Claims for compensation arising from strikes and lockouts

Common law and the LRA

by P.A.K. le Roux

In the recent Tim Mills Memorial Talk published in CLL (Vol 23 No 1) Adv Myburgh SC, made the point that one of the areas where the Labour Court may be prepared to adopt a more activist approach to discourage unprotected or violent strikes is when considering claims for compensation instituted against unions in terms of s 68(1)(b) of the Labour Relations Act, 66 of 1995 (LRA).

This section envisages that persons who suffer loss as a result of an unprotected strike or lock-out can institute claims for compensation against the union, employees or employer concerned.

In the few cases dealing with this type of claim the Labour Court has awarded relatively small amounts as compensation. He suggests that Labour Court Judges should be willing to award more substantial amounts as compensation when dealing with unprotected strikes.

In this contribution we discuss the provisions of s 68(1)(b). We also briefly consider the possibility that common law claims for damages may also be instituted in certain circumstances.

Common law claims

In terms of common law principles an employer who suffers a loss as a result of a strike has a potential delictual claim against the union and/or the employees concerned in order to recover this loss. (For our purposes a delict can be described as an intentional or negligent and wrongful act or omission of a person which causes loss to another person.) The same principle applies to acts or omissions committed during the course of a strike such as malicious damage to property and assault. An employer or other person who suffers loss as a result of these actions may be able to institute a delictual claim for damages to recover this loss.

In many cases it may be easier to succeed with such a delictual (or even contractual claim) against the actual strikers or the person(s) who maliciously damaged the property or assaulted another person. The reason for this is that it may be difficult to...
hold a union liable for the actions of its members. See in this regard the decision of the Labour Court in Mondi Ltd (Mondi Kraft Division) v Chemical Energy Paper Printing Wood & Allied Workers Union & Others (2005) 26 ILJ 1458 (LC). On the other hand, a claim against individual employees also has its disadvantages, not the least of which is that an individual employee will usually not have the resources to compensate the plaintiff. In addition, and at least in the case of a claim arising from participation in strike action, there must be some doubt that a court will be prepared to hold an individual employee liable for the total loss suffered as a result of a strike.

Because the purpose of a strike (ie to put economic pressure on an employer in order to compel it to comply with a demand) would be undermined if the employer were to be permitted to recover the losses it has suffered, s 67 of the LRA prohibits such claims if the strike complies with the provisions of the LRA and is therefore protected. Similarly, an employee who is prevented from working as part of a protected lock-out may also not claim her salary from her employer.

This protection also applies to actions in contemplation of, and in furtherance of, a protected strike, i.e. actions that do not constitute a refusal to work but that take place during the course of the strike.

This is the effect of s 67(2) which reads as follows:

“(2) A person does not commit a delict or a breach of contract by taking part in—
(a) a protected strike or a protected lock-out; or
(b) any conduct in contemplation or in furtherance of a protected strike or a protected lock-out.”

In addition 67(6) provides that

“(6) Civil legal proceedings may not be instituted against any person for—
(a) participating in a protected strike or a protected lock-out; or
(b) any conduct in contemplation or in furtherance of a protected strike or a protected lock-out.”

These protections also apply to picketing activity that complies with the requirements set in s 69 of the LRA. However, any actions in contemplation or furtherance of a strike that constitute criminal offences do not enjoy protection - see s 67(8). This means, for example, that an employer whose property is damaged as a result of the intentional actions of employees during the course of a protected strike could recover this loss on the basis that the action of damaging the property constitutes the criminal offence of malicious damage to property.

Section 68

Section 68 of the LRA deals with the legal consequences that flow from an unprotected strike or lock-out. It contains no prohibition of claims to recover a loss suffered as a result of an unprotected strike or lock-out – presumably on the basis that an employer, trade union, or employee that has failed to comply with the not very onerous provisions of the LRA should not be protected against such claims.

Section 68(1)(b) claims

In addition to not providing protection against claims, s 68 also provides for a claim for compensation that can be utilised in the case of an unprotected strike or lock-out. It gives the Labour Court exclusive jurisdiction to order the payment of “just and equitable” compensation for any loss attributable to the strike or lock-out, or any loss attributable to conduct in contemplation or furtherance of such a strike or lock-out. It reads as follows -

“68. Strike or lock-out not in compliance with this Act.—
(1) In the case of any strike or lock-out, or any conduct in contemplation or in furtherance of a strike or lock-out, that does not comply with the provisions of this Chapter, the Labour Court has exclusive jurisdiction—
(a) …
(b) to order the payment of just and equitable compensation for any loss attributable to the strike or lock-out, or conduct, having regard to—
(i) whether—
(aa) attempts were made to comply with the provisions of this Chapter and the ex-
tent of those attempts; 
(bb) the strike or lock-out or conduct was premeditated; 
(cc) the strike or lock-out or conduct was in response to unjustified conduct by another party to the dispute; and 
(dd) there was compliance with an order granted in terms of paragraph (a); 
(ii) the interests of orderly collective bargaining; 
(iii) the duration of the strike or lock-out or conduct; and 
(iv) the financial position of the employer, trade union or employees respectively.”

There have been very few decisions interpreting and applying this section and its interpretation and application is not without some uncertainty. Some of the legal issues arising from this section are dealt with below.

Claims for compensation and claims for damages

This section envisages a claim for compensation. Common law claims arising from a delict or a breach of contract are claims for damages. Two questions have been posed in this regard. The first is whether a claim for compensation and a claim for damages amounts to the same thing? The second is whether, on the assumption that a claim for damages differs from a claim for compensation, the LRA has impliedly ousted any potential claim for damages? Differing views have been expressed on the answers to these two questions.

Brassey, in Commentary on the Labour Relations Act Vol 3 A4:51 argues that we are dealing with two different claims. The claim for compensation is one created by statute. The claim for damages is a claim based on common law principles. He argues, however, that the LRA has impliedly ousted any potential claim for damages. In any event, if such a cause of action still exists it would have to be brought in the ordinary Courts – the Labour Court would not have jurisdiction to consider such a claim.

Thomson and Benjamin, in South African Labour Law AAI-347 also accept that these are two separate causes of action. They also argue that to permit a claim for damages would:

“be at odds with the clear intention of the legislature”.

Grogan Collective Labour Law 208 also seems to accept this view. On the other hand, Du Toit et al (Labour Relations Law 5th Edition at 317) accept that the common law delictual claim for damages is still available to plaintiffs. The decision in Lomati Mill Barberton (A Division of Sappi Timber Industries) v Paper Printing Wood & Allied Workers Union & others (1997) 18 ILJ 178 (LC) supports this view.

The decision of the Labour Court in Post Office Ltd v TAS Appointment and Management Services CC & Others [2012] 6 BLLR 621 (LC) accepts that a common law claim for delictual damages can still be utilised but it seems to accept that a claim for damages and a claim for compensation in terms of s 68(1)(b) are one and the same thing.

The Mondi decision indicates that delictual claims can be brought to recover losses suffered as a result of criminal actions committed during the course of a protected strike but this decision dealt with employee actions that took place prior to the extension of s 68(1)(b) in 2002 to cover acts or omissions that take place during the course of a strike. (See the discussion below.) Finally, reference can be made to the decisions in Jumbo Products CC v National Union of Metalworkers of SA (1996) 17 ILJ 859 (W) and National Union of Metalworkers of SA v Jumbo Products CC (1997) 18 ILJ 107 (W) where it was held that a union can be held liable in delict for loss suffered as a result of an unlawful strike. However, although both decisions were handed down after the introduction of the LRA, the strike that formed the basis for the claim took place prior to the introduction of the LRA.

It is submitted that a claim for damages in terms of common law delictual principles is based on a cause of action distinct from that found in s 68(1) (b). The common law delictual claim requires that the plaintiff must establish that he/she or it suffered loss caused by an unlawful and intentional or negligent act or omission of another party. If these requirements are met the plaintiff is entitled to recover the full loss suffered. A claim for compensation will succeed if the requirements of s 68(1)(b) are met and the Court has a wide discre-
tion to determine what the amount of compensation to be awarded will be.

The LRA provides no little support for the view that the common law delictual claim has been abolished by implication. As indicated above, s 67 (2) expressly states that a person does not commit a delict or by taking part in a protected strike or instituting a protected lock-out. This presupposes that such a common law remedy still exists and had to be expressly excluded in the case of protected strikes and lock-outs. The fact that such an express exclusion is not found in s 68 means that the common law principles still apply to unprotected strikes and lock-outs.

The above sources and discussions deal with the distinction between common law delictual claims and the statutory claim for compensation. It should also not be forgotten that a strike or a lock-out could also give rise to a claim based on breach of contract. An employee who embarks on a strike is refusing to comply with his contractual obligation to tender his services to the employer. The employer who locks out an employee is refusing to pay the employee his wage due in terms of his contract of employment. In Kgasako & Others v Meat Plus CC [1999] 5 BLLR 424 (LAC) the Court appears to have accepted that employees who have not been paid their wages during the course of an unprotected lock-out can, in principle, institute a contractual claim or a claim for compensation in terms of s 68(1)(b) of the LRA.

Who can utilise section 68(1)(b)?

Section 68(1)(b) creates a statutory cause of action in addition to any other cause of action a person may have. In order to invoke this remedy the claimant will, in the first place, have to show it suffered a loss and that this loss was attributable to an unprotected strike or lock-out, or attributable to conduct in contemplation or furtherance of such a strike or lock-out. The section does not specify who such a claimant must be or, indeed, who the defendant can be, in this type of action.

In most cases the claimant will be an employer that has suffered a loss as a result of a strike or actions committed during the course of a strike, or an employee who has suffered a loss as a result of a lock-out. In most cases the employer will seek to sue a trade union or an employee in order to recover the loss. If the employee is a claimant the defendant will probably be the employer concerned. However, the potential scope of this section is wider. For example, it is conceivable that a union may suffer loss as a result of an unprotected lock-out. It is also conceivable that an employers’ organisation may suffer loss as a result of an unprotected strike or actions committed in furtherance or in contemplation of the strike.

But the section also has a potentially wider application. For example, could an employee who has lost wages, or has perhaps been dismissed, as a result of an unprotected strike be able to recover losses suffered from his union in circumstances where he was misled by the union officials into believing the strike was protected? Further, could Employer A, who has contracted with Employer B to provide it with certain components it needs to produce its own product, recover any losses suffered from the employees of Employer B as a result of an unprotected strike by these employees which interrupted the supply of these components? Could the employees of Employer A who have been laid off as a result of an unprotected lock-out by Employer B of its employees, recover their loss in wages from Employer B? The wording of s 68(1)(b) does not preclude such a possibility.

In its original form, s 68(1)(b) only envisaged the payment of compensation in respect of losses arising from the strike or lock-out itself and not from other actions of employees that took place during the course of the strike. This was changed in 2002. As indicated above, losses caused by actions in contemplation and furtherance of an unprotected strike or lock-out now also fall within the scope of the section. This raises, for example, the possibility of the owner of a mall claiming compensation from a union or its members where damage was caused to the building by union members during the course of the strike at a tenant’s shop.

Section 68(1)(b) (i)– (iv) lists a number of factors that the Labour Court must consider when exercising its jurisdiction in terms of this section. These are -

• Whether attempts were made to comply with
the provisions of the LRA determining whether the strike or lock-out was protected or not.

- Whether the strike, lock-out or conduct was premeditated.
- Whether the strike, lock-out or conduct was in response to unjustified conduct by another party to the dispute.
- Whether there was compliance with an order of the Labour Court interdicting the employees from striking.
- The interests of orderly collective bargaining.
- The duration of the strike, lock-out or conduct.
- The financial position of the employer, trade union or employees respectively.

The decisions interpreting s 68(1)(b)

There are surprisingly few decisions dealing with the interpretation of s 68(1)(b).

The earliest of the reported decisions appears to be that in Rustenburg Platinum Mines Ltd v Mouthpiece Workers Union [2002] 1 BLLR 84 (LC). In this case the employer alleged that it had suffered a loss of at least fifteen million rand as a result of an unprotected strike. It sought to recover this amount from the union concerned but subsequently reduced its claim to one hundred thousand Rand.

During the course of the judgment the Court identified three requirements that must be met prior to liability being established.

The first is that the strike or lock-out must be unprotected.

The second is that the applicant seeking to utilise the section must have suffered loss as a result of the strike.

The third is that the party against whom the claim is made must have participated in the strike or committed acts in contemplation or in furtherance the strike.

It was the third element that was at issue in this case. The Court analysed the evidence and came to the conclusion that this requirement had been met. It did so on the basis that, during the course of a meeting between management and union representatives, management made the explicit allegation that the strike had been instigated by the union and that the union representatives present at the meeting had not denied this at all. The Court also relied on the fact that, prior to the strike commencing, and after hearing rumours that a strike would take place, a management representative had a telephone conversation with the union’s principal executive officer during the course of which the management representative sought clarity as to whether a strike would take place. The executive officer had been evasive and had not committed himself one way or the other; he had, however, articulated some of the demands being made by the workforce. From this the Court inferred that the executive officer knew of the possibility of the strike but failed to distance himself from the strike. Finally, the Court also took into account the fact that during the course of a mass meeting of union members two members of the union’s national executive committee urged the union members not to return to work until their demands had been met.

The subsequent decision in Mangaung Local Municipality v SAMWU [2003] 3 BLR 268 (LC) provided more detailed guidelines as to when liability would arise and especially as to when a union could be held liable for the actions of its members.

This case arose from an unprotected strike by...
members of the Union, SAMWU, in the employer’s electrical department. During the course of the strike the striking employees also blockaded the entrance to and from the electrical department, thus preventing non-striking employees from rendering electrical services to residents of the city.

The employer instituted a claim of R272 541.84 against SAMWU for the losses it alleged it had suffered during the course of the strike. These losses could be categorised into two categories. The first consisted of the loss of income the employer had suffered as a result of the fact that it had not benefitted from the fees the striking employees would have generated, had they worked. To this could be added the additional costs suffered as a result of having to pay overtime to non-striking employees to do the work of the strikers. The second category consisted of losses incurred as a result of the blockading of the entrances to the electricity department which meant that non-striking employees were unable to generate fees.

The Court was not prepared to consider a claim based on the second category of losses. This was because these losses did not arise from the strike itself but rather from the actions committed in furtherance of the strike, i.e. the blockade. These losses were not covered by s 68(1)(b) as then formulated. (See the discussion above.) It was, however, prepared to consider a claim based on alleged losses suffered as a result of the strike itself.

The Court pointed out that s 68(1)(b) does not state who can be ordered to pay compensation in terms of this section but it came to the conclusion that, if one takes into consideration the factors that must be considered by the Court mentioned above, it is clear that either a trade union or its members can be held liable.

In the case of employees, they would be liable because they actually participated in the strike that caused the loss. A trade union could also be held liable if it can be shown that it actually called the unprotected strike.

The Court then went on to consider whether a trade union can be held liable in circumstances where it did not call the strike but failed to take steps to bring the strike to an end. It found that it could be held liable. It argued as follows –

“[47] I am of the view that where a trade union has a collective bargaining relationship with an employer, and its members embark on unprotected strike action and the trade union becomes aware of such unprotected strike and is requested to intervene but fails to do so without just cause, such trade union is liable in terms of section 68 (1)(b) of the Act to compensate the employer who suffers losses due to such an unprotected strike. Similarly, if a trade union elects to delegate the responsibility to resolve the strike to its shop stewards employed by the employer facing an unprotected strike, and such shop stewards fail to discharge the same obligation that the trade union has, the trade union is also liable to compensate the employer for any losses that it has suffered as a result of such strike. The obligation arises because the trade union, as a party to a collective bargaining relationship with the employer, has a duty to ensure that its members comply with the provisions of the Act in relation to such an employer when they seek to exercise their collective power by way of strike action.

[48] In arriving at the above conclusion, I have also had regard, for comparative purposes, to the provisions of item 6 of Schedule 8, relating to the dismissal of employees engaged in an unprotected strike. The guidelines there provide for the employer to solicit the assistance of a trade union official to discuss the course of action that the employer intends to adopt, clearly, with a view that the union official should intervene and prevent dismissals, if that is what the employer contemplates doing, by securing a return to work by the striking employees. This guideline indicates that a trade union shoulders some responsibility with regard to participation by its members in an unprotected strike. This responsibility extends to liability to compensate an employer where the trade union fails to discharge its duty of intervening during unprotected strikes by at least at-
tempting to secure a return to work by its members.”

The Court came to the conclusion that the union was liable to compensate the employer for losses suffered. This was because the union was aware of the strike and its shop stewards were aware of, and participated in, the strike. They took part in meetings with the employer and, instead of agreeing to call off the strike, made demands in support of the strike. The branch committee of the union, which included shop stewards from outside the electricity department, also participated in the meeting and did not take steps to end the strike.

The above decisions dealt with claims brought by employers against a union. In *Algoa Bus Company v SATAWU & Others* [2010] 2 BLLR 149 (LC) the Court was prepared to order employees to pay compensation to an employer.

**Comment**

All the above decisions accept that s 68(1)(b) requires that a claim for compensation will only arise if losses are suffered that can be attributed to an unprotected strike or lock-out or actions in furtherance thereof. But there is a lot more that still has to be considered when interpreting this section.

The first question is whether these are the only requirements for liability? At first sight this seems to be the case but it is suggested that this cannot be so. This is illustrated by the third requirement set for liability by the Court in the *Rustenburg Platinum Mines* decision. Here the Court accepted that the potential defendant must have “participated” in the strike that formed the subject matter of that decision. From the perspective of the individual employee this seems self-evident. Section 68(1)(b) will not be interpreted to create a liability for an employee who did not participate in the strike or associate himself or herself in some form or manner with the strike. There will also, typically at least, not be problems in the case of a lock-out. The employer enforcing the lock-out will have “participated” therein.

But what is the position where an employer seeks to hold a union liable to pay compensation in terms of this section? It seems to be implicit in both the *Rustenburg Platinum Mines* decision and the *Mangaung Local Municipality* decision that the Court does not accept that a union would always and automatically be held liable for the actions of its members. In the *Rustenburg Platinum Mines* decision the Court held the union liable on the basis of the acts and omissions of senior officials and office-bearers of the union. In the *Mangaung Local Municipality* decision the union was held liable for the actions of its shop stewards – at least in the situation where certain responsibilities had been delegated to them.

Also of interest are the acts or omissions of the officials and shop stewards for which the union was held liable. In both cases the union was held liable as a result of the fact that the officials, office-bearers or shop stewards actively associated themselves with, supported, or called for, the strike. However, the *Mangaung Local Municipality* goes further and finds that the union can be held liable if the union fails to intervene and to take steps to bring an end to an unprotected strike.

These examples deal with losses suffered as a result of the strike itself. The same principles should apply to acts or omissions in furtherance of a strike. It seems unlikely that a union will be held liable for isolated acts of violence committed during the course of a strike. However, where there are several instances of violence which are concerted or planned in nature, and in which union officials or members are involved, liability may accrue. Liability may also accrue if the union, though its representatives fails to take steps to prevent such actions.

Also of importance is the role played by the factors mentioned in s 68(1)(b) (i) to (iv). Are they to be taken into account in determining whether liability should be imposed or are they only relevant in determining the extent of any liability that is found to exist? Grogan, (*Collective Labour Law 2011*) is of the view that these factors are relevant to both issues. Whilst this view is at least arguable, it is submitted that the factors are to be taken into account when determining the amount of compensation to be awarded. This seems to have been the view adopted in the *Rustenburg Platinum Mines* decision as well as the *Algoa Bus Company* decision.

Finally there is the point raised by Adv Myburgh –
namely that the Labour Court should consider ordering the payment of more substantial sums as compensation. The factors mentioned above do not prevent such an approach.

In the Mangaugung Local Municipality decision the Court had the following to say in this regard.

"[51] In so far as the amount that the respondent is liable to pay is concerned, I am of the opinion that a robust approach is appropriate for determining the amount. A message needs to be sent to the respondent and its members that, given the ease with which a protected strike can be embarked upon, unprotected strikes will not be tolerated. At the same time, the court must have regard to the fact that the compensation payable will be paid from the respondent’s coffers, and consequently, the funds of its other members who were not involved in the strike will probably be used to make such payment, to the latter’s detriment."

It is suggested that the message referred to in this excerpt should be sent with forcefulness when the Court is faced with a strike (or a lock-out) which is embarked upon with blatant disregard of the provisions of the LRA.

PAK le Roux

Locking out non-union members

Do the blades of protected industrial action cut both ways?

by P.A.K. le Roux

The recent decisions of the Labour Court in Transport & Allied Workers Union of South Africa obo Members v Algoa Bus Company (Pty) Ltd & Putco Ltd [2013] 8 BLLR 823 (LC) and UTATU SARWHU & Others v Autopax Passenger Services (SOC) Ltd & Another (Unreported J1931/2013 17/9/2013) are two important decisions dealing with ability of employers to lock-out employees in the situation where the employees concerned (and their union) are not party to a dispute which the employer is embroiled in with another union. This is a potentially important question as it seems that at least some COSATU unions are losing their dominant position in certain workplaces or industries and employers are required to bargain with more than one union in that workplace or industry.

The Algoa Bus Company decision

In this case two unions, namely the South African Transport and Allied Workers Union (SATAWU) and the Transport and Omnibus Workers Union (TOWU), gave notice of their intention to embark on a protected strike that would commence on 19 April 2013. This was an industry-wide strike arising from wage negotiations in the bargaining council for the road passenger transport industry.

The two employers in this matter, namely Algoa Bus Company (Algoa) and Putco, then issued a notice locking out “affected employees”. The lock-out would also commence on 19 April 2013.

This notice was also aimed at the employees of a third union, namely the Transport and Allied Workers Union (TAWU). It appears that TAWU is not a party to the bargaining council and was not party to the dispute. Prior to the lock-out commencing it addressed letters to both employers stating that its members would not take part in the strike and that its members would tender their services. This notwithstanding, both Algoa and Putco implemented the lock-out in respect of TAWU members.

TAWU then approached the Labour Court for an order restraining both employers from locking its members out.

Both employers argued that TAWU members had participated in the strike and that this therefore justified the lock-out. This was denied by TAWU.

This factual dispute was resolved in favour of TAWU and the Court then approached the matter on the basis that TAWU members had not been on strike.

It found that the two employers were not entitled to lock out TAWU members. The decision is a
difficult one to follow in all aspects but it appears that there were two main reasons for the Court’s view.

- The first is that, according to the definition of a lock-out, the purpose of a lock-out is to force employees to accede to a demand made by the employer. This presupposes that the employees had refused to accept the demand. This was not the case here.

- The second was that a lock-out can only be imposed on employees who are party to a dispute. In this case the TAWU members were not in dispute with the employers. They had not been party to the bargaining council negotiations and had made no demands in this regard.

The following excerpt contains Court’s views in this regard –

“[14] It does appear to me that a further important consideration is that a lockout must have a purpose. Firstly, an employer must have a demand directed to those employees. When employing a lockout, the purpose should be to compel those employees to accept a demand. Logic dictates that it is foolhardy for an employer to compel employees who do not resist. Put differently exclusion of employees without any purpose is not a lockout as defined and is bound to be unlawful in terms of the LRA.

[15] The second place to look is section 64. In terms of the section a lockout arises in two instances. The first instance is in subsection 1 (c). The second instance is: in subsection 3 (d). Subsection 1 (c) provides that in the case ‘of a proposed lockout, at least 48 hours’ notice of the commencement of the lock-out, in writing, has been given to any trade union that is a party to the dispute, or if there is no such trade union, to the employees, unless the issue in dispute relates to a collective agreement to be concluded in a council, in which case, notice must be given to that council.

[16] It is clear from the above provisions that the trade union to be given a notice of the proposed lock-out is one that is a party to the dispute. Axiomatically, if a trade union is not party to the dispute, it ought not to be notified of the proposed lock out. Equally, it serves no purpose to give notice to employees who are not party to the dispute.”

The Autopax Passenger Services Decision

This decision also involved an employer in the road passenger transport industry and it appears that it was also involved in litigation arising from the strike dealt with in the Algoa decision. However, this decision dealt with a later strike that arose out of negotiations that took place at enterprise level. The employer (Autopax) had entered into a recognition agreement with SATAWU and union called UTATU SARHWU (UTATU). In terms of this agreement the Autopax had recognised both unions for the purposes of collective bargaining in respect of their members in a specified bargaining unit.

After the industry wide dispute dealt with in the Algoa decision had been settled, SATAWU made additional demands against Autopax relating to payment for Sunday work and meal allowances. When these disputes remained unresolved SATAWU gave notice of its intention to embark on a strike. Autopax then also issued a notice of a lock-out. Despite the fact that UTATU had not been party to the dispute and that its members had tendered their services, its members were also locked out.

UTATU sought an order from the Labour Court the effect of which would have been that it’s members were entitled to be paid their salary for the period that they had been locked out.

The Court found that they were not entitled to be paid their salaries. The Court’s arguments in coming to this conclusion are lengthy and detailed. They can, however, be summarised as follows –

- A central theme of the decision is the role of strikes and lock-outs as deadlock-breaking mechanisms in the collective bargaining process. Where the parties to a negotiating process have reached deadlock they are entitled to resort to a strike or to a lock-out in order to resolve the dispute – provided that the requirements of the LRA have been met. In this regard strikes and lock-outs fulfil the same pur-
pose.

• Linked to this was the Court’s finding that the agreement reached between SATAWU and Autopax would have been, and was in fact, applied to UTATU’s members.

“[42] Therefore, it is in the above context that the issue of strikes and lock-outs must be considered. In fact, strikes and lock-outs fulfil the same purpose in the collective bargaining process as the purpose fulfilled by an adjudicator in the resolution of rights disputes. The point is that whatever the process, there is an impasse, and this required a deadlock breaking mechanism. In the case of rights disputes, this impasse would be the opposing views of the two parties presented in the litigation process and the adjudicator resolving the impasse by finding which view prevails. In the process of collective bargaining, the situation arises when a final position is adopted by the two parties when impasse is reached and it is then the strike or the lock-out, as the case may be, that is designed to resolve the issue in dispute and which position prevails. Turning then to the current matter now before me, the issue in dispute forming the subject matter of the opposing views of the two parties presented in the litigation process and the adjudicator resolving the impasse by finding which view prevails.

In the current matter, that would be all the ‘eligible employees’ in the bargaining unit and not just the members of SATAWU.”

• The Court referred to the Constitutional Court’s decision in SA Transport & Allied Workers Union & Other v Moloto NO & Another (2012) 33 ILJ 2549 (CC) in which it was held that if one union has already given notice of a proposed strike, the members of any other union with members in the workplace could also embark on a protected strike without giving notice themselves. An important element of the Constitutional Court’s decision was that the right to strike should not be restricted more than is expressly required by the LRA. This, the Labour Court held, should also apply to lock-outs. The members off UTATU were part of the same bargaining unit to which the dispute applied. They would benefit from any agreement reached. They could therefore be locked out even if they were not party to the dispute.

The Court’s views are succinctly summarised in the following excerpt -

“[54] I am, therefore, satisfied that in the current matter, the first respondent was entitled to implement a lock-out on all the employees in the defined bargaining unit, which lock-out was an integral part of the dispute resolution mechanism the first respondent was entitled to pursue in the collective bargaining process to effect a resolution of the issue in dispute. It simply does not matter if UTATU and its members declared their solidarity with the issue in dispute or strike. In simple terms, in my view, the sword must cut both ways. Just as UTATU and its members would have been entitled of their own volition and discretion to join the strike of SATAWU and its members as a matter of course to the prejudice of the first respondent, so can the first respondent of its own volition and in its own discretion implement a lock-out as part and parcel of the same process and issue in dispute on them as well.”

Comment

Which of these views will be upheld remains to be seen. However, it seems arguable that there is a distinction to be drawn between the two decisions. In the Autopax decision, UTATU was a party to the collective bargaining forum within which the dispute arose. This was not the case in the Algoa decision.

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