WHAT CAN BE DONE ABOUT STRIKE-RELATED VIOLENCE?

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Abstract
Recent newspaper reports and several decisions of the South African Labour Court illustrate that strike-related violence continues to be a destructive feature of industrial action. The misconduct includes the murder of non-strikers, destruction of property, random plundering of street-based traders, and intimidation. In the strike context labour law is proving to be an inadequate framework to regulate mob violence and criminal activity. Employers lack police expertise and powers to prevent and control a strike while it is occurring and to investigate strike-related misconduct after the strike. In the workplace, disciplinary action is often thwarted by the intimidation of witnesses.

The mechanisms of control within labour law are mainly judicial. Employers can turn to the courts for an interdict to stop a strike or to restrict aspects of it. Employers can later seek a court order for compensation for loss attributable to the strike. If there is evidence of intimidation or other criminal activity, criminal charges can be laid. There is the possibility that the courts may be prepared to suspend or nullify the protected status of a strike because of violence.

These legal mechanisms are largely reactive and punitive. A more holistic approach to the problem is required. There is a body of literature outside of law which helpfully explains the psychological, sociological and economic factors that contribute to mob violence. A fuller understanding of these factors, together with a robust and systematic pre-strike facilitation process which is supportive of good-faith negotiation, is proposed as pre-emptive measures to improve the situation.

This paper will in addition consider comparative law insights into the regulation of misconduct during strikes.

What can be done about strike-related violence?

The background to this paper is what has come to be known as the Marikana tragedy. On 16 August 2012 at the Lonmin Platinum Mine in Marikana in the North West Province in South Africa police shot and killed 34 striking miners and wounded 70 others. This followed the brutal murder of two policemen and two security officers by strikers. While the extent of the tragedy makes it unique, what is not unique is the resort to violence in strike situations in South Africa. In fact violence has become normative. [1]

In this paper I want to argue that legislation permitting and protecting strikes is based on certain assumptions. When those assumptions no longer prevail, and the strike becomes violent, employers can usually rely only on the limited restraining orders of courts and the intervention of the police. Policing of strikes largely assumes the irrationality of the mob, with consequent techniques – usually violent – to restrain the strikers. This paper calls for a more nuanced understanding of strike dynamics and more appropriate policing. It questions the need to reform strike law. It also calls for pre-emptive measures, particularly a commitment to meaningful negotiation processes, as a way to avoid violent strikes.

1. Introduction

When there is a sense of misfit between the law on strikes on the one hand and what can and does actually happen during a strike on the other, it is worth checking the assumptions which underlie modern strike law. In doing so I am mindful that many of these assumptions, in the words of Karl Klare, '*take[s] as given and unquestioned the desirability of maintaining the basic institutional contours of the liberal capitalist social order.*'[2] But a significant factor is that at the beginning of the democratic South Africa there was a commitment to tri-partism in labour issues. Nedlac (the National Economic Development and Labour Council) was established in 1994[3] as a means to attempt consensus between state, unions and employers in labour legislation and policy, mainly to avoid a repetition of bruising strikes in the 1980's in protest at changes to legislation which were perceived to be anti-union and pro-management. The Labour Relations Act 66 of 1995 (LRA) was the result of a largely consensual drafting process[4] and therefore it is a reasonable assumption that the legislation represents a fair, mutually acceptable and legitimate social contract.[5]

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[1] According to a report of the SA Institute of Race Relations (21 January 2013) a total of 181 people have been killed in strike violence in SA in the past 13 years. During the same period, at least 313 people were injured and more than 3 058 were arrested for public violence. Of the 1 377 people arrested between 1 January 2009 and 31 July 2011, only 217 cases of public violence made it to court and only nine people were convicted.

[2] Klare K E 'Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law' (1980-1981) 4 *Indus. Rel. L.J.* 450-482 at 451.

[3] National Economic Development and Labour Council Act 34 of1994

[4] See Gostner K and Joffe A 'Negotiating the future: Labour's role in NEDLAC' (1998) 2(1) *Law, Democracy & Development* 131-151; Rosenthal T and Gostner K 'Focus on NEDLAC: Progress on all fronts' (1996) 20 (4) *South African Labour Bulletin* 49-54; Friedman S & Shaw M 'Power in Partnership? Trade Unions, Forums and the Transition' in Adler G & Webster E (eds) *Trade Unions and Democratization in South Africa 1985-1997* (St Martin's Press, New York, 2000); Parsons R 'Steps towards social dialogue and the development of NEDLAC in a democratic South Africa 1979–2001' (2001) 16 *South African Journal of Economic History*

What then are the assumptions implicit in the strike provisions in the LRA?

The first assumption is that there is an inseparable link between collective bargaining and the right to strike.[6] This has been expressed in many ways, particularly in the often-employed saying 'without a right to strike, collective bargaining is collective begging'.[7] The right to strike is conceived as a mechanism integral to the continuation and finalisation of the collective bargaining process.[8] This link between strikes and collective bargaining has been seen as fundamental. For example, the interim South African Bill of Rights guaranteed that 'Workers shall have the right to strike *for the purpose of collective bargaining*'.[9]

This first assumption, then, accepts the legitimacy of the strike when it is part of a continuing process of collective bargaining. This has for some time been expressed in the phrase 'functional to collective bargaining', linking industrial action to a legitimate purpose. As it was put in an older South African case:

> 'Only functional strikes, ie those which have as their concern the industrial or economic relationship between employer and employee (the 'very stuff of collective bargaining') are protected.'[10]

There is a body of authority which supports the principle that if the strike is not linked to collective bargaining and is simply destructive and without demand, the legal protection of that strike is lost. It has been generally accepted that it is not for labour tribunals to interfere in bargaining between employer and employees, and certainly not to determine whether a demand is fair or unfair. However the demand behind the strike must be one that is reasonably possible for the employer to meet.[11]

139-171*;* Parsons, R 'The emergence of institutionalised social dialogue in South Africa' (2007) 75 *South African Journal of Economics* 1–21.

[5] While Davis D in 'The functions of Labour Law' (1980) 12 *CILSA* 212-217 argued that the purpose of labour law is '*the preservation of the social and economic structures prevailing in society at any given moment by the confinement and containment of the basic conflict of interests inherent in the relationship between employer and employee*' it can be argued that the LRA of 1995 was transformative of employees' rights and worker participation. See also Hyde A 'A Theory of Labor Legislation' 38 Buff. L. Rev. 383 (1990); Ely R T 'Economic Theory and Labor Legislation' *American Economic Association Quarterly*, 3rd Series, Vol. 9, No. 1, Papers and Discussions of the Twentieth Annual Meeting, Madison, Wis., December 28-30, 1907 (Apr., 1908), pp. 124-153.

[6] Lord Wright in *Crofter Harris Tweed v Veitch* [1942] AC 435 at 463 said "The right of workmen to strike is an essential element in the principle of collective bargaining".

[7] The earliest use of this phrase appears to be Bowers E & Buehler A *The Closed Union Shop Is Justifiable: The Case For The Closed Union Shop* (1922) 33, but is now used frequently, eg Estreicher S 'Collective Bargaining or "Collective Begging"?: Reflections on Antistrikebreaker Legislation' (1994) 93:3 *Michigan Law Review* 577-608.

[8] Hepple B 'The Right to Strike in an International Context' *15 Canadian Lab. & Emp. L.J.* (2009-2010) 133-146; Langille B 'Is There a Constitutional Right to Strike in Canada' 15 *Canadian Lab. & Emp. L.J. 129 (2009-2010)* 129-132.

[9] Section 27 (4), Constitution of the Republic of South Africa Act 200 of 1993, repealed by Constitution of the Republic of South Africa, 108 of 1996, in which an unqualified right to strike is given to every worker. Cheadle H 'Labour' in *Fundamental Rights in the Constitution: Commentary and Cases* (1997, Juta) 229 suggests the change was to allow for strikes for wider purposes, such as protest action as permitted in s 77 of the LRA.

[10] *NUM & others v Free State Consolidated Gold Mines (Operations) Ltd – President Steyn Mine; President Brand Mine; Freddies Mine* (1995) 16 *ILJ* 1371 (A) 438B.

[11] In *Buthelezi & others v Labour for Africa (Pty) Ltd* (1991) 12 *ILJ* 588 (IC) 592G-H it was the opinion of the Industrial Court that it could only consider the nature of the demand in extreme

The second assumption is that a strike must be orderly. This assumption manifests itself in various ways. Traditionally the 'golden formula'[12] prescribes that certain steps must be taken and certain requirements met before strikers are protected from the civil and contractual liability that could arise from the strike. The assumption of orderliness is also manifested in picketing rules[13] and the powers of labour courts to interdict an unprotected strike.[14]

The assumption or requirement of orderliness is seen in recent South African cases which have held that the rights to assemble, demonstrate, and picket do not encompass gatherings that are violent or riotous in nature.[15] Further, parties outside the employer / union relationship have the right to object to a disorderly picket. In *Growthpoint Properties Ltd v SACCAWU & others*[16] it was held that members of the public affected by noisy picketing can interdict the picket. A picket may lose its protection if picketers behave unreasonably.[17]

The third assumption is that the strike must not involve misconduct. This has two meanings. Item 6 of the Code of Good Practice: Dismissal provides that participation in a strike that does not comply with the provisions of Chapter IV is misconduct.[18] The second meaning of misconduct is more specific: s 67(5) allows dismissal of strikers for a reason related to the employee's conduct during the strike. In *Ram Transport (Pty) Ltd v SA Transport & Allied Workers Union & others*[19] it was said that the labour court is always open to those who seek the protection of the right to strike. It qualified this statement by saying: '*But those who commit acts of criminal and other misconduct during the course of strike action in breach of an order of this court must accept in future to be subjected to the severest penalties that this court is entitled to impose'*.[20]

Once these three assumptions that underlie strike law are replaced with disorderly and violent collective action disconnected from collective bargaining, the parties turn to the law to seek assistance. The key questions are these: Can the judicial system offer meaningful ways to curb strike violence? Does the intervention of the police resolve or complicate the resolution of the strike issues?

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cases, when an unconscionable or outrageous demand led to an inference that there was no intention to negotiate.

[12] For the development of the Golden Formula in English law, see Ewing K 'The Golden Formula: Some Recent Developments' (1979) 8 *Indus. L.J.* 133-146; Simpson B 'A not so Golden Formula: In contemplation or furtherance of a trade dispute after 1982' (1983) 46 *The Modern Law Review* 463–477; Doyle B 'Trade disputes: Union rules, recognition disputes and the Golden Formula' (1979) 8 (1*) Ind Law J* 173-176.

[13] See s 69 of the South African Labour Relations Act 66 of 1995.

[14] Note that in terms of current South African legislation the distinction is made between protected and unprotected strikes rather than legal or illegal strikes.

[15] See *Garvis & Others v SATAWU & others* (2011) 32 *ILJ* 2426 (SCA) where the court (at para 50) said: "In the past the majority of the population was subjected to the tyranny of the state. We cannot now be subjected to the tyranny of the mob".

[16] (2010) 31 *ILJ* 2539 (KZD).

[17] In *Shoprite Checkers (Pty) Ltd v CCMA* (2006) 27 *ILJ* 2681 (LC) para 30. the court held that 'if the picket exceeds the bounds of peaceful persuasion or incitement to support the strike, to become coercive and disruptive of the business of third parties, the picket ceases to be reasonable and lawful'.

[18] Schedule 7 to the Labour Relations Act 66 of 1995.

[19] (2011) 32 *ILJ* 1722 (LC).

[20] Para 9.

2. What the law offers

2.1 Interdict / Injunction

The interdict (or injunction) is a remedy aimed at protecting applicants from suffering irreparable damage caused by the wrongful activities of defendants. It often, in the strike context, involves the applicants going *ex parte* to court – mostly on an urgent basis - to obtain a temporary order restraining the defendants from continuing their wrongful activities. [21] Not surprisingly there has been criticism of the interdict mechanism on both procedural and substantive grounds:

> 'firstly, because the ordinary principles of civil procedure, ensuring that both parties have a full opportunity to present their case prior to the issue of an order, may be waived by the judge in injunction cases; and secondly, because the substantive law relevant to labour injunctions favours employers and gives little weight to the legitimacy of strike action in the collective bargaining process'.[22]

The interdict / injunction gives applicants – usually employers - a tactical advantage because the likelihood of a full trial is in most cases small, and the employer's widely expressed assertions of 'interference with business' or 'extreme violence' become *prima facie* evidence which the union has to disprove. This power led Lord Wedderburn to comment that

> 'Without scrupulous care by the judiciary – and sometimes even with it – the interlocutory labour injunction can become a great engine of oppression against workers and their unions'.[23]

Where the substantive principles are based on the individualist ethic of the common law, and not on a recognition of the legitimacy of collective action, they provide powerful tools for attacking unions.[24]

Leaving aside the inherent dangers of the injunction, a more pertinent question to ask is whether an injunction is generally respected in South Africa. It is difficult to get data on this, but as a general observation, an injunction is not seen as authoritative or powerful and, at this stage, does little to change the dynamic of the strike.

2.2 Criminal prosecution for contempt of court

Deliberate and bad faith non-compliance with a court order interdicting a strike may amount to contempt of court in South Africa which, potentially, can result in the imposition of criminal sanctions, such as imprisonment.[25] The usual explanation for such action is that

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[21] McCall K 'Interdicts and Damages Claims in Collective Disputes' in Benjamin P, Jacobus R & Albertyn C (eds) *Strikes, Lock-outs & Arbitration in South African Law* (Juta,1989) 41-52; the *locus classicus* on labour injunctions in the USA is Justice Felix Frankfurter and Nathan Greene's *The Labor Injunction* (1930 Macmillan New York).

[22] O'Regan C 'Interdicts restraining strike action – implications of the Labour Amendment Act 83 of 1988' (1988) 9 *ILJ* 959-985 at 959.

[23] Lord Wedderburn *The Worker and the Law* 3 ed (1986 Penguin Harmondsworth) at 686.

[24] O'Regan op cit 985.

[25] The test for determining the existence of contempt of court is set out in *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) as 'whether the breach was committed deliberately and *mala fide*. A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe him or herself entitled to act in the way claimed to constitute the contempt. In such a case, good faith avoids infraction. Even a refusal to comply that is

> All orders of court, whether correctly or incorrectly granted, have to be obeyed until set aside. Since it is vital to the administration of justice that those affected by court orders obey them, disregard cannot be tolerated and contempt applications are by their nature urgent. Thus, civil contempt proceedings exist in order that a court order stemming from civil proceedings may be brought to a logical conclusion by the imposition of a penalty in order to vindicate the court's authority.[26]

The conduct interdicted has to be narrowly defined to avoid an employee falling into contempt for an overly-broad prohibition.[27] In South Africa, where imprisonment is imposed it is usually suspended or the order may take the form of a fine with an alternative period of imprisonment, with a further period of imprisonment suspended on conditions. In fact there appear to have been few instances where strikers or trade union officials organising an interdicted strike have been imprisoned.[28]

Contempt prosecution in other countries has been controversial and divisive.[29] A Canadian writer from the 1970's[30] went so far as to say that 'Labour contempt, as it has developed in Canada, is potentially as effective a brake on union activity as was the nineteenth-century sanction of criminal conspiracy'. [31] Pointing out that the contempt sanction is not a substitute for responsive legislation, nor a defence against the forces of social discontent, Birks warns that courts may cease to fulfill their proper adjudicative function and in turn risk their own authority.[32] Lord Wederburn describes contempt as the sanction that 'enforces the key remedy, the interlocutory labour injunction granted when no more than 'serious questions to be tried' are proved by employers on affidavit'.[33]

Recognising theses difficulties, it is of note that the Labour Court in South Africa has recently used the contempt doctrine to fine a trade union R500 000 for not doing

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objectively unreasonable may be *bona fide* (though unreasonableness could evidence lack of good faith). These requirements - that the refusal to obey should be both wilful and *mala fide*, and that unreasonable non-compliance, provided it is *bona fide*, does not constitute contempt - accord with the broader definition of the crime, of which non-compliance with civil orders is a manifestation. They show that the offence is committed not by mere disregard of a court, but by the deliberate and intentional violation of the court's dignity, repute or the authority that this evinces.'

[26] Joubert WA, Faris JA, Kanjan A 'Civil Procedure: Superior Courts' *Law of South Africa* (Volume 4 3rd Ed) 399; see *SA Transport & Allied Workers Union & others v Ikhwezi Bus Service (Pty) Ltd* (2009) 30 *ILJ* 205 (LC); *Security Services Employers' Organisation & others v SA Transport & Allied Workers Union & others* (2007) 28 *ILJ* 1134 (LC).

[27] See *Polyoak (Pty) Ltd v Chemical Workers Industrial Union & others* (1999) 20 *ILJ* 392 (LC) Para 3.

[28] But see *Security Services Employers' Organisation & others v SA Transport & Allied Workers Union & others* (2007) 28 *ILJ* 1134 (LC); *SA Police Service v Police & Prisons Civil Rights Union & others* (2007) 28 *ILJ* 2611 (LC).

[29] See O'Regan C 'Contempt of Court and the Enforcement of Labour Injunctions' (1991) 52 *MLR* 385.

[30] Commenting on cases dating from *Canada Transport (U.K.) Ltd. v. Alsbury,* sub. nom. *Poje v. Atty-Gen. of B.C.* [1953]11 S.C.R. 516; [1953] 2 D.L.R. 785; (1953) 105 C.C.C. 311.

[31] Birks S 'The Doctrine of Labour Contempt' (1976-1977) 3 *Queen's L.J.* 38-57 at 38. See also Kidner R 'Sanctions for contempt by a trade union' (1986) 6 *Legal Studies* 18–34; Wallace A 'Enforcement of Labour Relations Board Orders and Arbitration Awards Pursuant to the Trade Union Act' (1982-1983) 47 *Sask. L. Rev.* 67-96; Wallington P 'Criminal Conspiracy and Industrial Conflict' *Ind Law J* (1975) 4(1) 69-88; Wedderburn Lord 'Contempt of Court: Vicarious Liability of Companies and Unions' (1992) 21 (1) *Ind Law J* 51-58.

[32] Birks op cit 57.

[33] Wedderburn Lord 'Contempt of Court: Vicarious Liability of Companies and Unions' (1992) 21 (1) *Ind Law J* at 51.

more to curtail a violent, unprotected strike by its members.[34] Intitally the court made an interim order in terms of which the union and strikers were called upon to show cause why an order should not be made final holding them in contempt; committing the workers to prison for a term of 180 days for contempt of court; and for the union to be fined an amount of R500 000. Not following through with the imprisonment option, the court nevetheless said:

> *"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…These actions undermine the very essence of disciplined collective bargaining and the very substructure of our labour relations regime".*

2.3 Damages

The right to strike is unusual in that it legalizes the infliction of harm on employers; no other rights, even the freedom of expression, start off with the express intention to harm. The failure of a union or strikers to meet the pre-requisites for a legal / protected strike removes the immunities and inevitably exposes them to liability for damages suffered by the employer.

South African courts have, from time to time, awarded damages to employers but the decision to sue a trade union or employees is not without practical problems.[35] The first is that there are relational considerations in suing a union and employees with whom there has to be an on-going relationship. The second is that a claim may yield nothing because the union is impecunious.

2.4 Withdrawal of protection[36]

While conforming to the 'Golden Formula' insulates and protects a union and strikers from the civil and contractual consequences of the strike, the question arises whether this protection can be lost or forfeited in certain circumstances.

There have been some examples over the years where South African courts have held that a strike's protection was lost. In the dated (and controversial) judgment in *FBWU & others v Hercules Cold Storage (Pty) Ltd*[37] the court interpreted the strike as being about getting the employer to negotiate. Once the strike started the employer offered to negotiate but was jeered at. The court said this:

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[34] *In2FOOD (Pty) Ltd v FAWU, Madisha, RS and 470 others* (LC Case Number: J350/13, 1 March 2013).

[35] Benedictus R 'The Use of the Law of Tort in the Miners' Dispute' *Ind Law J* (1985) 14(1): 176-190; Landman A A 'No place to hide – A trade union's liability for riot damage: A note on *Garvis & others v SATAWU* (2011) 32 *ILJ* 834-846; Landman A A 'Protected industrial action and immunity from the consequences of economic duress' (2001) 22 *ILJ* 1509-1515; Landman A A 'A trade union's delictual liability regarding its members: *Jada & others v SAMWU* (2000) 21 *ILJ* 101-102; Simpson B 'Economic Tort Liability in Labour Disputes: The Potential Impact of the House of Lords' Decision in *OBG Ltd v Allan' Ind Law J* (2007) 36(4): 468-479.

[36] Rycroft A J 'Can a protected strike loose its status? *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of South African Workers' Union & others*' (2012) 33 *ILJ* 821-827

[37] (1990) 11 *ILJ* 47 (LAC).

> 'We are of the view that the strike action was fair in so far as it was directed to compel the respondent to re-open negotiations. Having achieved this any further justification for the strike ceased. By refusing to negotiate with the respondent the employees' conduct became unfair and unreasonable. By conduct they waived their claim to equitable relief and brought their present predicament upon themselves'.[38]

The controversial aspect of this judgment is that at the very moment that the strike became partially effective (ie when the employer offered to negotiate, not settle), the court thought that the strike should cease. The removal of frozen carcasses into the hot sun by the workers before starting the strike appeared to be seen as a step too far. The court failed to understand that a strike is ultimately about power, even if it is called at a moment when the employer is particularly vulnerable.

An example of a court holding that a strike's protection was lost was in *Afrox Ltd v SACWU and Others 2*[39] which held that once the dispute giving rise to the strike is resolved, the strike must end and the right to strike falls away. The court explained that a strike can terminate in various ways: First, the strikers can abandon the strike and unconditionally return to work. Second, the 'substratum' (the court's interesting word for the basic cause of the dispute) has disappeared. This can happen where the employer concedes to the demands of the strikers or removes the grievance or resolves the dispute. The court said that in these circumstances, the foundations of the strike fall away:

> 'The strike is no longer functional; it has no purpose and it terminates. When the strike terminates so does its protection. It is not in the interests of labour peace for a strike action to be continued in such circumstances even in the case of a protected strike.'[40]

It is clear, then, that it is possible to argue that there can arise a point where a strike's protection is lost. So far in our law this mainly relates to the *reason* for the strike. The *conduct* of the strike is the focus of the recent case of *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of South African Workers' Union & others*.[41] The case tells a story of how badly a strike can get out of control. The picketing that occurred was anything but peaceful. Rubbish bins were emptied onto the road outside the casino, tyres were burnt on the road, the road was blocked with 20 litre water bottles, packets of broken glass were thrown onto the road, bricks were thrown at members of the police services, vehicles were damaged, passengers were dragged from vehicles and assaulted, concrete dustbins were rolled into the road, patron's vehicles were damaged, and persons in the vicinity of the casino were assaulted.

The employer went to the Labour Court and obtained an urgent interdict. On the return date, the employer sought the discharge of the rule, and an order for costs. Despite the union's arguments, the court ordered the costs be paid by the union and strikers. In making this order, the court seemed to signal its willingness to withdraw protection of the strike. The court held:

> '[13] This court will always intervene to protect both the right to strike, and the right to peaceful picketing. This is an integral part of the court's mandate, conferred by the Constitution and the LRA. But the exercise of the right to strike is sullied and ultimately eclipsed when those who purport to exercise it engage in acts of gratuitous

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[38] at 51E-F
[39] (1997) 18 *ILJ* 406 (LC).
[40] at 411A.
[41] (2012) 33 *ILJ* 998 (LC).

violence in order to achieve their ends. When the tyranny of the mob displaces the peaceful exercise of economic pressure as the means to the end of the resolution of a labour dispute, one must question whether a strike continues to serve its purpose and thus whether it continues to enjoy protected status.'

It is the last sentence that opens a door to argue that a strike marred by misconduct loses its protected status. This in turn means that the protection from dismissal falls away and the strikers can be sued for financial loss.[42]

There is no provision in the LRA which expressly provides for a strike to lose its protected status. But this may be implicit in the powers of the Labour Court. An application would have to be made by the employer to the Labour Court, probably on an urgent basis, for a declaratory order in terms of s 158(1)(a)(iv) of the LRA to declare the strike 'unprotected', due to misconduct taking place. Prima facie evidence would have to be supplied to support these contentions and the union would normally have to be given some opportunity to respond.

Practical difficulties would clearly arise: how much violence or misconduct would have to have occurred before the court would intervene? Extreme cases would be easily dealt with, but cases in which there has been some violence leading to attempts by the union to intervene, would be more difficult. The Court in addressing these dilemmas would have to ask this question: *Has misconduct taken place to an extent that the strike no longer promotes functional collective bargaining, and is therefore no longer deserving of its protected status?* In answering this question, the Court would have to weigh the levels of violence and efforts by the union concerned to curb it.[43]

2.5 Prosecution for criminal offences

While it is usually the employer that will seek the court's protection, the state itself may initiate proceedings through criminal charges of, for example, intimidation or public violence. This is fraught with the definitional problems; as Myburgh AJ said in S v *Mlotshwa*[44], in the context of deciding whether the strikers' conduct had amounted to public violence, said that a 'court should be careful not to make inroads on the worker's right to lawfully make use of the age-old remedy of strike action by

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[42] The court is not alone in its view. Recently Halton Cheadle, Peter le Roux and Clive Thompson wrote an article 'Reform of labour legislation needed urgently' in which they say: '*Violence in private sector labour relations has also reached new post-1994 heights. Here, too, there is a need to introduce procedural obligations that go beyond pro-forma picketing rules. And a case can be made for the right to industrial action to be open to suspension by the Labour Court if that action is accompanied by egregious conduct.*' *Business Day* 2011/11/15.

[43] This is not an anti-union proposal. A balancing counter-measure can be imagined allowing unions to launch a similar court application for an order granting protected status to an otherwise unlawful strike if it was in response to unjustified conduct by the employer. This is, after all, a factor listed in Item 6 of the Code of Good Practice: Dismissal to be taken into account in the substantive fairness of a strike-related dismissal. A court would have to consider whether the unjustified conduct committed by the employer is sufficient to grant such an order if the grievances could reasonably have been addressed in other ways. But by enabling a union to challenge the unprotected nature of the strike whilst it is taking place will influence the power dynamic during the strike and strengthen the union's bargaining power to achieve its demands.

[44] 1989 (4) SA 787 (W) 796E.

categorizing conduct of the kind in question which occurs during a strike as public violence'.

In South Africa there is specific legislation dealing with intimidation, in the form of the Intimidation Act 72 of 1982. Its immediate predecessor was the Riotous Assemblies Act 17 of 1956 which, in turn, was substantially a re-enactment of the Riotous Assemblies and Criminal Law Amendment Act 27 of 1914. Professor A Mathews wrote that the 'combination of employment and security offences is revealing since it constitutes a statutory recognition of the historical connection in our society between labour restrictions and security threats'.[45]

To intimidate a fellow employee to strike is a close cousin to passionate persuasion, and to criminalise the sometimes robust exchanges which occur in the process of garnering support for a strike is difficult and inadvisable. A now dated private-sector case study of the 1986/87 legal strike at retailers OK Bazaars illustrates the problems of fixing criminal liability for collective action. During this strike there were 141 detentions under the Emergency regulations, 55 individual court cases involving 700 union members which resulted in less than 10 convictions on charges other than municipal offences such as displaying a placard without permission. 237 people had charges withdrawn against them. 74 employees, detained for a period of months after they had gathered outside the locked gates of the warehouse in which they were employed, were released only after papers were filed in a Supreme Court application for their release. Certainly the late 1980's in South Africa were fraught years, but the easy application of political Emergency regulations to a private sector strike as well as the utilization of the criminal justice system, speaks of the ease with which the criminal law can be harnessed to suppress legitimate collective action.

The present Act directly restricts what may be said in case it is intimidatory. Section 6 of the Criminal Law Second Amendment Act 126 of 1992 broadened the scope of the offence of intimidation still further. It did so by amending s 1(1)*(b)* to read:

> '(1) Any one person who - ...
> *(b)* acts or conducts himself in such a manner or utters or publishes such words that it has or they have the effect, or that it might reasonably be expected that the natural and probable consequences thereof would be, that a person perceiving the act, conduct, utterance or publication -
> (i) fears for his own safety or the safety of his property or the security of his livelihood or for the safety of any other person or the safety of the property of any other person or the security of the livelihood of any other person; and ...
> shall be guilty of an offence and liable on conviction to a fine not exceeding R40 000,00 or to imprisonment for a period not exceeding ten years or to both such fine and such imprisonment.'

Plasket & Euijen have argued that s 1(1)*(b)* of the Intimidation Act is clearly unconstitutional: they write that "In infringing the right to freedom of expression, it is so broad and so all encompassing that nothing can be saved from it".[46]

2.6 Police or army control

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[45] *Law, Order and Liberty in SA* (Cape Town Juta & Co Ltd 1971 at 191 ; see Plasket C 'Industrial disputes and the offence of Intimidation' (1990) 11 *ILJ* 669-676; Plasket C & Spoor R 'The new offence of Intimidation' (1991) 12 *ILJ* 747-752; Rycroft AJ `Criminal sanctions and labour relations' (1989) 2 *South African Journal of Criminal Justice* 271-285.
[46] Plasket C & Euijen M 'Section 1(1)*(b)* of the Intimidation Act 72 of 1982 and Freedom of Expression' (1998) 19 *ILJ* 1367 at 1378.

Selznick has noted that the exercise of police power to regulate the terms and conditions of employment in the public interest has historically been one of three basic policies of Anglo-American employment law.[47] Harring's study of the police in the United States in the late nineteenth and early twentieth century highlights the repressive role played by the police in trade union matters, undermining workers' rights.[48] Baker's study of policing of strikes in Australia has similar conclusions.[49]

It has been said that a major achievement of the formation in the United Kingdom of the new police from 1829 onwards was the depoliticisation of the control of industrial disputes. Kahn writes that

> 'The police were structured so as not to be direct agents of the state, and they were to claim their authority from 'the law', which was presented as separate from sectional political interests. As long as this separation could be maintained and industrial disputes were controlled by the police, then such disputes posed no political threat to the state and were only a problem when breaches of the normal criminal law obtained. If the industrial unrest seemed to be bordering on the revolutionary then this separation could be temporarily laid aside and the army brought in as direct agents of state power.'[50]

Whelan's account of the extent of military intervention in industrial disputes in the United Kingdom contradicts this view,[51] although Kahn does concede that, not only has the dividing line between police and military been a constantly shifting one, but the distinction between legal order and political order has always been fragile.[52] The British Public Order Act of 1986 has created new offences which facilitate police control of pickets and processions, and has been criticized for increasing the likelihood of confrontation.[53]

3. The strike dynamic

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[47] Selznick P *Law, Sociey, and Industrial Justice* (1969) 122; the other two policies are the protection and guidance of a distinctive social relation, that of employer and employee, and freedom of contract. Wallington, P 'Policing the Miners' Strike' *Ind Law J* (1985) 14(1): 145-159; Whelan CJ 'Military Intervention in Industrial Disputes' *Ind Law J* (1979) 8(1): 222-234; Hall A & De Lint W 'Policing Labour in Canada' *Policing and Society* Vol. 13, Iss. 3, 2003. Cf Katz MB *In the Shadow of the Workhouse: a Social History of Welfare in America* (1986) 180-I where he says that repression by employers, aided by police, state militias and the National Guard, was one of four methods business used to control labour.

[48] Harring SL 'Policing a class society: the expansion of the urban police in the late nineteenth and early twentieth centuries' in Greenberg, DF (ed) *Crime and Capitalism* (1981) 292 at 305.

[49] Baker D 'Barricades and Batons: An Historical Perspective of the Policing of Major Industrial Disorder in Australia' Paper presented at the History of Crime, Policing and Punishment Conference convened by the Australian Institute of Criminology in conjunction with Charles Stuart University and held in Canberra, 9-10 December 1999. http://aic.gov.au/media_library/conferences/hcpp/baker.pdf , accessed 19 March 2013

[50] Kahn P, Lewis N, Livock R, and Wiles P *Picketing: Industrial Disputes, Tactics and the Law* (1983) 76.

[51] Whelan C 'The law and the use of troops in industrial disputes' in Fryer B et al (eds) *Law, State and Society* (1981) 160; also Whelan C 'State intervention, major disputes and the role of the law: contingency planning and the use of troops' in Lord Wedderburn Lord & Murphy WT (eds) *Labour Law and the Community* (1982) 37.

[52] Kahn et al op cit 76; see also Wedderburn Lord *The Worker and the Law* 3 ed (1986) at 668-9.

[53] Wallington P 'Some implications for the policing of industrial disputes' (1987) *Criminal Law Review* 180.

3.1 Psychological insights[54]

There is now a body of literature which alerts labour lawyers to what has been called 'the spurious unity suggested by the way strikes are labelled'[55], and instead has usefully distinguished between a diversity of forms of conflict. Nicolson and Kelly have identified the following: (1) the strike as **protest**, in which leaders race to keep pace with membership demands; (2) the strike as **warfare**, in which intergroup hostility sets the keynote for conflict; (3) the strike as **stratagem**, in which it is a counter in negotiation; (4) the strike as **group process**, where social structures and processes govern conflict susceptibility and control; (5) the strike as **organizational change**, through which the strike is a formative influence on the industrial relations 'climate' of the participants.

These are not mutually exclusive categories, and as distinctive themes or dimensions they all can apply to any strike. The essence of a psychological approach is to view strikes as social psychological processes, in which it is 'the characteristics of people's informal and spontaneous interactions, within a formal framework of rules and institutions that largely determine the occurrence, form, and outcomes of industrial conflict'.[56] More than this industrial psychology alerts us to the fluid nature of the strike process, often transforming issues and affecting the consciousness of participants; it is said that strikes can 'represent a radical break with past experience and practice, and can, after a very short space of time, permanently alter the beliefs, assumptions and values of those involved'.[57] This insight takes one to writing about the social identity of a group of strikers.

3.2 Mob theory

In the late 1980's and early 1990's, as South Africa was lurching towards its first democratic elections, there were a number of cases that came before the courts involving mob killings, usually of a policeman, sometimes of a police informer or a non-striker.[58] In a number of these – notably in the famous Upington 25 case[59] - evidence was led about the psychological processes which allow normally law-abiding employees to engage in violence and murder. An expert witness in one of the

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[54] Reicher S 'The Psychology of Crowd Dynamics' in Hogg MA and Tindale RS (eds) *Blackwell Handbook of Social Psychology: Group Process* (2002); Gurr T (1968) Psychological Factors in Civil Violence. World Politics, 20 ,pp 245-278; Kelly J E & Nicholson N 'The causation of strikes: a review of theoretical approaches and the potential contribution of social psychology' (1980) *Human Relations*; Senechal de la Roche R 'Collective violence as social control' *Sociological Forum* Volume 11 Number 1, 97-128;

[55] Nicholson N & Kelly J 'The Psychology of Strikes' *Journal of Occupational Behaviour* Vol. 1, No. 4 (Oct., 1980), pp. 275-284.

[56] Nicholson & Kelly op cit 277.

[57] Nicholson & Kelly op cit 281.

[58] *S v Thabetha and Others* 1988 (4) SA 272 (T) 280E-281I; 286B-C; *S v Motaunq and Others* 1990 (4) SA 485 (A) op 5261; *S v Wilson Matshili and Others* (judgment 6 May 1991) at 15-19; 26-27; *S v Safatsa* 1988 (1) SA 868 (A) op 904G-H; *S v Khumalo en Andere* 1991 (4) SA 310 (AD); *S v Matshili & others* 1991 (3) SA 264 (A) 271; *S v Matela & another* 1994 (1) SACR 236 (A) 242; See Dison D (1989) *Violence and the Law: An examination of some recent trials*. Paper presented at the Centre for the Study of Violence and Reconciliation, Seminar No. 9, 26 October; Joffe J (1990) *Violence and the Law in the 1989 Railway Strike*. Paper presented at the Centre for the Study of Violence and Reconciliation, Seminar No. 2, 25 April; Segal L & Simpson G (1990) '*Off the Rails: Violence in the Railway Strike of 1987*. Paper presented at ASSA conference, July.

[59] *S v Khumalo en Andere* 1991 (4) SA 310 (AD); [1991] 2 All SA 341 (A); Durbach A *A Common Purpose: The Story of the Upington 25* (2002, Continuum).

cases, Vogelman[60], relied on the views of Kelman[61] who identified three inter-related factors which help weaken moral constraints. They are: authorisation,[62] routinisation,[63] and dehumanisation.[64]

South African courts accepted, with varying qualifications, these social psychological phenomena as extenuating factors in several of the murder trials.[65] In one important case, railway workers were convicted of murdering non-strikers during a strike. The court accepted conformity, obedience, group polarization, deindividuation, bystander apathy, and other psychological phenomena as extenuating factors.[66] In a second trial, death sentences of defendants for the "necklace" killing of a young woman were reduced to 20 months imprisonment in the light of similar social psychological evidence.[67]

What is now apparent is that this theory is highly contested.[68] It is derived from the views of Gustave Le Bon, a French psychologist whose 1895 book *The Crowd*[69] is still widely cited today and has been called the most influential psychology text of all time.[70] Le Bon argued that 'when people become anonymous within the mass, they

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[60] Vogelman L 'Some Psychological Factors to Consider in Strikes, Collective Violence and the Killing of Non-strikers' *Violence in Contemporary South Africa*, SAB conference proceedings, Johannesburg, September 1991.

[61] H C Kellman 'Violence without moral constraints' (1973) *Journal of Social Issues* 29 no.4.

[62] 'Authorisation' refers to the process in a strike where certain behaviour is authorised by leaders or the group, making it extremely difficult to resist following the group.

[63] 'Routinisation' refers to the process where repeated authorisation for violent conduct provides continual justification for the act.

[64] 'Dehumanisation' occurs because non-strikers have placed themselves outside the aspirations of the community of strikers, an act which allow strikers to use words like "mpimpi" which define the non-strikers as enemy and therefore easier to kill.

[65] See Andrew M Colman 'Crowd psychology in South African murder trials' (1991) 46(10) *American Psychologist* 1071-1079.

[66] *S v Matshili & others* 1991 (3) SA 264 (A) 271. See D Dison *Violence and the Law: An examination of some recent trials*. Paper presented at the Centre for the Study of Violence and Reconciliation, Seminar No. 9, 26 October 1989; L Segal & G Simpson '*Off the Rails: Violence in the Railway Strike of 1987*' Paper presented at ASSA conference, July 1990.

[67] *S v Matala & others* 1993 (1) SACR 531 (A) 537.

[68] See particularly the writings of Stephen Reicher: Reicher S 'Social influence in the crowd: Attitudinal and behavioural effects of de-individuation in conditions of high and low group salience' (1984) *British Journal of Social Psychology* Vol 23 Issue 4 341-350; Reicher S, Stott C, Cronin P, Adang O, 'An integrated approach to crowd psychology and public order policing' (2004) *Policing: An International Journal of Police Strategies & Management* Vol. 27 Iss: 4 pp.558 – 572; Reicher S & Potter J 'Psychological Theory as Intergroup Perspective: A Comparative Analysis of "Scientific" and "Lay" Accounts of Crowd Events' (1985) *Human Relations* 38: 167-189; Stott C & Reicher S D 'How Conflict Escalates: The Inter-Group Dynamics of Collective Football Crowd `Violence'' (1998) *Sociology* 32: 353-377; Reicher S D, Spears R & Postmes T (1995) 'A Social Identity Model of Deindividuation Phenomena' *European Review of Social Psychology*, 6:1, 161-198.

[69] Le Bon G *The Crowd: A Study of the Popular Mind* 1895 (Ernest Benn, London); Nye R A *The origins of crowd psychology: Gustave Le Bon and the crisis of mass democracy in the Third Republic* (1975, Sage Publications).

[70] Reicher S, Stott C, Cronin P, Adang O 'An integrated approach to crowd psychology and public order policing' (2004) *Policing: An International Journal of Police Strategies & Management*, Vol. 27 Iss: 4, pp.558 – 572; Bendersky JW '"Panic": The impact of Le Bon's crowd psychology on U.S. military thought' *Journal of the History of the Behavioral Sciences* Volume 43, Issue 3, Article first published online: 10 July 2007; Lasswell HD 'The Impact of Crowd Psychology upon International Law' 9 *Wm. & Mary L. Rev.* (1967-1968) 664-681;

lose their individual identity.[71] As a consequence they forget their normal values and standards, their ability to think and to reason and to judge.'[72] More recent writers challenge this idea of mass irrationality.[73] Starting from a social identity perspective they argue that

> 'individuals do not lose identity in the crowd but rather shift from personal identity (what makes me as an individual distinctive from other individuals) to social identity (what makes my group distinctive compared to other groups). Correspondingly, they do not lose values and standards but rather shift to acting in terms of the values and standards associated with the relevant group'.[74]

There are several implications for strike violence which flows from this.[75]

The term 'social identity', as Reicher and others point out, is not just a theoretical concept, because an understanding of the social identity of a specific crowd becomes a tool to understand and deal with the crowd. Social identity shapes not only the values and standards on which we act, but it also determines who can influence us and how, the nature of our goals and priorities, how we view others and interpret their behaviour, and, more specifically, the conditions under which we enter into conflict with others. For groups of workers this is particularly important. It has been said that

> groups have collective memories which can sometimes go back well beyond the experience or even the lifetime of any individual member. Crowds will "remember" their supposed mistreatment at the hands of another group many years ago and they will retain a suspicion and a hostility to all members of the other group, irrespective of whether they individually have done anything to offend. Moreover, that discrepancy between collective histories and individual actions often fuels a continuing cycle of distrust.[76]

And yet in a single group there are 'many different psychological groups with different social identities and hence different values, standards, stereotypes, expectations and so on'. It has thus been said that it is crucial to distinguish between a physical mass of people and a psychological crowd. If this distinction is made, it is possible to encourage self-policing. But if 'the police treat all crowd members the same, they are

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Moscovici S *The age of the crowd: A historical treatise on mass psychology* (1985 Cambridge University Press).

[71] The writings of Smelser N *Theory of Collective Behaviour* (1962) New York: Free Press, have similar conclusions to Le Bon, and identify six basic determinants of disorder (structural conduciveness, structural strain, the growth and spread of a generalised hostile belief, precipitating factors, the mobilisation of participants for action, and social control) and had a profound effect on policing in the UK. See Waddington D & King M 'The Disorderly Crowd: From Classical Psychological Reductionism to Socio-Contextual Theory – The Impact on Public Order Policing Strategies' (2005) 44 *The Howard Journal of Criminal Justice* 490–503.

[72] Reicher op cit.

[73] Tajfel H *Social Identity and Intergroup Relations* (1982, Cambridge University Press), Turner J C, Hogg M A, Oakes P J, Reicher S D, Wetherell M S *Rediscovering the Social Group: A Self-categorisation Theory* (1987, Blackwell, Oxford).

[74] Reicher op cit.

[75] See generally, Waddington, D & King M 'The Disorderly Crowd: From Classical Psychological Reductionism to Socio-Contextual Theory – The Impact on Public Order Policing Strategies' (2005) 44 *The Howard Journal of Criminal Justice* 490–503; Durrheim K & Foster D 'Technologies of social control: Crowd management in liberal democracy' (1999) 28(1) *Economy and Society* 56-74; Foster D 'Crowds and Collective Violence' in Foster D & Louw-Potgieter J (eds) *Social Psychology in South Africa* (1991).

[76] Reicher op cit.

likely to see themselves as all the same; where the police treat all crowd members as oppositional they are likely to see themselves as a united opposition'.[77] In particular, where the police intervention is perceived to prevent the legitimate progress of the strike, then 'the message of confrontation begins to "fit" with their collective sense of what is acceptable and, more pertinently, unacceptable'.[78]

These insights have led commentators to argue that crowd events cannot be explained solely in terms of what crowd members do, but must also address police tactics and intervention.[79] Where police act against the crowd as a whole, the crowd members, whatever their initial intentions, find themselves the target of police action. They will look to ways of avoiding arrest or injury, in some cases using violence to keep the police at a distance. '[W]here the police treat all crowd members the same, they are likely to see themselves as all the same; where the police treat all crowd members as oppositional they are likely to see themselves as a united opposition'.[80] Where police regard everyone to be dangerous, their response will be proportionate to this perception. In other words, the escalation of violence may be attributable more to the police response than what might be relatively isolated and individualistic acts by strikers.

Is there a different response, one that appreciates the social identity of the group of strikers? It has been suggested that where the police are seen to be protecting the rights of strikers to pursue their legitimate aims, but are impeded in doing so by random acts of violence, then most members are likely to listen to the police and ignore those calling for confrontation.[81] 'Rather than thinking primarily about the best form of police action to control the crowd, it is important also to concentrate on how to act in order to get the crowd to control itself. Second, the best way of achieving this is to place a major emphasis on how to be supportive towards crowd members pursuing legal goals and activities, even under conditions where one is aware of the presence of groups with illegal goals and even at points where these groups start to act in illegal or violent ways.' The call has been made for police officers to 'consider crowds as an opportunity and seek to enable them. Then crowd members and their wider communities may cease to see the police as a problem and thereby start to side with them in controlling those who would cause disruption'.

3.3 Conflict escalation and de-escalation

Understanding what triggers the escalation of conflict is important in the pre-emption of strike violence. Writers suggest that in destructive conflict increasingly competitive

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[77] Reicher op cit.
[78] Ibid.
[79] Cf Benyon J *Scarman and after: Essays Reflecting on Lord Scarman's Report, the Riots and their Aftermath* (1984) Pergamon Press, London; Della Porta D & Reiter H *Policing Protest: The Control of Mass Demonstrations in Western Democracies* (1998) University of Minneapolis Press, Minneapolis; Earl J, McCarthy JD & Soule S A 'Protest under fire? Explaining the policing of protest (2003) 68 *American Sociological Review* 581-606; Feagin J R & Hahn H *Ghetto Revolts*, (1973) Collier-Macmillan, London; Keith M *Race Riots and Policing* (1993) University College London Press, London; McPhail C, Schweingruber D & McCarthy J 'Policing protest in the United States: 1960-1995' in Della Porta D & Reiter H (Eds),*Policing Protest: The Control of Mass Demonstrations in Western Democracies* (1998) University of Minneapolis Press, Minneapolis 49-69.
[80] Reicher op cit.
[81] Reicher op cit.

stances cause an escalation, with a greater resources being committed to the conflict process, and may result in the situation being misjudged at a variety of levels.[82]

4. Is there a different approach?

Strike action can take two forms. The first is conventional, non-violent strike action which is preceded by good faith negotiation. The second is violent strike action which is preceded by bad faith negotiation. It is conceivable for violent strike action to follow good faith negotiation and peaceful strike action to follow bad faith negotiation but these permutations are less common.[83]

John Brand has thoughtfully suggested how employers and unions can pre-emptively prepare for negotiations, with training in interest-based negotiation practice, using a facilitator in the negotiation process who uses a problem-solving approach, persuading the parties to come to negotiation with no fixed mandates. Good faith bargaining needs to be entrenched in South African negotiation culture.

There are stories of hope which are reminders that, with will and perseverance, fresh starts can be made which can change perceptions about how disputes can be resolved.[84] In the Blyvooruitzicht mine 2012 was a year of almost a thousand retrenchments, union rivalry, violent strikes, and police involvement. The mine management recognised that if the mine – which was down to 40% production - was to be saved, an urgent healing process had to be facilitated. In a tough but engaging process of workshops over six weeks involving the entire workforce management and three rival unions were able to break the general mistrust and intimidation, restoring communication. Productivity increased to its highest levels since 2010 and management is able to speak cautiously of 'sustained profitability'. While it is early days to boast of a complete turnaround, this anecdote is a reminder that there are alternatives to the violent strike in the balancing of competing interests.

We have seen that the legal mechanisms which exist to control violent strikes are largely reactive and punitive. A more holistic approach to the problem is required. With a greater understanding of the psychological, sociological and economic factors that contribute to mob violence, together with a robust and systematic pre-strike facilitation process which is supportive of good-faith negotiation, it is suggested that such pre-emptive measures can materially improve the situation.

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[82] Anstey M *Managing Change, Negotiating Conflict* (3 ed 2006) 36-44 relies on Deutsch M *The Resolution of Conflict: Constructive and Destructive Processes* (New Haven, Yale University Press, 1973) and Pruitt DG & Rubin JZ *Social Conflict: Escalation, Stalemate and Settlement* (New York, Random House, 1986).

[83] Brand J 'Strike Avoidance –How to develop an Effective Strike Avoidance Strategy' presented at the 23rd Annual Labour Law Conference, Johannesburg, August 2010

[84] Bloch L 'Blyvoor shows the way in fractured industry' *Sunday Times* 31 March 2013.