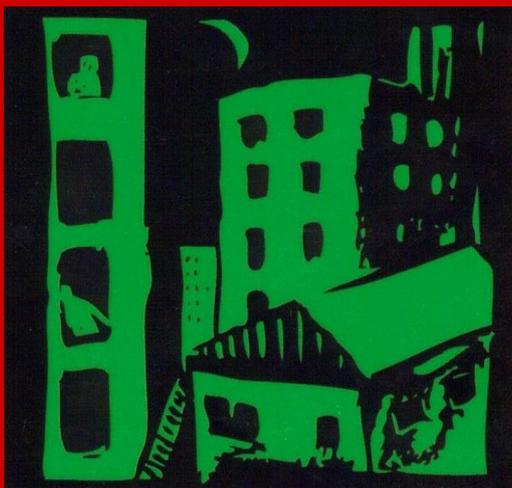


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Is the employer compelled to provide safe working conditions to employees during a violent strike?

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ABSTRACT

The law entrusts employers with a duty to provide employees with safe and healthy working conditions. However, it becomes challenging to discharge this duty if employees embark on a violent strike. The violence is usually directed or instigated against non-striking workers and replacement labour. Since violence during strikes has become a norm in the South Africa and affects both the way employers conduct their business and the staff that are not on strike, the article suggests that employers should arm and prepare themselves for the worse conditions. The non-striking employees become vulnerable to attacks by fellow striking employees. The result is that production or the delivery of services is interrupted or does not occur. The law is

not clear on what should happen to employees who do not discharge their duties as a result of fearing for their lives. The article submits that due to fragile conditions during a violent strike, the employer should provide employees with unpaid leave to protect them from violence. This may alleviate fears that such employees might lose their employment due to absence from work. The article further suggests that unions should demonstrate a form of social responsibility when negotiating with the employer.

Key words: Strike; violence; safe and healthy working conditions; non-striking workers; unpaid leave; responsible trade unionism.

1 INTRODUCTION

There is a general duty placed on all employers to ensure that the workplace in which employees work is safe. However, this duty gets distorted when employees embark on a violent strike where strikers commit various unacceptable acts ranging from attacks on non-striking employees and replacement workers, to damage to property and intimidation. The commission of these acts has become the norm in South Africa when the employer and trade unions are at loggerheads regarding issues affecting them in the workplace. Because of the violent nature of industrial action in South Africa, non-striking employees and workers who are brought into the workplace as scab or replacement workers become victims of attacks by striking workers. Workers are attacked on their way to and from their places of work.¹ In terms of the law, employers are obliged to ensure that workers are safe when they discharge their obligations.² The question that arises is whether the employer's duty to provide a safe working environment extends to circumstances where violence has erupted. This article argues that it may be difficult for the employer to guarantee the safety of both employees and replacement workers during a violent strike, as violence mostly takes place outside the workplace. The article recommends that it would be advisable that the employer grant these employees unpaid leave, until such time that the strike has come to an end or conditions have normalised. The article argues that the employer should desist from employing replacement workers until such time as the violence has calmed down.

2 THE COMMISSION OF VIOLENCE DURING STRIKES AND ITS EFFECT ON NON-STRIKING WORKERS

The Constitution of the Republic of South Africa (Constitution)³ grants every worker the right to strike.⁴ Although the Constitution grants the right to strike to an individual worker, this right can only be effective if exercised by a group of employees acting in

¹ See *Mahlangu v SATAWU, Passenger Rail Agency of SA & another* (2014) 35 ILJ 1193 (GS).

² Sections 8 & 9 of the Occupational Health and Safety Act 93 of 1985.

³ Constitution of the Republic of South Africa, 1996.

⁴ Section 23(2)(c) of the Constitution.

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concert.⁵ It has been a tradition in South Africa that the right to strike is exercised under the stewardship of a trade union. This, however, does not mean that it is a requirement that employees must first join or be members of a trade union before they are eligible to strike.⁶ The Labour Relations Act (LRA)⁷ in section 64(1) requires nothing more than 48 hours' notice in advance of a strike. This means that in a workplace where there is neither a collective agreement prohibiting a strike for a particular period, nor a trade union, the right to call a strike is enjoyed by any group of employees elected by the employees in the workplace. Such employees can convene a strike if they comply with the provisions of sections 64(1) and 65(1) of the LRA. An example of this practice is found in the private sector where union density is around 25 per cent, and employees participate in a strike even in the absence of a union.⁸

The exercise of the right to strike and other associated rights, such as picketing, have been a source of unrest in the South African labour landscape as workers use violence to voice their grievances.⁹ This is borne out by the fact that in a 2012 poll, around half of Congress of South African Trade Unions (COSATU) members surveyed saw violence "as an accessory to achieve an acceptable result".¹⁰ During a violent strike, non-striking employees are even prevented from accessing their workplaces because of assault and other forms of intimidation.¹¹ This conduct continues for a long period since strikes in South Africa often take a long time to be resolved.¹² The absence of quick solutions to labour problems signal strained labour relations between employers and

⁵ Section 213 of the Labour Relations Act 66 of 1995 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 the employer and employee, and every reference to 'work' in this definition includes overtime work, whether it is voluntary or compulsory".

⁶ *Equity Aviation Services (Pty) Ltd v SATAWU & others* (2011) 32 ILJ 2894 (SCA) at para 16.

⁷ Labour Relations Act 66 of 1995.

⁸ See generally Msila X *Trade union density and its implications for collective bargaining in South Africa* (unpublished MBA mini-thesis, University of Pretoria, 2018).

⁹ Myburgh A "Interdicting protected strikes on account of violence" (2018) 39 ILJ 703 at 705.

¹⁰ Eleventh COSATU Congress Secretariat Report para 10.8.3. A typical comment received from workers was this: "strike [action] is the last resort for workers, after negotiations fail, when we go on strike we lose wages thus we use violence to make sure that the employer listens to our demands fast so that we can go back to work".

¹¹ In Cape Town, trains were torched during a strike organised by SATAWU.

¹² An example of the longest strike in South Africa since the dawn of democracy took place in the platinum industries. The strike lasted for four months. It started in February 2014 and ended in June 2014.

trade unions, resulting in loss of production, loss of profit, and the eventual retrenchment of employees.¹³

In *SA Chemical Workers & others v Afrox Ltd*¹⁴ the employer dismissed its employees after they participated in a strike that was characterised by violence. The employer argued that the dismissal was based on operational requirements.¹⁵ The Labour Appeal Court (LAC) upheld the decision of the employer. In confirming the employer's decision to dismiss strikers on account of operational requirements, the LAC considered the functional limits of a protected strike. Such limitations include the fact that a strike must be functional to collective bargaining. A strike that threatens the continued existence of the business of the employer¹⁶ and a prolonged strike which could not bring about a compromise cannot be regarded as functional to collective bargaining.¹⁷

Rycroft opines that the phrase "functional to collective bargaining" is grounded in the constitutional understanding of a strike, namely, that it is for the purposes of collective bargaining.¹⁸ Hence, if the strike is destructive of that purpose, it then becomes a cause for concern with dire consequences for the economy and social stability, inside and outside the workplace. In the workplace, violent strikes fuel tension and create friction in the employer's workforce as those who are out on strike tend to attack non-striking workers, thereby preventing them from discharging their contractual obligations. This calls into question the justifiability of the conduct of the strikers and whether the right to strike supersedes the rights of non-striking employees and other workers, such as replacement labour, not to be subjected to any form of violence whether public or private,¹⁹ or restricts their right to freedom of association²⁰ or freedom of movement.²¹

It must be noted, however, that participation in a strike is not an obligation and that some employees may choose not to exercise this right and continue with their normal duties in terms of their contracts of employment. The idea behind the withdrawal of labour in the form of a strike is to put economic pressure on the employer to heed employees' demands and perhaps see the need to bargain fruitfully with unions before there is substantial damage to the business. The Constitution enjoins participants in a

¹³ Section 67(5) of the LRA.

¹⁴ *South African Chemical Workers & others v Afrox Ltd* (1999) 20 ILJ 1718 (LAC) at paras 29-30.

¹⁵ Dismissal on the basis of operational requirements is regulated in s 189 of the LRA.

¹⁶ *AMCU v AG Gilles (Pty) Ltd* (1996) 17 ILJ 291 (IC).

¹⁷ *NUMSA v Vetsak Co-operative Ltd & others* (1996) 17 ILJ 455 (A) at 477F-G.

¹⁸ Rycroft A "Can a protected strike lose its status" (2012) 33 ILJ at 821.

¹⁹ Section 12(1)(c) of the Constitution.

²⁰ Section 18 of the Constitution.

²¹ Section 16(1) of the Constitution.

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strike and/or conduct in furtherance or contemplation of a strike, such as a picket, to be peaceful.²² Despite this constitutional commitment, industrial action in South Africa is often characterised by violence.²³ Violent strikes not only have an effect on non-striking and replacement workers; many people, including civilians, are injured or killed and property gets damaged.²⁴

In certain instances, the lines become blurred between a strike and a protest action. As stated above, a strike is regulated by the LRA, but when it develops into a protest action it is regulated by the Regulation of Gatherings Act (RGA)²⁵. A case that illustrates this is *South African Trade & Allied Workers Union (SATAWU) v Garvas & others (Garvas (2012))*.²⁶ In this case a gathering organised by SATAWU started as a strike in Cape Town in May 2006. The gathering complied with the initial procedures prescribed by the RGA, in that the union was granted permission by the local authority and it had appointed about 500 marshals to manage the movement of the crowd. It apparently advised its members to refrain from any unlawful and violent conduct and requested the local authority to clear the roads of vehicles and to erect barricades along the prescribed route on the day of the gathering. Despite all these attempts by the union, the demonstration got out of hand. In the union's own words, it "descended into chaos", with extensive damage to vehicles and shops along the route.²⁷ Several people were also injured. The total damage caused to property (private and owned by the City of Cape Town) was estimated to be around R1.5 million. Consequently, claims for damages were instituted against *SATAWU* in terms of section 11(1) of the RGA. The Court held that the union had failed to take reasonable steps to avoid damage in terms of section 11 of the RGA, and was liable for the damage caused.

The question that arises is why there is violence against fellow workers. The answer is that the aim is to persuade or force the non-striking employees not to continue working during a strike, as this will diminish the attempt to inflict economic harm on the employer. In addition to compromising the safety and security of the non-striking employees, the attack on, or intimidation of these employees has the effect of

²² Section 17 of the Constitution.

²³ Van Niekerk J put it in *National Union of Food Beverage Wine Spirits & Allied Workers & others v Universal Product Network (Pty) Ltd: In re Universal Product Network (Pty) Ltd v National Union of Food Beverage Wine Spirits & Allied Workers Union & others* (2016) 37 ILJ 476 (LC) (*UPN*) at para 37 that "it is regrettable that acts of wanton and gratuitous violence appear inevitably to accompany strike action, whether protected or unprotected ... A week in the urgent court where employers seek interdicts against strike related misconduct on a daily basis bears testimony to this".

²⁴ *South African Trade & Allied Workers Union (SATAWU) v Garvas & others* (2012) 33 ILJ 1593 (CC).

²⁵ Act 205 of 1993.

²⁶ (2012) 33 ILJ 1593 (CC).

²⁷ *SATAWU v Garvas & others* (2011) 6 SA 382 (SCA) at 238F.

eroding the individual worker's freedom to choose whether to strike or not, by forcing them to not go to work because of violence. The International Labour Organisation²⁸ (ILO) has described the use of violence during a strike as abuse of the right to strike, while the Labour Court has labeled it collective brutality and that it results in economic duress.²⁹ In this regard, the employer is scared into settlement, not to avoid the economic harm caused by the continued strike per se but rather to avoid the harm caused by violence.³⁰

Violence accompanied by the destruction of employer's property is also risking a company's ability to meet the wage demands. For example, the fruit workers' strike that spread across the Western Cape Province in January 2013 saw workers inflicting damages totaling tens of millions of dollars. This included destruction, such as, setting crops on fire and destroying buildings and agricultural equipment. An alarmed farming industry chose to settle negotiations quickly in an effort to curb further destruction and loss of investment. It is clear that the effect of violence during industrial action is the disturbance of the equal balance in collective bargaining between employers and employees – something that the LRA seeks to achieve.³¹ When it comes to strike action the employees, subject to certain limitations, have the right to strike and all the protections that go with it. They also have the right to engage in conduct in contemplation or in furtherance of the strike on a protected basis.³² This is balanced by the employer's entitlement to lock-out employees in response to the strike and to engage the services of replacement labour³³, which, in turn, is balanced by the strikers' right to engage in peaceful picketing.³⁴ Thus, if part of the employer's workforce is out on strike and another section of the workforce continues to discharge their contractual obligations, the employer's workforce will be divided into two categories – those who choose to go on strike and those who choose not to strike. In addition, employers can hire replacement workers during a strike to keep production going. This becomes the

²⁸ Gerngon B, Odero A & Guido H *ILO principles concerning the right to strike* Geneva: ILO (1998) states at 42: "Abuses in the exercise of the right to strike may take different forms [including] damaging or destroying premises or property of the company and physical violence against persons."

²⁹ *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Workers Union & others* (2012) 33 ILJ 998 (LC) at para 11.

³⁰ See *Stuttafords Department Stores Ltd v SA Clothing & Textile Workers Union* (2001) 22 ILJ 414 (LAC) at para 24.

³¹ Section 1 of the LRA.

³² As Zondo AJ found in *Steenkamp & others v Edcon Ltd (NUMSA intervening)* (2016) 37 ILJ 564 (CC) at paras 173–174: "The only limitation to this extensive right is that such conduct may constitute a criminal offence. Conduct referred to in section 67(2) would include the calling of a boycott of the products of the employer. It would also include the union and workers *peacefully dissuading potential temporary workers not to take up employment with the employer for the duration of the strike.*"

³³ *Technikon SA v National Union of Technikon Employees of SA* (2001) 22 ILJ 427 (LAC) at para 43.

³⁴ *Ntimane & others v Agrinet t/a Vetsak (Pty) Ltd* (1999) 20 ILJ 896 (LC) at para 18.

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root cause of friction between striking, non-striking, and replacement labour. On the other hand, unions view the employment of replacement labour as a way of distorting their collective action, which is primarily aimed at halting production and profit-making. Eventually, the union's objective will be defeated if the employer is allowed to continue production through the use of replacement labour.³⁵

It is believed that through withdrawal of labour the employer will reconsider their position by either heeding union demands or accelerating negotiations to find a solution to disputed issues. In this regard, where the labour potential of employees is replaced by the employment of replacement workers, a strike will lose its potential to remedy a grievance or to resolve a dispute between the parties.³⁶ Once the employer has appointed replacement labour, it is believed that the desire to reach an agreement is removed, as the employer will be able to continue to operate as usual while the regular workforce is out on strike.

However, the suspension of production, through the downing of tools in the form of a strike, is temporary until such time that the parties reach an agreement on the disputed issues. To allow employers to continue with production during a strike through the use of replacement labour is viewed by trade unions and striking employees as an indirect way of strengthening the bargaining and economic position of employers, while robbing the strike of much of its intended effect: inflicting economic harm on the employer. This is disputed by the fact that the continuation of a business during a strike has the advantage of ensuring that it continues to operate, even after the strike has ended. This is contrary to a situation where the business completely shuts down due to non-operation, with eventual loss of jobs and subsequent poverty.

The employer's decision to continue with operations during a strike is determined by two extremes: on the one hand, the non-feasibility of operating during a strike, versus, on the other hand, the feasibility or desirability of the company/employer operating during a strike. Brassey³⁷ argues that

“a systemic remedy is crucial if this scourge [ie strike related violence] is to be dealt with properly. Compassion dictates as much; so, do considerations of the maintenance of law and order; and so, does the proper interplay of collective bargaining, which centrally depends on non-strikers and replacement labour to keep production going. Without this, the collective agreement, which should be dictated by the forces of supply and demand, cannot find its proper level”.

³⁵ Section 213 of the LRA.

³⁶ Section 213 of the LRA.

³⁷ Brassey M “Fixing the laws that govern the labour market” (2012) 33 *ILJ* 1 at 16.

Thus, the employment of replacement labour has the advantage of keeping the business running while full-time employees are out on strike. The LRA excludes essential services workers and maintenance services workers from participating in a strike.³⁸ This means that during a strike three categories of workers can be found in the employer's workplace: essential service workers, replacement workers and non-striking working employees. Although the employer is allowed to keep these categories of workers in their workplace during a strike, the safety of these workers is not guaranteed when a strike has turned violent. The employer can make provision for their safety while performing their duties and during working hours. However, the employer cannot guarantee their safety outside the workplace, as these workers normally are attacked on their way to and from work. Evidence has shown that the victims of strike-related violence are more vulnerable when they are outside the employer's workplace. For example, during a security guards' strike in 2006, the South African Broadcasting Corporation (SABC) reported that workers who were believed to be replacement workers were attacked and thrown off moving trains.³⁹

Violence forces the employer to agree to the demands of employees in order to avoid continuing attacks on non-striking workers and replacement labour, as well as damage to property. This is illegitimate because violence effectively increases participation in the strike even by those who had not initially intended to participate, but are now forced to withdraw their labour and perhaps stay at home in fear for their lives. The end result is that the focus changes from the real issues affecting the parties to forming new strategies for addressing violence. In this regard, the employer feels compelled to accede to union demands, but not because of the forces of supply and demand for which collective bargaining is designed. Employers can feel a sense of compulsion and be held hostage by circumstances beyond their control, and end up raising wages or acceding to union demands. In a situation where wage negotiations have deadlocked and employees decide to embark on a strike which turns out to be violent, they indirectly place their employer under economic duress to settle on their terms. As a result of violence, employers are confronted with difficult choices, especially when their employees fall victim to violent threats in the workplace. As a result of violent strikes, non-striking workers have been described as undisciplined and are criticised by some union leaders. For example, in 2013 during a strike by petrol attendants called by the National Union of Metalworkers of South Africa (NUMSA), Irvin Jim (the general secretary of NUMSA) referred to non-striking workers as "undisciplined".⁴⁰ A Somali petrol attendant was thereafter killed, allegedly by

³⁸ Section 65(1)(d) of the LRA.

³⁹ Tenza M "The link between the use of replacement labour and the eruption of violence during industrial action" (2016) *Obiter* 37(1) 106 at 114.

⁴⁰ Guest author "NUMSA to address claims of intimidation towards non-strikers" *The Mail & Guardian* 10 September 2013 available at <https://htmg.co.za/article/2013-09-10-numsa-addresses-claims-of-intimidating-strikers/#:~:text=Numsa%20general%20secretary%20Irvin%20Jim,they%20were%20not%20Nums>

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participants in the strike called by NUMSA, because he offered his services while other employees were on strike.

It is clear that violence places pressure on the employer to increase the wage offer (if this is a demand from unions), and not the pressure brought about by collective bargaining and normal strike action⁴¹ The Court also emphasised the compromised position of the employer in relation to the union during a violent strike in *Verulam Sawmills (Pty) Ltd v AMCU & others*,⁴² where it observed:

“Not only are picketing rules there to attempt to ensure the safety and security of persons and the employer’s workplace, but if they are not obeyed and violence ensues resulting in non-strikers also withholding their labour, the strikers gain an illegitimate advantage in the power play of industrial action, placing illegitimate pressure on employers to settle. Typically, one of two things then happens – either the employer gives in to the pressure and settles at a rate above that reflecting the forces of demand and supply (which equates to a form of economic duress) or the employer digs in its heels and refuses to negotiate or settle while the violence is ongoing (which inevitably causes strikes to last longer than they should). Either way, the orderly system of collective bargaining that the LRA aspires to is undermined – and ultimately, economic activity and job security are threatened.”

South Africa is a constitutional democracy with a fundamental Bill of Rights⁴³ supplemented by the limitation clause in the Constitution.⁴⁴ The existence of the limitation clause in the Constitution ensures that the rights in the Bill of Rights, including the right to strike, are not absolute and that the exercise of these rights should not unreasonably encroach on the rights of other people – including employees and employers. In the case of *SATAWU v Garvas & others*,⁴⁵ workers employed in the security industry exercised their right to strike and picket in direct conflict with the principles of peaceful picketing. During the strike/picket there was massive damage to property, while the rights of non-striking workers to discharge services in terms of their contracts

[a%20members.&text=%22If%20you%20go%20to%20work,%22Run%20employers%2C%20run.](#)
(accessed 4 February 2021).

⁴¹ Myburgh A “The failure to obey interdicts prohibiting strikers and violence: the implications for the rule of law” (2013) 23 (1) *CLL* 1 at 5.

⁴² *Verulam Sawmills (Pty) Ltd v AMCU & others* (2016) 37 *ILJ* 246 (LC) at para 15.

⁴³ Chapter 2 of the Constitution.

⁴⁴ Section 36 of the Constitution.

⁴⁵ *Garvas* (2012).

of employment were disregarded and they were subjected to physical violence, verbal abuse and humiliation. SATAWU was held liable for the damage caused to street vendors and other civilians.

By resorting to or condoning acts of gratuitous violence, a union calling the strike runs the risk that the exercise of the right to strike could no longer support the legitimate purpose of collective bargaining as envisaged in the LRA.⁴⁶ Snyman J supports this in *KPMM Road and Earthworks (Pty) Ltd v AMCU & others*,⁴⁷ where he stated :

“I am quite sure it was never envisaged or contemplated that the right to strike as enshrined in the Constitution would have components of unlawful conduct, violence and intimidation as such a significant part of it. This kind of behaviour deserves no constitutional protection, and should be completely rooted out of the employment environment.”

The phenomenon of threats or injury to non-striking workers cannot be properly controlled. An analysis of case law on violent strikes reveals that both the acts of physical and non-physical violence against non-striking workers are perpetrated with impunity. The effects of violent acts can also be felt by employees and employers in other workplaces who then become victims of striking workers when violence spills over to their workplaces. The effect is that these workers are forced to strike as they cannot exercise their free will – even if they want to go back to work. The Labour Court has decided a number of cases where a strike has turned violent, putting the lives of workers in danger.

In *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of South Africa Workers' Union & others*,⁴⁸ the union prevented vehicles and persons from entering or leaving the premises of the employer, interfering with traffic, intimidating and assaulting persons, and damaging property on or near the premises. The Court granted an interdict restraining the union and its members from obstructing vehicles and persons from entering or leaving the premises in breach of picketing rules. The Court further held (para 14): “This court must necessarily express its displeasure in the strongest possible terms against the misconduct that the individual respondents do not deny having committed, and against unions that refuse or fail to take all reasonable steps to prevent

⁴⁶ *National Union of Food Beverage Wine Spirits & Allied Workers & others v Universal Product Network (Pty) Ltd: In re Universal Product Network (Pty) Ltd v National Union of Food Beverage Wine Spirits & Allied Workers & others* (2016) 37 ILJ 476 (LC) at para 37. Van Niekerk J stated that “it is regrettable that acts of wanton and gratuitous violence appear inevitably to accompany strike action, whether protected or unprotected....”. See, also, Rycroft (2012) at 826.

⁴⁷ Unreported case no J1520/2016 at para 1.

⁴⁸ (2012) 33 ILJ 998 (LC).

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its occurrence.” In this regard, violent strikes not only affect employees, but also have a detrimental effect on employers.

The Labour Court has also been called upon to interdict or prevent unlawful and violent conduct during the course of a strike, where employees who do not wish to take part in strike action are intimidated and, in some instances, violently assaulted because of lack of solidarity. For example, in *Royalserve Cleaning (Pty) Ltd v Democratic Union of Security Workers & others*⁴⁹ the applicant company had obtained a rule *nisi*, inter alia, ordering the respondent trade union and employees to refrain from inciting or encouraging its members to demonstrate unlawfully and contrary to picketing rules. The Court held that the company met the requirements for an interdict. In this case someone had been injured as a result of the action. Striking employees had further gathered in areas that were off-limits in terms of the picketing rules, and their unlawful conduct threatened the commercial relationship between the company and its clients.⁵⁰ An order for an interdict was granted. In *SA Post Office Ltd (SAPO) v TAS Appointment & Management Services CC & others*,⁵¹ SAPO applied to the Labour Court for an interdict to prevent an unprotected strike by several employees supplied to the Post Office by temporary employment services from taking place. The Labour Court had to determine whether SAPO had *locus standi* to bring an application for an interdict. It noted that the Labour Relations Act (LRA) does not specify who may apply for an interdict and that the only requirements set by the LRA for SAPO, in order to establish *locus standi*, were to show that the strike was unprotected and that it infringed one or more of SAPO’s legal rights.⁵² The interdict was consequently granted.⁵³

Therefore, the rationale behind these violent elements during a strike is to force the employer to speedily address workers’ issues and reduce the effects of financial loss that arise as a result of the “no work no pay rule”. The striking employees believe that in order to push for a speedy resolution of disputes, they should attack non-striking workers and replacement workers. The reason behind these attacks is the suspicion that these workers are behind the delays in settlement of the dispute(s), as they enable

⁴⁹ (2012) 33 ILJ 448 (LC) at 449F.

⁵⁰ At 453I. See also *Polyoak (Pty) Ltd v Chemical Workers Industrial Union & others* (1999) 20 ILJ 392 (LC); *General Motors of SA (Pty) Ltd v National Union of Metalworkers of SA on behalf of Members employed by applicant & others* Case no P470/11 (18 November 2011); *Nampak Metal Packaging Ltd t/a Bevcan v National Union of Metalworkers of SA & others* (2009) ILJ 1610 (LC); *Ripple Effect 40 (Pty) Ltd t/a Mkuze Bus Service v SATAWU & others* Case no D440/09; and *Lourenco & others v Ferela (Pty) Ltd & others* (1998) 3 SA 281 (T).

⁵¹ (2012) 33 ILJ 1958 (LC).

⁵² At 1964H.

⁵³ At 1865A.

the employer to continue with production, despite the strikers' attempt to place the employer in financial lockdown.

3 THE EMPLOYER'S DUTY TO PROVIDE SAFE WORKING CONDITIONS

The duty to provide safe working conditions to employees is entrusted to all employers.⁵⁴ This duty is derived from the Constitution,⁵⁵ the common law and various pieces of legislation.⁵⁶ The Constitution provides that "everyone has the right to freedom and security of the person, which includes the right to be free from all forms of violence from either public or private sources".⁵⁷ It further provides that "every person has the right to an environment which is not harmful to their health and well-being".⁵⁸ Despite the provisions of the Constitution and various pieces of legislation that regulate the safety of employees, the article will limit its investigation to liability of the employer to provide a safe working environment in terms of the Occupational Health and Safety Act 85 of 1993 (OHSA).

The employer's duty to provide a safe and healthy working environment is one of the cornerstones of the contractual relations between an organisation and its staff. The employer would be in breach of this duty if they fail to meet these obligations.⁵⁹ Section 8 of the OHSA provides that all employers have a duty to provide and maintain, as far as is reasonably practicable, a safe working environment that is free of risk to the health of employees. It is the working environment that must be safe and not just the actual place where work is rendered.⁶⁰ In line with the decision in *City of Johannesburg v Swanepoel NO & others (Swanepoel (2016))*,⁶¹ therefore, the working environment can be defined as the surrounding conditions in which an employee carries out operations as described in his or her contract of employment. In this regard, the employer is required by law to provide a safe place of work, safe machinery and tools, and computers, and to ensure that safe procedures and processes are followed.⁶² However, the working environment

⁵⁴ Section 8(1) of the Occupational Health & Safety Act 85 of 1993.

⁵⁵ Section 12 of the Constitution.

⁵⁶ These are the Employment Equity Act 55 of 1998 (ss 6(1), 6(3) & 60); Basic Conditions of Employment Act 75 of 1997 (s 17(2)); OHSA (ss 8 and 9); Items 5(1)(f) – (h), (2) & (3) of the Code of Good Practice on Collective Bargaining, Industrial Action and Picketing GG 42121 of December 2018.

⁵⁷ S 12(1)(c) of the Constitution.

⁵⁸ S 24 (a) of the Constitution.

⁵⁹ *NUM & others v Chrober Slate (Pty) Ltd* [2008] 3 BLLR 287 (LC); *Oosthuizen v Homegas* 1992 (3) SA 463 (O).

⁶⁰ *City of Johannesburg v Swanepoel NO & others* (2016) 37 ILJ 1400 (LC) at para 1408.

⁶¹ (2016) 37 ILJ 1400 (LC) at para 1408.

⁶² *Van Deventer v Workmen's Compensation Commissioner* 1962 (4) SA 28 (T). See also, *Oosthuizen v Homegas (Pty) Ltd* 1992 (3) SA 463 (T).

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may be wider than a workplace.⁶³ In *Swanepoel* (2016) the employee and employer included a clause in their contract with the proviso that

“an employee’s normal place of work shall be the Pental House, 55 Andries Street, Wynberg. The city may, however, require the employee to work at such other places within the city’s boundary/jurisdiction and within the Republic of South Africa, whether on a temporary basis, as the city may from time to time require, and may require the employee to travel internationally in performance of duties when necessary”.

The facts in *City of Johannesburg v Swanepoel NO* were the following. The employee was working with a community where there was dissatisfaction with, and disgruntlement about, the work. This was accompanied by death threats made to the employee, and reasonable apprehension of harm. The employer considered transferring the employee to ensure that the employer discharged its duty of care. It was insisted that the duty to provide a safe working environment can rest upon the employer under both common law and statute.⁶⁴ It is the working environment that must be safe and not just the actual place where work is rendered. Where the working environment is unsafe the employer would be in breach of their obligations.⁶⁵ The duty to provide a safe workplace relates to the employer’s responsibilities imposed by the common law to ensure that the workplace is reasonably safe. In contrast, the employer’s duty to provide a safe work system relates to the responsibility to ensure that the actual mode of conducting work is safe.⁶⁶ In *MacDonald v General Motors South Africa (Pty) Ltd*⁶⁷ the Court dealt with the alleged failure on the part of an employer to adequately protect a tank platform, by the provision of railings, in order to prevent accidents to persons. It was held that an employer would only be expected to guard against accidents which are likely to happen in the ordinary, common use of the machinery.

The working environment can also refer to transport provided by the employer that is used to take employees to and from work. For example, sometimes employees who are drivers or who have to be transported as part of their work may be involved in motor vehicle accidents while on duty. This position is regulated by section 22(5) of the

⁶³ A workplace is defined in s 213 of the LRA as “a place or places where the employees of an employer work”.

⁶⁴ *Swanepoel* (2016) at 1408D.

⁶⁵ See *NUM & others v Chrober Slate (Pty) Ltd* (2008) 29 ILJ 2708 (LAC).

⁶⁶ Tshoose C “Employer’s duty to provide a safe working environment: a South African perspective” (2011) 6 (3) *Journal of International Commercial Law and Technology* 165; Tshoose C “Placing the right to occupational health and safety within a human rights framework: trends and challenges for South Africa” (2014) 47 (2) *Comparative and International Law Journal of Southern Africa* 276.

⁶⁷ *MacDonald v General Motors South Africa (Pty) Ltd* 1973 (1) SA 232 (E).

Compensation for Occupational Injuries and Diseases Act (COIDA).⁶⁸ It stipulates that “the conveyance of an employee free of charge to or from his place of employment for the purposes of his employment by means of a vehicle driven by the employer himself or one of his employees and specially provided by his employer for the purpose of such conveyance, shall be deemed to take place in the course of such employee's employment”. However, the ILO explains working environment to mean “all aspects of working life, from the quality and safety of the physical environment, to how workers feel about their work, their working environment, the climate at work and work organisation”.⁶⁹ The explanation by the ILO is supported by Nielson,⁷⁰ who, although he leaned towards employee wellness, postulated that employee wellness relates to “the state of individuals' mental, physical, and general health, as well as their experiences of satisfaction both at work and outside of work”. If not properly looked after, work and the environment where it is performed can pose dangers to people's health, safety and welfare.

Section 8 of the OHSA is supplemented by section 9 of the OHSA, which provides that employers are obliged to conduct their activities in such a manner as to reasonably ensure that they do not expose people other than their employees, who are directly affected by the employers' activities, to any hazards to their health and safety. In addition, section 26 of the OHSA forbids victimisation of employees who give information to the Minister or any other person charged with the administration for refusing to do anything which s/he is prohibited from doing in terms of the OHSA. These provisions serve as safety frameworks for health and safety in the workplace and are aimed at preventing and controlling potential dangers befalling employees and any other person(s) who may be affected while performing their duties. In addition, sections 8 and 9 of the OHSA set standards and provide staff or employees with some element of protection while doing the work of the employer. Where the employer fails to provide a safe working environment, the employee can refuse to perform his or her duties.⁷¹

An employer, in accordance with the OHSA and the common law, has a duty to take further steps than might be ordinarily expected to prevent harm to its employees.⁷² The obligation may be extended to situations where employees can become vulnerable to criminal misconduct should the circumstances call for it. A failure to provide a safe

⁶⁸ Act 130 of 1993.

⁶⁹ International Labour Organisation (2018) *Workplace health promotion and well-being* available at https://www.who.int/occupational_health/topics/workplace/en/ (accessed 18 April 2021).

⁷⁰ Nielson K, Obonnaya C, Kansala M and Isaksson K *Workplace resources to improve both employee well-being and performance: A systematic review and meta-analysis* (2017) at 104 available at <https://www.tandfonline.com/doi/full/10.1080/02678373.2017.1304463> (accessed 15 March 2021).

⁷¹ *NUM & others v Driefontein Consolidated Ltd* (1984) 5 ILJ 101 (IC).

⁷² Section 13 of the OHSA.

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working environment may constitute a breach of this duty.⁷³ There is no doubt that an employer who takes an employee into his service and whose duties will involve working with a dangerous substance, must place that person on his guard against the dangers involved, and should give such general safety instructions as a reasonably careful employer who has considered the problem presented by their work, would give to his workmen.⁷⁴

In *City of Johannesburg v Swanepoel NO & others*,⁷⁵ the Court provided a measure of clarity on the extent of an employer's obligation to provide a safe working environment for employees, as provided for by the OHSA. The Court was faced with determining the justifiability of an employee's dismissal as a result of the refusal to be transferred to a different region. The employer proposed the transfer of the employee on the grounds of his family's protection and safety. The tension between the community members and the employee, and the consequent concerns for the safety of the employee and his family, led the employer to seek to transfer the employee to a different region, based on the same terms and conditions of employment. The transfer aimed to provide safety to the employee and his family, and to calm emotions, in order to properly investigate the community's grievances in the absence of the employee. The Court held that the employer's actions constituted a reasonable move in the circumstances – in compliance with its duties in terms of the OHSA. The refusal by the employee to take the transfer constituted insubordination and had prevented the employer from complying with its duties in terms of the legislation.

Violence can be committed by several employees and this is called derivative misconduct.⁷⁶ The principle of derivative misconduct allows the employer to dismiss all employees who were part of the group that committed misconduct. In *NUMSA obo Nganezi & other v Dunlop Mixing & Technical Services (Pty) Ltd & others (Casual Workers Advice Office as Amicus Curiae)*,⁷⁷ the employer dismissed employees for failure to disclose the perpetrators of violence during a strike. The employer argued that the failure to disclose the actual perpetrators breached the duty of good faith that the employees owed to the employer. The Constitutional Court held that the duty of good faith can never be unilateral.⁷⁸ The duty to disclose must be accompanied by a

⁷³ *Oosthuizen v Homegas (Pty) Ltd* (1993) 14 ILJ 83 (O). See also, *Clifford v Charles H Challen & Son Ltd* [1951] 1 All ER 72 (CA) at 74G-H; *Van Deventer v Workmen's Compensation Commissioner* 1962 (4) SA 28 (T) at 31B-C.

⁷⁴ *General Cleaning Contractors Ltd v Christmas* [1952] 2 All ER 1110 (HL) at 1114e-g.

⁷⁵ *Swanepoel* (2016).

⁷⁶ See *Western Platinum Refinery Ltd v Hlebela & other* (2015) 36 ILJ 2280 (LAC).

⁷⁷ [2019] 40 ILJ 1957 (CC).

⁷⁸ At para 1978E.

reciprocal, concomitant duty on the part of the employer to protect the employee's individual rights, including the fair labour practice right to effective bargaining. In the context of a strike, an employer's reciprocal duty of good faith would require, at the very least, that employees' safety should be guaranteed before expecting them to come forward and disclose information or to exonerate themselves.⁷⁹ Circumstances would have to be exceptional for this reciprocal duty of good faith to be jettisoned in favour of a unilateral duty on the employee to disclose information.⁸⁰

However, the prevalence of violence during industrial action has called into question the practicality or feasibility of the employer's obligation to provide a safe working environment for their employees, in particular to non-striking workers. Violent strikes have turned workplaces into a hostile and dangerous environment for non-striking workers and other strike-breakers, such as replacement workers. These workers have been exposed to risks to their lives and possible damage to the property of the employer. In the mines, for example, the ILO Convention on Safety and Health in Mines 176 of 1995 has entrenched the right of employees or miners to refuse to perform dangerous work, as an important mechanism through which workers act in the best interests of their own occupational health and safety.⁸¹ This is echoed by the Mine, Health and Safety Act (MHSA)⁸² which grants workers the right to remove themselves from any location at a mine when circumstances arise which appear, with reasonable justification, to pose a serious danger to their health or safety.⁸³ Section 23 of the MHSA states that an employee has the right to leave any working place whenever

“(a) circumstances arise at that working place which with reasonable justification, appear to pose a serious danger to the health or safety of that employee; or

(b) the health and safety representative responsible for that working place directs that employee to leave that working place”.

Due to the inability of the OHSA to address some safety issues faced by employees, the article proposes that the Act should be amended to reflect the approach of the MHSA. A provision similar to section 23 of the MHSA should be included in the OHSA, to help address the issue of unsafe working conditions caused by striking workers. The amendment should provide that employees may refuse to perform work where they feel it is dangerous to do so. To determine whether the performance of work is dangerous, a

⁷⁹ At para 1978E.

⁸⁰ At para 1978E.

⁸¹ Article 13.

⁸² Act 29 of 1996.

⁸³ Rungan SV & Barker D “*Commentary on the Mine Health and Safety Act and Regulations*, P Masilo and G Rautenbach: Book Review” (2010) 20(3) *Stell LR* 407.

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subjective test should be used, which means that if the employee subjectively believes that the workplace or the working environment is dangerous, they should refuse to perform work there. Thus, physical conditions in the workplace, the condition of equipment and machinery, including transport provided or authorised by the employer, and the competence and behaviour of workers, are some of the major factors that could contribute to the workplace being considered dangerous. This triggers an obligation on the employer to address the concerns of workers and they should only return to work when it is safe to do so.

Although South Africa has been experiencing violent strikes in recent years, this kind of violence is new in South Africa after political violence. Therefore, new strategies and methods need to be developed to try to deal with it. When strikers prevent employees from discharging their obligations, employers are confronted with difficult choices, such as whether to allow non-striking employees to continue discharging their duties in honouring their contractual obligations, despite risks to their lives, or granting them leave of absence. It would be an unfair decision if employers were to expect employees to come to work under such fragile conditions, thereby risking their lives. In this regard the employer will be left with only one option: granting non-striking employees leave.

Even though the non-striking employees are prohibited from discharging their services by strikers, which is conduct beyond their control, the principle of “no work no pay” applies.⁸⁴ Therefore, a prolonged and violent strike will have detrimental effects on the financial position of striking workers and their families; the employer; the economy; and the community at large. It has been held that the use of violence during a strike amounts to a denial of the rights of those against whom violence is directed, namely, those who elect to continue discharging their duties as required by their contracts of employment.⁸⁵ The Constitution provides that “everyone has the right to freedom and security of the person, which includes the right to be free from all forms of violence from either public or private sources”.⁸⁶ The application of this right extends to non-striking employees and replacement labour. The question is what happens if two or more rights compete with each other. For example, the right to exercise contractual duties as an employee without any negative interference, and the right of those involved in a strike to continue with their strike action, as enshrined in the

⁸⁴ *SAMWU v City of Cape Town & another* (2013) 31 ILJ 724 (LC).

⁸⁵ *National Union of Food Beverage Wine Spirits & Allied Workers & others v Universal Product Network (Pty) Ltd: In re Universal Product Network (Pty) Ltd v National Union of Food Beverage Wine Spirits & Allied Workers Union & others* (2016) 37 ILJ 476 (LC) at para 37.

⁸⁶ Section 12(1)(c) of the Constitution.

Constitution.⁸⁷ In *Hotz & others v University of Cape Town*⁸⁸ the Court held as follows with regard to competing rights:

“[A]ll rights are to be exercised in a manner that respects and protects the foundational value of human dignity of other people (s 10) and the rights other people enjoy under the Constitution. In a democracy the recognition of rights vested in one person or group necessitates the recognition of the rights of other people and groups and people must recognise this when exercising their own constitutional rights. As Mogoeng CJ said in *SATAWU v Garvis*⁸⁹ [sic] ‘every right must be exercised with due regard to the rights of others’. Finally, the fact that South Africa is a society founded on the rule of law demands that the right is exercised in a manner that respects the law.”⁹⁰

4 RECOMMENDATIONS

It is clear that the issue of the safety of non-striking workers during a violent strike remains a concern, as the employer cannot guarantee their safety as required by law.⁹¹ Although employers cannot guarantee the safety of non-striking employees, they do not sit back and do nothing. Employers usually rely on the protection offered by the South African Police Service (SAPS) as a precautionary measure against any harm that may befall non-striking employees. The limited security agencies available to provide security to non-striking employees during violent strikes raises several questions, such as, the ability of the police to control big crowds and whether police officers are trained to deal with strike-related violence. This is because cases of police brutality are always reported when police are asked to disperse violent strikers. Since violent strikes have become the norm in South Africa, the article argues that employers must have an efficient strike preparedness plan in place. Without an adequate and up-to-date strike contingency plan, organisations become an easy target for violence, intimidation and vandalism.

4.1 Responsible trade unionism

The struggle for liberation in South Africa has involved the active participation of trade unions. During this process trade unions played a dual role: liberating South Africa from the oppression of apartheid and fighting for workers’ rights. The fact that South Africa attained democracy in 1994 did not signal an end to this task, as unions continue to

⁸⁷ Section 23(1)(c) of the Constitution.

⁸⁸ 2017 (2) SA 485 (SCA).

⁸⁹ See *Garvas* (2012) at para 68.

⁹⁰ At para 62.

⁹¹ Sections 8 & 9 of the OHSA.

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fight for the liberation of workers in the country.⁹² The role of trade unions is not only limited to political and labour issues, but extends to the economic and social spheres. Trade unions not only have a duty to collaborate with other social institutions, which include representatives of management and capital, but also have responsibilities when it comes to the production of wealth.⁹³ The functioning of trade unions can be likened to that of corporate organisations when discharging their duties as specified in the King III Report.⁹⁴ It is argued that in order to make it a real possibility that a corporation serves its stakeholders by creating wealth in a sustainable manner, and shares the wealth in an equitable way, the management (and trade unions) need to be subject to different constraints.⁹⁵ Good corporate governance, of which the advancement of sustainability is a fundamental component, has the potential not only to benefit the owners of the corporation, but also those whom they employ.⁹⁶

Trade unions, like management, should consider sustainability issues when they negotiate⁹⁷ Sustainability encompasses an inclusivity of stakeholders, innovation, fairness and collaboration, as well as social transformation and redress. The principle of fairness is seen as central for a representative union, to ensure that employers treat workers fairly. In this regard fairness plays an important role in ensuring that society is not exclusively concerned with the maximisation of aggregate wealth, but also with the equality of its distribution.⁹⁸ In this regard trade unions, as stakeholders, should consider the legitimate interests of their members at the negotiating table.⁹⁹ On the question of what sustainability implies for unions, Le Roux points out that trade unions “will have to be mindful of the environment in their day-to-day operations, but sustainability ought to become the basis of their decision-making and, more importantly, the basis on which they bargain”.¹⁰⁰

⁹² Tenza M “The first of May: do workers have anything to celebrate twenty years into democracy” (2018) 24(2) *Fundamina* 100 at 101.

⁹³ Lower M *Employee participation in governance: a legal and ethical analysis* (Cambridge : Cambridge University Press (2012) at 151.

⁹⁴ King Report on Corporate Governance for South Africa, 2009 (King III).

⁹⁵ Botha M “Responsible unionism during collective bargaining and industrial action” (2015) 48(2) *De Jure* 339.

⁹⁶ Le Roux R “The purpose of labour law: can it turn green?” in Malherbe K & Sloth-Nielsen J (eds) *Labour law into the future: essays in honour of D’Arcy du Toit* Cape Town: Juta (2012) 240 at 242.

⁹⁷ See Botha (2015) at 339.

⁹⁸ Greenfield K “New principles for corporate law” (2005) 1 (1) *Hastings Bus LJ* 87 at 109-110.

⁹⁹ See Botha (2015) at 337.

¹⁰⁰ See Le Roux (2012) at 242.

Unions also contribute to society, as they are regarded as the primary vehicles through which social justice is achieved.¹⁰¹ This duty is imposed on everyone involved with labour issues in terms of the LRA and other applicable legislation. The LRA states that its main purpose is to promote orderly collective bargaining, and to advance economic development, social justice, labour peace, and the democratisation of the workplace.¹⁰² It should be argued that a union that seeks to improve the life of workers in a sustainable manner should be macro-focused.¹⁰³ The aim of such a macro-focused trade union would be to set wages at levels that would maximise employment, which is based on the competitiveness of the firms.¹⁰⁴ However, the issue of macro trade unionism is countered by the so-called free riders, which is addressed by closed shop and agency shop agreements in the LRA.¹⁰⁵

Although trade unions are essential in the promotion and protection of the various rights of workers, they should also ensure that they are sustainable. This entails that when trade unions negotiate with the employer, they should demonstrate a form of social responsibility. Most unions and their members are concerned only with the improvement in the benefits of their members and demand higher wages at the expense of employment levels, thereby overlooking the effect of their actions on other workers, the economy and society.¹⁰⁶ Lower describes the role of a trade union in effecting social responsibility as follows:

“Beyond their functions of defending and vindicating, unions have the duty of acting as representatives working for ‘the proper arrangement of economic life’ and of educating the social consciences of workers so that they will feel that they have an active role, according to their proper capacities and aptitudes, in the whole task of economic and social development and the attachment of the universal common good.”¹⁰⁷

This means that unions should consider taking the responsibility of looking after the interest of the business and the interest of the wider economy, beyond the interest of the union itself and its members. A failure to do this can have devastating effects on the survival of the business and the economy. This does not mean that the union should abandon its main responsibility of negotiating in the interest of its members. However,

¹⁰¹ Van Niekerk A et al *Law@work* 3ed Durban: LexisNexis (2015) at 10.

¹⁰² Section 1 of the LRA.

¹⁰³ Chew R & Soon-Beng C “Union social responsibility: a necessary public good in a globalised world” (2010) 26(4) *The International Journal of Comparative Labour Law and Industrial Relations* 436 at 438.

¹⁰⁴ Chew & Soon-Beng (2010) at 438.

¹⁰⁵ Sections 25 and 26 of the LRA.

¹⁰⁶ Chew & Soon-Beng (2010) at 435.

¹⁰⁷ Lower (2012) at 151.

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it should attempt to find alternatives to strikes, particularly in an environment where such strikes have become synonymous with violence. In this way unions would want to improve the lives of workers in a more sustainable manner. To do this, it would be essential for trade unions to take into account not only labour laws when they bargain on behalf of workers, but also certain corporate laws which extend certain rights to workers.

4.2 Provision for unpaid leave

As stated above, the use of violence during strikes has become the norm in South Africa. It often happens that due to violence, or threat of violence, non-striking employees feel forced to stay at home to shield themselves from the violent conduct of strikers. This would be justified as the non-striking employees fear that their lives may be in danger if they attend to their work obligations. In *Trident Steel (Pty) Ltd v CCMA & others*¹⁰⁸ the Court went to great lengths to justify that the employer should not have dismissed the employee for being absent from work, without providing such employee with a fair pre-dismissal procedure. The employer had dismissed the employee after the latter had informed it of his whereabouts and that it was impossible for him to come to work due to forces beyond his control. The Court found the dismissal substantively and procedurally unfair. Since the law is not clear on this aspect, the article proposes that such employees be granted unpaid leave for the following reasons.

A duty rests upon the employee to be at work according to the employment contract, and absence may constitute a breach of that contract. The question that arises is whether employees are legally entitled to be paid when they have been absent from work for reasons beyond their control and in circumstances where they are simply prevented from physically reporting for duty, such as being fearful of attack by violent strikers. The principle of reciprocity applies in contracts of employment. A failure by one party to perform his or her obligations entitles the other party to withhold their counter-performance (*exceptio non adimpleti contractus*). In this regard, the employer would not be legally obliged to pay the salaries of the affected employees for the period during which they are unable to report for duty. The “no work no pay” principle is confirmed by the LRA, when it states that “an employer is not obliged to remunerate an employee for services that the employee does not render...”.¹⁰⁹ The affected employees could however raise a defence that it was objectively impossible for them to report for duty.¹¹⁰

¹⁰⁸ *Trident Steel (Pty) Ltd v CCMA & others* (2005) 56 ILJ 1519 (LC) at 1520.

¹⁰⁹ Section 67(3) of the LRA.

¹¹⁰ *Trident Steel* (2005).

Since violent strikes are prevalent in South Africa, the article argues that a distinction should be drawn between employers with policies/practices which provide that any absence from work due to unrest or violence should be granted unpaid leave, and employers with no provision(s) regulating absence from work due to violence or other forces beyond workers' control. With regard to the former, the employer will apply the principle of "no work no pay" to employees who do not attend to work obligations for fear of being attacked by strikers. In *Macsteel Service Centres SA (Pty) Ltd v NUMSA & others*¹¹¹ the case dealt with workers who did not come to work due to circumstances beyond their control, namely, COVID-19. The Court considered the applicability of the "no work no pay" principle and held as follows:

"The reality in law is that the employees who rendered no service, albeit to no fault of their own or due to circumstances outside employer's control, like the global Covid-19 pandemic and national state of disaster, are not entitled to remuneration and the Applicant could have implemented the principle of 'no work no pay'".¹¹²

The *Macsteel* judgment provides clarity that companies are well within their rights to invoke the principle of "no work no pay" if employees do not render their services. The employer, on the other hand, does not have a legal obligation to pay employees when they are unable to render their services. Therefore, if the employer has a policy or practice to this effect in the workplace, it should not deviate from it. Employers with no policies or practices regulating absenteeism during violent conditions should enter into discussions with the employees and/or trade union and take a stance, following submissions from the employee and/or trade union, to grant the employees unpaid leave. The article submits that imposing this duty on the employer would be necessary due to the lack of legal protection for these workers against dismissal, for not attending to their work commitments when violent strikes arise. The employer should consider whether there was a genuine case of unrest or violence that made it impossible for an employee to report for duty and whether the employee made reasonable attempts to notify the employer of his or her absence.¹¹³ The unpaid leave should be granted to employees who could not come to work due to uncontrollable events, such as, floods, violence, a tornado, or telephones which are out of order. These can be considered as valid and acceptable reasons for an employee not to attend to their work commitments. Unrest, violent strikes and political stay-away actions occur more frequently, and

¹¹¹ *Macsteel Service Centres SA (Pty) Ltd v National Union of Metalworkers of South Africa (NUMSA) & others* (J483/20) LCJHB (03/06/2020).

¹¹² At para 82.

¹¹³ Van Zyl L *An evaluation of the fairness criteria for dismissals due to absenteeism and desertion from the workplace* (LLM dissertation, North-West University, 2011) at 294.

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granting such employees unpaid leave would be an effective strategy to be adopted by an employer.¹¹⁴

Employers are expected to exercise leniency and a certain level of tolerance in such circumstances, and allow employees to return to work when it is safe to do so. However, the damage or injury caused by strikers can lead to an abuse of the employer's leniency, as shown in *AMCU & another v The Metal and Engineering Bargaining Council & others*.¹¹⁵ In this case, employees staged and participated in an unprotected strike with non-striking employees being victims of assault and other acts of violence. In an attempt to keep the non-striking employees safe, the employer suspended the transport service carrying workers to work. In addition, the employer secured an interdict against the unprotected strike and asked employees via short message service (SMS) to return to work and the suspension of the transport service was lifted. One of the employees, Mr Mashologo, however did not return to work. The employer issued him with a written warning, which he contested, and he alleged it constituted unfair labour practice and took the employer to court. The Court reasoned that if Mr Mashologo did not participate in the unprotected strike, and the only reason for him not being at work was the lack of transport, he should have been the first employee to avail himself for work when the buses were made available to take workers to their workplace. It further held that Mr Mashologo had accordingly taken no steps to dissociate himself from the strike. The Court reasoned as follows:

“It will be an arduous burden to expect employers faced with an unprotected strike to deal with minute details of each employee who did not report for duty. It is incumbent upon an individual employee to dissociate him/herself from the striking employees and communicate that decision to the employer in no uncertain terms. In the present case, the arbitrator correctly found that Mr Mashologo failed to demonstrate and intend to return to work.”

It must be accepted that safety risks and financial considerations play an important role in determining whether an employee should honour his or her contractual obligations and go to work. To avoid the danger befalling non-striking employees and to ensure their safety, the article argues that employers should develop a comprehensive strategy to safeguard and secure the rights and interests of non-striking workers during a strike. The strategy should talk to measures that the employer can implement when faced with a violent strike. Such measures should include a plan that will protect non-striking employees from the violent conduct of strikers. The strategy or plan must not discourage workers from not exercising their constitutional right to strike. Any action

¹¹⁴ Anonymous *Absenteeism* (unpublished thesis, 2010) available at www.labourguide.co.za (accessed 4 March 2021).

¹¹⁵ (JR729/16) [2018] ZALCJHB 420 (13 December 2018).

that tends to undermine the effectiveness or success of a strike should be discouraged or stopped by any means necessary. Fergus argues that the right to strike is entrenched in the Bill of Rights and has also been repeatedly recognised by the courts as a fundamental right, without which workers' ability to bargain with employers would be hamstrung.¹¹⁶

In the context of violent strikes, the rights of workers to continue striking, but particularly the rights of non-violent workers to continue striking (who may well be in the majority), should also not be forgotten.¹¹⁷ The strategy must include the possibility of granting workers unpaid leave. It should be adopted (in consultation with workers' representatives) as part of the policy regulating the conduct of employees in the workplace. Although this will harm the business in the long run (as a result of no production taking place), it would have less effect on the employer's financial viability, since the employer will be exempted from paying employees during the period they are absent from work. Employees may be in desperate need of earning wages to survive and support their families. The article submits that this must be balanced with the need to protect the employees' lives, as any attempt to force them to attend to work commitments, despite violent conditions, may cost them their lives. This move should be interpreted to mean that it is an attempt to force the employees to support the union on strike and its members. However, the aim is to ensure that the business continues to operate, even beyond the strike, and that the employer's workforce is available to do the work – as was the position prior to the strike. The employees will continue to be members of their chosen unions, but where the employer foresees the possibility of danger, they should take a decision not to allow their workers to be exposed to the risk of being attacked by violent strikers.

However, granting employees long leave will have a detrimental effect on the business, such as, lack of production and eventual retrenchments. The employer may dismiss employees on the basis of operational requirements.¹¹⁸ Since it is expected that the employer will not produce, or make a profit, during a strike as a result of work stoppage, the employer may dismiss on the basis of operational requirements.¹¹⁹ In this regard the employer must put forward economic conditions as the main reason for the dismissal. In *SACCAWU v Pep Stores*¹²⁰ the Court held that it is permissible for an employer to retrench employees where a genuine operational reason has arisen. In order for an employer to justify terminating the contracts of employees for operational requirements, the dominant reason for the dismissal must be that operational

¹¹⁶ Fergus E "Reflections on the (dys)functionality of strikes to collective bargaining: recent developments" (2016) 37 *ILJ* 1537 at 1546-1547.

¹¹⁷ Myburgh (2018) at 711.

¹¹⁸ *FAWU obo Kapesi & others v Premier Foods Ltd t/a Blue River Salt River* [2010] *BLLR* 903 (LC).

¹¹⁹ Section 189 of the LRA.

¹²⁰ *SACCAWU v Pep Stores* (1998) 19 *ILJ* 1226 (LC).

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requirements are impacting on the survival of the business. In other words, the economic viability of the employer must be at stake.¹²¹ In *Tiger Food Brands Ltd t/a Albany Bakeries v Levy NO & others*¹²² violence was ongoing and the employer considered the threats so great that it closed down the business, pending section 189 of the LRA procedure. As in the *Pep Store* case, no solution was found for the anarchic situation, and indications were that such situation would continue as a concerted effort by the employees. Thus, no alternatives could be found and the retrenchments took place.

The article argues that under these circumstances, it is essential that the employer and unions find quick solutions for disputed issues. The article further argues that if unpaid leave is granted to non-striking employees, it should be properly managed. The identity of the employees who have been granted this form of leave should not be disclosed, as this may cause friction even after the strike has ended. This move will not favour one party over the other, as employers will still have an interest in the speedy resolution of the dispute. The unions, on the other hand, will have the same sense of urgency, as their members will suffer financially if the dispute is not resolved. The effect of this is that granting non-striking employees unpaid leave could outweigh the risk of having them injured or killed or their property damaged.

5 CONCLUSION

It has become an accepted practice that as part of the bargaining process, unions and their members would embark on a strike to compel the employer to agree to their demands. In doing this, the union engages in a variety of violent acts with some directed at non-striking and replacement workers posing a risk to their lives. It has been argued that the vulnerability of non-striking employees to violence during a strike could erode their freedom to choose to go to work in terms of their contractual duties. Employers should learn to acknowledge these effects, as they hamper their ability to provide safety and security to non-striking workers. This acknowledgment should be premised on the understanding that in most strike actions the main objective of introducing violence is to ensure that the strike impacts negatively on the employer – thus necessitating a speedy resolution from both sides. This has its own disadvantage, as it shifts the focus from real issues affecting labour to devising measures to deal with violence and its effect on non-strikers.

The article submits that unions should play an active role in ensuring that there is justice in the process, by putting forward the interest of workers as well as that of the

¹²¹ Whitearnel N “Can unidentified protected strikers engaging in misconduct be retrenched? *FAWU obo Kapesi & others v Premier Foods Ltd t/a Blue River Salt River*” (2011) 23 *SA Merc LJ* 269 at 276.

¹²² *Tiger Food Brands Ltd t/a Albany Bakeries v Levy NO & others* (2007) 28 *ILJ* 1827 (LC).

employer. This will ensure that the company does not shut down completely. The employer, on the other hand, and in consultation with the employees, should develop a policy that will include the provision of unpaid leave.

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