiation is achieved. If a settlement or compromise is reached by the parties, a binding and legally enforceable collective agreement is signed, which indicates a peaceful labour relationship between the parties.

However, this is most often not the case in South Africa because negotiations frequently break down, forcing either of the parties (in most cases the union) to declare a labour dispute in accordance with the provisions of s 64(1) of the LRA (see the procedure in Figure 1). The essence of the statutory provision is for the CCMA or relevant Bargaining Council to attempt (re)conciliation of the disputing parties. If conciliation is successful, then a settlement agreement is signed by the parties, which becomes binding; otherwise, an aggrieved party is at liberty to declare an industrial or recourse action, which often times is a strike (trade unions) or lock-out (employer).

The final resolution of a labour dispute is achieved through negotiation, successful industrial action, arbitration, or adjudication (judicial process). It is however noteworthy to mention that a strike is prohibited in terms of Section 65 of the LRA (as explained in above section).

5. SOME PROTRACTED STRIKES IN 2012 AND BEYOND

Strike 'season' has become an established word in the lexicon of the South African labour relations system. Strike season represents the periodic wage negotiation between employers and labour unions, and is most often characterised by violence, intimidation, and vandalism by strikers (Myburgh 2013:4). The court judgement by Landman AJA in a strike by Food and Allied Workers Union at Premier Foods Ltd in 2007 (reported in 2012) provides an illustration of the nature of intimidation and violence that is typically associated with strikes in South Africa:

> "Non-strikers were harassed and intimidated. Employees were visited at their homes by persons who threatened them with physical harm and death. Relatives of non-strikers were also visited in this manner and informed of what would be done to

> family members working at the bakery. One female non-striker was dragged from her home at night and assaulted with *pangas* and *sjamboks*. The vehicle of a non-striker was set alight and destroyed. Shots were fired on this occasion. A neighbour of the non-striker was able to identify the perpetrators. He was subsequently shot and killed near his home. Houses were petrol bombed. Threats to kill senior management were made. Some employees and senior management were provided with security guards. A shot was fired through the security guard's vehicle." (Myburgh 2013:2).

The above statement vividly captures the destructive and violent nature of strike actions in South Africa.

A number of protracted strikes that significantly defined the labour relations landscape in South Africa have occurred in recent years. Defining characteristics of most strikes by workers in South Africa include their unprocedural nature and tendency for violence, intimidation, vandalism, and arson. These characteristics are a clear negation of the intended use of strikes by workers as a mechanism for balancing economic powers. Strike violence has become a form of economic threat that skews collective bargaining power in favour of the workers, distorts the market forces of demand and supply, places tremendous pressure on employers to accede to workers' demands, and intimidates employers to reach a settlement (Myburgh 2013:4).

Statistical evidence provided by the Department of Labour (DoL) in South Africa showed that out of the 99 strike actions by workers in 2012, about 45 did not follow the procedure prescribed by the LRA, and were severely violent (Samuel 2013:248).

A Worker Survey commissioned in 2012 by the Congress of South African Trade Unions (COSATU), which is the largest labour federation in South Africa, provided rather disturbing insight into workers' perceptions of violence during strikes. The survey's findings suggested that about 60 per cent of respondents believed that employers would not accede to workers' demands if strike actions were not violent (Myburgh 2014b:1). The number of strikes in South Africa over the last five years is provided in Table 1.

TABLE 1: South African strike statistics

Year	Number of strikes
2008	57
2009	51
2010	74
2011	67
2012	99

Source: Department of Labour, South Africa, cited in Samuel 2013:248

In 2012, a total of 241,391 South African workers reportedly participated in strikes which resulted in the loss of 3.3 million working days (lost productivity) and striking workers collectively losing over US$ 660 million in wages (Samuel 2013:249). These statistics have a damaging effect on the national economy. South Africa ranked 144th out of 148 countries surveyed by the Global Competitiveness in terms of flexibility in collective bargaining, and also ranked last (out of 148 countries) with regard to employer-employee relationships (Krugel 2013:Internet). These reports are quite concerning.

5.1 The platinum sector strike of 2012

The most violent and morbid strike in post-apartheid South Africa occurred in the platinum sector in February 2012, when 5,000 rock drill operators at Impala Platinum led 12, 000 other mineworkers out on a strike agitating for wage increases. The strike was unprocedural, characteristically violent, with intense intimidation of non-striking workers and other stakeholders (Samuel 2013:249).

The industrial unrest at Impala mines quickly spread across the sector and culminated in what is today popularly referred to as the "Marikana massacre". In August 2012, rock driller operators led 3,000 mineworkers at Lonmin Platinum to declare a wage dispute. The miners demanded that the minimum monthly salary be raised from ZAR 4,000 (about US$ 480) to

ZAR 12,500 (about US$1500) (Samuel 2013:250; Selala 2014:121). Lonmin Platinum's Management refused to negotiate with the representatives of the strikers while the latter ignored all the notices issued by the employer ordering them to return to work.

In the face of defiance and escalation of violence by the striking workers, the company invited the South African Police Services (SAPS) to maintain law and order on its premises, and to protect non-striking workers who were constantly intimidated. On the 16th of August 2012, the ensuing confrontation between the strikers and SAPS resulted in the death of 34 miners, with another 71 injured in the mining town of Marikana (Alexander 2013:605-619).

After a concerted intervention and negotiation by civil society and religious leaders, Lonmin's Management and the striking workers settled for a 22 per cent wage increase, which is the highest increase that has ever been recorded in South Africa. The strikes in the platinum sector resulted in a cumulative loss of revenue and income by both parties, while the national economy experienced a significant drop in the platinum sector's contribution to the Gross Domestic Product (GDP).

5.2 Strikes in other sectors in 2012

Immediately after the platinum sector strikes in South Africa, a wave of other strikes spread rapidly through the gold mine sector and other sectors of the economy. At the Goldfields' KDC West shaft, 15,000 miners downed their tools, followed by 24,000 miners at Anglo-Ashanti Gold; with all demanding wage increases (Dolan & Lakmidas, cited in Samuel 2013:252). Similarly in the coal mining sector, workers at both Forbes and Manhattan Coal and South African Coal Mining Holdings embarked on unprotected strikes in October 2012 to demand wage increases (Kirilenko, cited in Samuel 2013:252). Kirilenko reported that the strikes were characteristically violent, resulting in security guards at Forbes and Manhattan Coal murdering two miners on October 31st 2012.

The unprotected or 'wildcat' strikes in the mining sector have become fashionable across South Africa. Commercial vehicle drivers across the country embarked on a strike demanding a 12 per cent salary increase. The strike was organised under the auspices of the South African Transport and Allied Workers Union (SATAWU), the Professional Transport and Allied Workers' Union SA, and the Motor Transport Workers' Union. In the

automotive sector, Toyota Motor Manufacturers also experienced a four-day wildcat work stoppage at its Durban plant.

Inspired by the events at the Lonmin Platinum mine where miners succeeded in negotiating an unprecedented wage increase using violence, arson, and intimidation, farmworkers in the picturesque Boland town of De Doorns, some 90 miles outside of Cape Town, went on an illegal and violent strike to demand wage increases from a daily amount of ZAR 70 (about US$ 7.85), to ZAR 150 (about US$ 16.90) (Alexander 2013:605-619; Lumet & Qalam, cited in Samuel 2013:253). Following the tactic adopted by the rock drillers at the Lonmin mine, the strike was organised and managed by a group of workers rather than a labour union. Consistent with the previous strikes at Lonmin mine, violence, intimidation, arson, and murder were employed to back workers' demands.

On the 2nd of July 2014, members of the National Union of Metalworkers of South Africa (NUMSA) embarked on a supposedly peaceful strike over demand for wage increase in the steel, metal, and engineering sector, which lasted for one month. The striking workers destroyed Vulcania Company's reinforcing windows and personal vehicles, and attempted to burn the company's transformer using a petrol bomb (South Africa Today 2014: Internet). A similar four-week strike in 2013 by more than 30,000 NUMSA members working in major auto-manufacturing companies cost the industry around US$ 2 billion in lost output (Shabalala 2014:Internet).

5.3 The AMCU strike of 2014

The longest labour strike in the history of labour relations in South Africa occurred in January 2014, involving about 70,000 members of the Association of Mineworkers and Construction Union (AMCU). The strike, which lasted for 5 months, was in support of the union's demand for wage increases. The strike affected three mining companies (Anglo American Platinum, Impala Platinum, and Lonmin Platinum), who collectively lost a total revenue of close to US$ 2.4 billion, while the striking workers lost about US$ 1.06 billion in unpaid wages, as the rule of "no work, no pay" applied (Solomons 2014:Internet). The strike resulted in negative economic growth in South Africa and a dwindling GDP in the first quarter of 2014 (Bhorat, Naidoo & Yu 2014:12-14). The AMCU strike was also characterised by intense violence and

intimidation of non-striking workers. The strike did not conform to the procedure stipulated by the relevant section of the LRA, which regulates industrial action.

The strike was therefore illegal, which rendered the application of an institutionalised dispute resolution mechanism ineffective. The striking workers defied court interdicts and intensified the illegal strike. In keeping with the principle of 'voluntarism', which inhibits government from interfering in collective bargaining processes between employers and labour unions, government was also unable to end the strike, despite its negative consequences for the country's economy. This statutory inhibition prompted the South African Attorneys Association to suggest that the DoL should consider an amendment to the LRA to extend compulsory wage arbitration as a deadlock-breaking mechanism in protracted strikes (South African Labour News 2014:Internet). Such provision is currently only applicable to essential service workers.

According to security analyst David Davies (cited in Samuel 2013:254), one important conclusion that can be drawn from these strike actions is the significant long-term ripple effects on affected employers, individual employees and their dependants, associated industries, government revenue and economic growth.

6. INABILITY OF GOVERNMENT TO INTERVENE IN PROTECTED STRIKES

Given the gravity of the negative impact of protracted strikes on the social and economic life of South Africa, the expectation would be that government, as the custodian of law and manager of the national economy, should be able to bring an end to crippling strikes. However, government is incapacitated by the operation of the principle of voluntarism, which guides the collective bargaining system and precludes any form of government intervention in the collective bargaining system (Constitution of South Africa 1996:S23 (5)).

This constitutionally inspired principle is further reinforced by the economic right of workers to strike, as enshrined in the LRA. Both concepts represent an important component of a successful collective bargaining system. The principle of voluntarism is in compliance with the international law obligations of South Africa as a signatory to the ILO Conventions on freedom of association (87) and collective bargaining (98).

The ILO's "Organising for social justice – Global Report 2004" (cited in Van Niekerk *et al*. 2012:369) describes collective bargaining as:

> "A process in which workers and employers make claims upon each other and resolve them through a process of negotiation leading to a collective agreement that is mutually beneficial. In the process, different interests are reconciled. For workers, joining together allows them to have a more balanced relationship with their employer. It also provides a mechanism for negotiating a fair share of the results of their work, with due respect for the financial position of the enterprise or public service in which they are employed. For employers, free association enables firms to ensure that competition is constructive, fair, and based on a collaborative effort to raise productivity and conditions of work."

7. STATUTORY DUTY TO BARGAIN

While the LRA intends for collective bargaining to represent a mechanism through which employers and employees can reach consensus in all matters of mutual interest and achieve industrial peace and stability in the economy, the Act does not compel or impose any duty on both parties to bargain (Brand 2011:3; Grogan 2014:409; Van Niekerk *et al*. 2012:370). This voluntary nature of collective bargaining could explain why the Courts cannot intervene in the process, since there is no judicially enforceable duty to bargain in the statute. Therefore, the LRA merely facilitates rather than prescribes the modalities for collective bargaining.

Out of the three models considered in the draft Labour Relations Bill, the option that enables both the employer and employees to determine matters that are of mutual interest, through the exercise of power and the statutory provision of organisational rights and a protected right to strike was preferred (Van Niekerk *et al*. 2012:370). In order to avoid a reckless application of the rights accorded unions to declare a strike should the employer refuse to bargain, the LRA provided that such a dispute must be referred to advisory arbitration, in order to persuade the employer to agree to bargain. Regrettably, the only statutory jurisdiction and power of the Labour Court in respect of strikes by workers is limited to the interdiction of 'unprotected' strikers (section 68(1)(a) of the LRA), while 'protected' strikers are allowed to perpetuate a 'peaceful' strike indefinitely.

The following section articulates some pragmatic and alternative dispute resolution strategies that could be effective ways of managing protracted strikes and platforms through which government could intervene in such strikes.

8. PROPOSITIONS FOR DISPUTE RESOLUTION AND INTERVENTION IN PROTRACTED STRIKE

8.1 Legislative amendment

The statutory limitation of government's intervention in protected strikes (even through the judicial process) has led various labour experts to propose amendments to the relevant provisions of the LRA, in order to provide alternative dispute resolution mechanisms. For example, Rycroft (Cited in Myburgh 2013:7) argued against the continued protection of a procedural strike that turns violent and is characterised with misconduct. According to Rycroft (cited in Myburgh 2013:7), "these suggestions are grounded on the constitutional understanding of a strike; it is for the purposes of collective bargaining. If behaviour during the strike is destructive of that purpose then the protected status has been jeopardised".

The essence of Rycroft's (cited in Myburgh 2013:7) argument echoes section 69(12), which was recently amended by Act No. 6(50) of the Labour Relations Amendment Act, 2014. The amendment now empowers the Labour Court to grant an urgent interim relief in the event of a breach of picketing rules. However, the amendment does not give the Labour Court the enabling power to interdict a strike on account of violence; it is restricted to violence committed within the employer's premises (Myburgh 2013:7).

In this article it is proposed that a better mechanism for ending violent strikes would be the reinstatement of the provision of the defunct LRA of 1956, which empowered the Court to suspend a violent strike.

8.2 Adoption of deterrent judicial awards

Within the labour circle, there is thinking that the Labour Court should adopt a more deterrent approach in dismissal cases that involve workers who have participated in unprotected strikes (Myburgh 2013:1-10). This school of thought is informed by the rigid test for dismissal set by the Constitutional Court (in Sidumo & Another vs. Rustenburg Platinum

Mines Ltd & Others (2007) 28 ILJ 2405 (CC)), which makes it explicitly difficult for employers to sustain a dismissal case against an unprotected striker (Myburgh 2013: 1-10). Item 6 of the "Code of Good Practice – Dismissal" argues that participation in an unprotected strike is a form of misconduct, which does not always deserve dismissal (Myburgh 2013: 1-10). Although item 6 is not statutory, it is very instructive with regards to what needs to be considered before an employee who participated in an unprotected strike is dismissed.

Based on the reasoning by the above school of thought, it is recommended that there is a shift away from the employer carrying the burden of strike. Instead, strikes and their related consequences should be the liability of the strikers and or their unions, and not that of the employer. In order to achieve this purpose, it will be appropriate for the Courts to award substantial compensation to employers for losses sustained as a result of an unprotected strike, as provided for in section 68(1)(b) of the LRA (Myburgh 2013:1-10). This section of the LRA could be amended to impose more severe liability on unions whose members are identified or associated with violence and the destruction of public, private, or employers' property in the course of a strike.

Although the proof of identification and evidence (and cost evaluation) against offenders could be cumbersome and completely rest on the employer or the individual seeking aggravated compensation, it could nevertheless serve as a deterrent and cause unions to be accountable and act more responsibly in the conduct and management of subsequent strikes. Support for this option was alluded to by Judge Steenkamp in 2Food (Pty) Ltd versus the Food and Allied Workers Union ("FAWU"), where he asserted that "the time has come in our labour relations history that trade unions should be held accountable for the actions of their members. For too long, trade unions have glibly washed their hands of the violent actions of their members" (Myburgh 2014a:111). Steenkamp held that FAWU's actions had undermined collective bargaining and that:

> "there is no justification for the type of violent action that the respondents have engaged in, in this instance. And alarmingly, on the evidence before me, the union and its officials have not taken sufficient steps to dissuade and prevent their members from continuing with their violent and unlawful actions" (Hart 2013: Internet).

Judge Steenkamp imposed a fine of US$50,000 on the union. Similar sentiments regarding unions' failure to accept accountability for the violent conduct of their striking members have also been expressed in various Labour Court judgments by judges Basson, Van Niekerk and others (Myburgh 2014a:120).

8.3 Pre- and during-strike ballots

The DoL is currently rethinking implementation of the provision of section 95 (p) of the LRA regarding strike ballots by members of a trade union that has declared strike action on behalf of its members (Selala 2014:123-125). In the past, the LRA does not make this statutory provision a compulsory requirement for a strike to happen, neither do non-compliance by unions render such a strike illegal or unprotected. Furthermore, non-compliance with the statutory provision does not necessarily constitute a ground for litigation that could affect the legality of the strike and also the protection enjoyed by the striking workers.

Although the Constitution of labour unions, such as the National Union of Metalworkers of South Africa (NUMSA) and the South African Democratic Teachers' Union (SADTU), provided for strike balloting, they never complied with it, which made such a provision a mere 'decorative statement'. The practice in reality is for union leaders to call for a 'voice vote' or show of hands by their members to determine majority support for the proposed strike. This practice was aptly demonstrated in the protracted five-month AMCU strike in the platinum sector in 2014.

Mandate to continue or discontinue a strike is obtained through an occasional meeting of membership where a 'yes' or no' vote is taken. Such mandate-taking meetings are often conducted openly amidst palpable tension, fear, and intimidation. Predictably, the outcome in most cases is in favour of continuation and or escalation of the subsisting strike. However, in the AMCU strike discussed above, management of the affected mining companies conducted an opinion poll of striking workers by sending direct Short Message Services (SMSes) to the cellular phones of individual workers; this was to determine the percentage of striking workers who would like to end the strike and return to work.

The outcome of the poll indicated that majority of the striking workers were keen to return to work. However, the tactics adopted by management to break the strike did not succeed, as

workers who attempted to return to work were intimidated, some were murdered, and others had their homes burned by people believed to be acting on behalf of the union.

The DoL is thinking about a legislative amendment to compel both existing and prospective labour unions to make provisions for a compulsory pre-strike balloting in their respective Constitutions. The Head of Policy and Industrial Relations at the DoL (Thembinkosi Mkalipi) reiterated this by emphasising the need for both new and old unions to comply with this requirement, while existing unions that do not have such provisions should be given a deadline to amend their Constitutions accordingly (Musgrave 2014:Internet).

The DoL has further demonstrated its intention to enforce the pre-strike ballot provision by making its inclusion in union Constitutions a pre-registration requirement for the newly formed South African Public Service Union (SAPSU) and the Liberated Metalworkers of South Africa (LIMUSA) (Musgrave 2014:Internet). For section 95 of the LRA to be more effective, some labour analysts have proposed that strike votes should be conducted through a 'secret ballot system', in order to protect the identity of voters against intimidation or victimisation by other union members and leadership. Furthermore, such balloting should be held at the commencement and at intervals during the strike, in order to determine whether majority of the striking workers are still keen to continue with the strike (Levy 2014:3; Myburgh 2014:109-120; Selala 2014:123). Although some union officials have raised concerns around the implementation of the balloting requirement, labour analysts have suggested that the CCMA should assume responsibility for the conduct of such ballots, in order to make it transparent, objective, and democratic (Myburgh 2014a:109-120). This process will confer credibility and integrity on the outcome of the ballot.

8.4 Compulsory interest arbitration

Under the auspices of the CCMA, arbitration is generally regulated by sections 136-138 of the LRA. This is a compulsory intervention by a neutral third party (called a commissioner) who, unlike in conciliation, is vested with the power to take on a decision-making role (and make awards) in a dispute between parties. Arbitration awards are final and binding on the parties and can only be reviewed by the Labour Court. Different forms of arbitration include advisory arbitration, conciliation-arbitration procedures (*con-arb*), and pre-dismissal arbitration (Van Niekerk *et al.* 2012:438-439). However, discussion in this article will be

limited only to arbitration in terms of section 139 of the LRA, which relates to dispute resolutions involving essential service workers.

Section 65(1) of the LRA prohibits workers who are engaged in essential services from embarking on a strike. Section 213 of the LRA defines an essential service as one that if interrupted, "endangers the life, personal safety, or health of the whole or any part of the population". The prohibition of the fundamental right of workers in essential services to strike was necessitated by the need to balance other fundamental rights, such as the rights to health care, food, water, and social security (Brand 2011:111).

For example, soldiers in the South African Defence Force, law enforcement members of the SAPS, correctional services, and other law enforcement agencies are classified as essential services (Grogan 2014:447). Similarly, medical service personnel in the public sector and others such as fire fighters, air traffic controllers, and parliamentary service employees are statutorily prohibited from embarking on a strike. This statutory exclusion from participation in a strike is intended to protect life and property of the citizenry and enhance the proper functioning of society. However, because of the constitutional provision for 'everyone' and statutory recognition for 'every worker' to exercise their right to strike (subject to certain limitations), the LRA provided a special platform (compulsory arbitration) for workers in essential services to also engage in collective bargaining with their employer or employer organisations (Brand 2011:3-4).

Other than strike action, the compulsory arbitration process provides this category of workers with an effective institutionalised mechanism of maintaining power equilibrium at the bargaining table (Brand 2011:3-4). It will be useful to emphasise here that it is not every worker who is employed in the essential services work environment that is prohibited from striking; this provision is limited to workers who are engaged in the provision of 'core' or 'maintenance' services in terms of section 72 of the LRA. For example, employees who perform administrative duties at the SAPS may go on strike, but not those engaged directly in law enforcement.

In addition, maintenance services refers to the operational part of the work, of which strike action may result in damage to material, physical structures, or machinery in that workplace (Van Niekerk *et al*. 2012:408-409). For instance, workers who are engaged in power

generation and core maintenance services at the electricity company of South Africa (ESKOM Holdings (Pty) Ltd.) are prohibited from embarking on any strike called by a trade union like NUMSA; withdrawal of services in this section of the utility company would disrupt power generation, which is essential to the living and economic sustainability of South Africa.

Given the application of compulsory arbitration in the essential services sector, the argument in the labour circle is that legislation should be amended to make provision for compulsory interest arbitration in protected strikes that have endured for a certain length of time without any prospect of settlement between the parties. The reasoning in this regard is that such statutory intervention would mitigate the extent of damage that problematic strikes like those by AMCU and NUMSA (discussed earlier in this article) could cause to the economy.

A legislation of this nature may prescribe the manner and process of the intervention, in order to ensure fairness and equity for the disputing parties. For example, disputing parties may be at liberty to appoint preferred and separate arbitrators who are adjudged as reputable members of society (e.g., retired judicial officers, senior members of the bar association, clergy/religious leaders, etc.). Essentially, arbitrators should be persons who have no direct interests in the dispute under arbitration, while the CCMA facilitates the process. The body of arbitrators may be empowered, amongst others, to order an immediate suspension of a strike, pending the determination of the dispute. The determination of the arbitrators (awards/orders) shall remain final and binding on the parties, but reviewable by the Labour Appeal Court.

9. CRITICISM OF COMPULSORY INTEREST ARBITRATION

A number of criticisms have been raised against interest arbitration, which range from its incompatibility with the principle of free collective bargaining, to parties' tendency to be reluctant in effectively engaging in collective bargaining and rather choosing to rely on the outcome of interest arbitration (Kochan, Lipsky, Newhart & Benson 2010:566-567). The authors contended further that parties tend to withhold concession during negotiations or hold extreme positions, believing that the arbitrator would give a 'compromise' award (i.e., mid-point between minimum and maximum offer and demand). Providing reasoning in support of the merits of compulsory interest arbitration, the Supreme Court of Appeal in

South Africa in the SANDU versus The Minister of Defence and Others had the following to say:

> "Secondly, proceedings before an arbitrator are remarkably akin to a process of bargaining. Each party presents facts and arguments to which the other is at any time entitled to respond by making an offer to negotiate or to settle. Thirdly, the prospect of third party determination is a powerful incentive to parties to settle. This is a well-known phenomenon in the civil courts and other forums flowing from the fact that each party would rather negotiate an outcome that is more or less acceptable to it, than be faced with a less acceptable outcome imposed by an outside decision-maker. The incentives to negotiate may, in these circumstances, be even more powerful than those operating in the case of economic pressure. A weak union might, through the process of rational debate before an arbitrator, achieve a better result than by exerting such little economic pressure as it is able to bring to bear. On the other hand, a strong union might have a better chance of gaining larger concessions by striking than by resorting to arbitration. But it is certainly not true to say that the arbitration option is so feeble a remedy that it cannot serve as a substitute for the economic pressure that would ordinarily set the bargaining process in motion" (BLLR 1043 (SCA, paragraph 24).

Evidence from both the USA and Canada showed an extensive application and remarkable success of interest arbitration, with an achievement of comparable outcomes in wages determined through compulsory arbitration, to those achieved through negotiations (Kochan *et al.* 2010:583).

10. CONCLUSION

The direct consequences of the inherent imbalance in the social and economic powers between the owners of capital and labourers has often resulted in the use of violence and self-help by the latter to either protect their jobs or agitate for wage increases. However, these attempts are often met with the use of extreme economic power by capitalists, in order to protect their own economic interests.

The advent of constitutional democracy in South Africa (1994) brought about significant reforms in the country's labour relations system. Progressive labour legislation (e.g., the LRA and the Basic Conditions of Employment Act No. 75 of 1997) that was derived from internationally recognised labour standards and practices was enacted to regulate relationships between business and labour.

Regardless of the seemingly progressive provisions of labour legislation (which business has often characterised as severely skewed in favour of labour), it has become almost impossible to extricate violence, intimidation, arson, vandalism, mortality, and flagrant disregard for court interdicts in the execution of strike actions by workers. Most of the strikes in South Africa in recent times have been severely violent, protracted, and destructive, thus resulting in aggravated loss of productivity and profits by employers, unearned wages by striking workers, and collectible revenue by government. The resultant cumulative effects of this is stunted economic growth, an increase in the unemployment rate as a result of retrenchment by companies who have suffered paralysing strikes, and social dislocation in society.

This article was informed by the perceived deficiency in the country's labour legislation, which inhibits government from intervening in protracted and economically spiralling strikes. While recognising the principle of voluntarism in the collective bargaining system, and the fundamental and statutory right of workers to strike, the time has come for a meaningful amendment to relevant labour legislation, in order to incorporate pragmatic dispute resolution and defined statutory provisions that enable government to intervene in protracted and problematic strikes. This consideration has become a necessity to avoid the kinds of rampant, economically paralysing and socially dysfunctional strikes that have seemingly characterised the collective bargaining system in contemporary South African labour relations practice.

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