Introducing a Serpent into the Garden of Collective Bargaining: *A Case Analysis of Numsa Obo Members v Elements Six Productions (Pty) Ltd* [2017] ZALCJHB 35 (7 February 2017)*

NT Rwodzi & N Lubisi*****

P·E·R

Pioneer in peer-reviewed, open access online law publications

Authors

Night T Rwodzi
Nombulelo Lubisi

Affiliation

University of Fort Hare,
South Africa

Email

ntrwodzi@gmail.com
nlubisi@ufh.ac.za

Date Submission

1 June 2018

Date Revised

19 November 2018

Date Accepted

10 December 2018

Date published

12 March 2019

Editor Prof W Erlank

How to cite this article

Rwodzi NT and Lubisi N Introducing a Serpent into the Garden of Collective Bargaining*: A Case Analysis of Numsa Obo Members v Elements Six Productions (Pty) Ltd* [2017] ZALCJHB 35 (7 February 2017)"*PER / PELJ* 2019(22) - DOI http://dx.doi.org/10.17159/1727-3781/2019/v22i0a5190

DOI
http://dx.doi.org/10.17159/1727-3781/2019/v22i0a5190

Abstract

This case note is an analysis *of Numsa obo Members v Elements Six Productions (Pty) Ltd* [2017] ZALCJHB 35 (7 February 2017). The jurisprudence advanced in this case is pertinent to balancing the employer and employee's rights in the context of collective bargaining. The worker's right to strike is one of the rights entrenched in the South African constitution. In addition, this right to strike should not be directly or indirectly undermined without a just cause. The preamble of the South African Constitution seeks to redress the unjust laws of the past including those in the employment arena. Furthermore, unfair discrimination is also one of the prohibited practices which are sanctioned not only domestically but internationally as well in terms of the International Labour Conventions. This note contributes to the existing literature of labour law by critically analysing the decision reached by Tlhotlhalemaje J.

Keywords

Right to strike; collective bargaining; unfair discrimination; employers' rights and employees' rights.

.....

1 Introduction

Does offering bonuses to non-striking employees who went beyond the call of duty and performed the duties of the striking employees contravene section 5 of the *Labour Relations Act* 66 of 1995 (LRA)? How compelling is the contention that the employer is simply rewarding volunteers for their efforts in ensuring that it fulfils clients' demands during a crippling strike? More accurately, what is significant here is that without non-strikers going the extra mile, the employer would have lost market share as well as suffering reputational damage. From a different perspective, can it be argued that the interests of the employer in safeguarding the viability of the enterprise override concerns about the disproportionate treatment of striking employees?

The objections lodged by the striking employees and their union about the extra payment made to non-strikers are important. At the core of the objections is the likely detrimental effect on future strikes, as striking employees would be dissuaded from joining strikes based on the lure of reward. To this should be added that the practice has the effect of weakening the employees' collective bargaining effort, or even of sowing discord and disunity among members of a union and a workforce in general. In this sense, additional payments undermine the right to strike and invariably tilt the scales of power in favour of the employer. There is also the free-rider problem: if the striking employees' demands are met, the non-striking employees who are within the bargaining component and who had performed the tasks of those on strike in addition to their own would end up benefitting twice. Firstly, the non-strikers would receive salary increments as a result of the sacrifices made by their colleagues, and secondly, they would recieve an extra income derived from the strike action.

This paper engages with these difficult and interesting questions against the backdrop of *NUMSA obo Members v Elements Six Productions (Pty) Ltd*.[1] It also reflects on the conundrum created by the lacuna in the LRA left unattended despite recent amendments. This is also underlined by a related

---

* This note is dedicated to our colleagues Tumo Maloka and Chuks Okpaluba. Without their foundational ideas, thoughtful comments and moral support, this note would not have been possible.

** Night T Rwodzi. LLB LLM. LLD Candidate at the University of Fort Hare, South Africa. E- mail: ntrwodzi@gmail.com.

*** Nombulelo Lubisi. B Juris LLB LLD (UFH) Advanced Labour Law (UNISA). Senior Lecturer, University of Fort Hare, South Africa. E-mail: nlubisi@ufh.ac.za.

1 *NUMSA obo Members v Elements Six Productions (Pty) Ltd* 2017 ZALCJHB 35 (7 February 2017) (hereinafter referred to as *Elements Six Productions).*

pronouncement in *NUM v Namakwa Sands (A Division of Anglo American Corporation Ltd)*.[2]

2 The facts in *Element Six Productions*

Since the foundational cases of *CWIU v BP SA*[3] and *OK Bazaars (1929) Ltd v SACCAWU*,[4] recourse by employers to defeat a protected strike by paying inducements, incentives or bonuses to non-strikers, though characterised as "innocent" rewards for "hard work", has been and still is a valid ground for litigation. The facts of *Elements Six Production* were straightforward. Members of NUMSA, UASA and SAEWA had embarked upon a protected strike in pursuit of their wage demands. As was to be expected, not all employees joined the protected strike. During the strike some of the non-striking employees performed extra duties, thereby enabling the employer to sustain production at a level sufficient to meet clients' demands. In appreciation of the non-striking employees' efforts in going the extra mile, the employer decided to pay them an additional sum termed "a token of appreciation".[5] In the aftermath of the strike, the striking employees were naturally aggrieved by the selective payment of the bonuses. It was this dispute over the payment of bonuses to non-strikers that found its way to the Labour Court.

The core issue before the Labour Court was whether the payment of bonuses to the non-strikers amounted to unfair discrimination against the striking employees. It was contended by the applicants that rewarding the non-strikers discriminated against the striking employees for exercising a right contemplated by the LRA in terms of section 5(1) of that Act, or constituted the provision of a prohibited advantage or promise of advantage to a person not utilising any right granted by the Act or for not engaging in any proceedings in terms of the Act as contemplated by section 5(3). On the other hand, the respondent retorted that it had not breached the provisions of section 5 and its payments were not discriminatory on any specified or unspecified ground.[6] The employer's second line of defence was that the criteria it had applied in making the payments were objective and rational and did not result in any corrosive effect on future strikes.[7]

---

2 *NUM v Namakwa Sands (A Division of Anglo American Corporation Ltd)* 2008 29 ILJ 698 (LC) (hereinafter referred to as *Namakwa Sands*).
3 *CWIU v BP SA* 1991 12 ILJ 599 (IC).
4 *OK Bazaars (1929) Ltd v SACCAWU* 1993 14 ILJ 362 (LAC).
5 *Elements Six Productions* para 3.3.
6 *Elements Six Productions* para 4.
7 *Elements Six Productions* paras 4, 10.9.

2.1 The labour court judgment

The court ruled that the payment of the "token" to the non-striking employees constituted differentiation, which amounted to discrimination within the context of section 5(1), 5(2)(c)(iii) and 5(2)(c)(vi) of the LRA,[8] and that the discrimination was unfair in that the striking employees were prejudiced for their participation in the lawful activities of their trade union, and the exercise of their right to strike. A declaratory order was made prohibiting the employer from ever again engaging in such an activity. The reasons advanced by Tlhotlhalemaje J for concluding that the employer had engaged in conduct prohibited by both subsections 5(1) and 5(3) and for making the declaratory order merit detailed analysis.

3 The lacuna

The labour court's decision recapitulates the reasons why tokens of appreciation are not to be paid to non-striking employees. There is no doubt that non-striking employees cannot be forced by their employers to do the task of striking employees. However, the LRA is silent on whether an employer can politely request non-striking employees to voluntarily perform such tasks. There is nothing in the LRA or any other statutory provision that prohibits an employer from utilising the services of its non-striking employees to perform work ordinarily performed by striking employees, and rewarding them for going the "extra mile".[9] In addition, no consequences are visited upon an employer that has politely asked non-strikers to volunteer to perform work ordinarily performed by striking employees.[10] It is unlikely that the court would prohibit the payment of "tokens" for work done during an unprotected strike, given the fact that there is no lawful right to strike that requires protection. Furthermore, the provision of section 10 of the *Basic Conditions of Employment Act*[11] escaped the attention of the drafters during its recent amendment in regard to these vexed issues. Although consensual overtime work is allowed, section 10 of the BCEA does not address the issue whether such overtime work may include work ordinarily performed by striking employees.[12]

8 *Elements Six Productions* para 23.12.
9 *Elements Six Productions* para 16.
10 *Elements Six Productions* para 17.
11 *Basic Conditions of Employment Act* 75 of 1997 (hereinafter referred to as BCEA).
12 *Elements Six Productions* para 18.8.

4 The constitutional and statutory context

In any discussion of the complex issue of discrimination in employment, the starting point is to look at the constitutional and statutory context. In that regard it is important to appreciate the trilogy of rights: the right to freedom of association,[13] the right to engage in collective bargaining[14] and the right to strike.[15] The LRA sets out to amplify the said fundamental right of freedom of association.[16] At the core of the LRA's guarantee of the fundamental right of freedom of association is the right of every employee to take part in the formation of a trade union and to become a member of a trade union.[17] A corollary of trade union membership is the right to participate in lawful activities of the union.[18] This brings to the fore the pivotal provisions of section 5(1) and 5(3), which read as follows:

> (1) No person may discriminate against an employee for exercising any right conferred by this Act…
>
> (3) No person may advantage, or promise to advantage, an employee or a person seeking employment for that person not exercising any right conferred by this Act for not participating in any proceedings in terms of this Act. However, nothing in this section precludes the parties to a dispute from concluding an agreement to settle that dispute.

Freedom of association is further buttressed by section 187 of the LRA concerning automatically unfair dismissals. Section 187(1)(a) of the LRA provides that:

> A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, if the reason for the dismissal is (a) that the employee participated in or supported, or indicated an intention to participate in or support, a strike or protest action that complies with the provisions of Chapter IV.

---

13 Section18 of the *Constitution of the Republic of South Africa*, 1996 (hereinafter referred to as the *Constitution*) provides: "Everyone has the right to freedom of association."

14 Section 23(5) of the *Constitution* provides: "Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1)."

15 Section 23(2)(c) of the *Constitution*.

16 Sections 4-10 of the *Constitution*.

17 Section 4(1)(a) of the *Labour Relations Act* 66 of 1995 (hereinafter referred to as LRA).

18 *Kroukam v SA Airlink (Pty) Ltd* 2005 26 ILJ 2153 (LAC).

As per the above provision, to dismiss an employee for joining or participating in the affairs of a union is therefore automatically unfair.

The endorsement of trade union rights in the *Constitution*[19] and the LRA[20] essentially provides for strong protection of the rights of employees.[21] A trade union can be described as the in-between body that bridges the gap between an employer and an employee.[22] Essentially the role of a trade union is to safeguard the existing rights of its members and also to improve and enhance these rights.[23] All employees are entitled to join and participate in trade union activities.[24] Therefore, trade unions are essential to the furtherance of the concepts of equality and democracy in the workplace as they promote the interests of employees by ensuring that employees are placed in a position equal to that of their employers.[25]

The court's enforcement of the LRA's dispute resolution framework is further illustrated in *Mackay v ABSA Group*,[26] where the court stated that:

> All disputes arising from the employer-employee relationship must be effectively resolved. Such disputes are resolved through conciliation, arbitration and adjudication, and those of a collective nature through collective bargaining. It is clear that it could never have been intended that some disputes arising out of the employer-employee relationship are incapable of resolution in terms of the Act.[27]

The court averred that the labour dispute resolution framework is deemed effective in protecting the rights of employees.[28] Furthermore, the protection of employees' rights is enforced through the process of collective bargaining within the dispute resolution system.[29] In *National Police Services Union v National Negotiating Forum*,[30] the court pointed out that the LRA does not place any duty on either the employer or the employee to engage in the bargaining process. The courts are not given authority to determine or influence the result of the bargaining process. The outcome of such

19 Section 23(2) of the *Constitution*.
20 Section 65 of the LRA.
21 Botes 2013 *PELJ* 525.
22 Sundar 2007 *Indian J Ind Relat* 713. Also see Grawitzky *Collective Bargaining in Times of Crisis* 1.
23 Sundar 2007 *Indian J Ind Relat* 714.
24 Grogan *Collective Labour Law* 34.
25 Finnemore and Van Rensburg *Contemporary Labour Relations* 139.
26 *Mackay v ABSA Group* 1999 12 BLLR 1317 (LC) (hereinafter referred to as *Mackay*).
27 *Mackay* para 15.
28 *Mackay* para 15.
29 Brand *et al Labour Dispute Resolution* 30.
30 *National Police Services Union v National Negotiating Forum* 1999 20 ILJ 1081 (LC) (hereinafter referred to as *National Negotiating Forum*).

negotiations is entirely dependent on the parties themselves.[31] This ruling essentially portrays that both parties to the bargaining process must be given equal power to ensure that there is democracy in labour relations.[32]

It is undisputed that the balance of power in employment relationships favours employers over employees, so strikes are used as tools by employees to bring some sort of balance.[33] Botha[34] argues that a refusal to work grants employees a significant voice regarding what goes on in the workplace. Similarly, Estreicher[35] expresses the opinion that "without the right to strike, collective bargaining becomes collective begging". In the same spirit, Chicktay[36] advances that a strike action enables employees to preserve their dignity by showing the employer that they are "not just cogs in a machine". In addition, the *Constitution* entrenches the right of workers to go on strike.[37] The right to strike is recognised not only domestically but also through International Labour Organisation (ILO) conventions such as the Freedom of Association and Protection of the Right to Organise[38] and the Right to Organise and Collective Bargaining,[39] which advocate for the protection of workers' rights.

4.1 Did the discrimination amount to unfair discrimination

In *Elements Six Productions* it was shown that there was a high demand for the employer's products and in order to meet the demands of the clients during the looming strike, the employer had to increase overtime shifts, for which employees were remunerated.[40] The employers contended that the firm's stocks had almost depleted whilst the demand for the firm's products continued; hence the need to come up with measures to continue with production in order to meet the demands of the firm's clients.[41] The questions dealt with in *Elements Six Productions* were: how realistic is it that employees would have assisted the employer voluntarily without the inducement or incentive of financial gain?[42] And would ordinary non-striking

31 *National Negotiating Forum* para 52.
32 Du Toit 1997 *LDD* 42.
33 Manamela and Budeli 2013 *CILSA* 323. See also Myburgh 2013 *CLL* 1.
34 Botha 2015 *De Jure* 332.
35 Estreicher 1994 *Mich L Rev* 578.
36 Chicktay 2006 *Obiter* 348.
37 Section 23(2) of the *Constitution*. Also see s 64 of the LRA.
38 *Freedom of Association and Protection of the Right to Organise Convention 87* (1948).
39 *Right to Organise and Collective Bargaining Convention 98* (1949).
40 *Elements Six Productions* para 10.2.
41 *Elements Six Productions* para 10.5.
42 *Elements Six Productions* paras 6, 10.6.

employees volunteer to perform the tasks of striking employees without an expectation of some form of reward?[43] This article agrees with the court's finding that employees would be unlikely to volunteer to save the business of an employer without the expectation of a reward.

Furthermore, in *Elements Six Productions* it was shown that the striking employees felt that they had lost out by going on strike, as they had not been given the token and were also not paid for the duration of the strike. The employees were also concerned about the fact that the non-strikers benefitted from the increase in wages attained as a result of the strike action, and the employer had therefore discriminated against the striking employees by not paying them the token too.[44] The employees in *Elements Six Productions* argued that in the case of *FAWU v Pets Products*, once it had been established that there was discrimination against employees for exercising a right conferred in the LRA, it was presumed that the discrimination was unfair until the contrary had been established.[45]

The employers argued to the contrary that the courts in *FAWU* and *NUM v Namakwa Sands*[46] erred in concluding that discrimination against employees for striking was discrimination on a listed ground. This was so in that striking was not listed in section 9(3) of the *Constitution* of the Republic, and the court in *Namakwa Sands* had not conceded that striking was a listed ground of discrimination.[47] It was further contended that if the employer's motive is not to unfairly discriminate, then the discriminatory conduct complained of cannot be seen as unfair.[48] More so, if an employer can show that there were rational and objective criteria for the payment of the bonus, the employer is justified in making such discrimination.[49] What was worrisome about the employer's arguments, though, was that they refused to disclose the payments made to the non-strikers, which suggested that the transparency of the "rational and objective criteria" used was questionable.

The court referred to the case of *Mbana v Shepstone & Wylie,*[50] where the Constitutional Court held that within the context of employment law the test

43 *Elements Six Productions* para 18.1.
44 *Elements Six Productions* para 8.4.
45 *Elements Six Productions* para 14.4.
46 *NUM v Namakwa Sands (A Division of Anglo American Corporation Ltd)* 2008 29 ILJ 698 (LC).
47 *Elements Six Productions* para 15.1.
48 *Elements Six Productions* para 15.2.
49 *Elements Six Productions* para 15.3.
50 *Mbana v Shepstone & Wylie* 2015 36 ILJ 1805 (CC).

for unfair discrimination is commensurate to that laid down in *Harksen v Lane*.[51] The initial step is to establish whether the employer's policy differentiates between employees. The second step entails establishing whether that differentiation amounts to discrimination, and the third step involves determining whether the discrimination is unfair.[52]

Tlhotlhalemaje J observed that the employees had discharged the onus placed on them by demonstrating that there had indeed been differentiation which amounted to discrimination, and that in return the employer had not been able to demonstrate that its conduct had not infringed on the rights of the employees as they had contended, nor had it demonstrated that the discrimination was fair.[53] Tlhotlhalemaje J further observed that it was very unlikely that employees would volunteer to work shifts without an expectation of a reward.[54] More so, the veil of secrecy surrounding these payments led to an inference that they were not made merely as a token.

4.2 Undermining the Holy Cow of collective bargaining

In terms of what transpired in *Elements Six Productions* there is a great likelihood of employers gaining the upper hand and turning collective bargaining into collective begging. In future, no employees will heed the call to go on strike, and this indirectly limits the constitutional right to strike. In addition, the practice of awarding bonuses only to non-striking employees has the effect of weakening the employees' collective bargaining effort, or at least of causing discord and disunity amongst the members of a union, thus undermining the right to strike and invariably tilting the scales of the power play in favour of the employer.[55] In a similar vein, when non-striking employees perform the tasks of striking employees, it means employers can continue with a “business as usual” attitude. Such practices can be used as a strategy by employers to negate and dilute the intended effects of the protected strike action embarked upon by employees.[56] This undoubtedly degrades the status of collective bargaining as a constitutional tool to resolve disputes; it defeats the purpose of the LRA as identified in its section

51 *Harksen v Lane* 1998 1 SA 300 (CC) para 50.
52 *Mbana v Shepstone & Wylie* 2015 36 ILJ 1805 (CC) para 26. Also see *Sali v National Commissioner of the South African Police Service* 2014 ZACC 19 (19 June 2014) para 9.
53 *Elements Six Productions* para 23.
54 *Elements Six Productions* para 23.6.
55 *Elements Six Productions* para 18.4.
56 *Elements Six Productions* para 18.6.

1; and undermines the rights of employees to freely associate and take part in the lawful activities of their unions.[57]

Non-striking employees who are asked to perform the tasks of those on strike in addition to their normal tasks could view this as an opportunity to supplement their salaries during the duration of the strike. This could induce them to refrain from joining strike actions, or to abandon the strike midway, or to be deterred from taking part in strike action in future.[58] Additionally, the exercise of a right to strike with a view to advancing and addressing employees' legitimate concerns might be rendered ineffective, if not nugatory. In the alternative, if in the end the striking employees' demands are met, the non-striking employees who fall within the bargaining unit and who had performed the tasks of those on strike in addition to their own would end up benefitting twice, that is, from an increase in salary as a result of the sacrifices made by their colleagues, and from extra income derived from the strike action. This clearly cannot be a fair labour practice.[59]

The consequences that flow from such disunity may be dire for non-striking employees, given the common knowledge that strikes normally tend to turn violent at or near workplaces. "It is not uncommon for strike violence to spiral into communities and the courts would be remiss and imprudent in not acknowledging these far-reaching consequences".[60] For example, in the case of *Transnet SOC Ltd v SATAWU*,[61] "a non-striking truck driver lost his life after a brick was thrown at his truck and hit him on the head".[62] In addition, in *SATAWU v Ram Transport South Africa (Pty) Ltd*,[63] employees participating in a protected strike threatened replacement employees in terms of section 76(1)(b) of the LRA with sticks and forced them to vacate the workplace.

The function of collective bargaining is to ensure that parties come to an understanding about the issue in dispute and that the dispute will not necessitate industrial action or lock-outs to reach a resolution.[64] This would benefit both the employer and the employee in that the employer would save on production time lost and the employee would not forfeit the right to be

57 *Elements Six Productions* para 18.7.
58 *Elements Six Productions* para 18.2.
59 *Elements Six Productions* para 18.3.
60 *Elements Six Productions* para 18.5.
61 *Transnet SOC Ltd v SATAWU* 2012 ZALCJHB 107 (12 October 2012).
62 *Transnet SOC Ltd* para 2.
63 *SATAWU v Ram Transport South Africa (Pty) Ltd* 2014 ZALCJHB 471 (26 November 2014).
64 *Macsteel (Pty) Ltd v NUMSA* 1990 11 ILJ 995 (LAC).

paid. In *Ceramic Industries Ltd t/a Betta Sanitary Ware v NCBAWU*,[65] the court stated that the LRA must be interpreted in conformity with international law and the *Constitution*.[66] It must be understood that the *Constitution* was enacted to redress the injustices of the past, not only in society but also in the field of labour. It is for this reason that the LRA has the dual function of inculcating transformation in the workplace as well as in society at large, because an injustice to an employee at a workplace adversely affects his family and the community in which he resides.

In *Foodgro (A division of Leisurenet Ltd v Keil)*,[67] the Labour Appeal Court acknowledged that unjust laws that govern society negatively impact on labour relations.[68] In addition, labour peace essentially entails the elimination of strife which takes the form of strikes and lock-outs. By engaging in collective bargaining, parties would be able to resolve disputes amicably and speedily rather than having to resort to strikes and lock-outs.[69] This, in turn, would result in a decrease of work days lost and greater productivity.[70]

4.3 The Sword of Damocles[71]

Granted that an employer is statutorily prohibited from using economic incentives to defeat a protected strike, does that mean an employer is prevented from taking measures aimed at ensuring the viability of its business? It bears repeating that strikes are intended to cause financial loss.[72] A careful reading of the strike provision indicates that the answer is no. This is because section 67(5) provides an escape route in the face of a crippling protected strike. Even in the context of a protected strike, an employer still possesses the ultimate weapon of last resort under section 67(5). If it can be proved that the economic harm caused by an industrial action has become unbearable, the dismissal of the protected strikers on the grounds of operational requirements[73] may be justifiable. Put simply,

65 *Ceramic Industries Ltd t/a Betta Sanitary Ware v NCBAWU* 1997 6 BLLR 697 (LAC).

66 *Ceramic Industries Ltd t/a Betta Sanitary Ware v NCBAWU* 1997 6 BLLR 697 (LAC) para 70.

67 *Foodgro (A Division of Leisurenet Ltd) v Keil* 1999 9 BLLR 875 (LAC).

68 Desai and Habib 1997 *JMAS* 495.

69 *Pep Stores (Pty) Ltd v Laka* 1998 19 ILJ 1534 (LC).

70 Daemane 2014 *JETEMS* 122.

71 The Sword of Damocles means any impending danger and, in this case, if an employer suffers financial loss due to a prolonged strike, employees risk being dismissed in terms of operational requirements. Also see Collins English Dictionary 2018 https://www.collinsdictionary.com/dictionary/english/sword-of-damocles.

72 *Metsimaholo Local Municipality v SAMWU* 2016 ZALAC 19 (11 May 2016) para 27.

73 Section 189(1) of the LRA, "when an employer contemplates dismissing one or more employees for reasons based on the employer‘s operational requirements, the

dismissal becomes a weapon only in exceptional circumstances, when operational requirements dictate its use.[74]

The LRA recognises that an employer may dismiss employees if the operational requirements of its business make such a dismissal unavoidable.[75] This is supported by the recent case of *SATAWU v G4S Aviation Secure Solutions*.[76] Section 213 of the LRA defines operational requirement as one based on "the economic, technological, structural or similar needs of the employer". However, failure by the employer to prove that the reason for the dismissal is fair and is based on the employer's operational requirements will result in the dismissal's failing the substantive test.[77] Courts will uphold a dismissal as fair only where it was both substantively and procedurally fair.[78] Du Toit[79] argues that "a fair reason for dismissal is not limited to efforts to save a business but may be related to any legitimate business objective, including *bona fide* attempts at improving its efficiency, profitability or competitiveness". Furthermore, the fact that the measure was the last available resort needs to be demonstrated by the employer, which needs to show that all alternative steps had been considered to prevent retrenchments.[80]

On the other hand, the dismissal of an employee because of his or her participation in a protected strike will be labelled as an "automatically unfair dismissal".[81] In the same vein, section 67(4) of the LRA provides that "an employer may not dismiss an employee for participating in a protected strike". However, section 67(5) states that "it is lawful to dismiss a striking employee for reasons based on the employer's operational requirements" and section 77(3) provides that:

> A person who takes part in protest action or in any conduct in contemplation or in furtherance of protest action that complies with subsection (1), enjoys the protections conferred by section 67.

---

employer must consult, (a) any person whom the employer is required to consult in terms of a collective agreement".

74 See *NUMSA v Dorbly Limited* 2004 ZALC 47 (8 June 2004); *Steenkamp v Edcon Limited* 2016 ZACC 1 (22 January 2016).

75 See s 189 of the LRA.

76 *SATAWU v G4S Aviation Secure Solutions* 2016 ZALCJHB 10 (13 January 2016).

77 Gandidze 2007 *LDD* 84.

78 Gandidze 2007 *LDD* 83.

79 Du Toit 2005 *ILJ* 595. Also see Gandidze 2007 *LDD* 95.

80 See *General Food Industries Ltd v Food Allied Workers Union* 2004 25 ILJ 1260 (LAC).

81 See s 187(1)(a) of the LRA.

The court in *SA Chemical Workers Union v Afrox Ltd*[82] was faced with a problem created by the LRA, in that section 67(4) read together with section 187(1)(a) contradicts section 67(5), which does not prohibit an employer from fairly dismissing an employee for reasons based on an employer's operational requirements. The court then referred to the case of *Johnson and Johnson v CWIU*,[83] which stated that a strike becomes counter-productive if it threatens the very existence of the enterprise against which it is directed.[84] However, the question still remains, does this not undermine the purpose of a strike and its intended consequences?

The question to ask is how much economic hardship an employer is required to tolerate before it is entitled to retrench striking workers. It is trite that economic harm through industrial action is both expected and accepted by all parties involved in collective bargaining.[85] The complex issue of the retrenchment of strikers involved in a legal strike is freighted with history.[86] However, the power of the employer to inflict "capital punishment" on the strikers who partake in a protected strike is constrained by the fact that such dismissals are categorised as automatically unfair.[87] The vexed question that arises in each case is whether the employees were dismissed for participating in a protected strike or whether they were dismissed for the operational requirements of the employer. Where the reason for the dismissal is participation in a protected strike and not the employer's operational requirement, then the dismissal will be branded as automatically unfair in terms of section 187(1)(a).

It is submitted that rather than contravening the safeguards in section 5(1) and (3), an employer confronted with a prolonged and crippling protected strike may resort to the dismissal of the strikers on the ground of operational requirements. For instance, in *NUMSA v Dorbly Ltd*[88] the retrenched employees were taking part in a protected national strike. The Labour Court

82 *SA Chemical Workers Union v Afrox Ltd* 1999 20 ILJ 1718 (LAC).

83 *Johnson and Johnson v CWIU* 1998 12 BLLR 1209 (LAC).

84 *Johnson and Johnson v CWIU* 1998 12 BLLR 1209 (LAC) 1726 B-C.

85 *MAN Truck & Bus (SA) (Pty) Ltd and United Motor & Allied Workers Union* 1991 12 ILJ 181 (LC) 198H-I.

86 See generally *BAWU v Prestige Hotels CC t/ Blue Waters Hotel* 1993 14 ILJ 963 (LAC) 972F; *Cobra Watertech v NUMSA* 1995 16 ILJ 582 (LAC) 616F; *NUMSA v Vetsak Co-operative* 1996 17 ILJ 455 (A); *NUM v Black Mountain Mineral Development Co (Pty) Ltd* 1997 4 SA 51 (SCA).

87 *SACCAWU v Afrox Ltd* 1999 20 ILJ 1718 (LAC) para 41.

88 *NUMSA v Dorbly Limited* 2004 ZALC 47 (8 June 2004). Also see *General Food Industries Ltd v FAWU* 2004 25 ILJ 2135 (LAC); *Early Bird (Pty) Ltd v FAWU* 2004 25 ILJ 2135 (LAC). And also *Steenkamp v Edcon Limited* 2016 ZACC 1 (22 January 2016).

had to determine whether their retrenchment constituted a dismissal for operational requirements or whether it was automatically unfair in terms of section 187(1)(a). An important question concerned the extent to which an employer is expected to endure the harm occasioned by industrial action before it is permitted to effect a dismissal for operational reasons. On the facts, the court found the dismissals to have been genuinely grounded in operational requirements, but held that they were procedurally unfair because the employer took the decision to close down the operation prior to engaging in proper consultations with the union.

At first glance, it would appear that an employer in a protected strike is statutorily emasculated. However, an employer can still invoke replacement labour to a limited extent for continuous production or to retain the legal power of dismissal. The employer can invoke operational requirements to dismiss employees engaged in a protected strike, although it is not that simple. Therefore, while the LRA provides important safeguards with regard to freedom of association, collective bargaining and striking, it does not entirely insulate protected strikers from dismissal. We cannot also lose sight of the fact that the underlying purpose of labour law is to serve as a countervailing force against the power of the employer. Otto Khan-Freund's[89] aphorism still carries force: "The relations between an employer and an isolated employee or worker is typically a relation between the bearer of power and one who is not a bearer of power". Hence, preserving job security is one of the overarching objectives of the LRA and to the same extent the *Constitution*.[90] In a nutshell, the vulnerability of those in employment is an abiding feature of the contemporary world of work.

4.4 A declaratory order

The court in *Elements Six Productions* deemed a declaratory order prohibiting the repetition of similar conduct to be appropriate.[91] The court reasoned that "it would be neither competent nor appropriate for this court to grant any monetary relief in this case".[92] The authors, however, disagree with this court's declaratory order as it is little more than a slap on the wrist for the employer. Although it was acceptable not to award damages, the courts could have considered compensation (no need to prove damages) for unfairly discriminating against the striking employees in terms of section

89 Davies and Freedland *Kahn-Freund's Labour and the Law* 6.
90 *Sidumo v Rustenburg Mines Ltd* 2007 28 ILJ 2405 (CC) para 74. Also see Cheadle *et al South African Constitutional Law* 6.
91 *Elements Six Productions* para 24.
92 *Elements Six Productions* para 24.

158(1)(a)(vi) of the LRA, which reads: "The Labour Court may - (*a)* make any appropriate order, including – (vi) an award of damages in any circumstances contemplated in this Act." The authors argue that an order that the employer should pay compensation could possibly have a deterrent effect on employers who willy-nilly undermine collective bargaining in future.

5 Conclusion

Elements Six Productions demonstrates that if employers in a protected strike context are allowed to pay incentives, rewards or bonuses to non-strikers and these rewards are benignly styled as "token of appreciation" for hard work, then there is a real danger that one of the core objectives of the LRA, namely promoting collective bargaining, may be defeated. In addition, incentivising non-strikers also impedes the speedy resolution of labour disputes.[93] Being cognisant of the employer's need to meet the demands of its clients during the strike and to avoid the loss of market share, the authors understand that the employer had to increase the amount of overtime worked, for which non-strikers were remunerated. Strikes in South Africa are becoming more common and it cannot be gainsaid that this adversely affects the profitability of businesses and the economy at large. Inasmuch as the employer has the right to find means to keep its business afloat, we argue and maintain that the right to strike should not be undermined by the payment of an incentive innocently dressed as a token.

It is beyond doubt that the payment of bonuses to non-striking employees unavoidably places strikers at a huge disadvantage, so NUMSA's complaints about the payment of bonuses to non-strikers makes sense. They have practical force and some ethical appeal. Rewarding non-strikers would affect or influence a union member's decision whether or not to strike in future. This is principally due to the fact that some strikers may feel that to strike is futile because the benefit of the strike is conferred also upon non-strikers, and moreover the non-strikers get something "extra" if they work during the strike. The non-strikers may say that their decision not to strike is vindicated because firstly they get what the strikers wanted in any event, that is, a higher wage, and secondly, they receive additional remuneration in the form of overtime payment. Thirdly, they are rewarded for working during the strike, the reward taking the form of an additional payment. In

93 *NUMSA v Bader Bop (Pty) Ltd* 2003 24 ILJ 305 (CC) paras 26, 65; *Kim-Lin Fashions CC v Brunton* 2001 22 ILJ 109 (LAC) paras 17-18; *SA Breweries v CCMA* 2002 23 ILJ 1467 (LC) para 2.

short, there is no justification for giving rewards to non-strikers because they refrained from exercising their statutory right to strike.

The approach adopted by the *Elements Six Productions* court to the interpretation of the relevant provisions of the statute cannot be faulted and the case, particularly when read in tandem with antecedent Labour Court decisions, sends an unmistakable message that retaliatory economic measures to defeat a protected strike will not be countenanced. The last word on this topic belongs very firmly to Arendse AJ:

> If employers, in a protected strike context, are allowed to pay incentives, rewards or bonuses to non-strikers albeit that they are dressed up as 'innocent' rewards for 'hard work' then there is a very real danger that the Holy Cow called collective bargaining, may be undermined or compromised in the process. Indeed, in my view, in the context of a legal strike, payment of any reward, incentive, or bonus should be strictly prohibited. Such payment is unnecessarily provocative and fuels an adversarial approach to collective bargaining.

Since the LRA is mute on whether an employer can respectfully request a non-striker to perform the work of a striker, the legislature should consider adopting a provision which explicitly prohibits an employer from engaging in such conduct. If such conduct persists in today's labour environment, its effects would be that the strikers would be deterred from striking in future; conversely, non-strikers would be encouraged not to go on strike at all. More so, an offer of a reward to non-strikers perform work beyond their duty should be prohibited *per se*, as this is done with an ulterior motive. Instead of luring employees with a reward, employers still have the option of invoking replacement labour or of dismissal based on operational requirements.

Bibliography

Literature

Botes 2013 *PELJ*
Botes A "The History of Labour Hire in Namibia: A Lesson for South Africa" 2013 *PELJ* 506-536

Botha 2015 *De Jure*
Botha MM "Responsible Unionism during Collective Bargaining and Industrial Action: Are we Ready Yet?" 2015 *De Jure* 328-350

Brand *et al Labour Dispute Resolution*
Brand J *et al Labour Dispute Resolution* 2nd ed (Juta Cape Town 2008)

Cheadle *et al South African Constitutional Law*
Cheadle H *et al South African Constitutional Law: The Bill of Rights* 2nd ed (LexisNexis Butterworths Durban 2005)

Chicktay 2006 *Obiter*
Chicktay MA "Placing the Right to Strike within a Human Rights Framework" 2006 *Obiter* 344-350

Daemane 2014 *JETEMS*
Daemane MMM "Human Resources Management and Trade Unions Compatibility: Soft-Hard Model Digestion for Human Capacity Building and Sustainable Productivity at Workplace" 2014 *JETEMS* 121-130

Davies and Freedland *Kahn-Freund's Labour and the Law*
Davies P and Freedland M *Kahn-Freund's Labour and the Law* (Stevens London 1983)

Desai and Habib 1997 *JMAS*
Desai A and Habib A "Labour Relations in Transition: The Rise of Corporatism in South Africa's Automobile Industry" 1997 *JMAS* 495-518

Du Toit 1997 *LDD*
Du Toit D "Industrial Democracy in South Africa's Transition" 1997 *LDD* 39-68

Du Toit 2005 *ILJ*
Du Toit D "Business Restructuring and Operational Requirements Dismissals: Algorax and Beyond" 2005 *ILJ* 595-617

Estreicher 1994 *Mich L Rev*
Estreicher S "Collective Bargaining or 'Collective Begging?' Reflections on Anti-strike-breaker Legislation" 1994 *Mich L Rev* 577-608

Finnemore and Van Rensburg *Contemporary Labour Relations*
Finnemore M and Van Rensburg R *Contemporary Labour Relations* 2nd ed (LexisNexis Durban 2002)

Gandidze 2007 *LDD*
Gandidze T "Dismissals for Operational Requirements" 2007 *LDD* 83-96

Grawitzky *Collective Bargaining in Times of Crisis*
Grawitzky R *Collective Bargaining in Times of Crisis: A Case Study of South Africa* (International Labour Organisation Geneva 2011)

Grogan *Collective Labour Law*
Grogan J *Collective Labour Law* (Juta Cape Town 2007)

Manamela and Budeli 2013 *CILSA*
Manamela E and Budeli M "Employees' Right to Strike and Violence in South Africa" 2013 *CILSA* 308-336

Myburgh 2013 *CLL*
Myburgh A "The Failure to Obey Interdicts Prohibiting Strikes and Violence: The Implications for Labour Law and the Rule of Law" 2013 *CLL* 1-10

Sundar 2007 *Indian J Ind Relat*
Sundar KRS "Trade Unions and Civil Society: Issues and Strategies" 2007 *Indian J Ind Relat* 713-734

Case law

BAWU v Prestige Hotels CC t/ Blue Waters Hotel 1993 14 ILJ 963 (LAC)

Ceramic Industries Ltd t/a Betta Sanitary Ware v NCBAWU 1997 6 BLLR 697 (LAC)

Cobra Watertech v NUMSA 1995 16 ILJ 582 (LAC)

CWIU v BP SA 1991 12 ILJ 599 (IC)

Early Bird (Pty) Ltd v FAWU 2004 25 ILJ 2135 (LAC)

Foodgro (A Division of Leisurenet Ltd) v Keil 1999 9 BLLR 875 (LAC)

General Food Industries Ltd v FAWU 2004 25 ILJ 2135 (LAC)

General Food Industries Ltd v Food Allied Workers Union 2004 25 ILJ 1260 (LAC)

Harksen v Lane 1998 1 SA 300 (CC)

Johnson and Johnson v CWIU 1998 12 BLLR 1209 (LAC)

Kim-Lin Fashions CC v Brunton 2001 22 ILJ 109 (LAC)

Kroukam v SA Airlink (Pty) Ltd 2005 26 ILJ 2153 (LAC)

Mackay v ABSA Group 1999 12 BLLR 1317 (LC)

Macsteel (Pty) Ltd v NUMSA 1990 11 ILJ 995 (LAC)

MAN Truck & Bus (SA) (Pty) Ltd and United Motor & Allied Workers Union 1991 12 ILJ 181 (LC)

Mbana v Shepstone & Wylie 2015 36 ILJ 1805 (CC)

Metsimaholo Local Municipality v SAMWU 2016 ZALAC 19 (11 May 2016)

National Police Services Union v National Negotiating Forum 1999 20 ILJ 1081 (LC)

NUM v Black Mountain Mineral Development Co (Pty) Ltd 1997 4 SA 51 (SCA)

NUM v Namakwa Sands (A Division of Anglo American Corporation Ltd) 2008 29 ILJ 698 (LC)

NUMSA obo Members v Elements Six Productions (Pty) Ltd 2017 ZALCJHB 35 (7 February 2017)

NUMSA v Bader Bop (Pty) Ltd 2003 24 ILJ 305 (CC)

NUMSA v Dorbly Limited 2004 ZALC 47 (8 June 2004)

NUMSA v Vetsak Co-operative 1996 17 ILJ 455 (A)

OK Bazaars (1929) Ltd v SACCAWU 1993 14 ILJ 362 (LAC)

Pep Stores (Pty) Ltd v Laka 1998 19 ILJ 1534 (LC)

SA Breweries v CCMA 2002 23 ILJ 1467 (LC)

SA Chemical Workers Union v Afrox Ltd 1999 20 ILJ 1718 (LAC)

SACCAWU v Afrox Ltd 1999 20 ILJ 1718 (LAC)

Sali v National Commissioner of the South African Police Service 2014 ZACC 19 (19 June 2014)

SATAWU v G4S Aviation Secure Solutions 2016 ZALCJHB 10 (13 January 2016)

SATAWU v Ram Transport South Africa (Pty) Ltd 2014 ZALCJHB 471 (26 November 2014)

Sidumo v Rustenburg Mines Ltd 2007 28 ILJ 2405 (CC)

Steenkamp v Edcon Limited 2016 ZACC 1 (22 January 2016)

Transnet SOC Ltd v SATAWU 2012 ZALCJHB 107 (12 October 2012)

Legislation

Basic Conditions of Employment Act 75 of 1997

Constitution of the Republic of South Africa, 1996

Labour Relations Act 66 of 1995

International instruments

Freedom of Association and Protection of the Right to Organise Convention 87 (1948)

Right to Organise and Collective Bargaining Convention 98 (1949)

Internet sources

Collins English Dictionary 2018 https://www.collins dictionary.com/dictionary/english/sword-of-damocles
Collins English Dictionary 2018 *Sword of Damocles* https://www.collinsdictionary.com/dictionary/english/sword-of-damocles accessed on 8 November 2018

List of Abbreviations

BCEA	Basic Conditions of Employment Act
CILSA	Comparative and International Law Journal of Southern Africa
CLL	Contemporary Labour Law
ILJ	Industrial Law Journal
ILO	International Labour Organisation
Indian J Ind Relat	Indian Journal of Industrial Relations
JETEMS	Journal of Emerging Trends in Economics and Management Sciences
JMAS	Journal of Modern African Studies
LDD	Law, Democracy and Development
LRA	Labour Relations Act
Mich L Rev	Michigan Law Review
PELJ	Potchefstroom Electronic Law Journal