A core value upon which the Republic of South Africa is founded is the “supremacy of the constitution and the rule of law” (s1 of the Constitution). Allied to this, the Constitution itself provides that court orders are binding on the parties to whom they relate (s165). Workers are also guaranteed the right to strike (s23) and everyone is guaranteed the right, peacefully and unarmed, to picket (s17).

In the labour law arena, the Labour Relations Act, 66 of 1995 (LRA), which embodies the constitutional labour relations rights, affords workers the right to strike and picket, subject to certain limitations, prohibits their dismissal and affords them civil immunity in respect of such action (s67 and s69 (7)). The Labour Court is tasked with upholding the provisions of the LRA, and it has the jurisdiction and power to interdict unprotected strikes and strike violence (s157(1) and s158(1)). As with the High Court, orders of this sort are enforceable by way of contempt of court proceedings (s163).

Both the Constitution and the LRA envision a society and industrial relations community where the rule of law reigns supreme. One that could be described along these lines:

“In [omitted], strikes are not a common occurrence. We have no ‘strike season’, and violence and destruction of property during industrial action is almost unknown. Generally industrial relations are good, with mutually acceptable salary increases being sensibly negotiated from time to time, both in the private sector and the public sector. This is to be expected in a country that has enjoyed peace and stability … . [Omitted] is also a country in which the rule of law is universally respected. Court orders are to be obeyed, promptly and without debate, as every [omitted] knows. Disagreement can be debated later, in an appeal. No exception is made in the case of strikers or their unions.”

There are no prizes for guessing that this was not said in relation to South Africa. Instead, it was a finding recently made by the Court of Appeal in Botswana about the state of that nation (Attorney Gen-
eral v Botswana Landboards & Local Authorities Workers’ Union [2013] 6 BLLR 533 (BWCA) at para 77). Regrettably, none of it holds true for South Africa. As a nation, we are notorious for our perpetual strike season, the violence and destruction of property that goes with it, and the disregard by strikers of court orders interdicting unprotected strikes and strike violence.

The social, political and economic implications of this are now everyday news. What I address below are the implications of the disregard by strikers of interdicts for labour law and the rule of law, and how the Labour Court may respond in the future.

For those of us whose vocation is that of a lawyer – the fundamental role of whom is to serve the judiciary and uphold the rule of law – what follows ‘makes you whistle’ (to borrow from our review law).

**Setting the scene**

Just how different the labour law and industrial relations environment in South Africa is to Botswana (to name but one example) is demonstrated by the facts of two judgments reported in 2012 – Food & Allied Workers Union on behalf of Kapesi & Others v Premier Foods Ltd t/a Blue Ribbon Salt River (2012) 33 ILJ 1779 (LAC), and Tsogo Sun Casinos (Pty) Ltd t/a Monte-casino v Future of SA Workers Union & Others (2012) 33 ILJ 998 (LC). They are illustrative of the problem that confronts labour lawyers and the Labour Court on a regular basis.

In Blue Ribbon, the court (per Landman AJA) set out the facts relating to the strike as follows at paras 10-14:

“Non-strikers were harassed and intimidated. Employees were visited at their homes by persons who threatened them with physical harm and death. Relatives of non-strikers were also visited in this manner and informed of what would be done to the family members working at the bakery. One female non-striker was dragged from her home at night and assaulted with pangas and sjamboks. The vehicle of a non-striker was set alight and destroyed. Shots were fired on this occasion. A neighbour of the non-striker was able to identify the perpetrators. He was subsequently shot and killed near his home. Houses were petrol bombed. Threats to kill senior management were made. Some employees and the senior management group were provided with security guards. A shot was fired through the security guard’s vehicle parked outside of the home of Lavery, the regional manager. Delivery vans were held up and the daily takings were robbed as were personal possessions and money of the drivers and staff. A state of lawlessness prevailed. The cost of increased private security escalated and non-strikers went about their business knowing that they, their families, property and possessions were in a state of danger. Criminal charges were laid with the police. The police were unable to be of much assistance and the crimes went unpunished. An interdict was sought and obtained in the Labour Court.

Statements were obtained from non-strikers as well as from the family members who had experienced these crimes. Various communications were addressed to the union. A commencement was made with an application for contempt of court. But it was not finalized. The strike was eventually settled about two months later on 9 May 2007.”

Although not as violent as the Blue Ribbon strike, the facts in Tsogo Sun are also reflective of a general state of lawlessness. The Labour Court (per Van Niekerk J) described them as follows at para 4:

“Regrettably, the picketing that occurred was anything but peaceful. In the founding papers, the applicant averred that the individual respondents were acting in breach of the picketing agreement by engaging in a variety of criminal acts, including assault, theft, malicious damage to property, and blocking access to and egress from the applicant’s premises. The conduct described in the founding and supplementary affidavits includes the emptying of rubbish bins onto the road outside Montecasino, burning tyres on the road, blocking the road with 20 litre water bottles, throwing packets of broken glass onto the
road, throwing bricks at members of the SAPS, damaging vehicles, dragging passengers from vehicles and assaulting them, rolling concrete dustbins into Montecasino Boulevard, damaging patron’s vehicles, and assaulting persons in the vicinity of Montecasino.

The applicant’s attempts to resolve the issue of strike related violence by agreement with the first respondent failed - an undertaking given by the first respondent at the applicant’s request proved to be worthless. Ultimately, intervention by the SAPS was necessary, but even this did not deter the individual respondents.”

In both cases, the Labour Court interdicts were apparently ignored, and it is clear that the intervention of the SAPS was ineffective. In the result, the violence persisted and the companies were made to suffer the consequences.

Contempt of Labour Court orders: four major implications

Firstly, and most fundamentally, the rule of law is undermined. In his keynote address at the 2012 SASLAW national conference ("Marikana: The perspective of the Labour Court"), Van Niekerk J said this:

“The first and fundamental concern is one that acknowledges that what may be at issue is a breakdown of the rule of law, especially where orders are issued and then blatantly disregarded. It is not uncommon on return dates to be told that when the order granted by the court was served, the recipients of copies of the order refused to accept them, or threw them to the ground and trampled on them. At its most basic level, this is demonstrative of a rejection of the rule of law, and contempt for its institutions.”

This is also something which has been commented on by the courts themselves. In Modise & Others v Steve’s Spar Blackheath (2000) 21 ILJ 519 (LAC), the strikers had been dismissed after they failed to obey an interdict prohibiting the strike. The LAC (per Conradie JA in his minority judgment) held as follows at para 120:

“It is becoming distressingly obvious that court orders are, by employers and employ-

ees alike, not invariably treated with the respect they ought to command. … Obedience to a court order is foundational to a state based on the rule of law.” (My emphasis.)

Similarly, in North West Star (Pty) Ltd (under judicial management) v Serobatse & Another (2005) 26 ILJ 56 (LAC), the LAC (per Davis JA) held as follows at para 17:

“Upholding the submission made by counsel for the appellant would make a mockery of the Constitution and the rule of law that forms part of the foundations of our constitutional democracy. It would be a licence for people to disregard orders of courts simply because they do not agree with the court that such orders should have been issued. A society that would allow such would in no time be a society of chaos and lawlessness. … If we want to deepen our democracy, promote the rule of law, discourage self-help and encourage those who have disputes to take them to the courts of the land and not to seek to resolve them through physical fights or violence, the whole society must frown upon anyone who disobeys an order of court or who, either by word or deed, encourages or incites another or others to disobey an order of court.”

These two sets of findings were made by the LAC many years ago. Regrettably, the failure to obey court orders has become increasingly prevalent over the years. If the tide is not stemmed we may fast be approaching the “society of chaos and lawlessness” referred to by Davis JA.

Secondly, related to the above, the credibility and standing of the Labour Court as an institution is undermined by the failure to obey its orders. In this regard, in S v Mamabolo (E TV & Others intervening) 2001 (3) SA 409 (CC), the Constitutional Court (per Kriegler J) held as follows at para 16:

“… but in terms of political, financial or military power [the Judiciary] cannot hope to compete [with the executive or legislative pillars of the State]. It is in these terms by far the weakest of the three pillars; yet its manifest independence and authority are
essential. Having no constituency, no purse and no sword, the Judiciary must rely on moral authority. Without such authority it cannot perform its vital function as the interpreter of the Constitution, the arbiter in disputes between organs of State and, ultimately, as the watchdog over the Constitution and its Bill of Rights - even against the State.”

And further (at paras 18-19):

“The Judiciary cannot function properly without the support and trust of the public. … In the final analysis it is the people who have to believe in the integrity of their Judges. Without such trust, the Judiciary cannot function properly; and where the Judiciary cannot function properly the rule of law must die.” (My emphasis.)

Some practitioners (and their clients) may well be contributing to undermining the credibility of the Labour Court as an institution by seeking orders strategically. As Van Niekerk J said in his SASLAW keynote address:

“… there is a sense amongst those of us on the court that we are increasingly being asked to issue orders related to strikes and strike misconduct where the purpose of the application is more strategic than real. It is inevitable that both sides to a labour dispute will seek to use the law and whatever legal remedies that may be available to them to gain short-term tactical advantage. The purpose here is not directly one that seeks to have parties comply with the law. It may be a case, for example, of banking an order to the effect that a strike is unprotected for use in some future disciplinary enquiry, mass dismissal or even a claim for damages. Even worse, it may be a strategy that seeks to provoke a striking workforce into acts of contempt, thus laying the basis for an application to have them imprisoned. Being used as a means to an end is always an indignity … .”

Also contributing to undermining of the credibility of the Labour Court as an institution is the inaction of the SAPS following the Marikana tragedy. This in circumstances where employers are forced to seek orders compelling the SAPS to do their work, and where, even when such orders are granted, they are often not acted upon. In the result, the credibility of the Labour Court suffers.

Thirdly, the failure to heed orders prohibiting strike violence and the perpetuation thereof in the context of a protected strike, skews collective bargaining power and takes on a form of economic duress. As held by the Labour Court (per Basson J) in Food & Allied Workers Union on behalf of Kapesi & Others v Premier Foods Ltd t/a Blue Ribbon Salt River (2010) 31 ILJ 1654 (LC) at para 6:

“Strikes that are marred by this type of violent and unruly conduct are extremely detrimental to the legal foundations upon which labour relations in this country rest. The aim of a strike is to persuade the employer through the peaceful withholding of work to agree to their demands. As already indicated, although a certain degree of disruptiveness is expected, it is certainly not acceptable to force an employer through violent and criminal conduct to accede to their demands.”

Along the same lines, the Labour Court (per Pillay J) held as follows in Shoprite Checkers (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & Others (2006) 27 ILJ 2681 (LC) at para 30:

“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.”

Martin Brassey SC “Fixing the Laws that Govern the Labour Market” (2012) 33 ILJ 1 at 16 captures the same concern in these terms:

“A systemic remedy is crucial if this scrooge is to be dealt with properly. Compassion dictates as much; so do considerations of the maintenance of law and order; and so does the proper interplay of collective bargaining, which centrally depends on the ready deployment of non-strikers and strike-breakers to keep production going. Without this, the collective agreement, which should be dictated by the forces of supply and demand, cannot find its proper level.” (My emphasis.)
What I mean by economic duress in this context is this. Where levels of violence get out of control, it is the violence that places pressure on an employer to increase its wage offer, not the pressure brought to bear by collective bargaining and strike action per se. In effect, the strike fuels the violence; the violence becomes the focal point of the strike; and the violence then transcends the strike. To bring the violence (and not the strike per se) to an end, the employer is placed under economic duress to conclude a wage agreement at a wage level that does not reflect the forces of supply and demand, but rather the force of violence. (I return to this issue below when dealing with the proposed amendment to s69 of the LRA.)

Fourthly, the failure to heed orders declaring strikes unprotected deprives employers of this strike breaking mechanism as a means to the resolution of disputes. The typical statement in an application for an interdict to the effect that, short of dismissal, the employer has no alternative remedy other than to seek an urgent interdict, no longer holds true insofar as interdicts are now often not worth the paper they are written on.

The Labour Court is unlikely to become activist

Where there is a breakdown of the rule of law, it would probably not be realistic to expect the Labour Court to become activist in trying to remedy the problem for two main reasons. The first is that the solution lies predominantly in socio-economic and political reform, which the Labour Court can do little about. In his article “Strike Law, Structural Violence and Inequality in the Platinum Hills of Marikana” (2013) 34 ILJ 836, Tembeka Ngcukaitobi sums up his assessment of the situation as follows at 858:

“The role of the state is to create a legal framework within which parties can address their labour concerns. However, any type of legal regulation implies an acceptance of the underlying social order. Our present LRA framework remains ineffective in the face of inadequate public service delivery, ambiguous business social responsibility, changing union dynamics and the collapse of collective bargaining institutions. Unprotected strikes occur at an increasing rate. The prevalence of violence in industrial action caused by this instability means that there remains a limited role that the law can play. The solution then becomes one of a political nature.” (My emphasis.)

Along similar lines, Van Niekerk J said this in his SASLAW keynote address:

“But we are dealing here, it seems to me, with a different phenomenon, one that displays contempt for the law and its institutions. The value and effectiveness of legal institutions is dependent entirely on an acknowledgement and commitment to the rule of law. When citizens or a group of citizens decide that their interests are better advanced by flouting the law, then there is very little to say about the role and perspective of courts. The basic foundation of law assumes that as good citizens, while we recognise the inevitability of conflict, we share substantive moral conceptions of the good, and that we are concerned to maintain the integrity of the legal system. When this is not present, and when citizens reject the law as a means
of settling normative conflict, then the social good of the law, which includes its capacity to provide a framework of co-operation despite disagreement, disintegrates.” (My emphasis.)

The second reason why the Labour Court is unlikely to become activist is that, as dealt with above, an inevitable consequence of the breakdown in the rule of law is that the credibility of the Labour Court as an institution suffers. With its orders already being disobeyed, the Labour Court may well be setting itself up for failure if it now seeks to impose novel legal solutions.

But there are things within its domain that the Labour Court can do – or continue doing – to assist in clawing back the rule of law. It is to these that I now turn.

The likely approach of the Labour Court to strike violence

Firstly, in circumstances where witnesses refuse to testify, it would seem to me that the Labour Court (and the CCMA) will give employers as much leeway as possible to attempt to identify the perpetrators of strike violence by way of hearsay evidence. This in the light of the following finding by the Labour Court (per Basson J) in Blue Ribbon at para 45:

“It is possible to proceed with a disciplinary hearing on the basis of written statements in circumstances where witnesses are too scared to testify. To exclude hearsay evidence in circumstances such as those which prevailed in this case will only play into the hands of people who have the attitude that they can do as they please with impunity. Allowing individuals to get away with their acts of misconduct simply because they intimidate potential witnesses ‘will destroy the very foundations on which our society is built’.”

Secondly, there also seems to me to be little doubt that where it can be proven that employees are guilty of strike violence and / or disobeying a court order interdicting it, the Labour Court will deal with them uncompromisingly. This in the light of the following finding by the Labour Court (per Van Niekerk J) in Ram Transport SA (Pty) Ltd v SA Transport & Allied Workers Union & Others (2011) 32 ILJ 1722 (LC) at para 9:

“Regrettably, the detailed incidents of violence and damage to property perpetrated by unidentified persons that are recorded in the papers are representative of a blight that has come to characterize the South African industrial relations landscape. This court is always open to those who seek the protection of the right to strike. 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.”

Thirdly, albeit less ambitiously, it is clear that the Labour Court will mulct unions in costs where it is found that their members were guilty of strike violence and caused the employer to seek an interdict. This in the light of the following finding by the Labour Court (per Van Niekerk J) in Tsogo Sun at para 14:

“This court must necessarily express its displeasure in the strongest possible terms against the misconduct that the individual respondents do not deny having committed, and against unions that refuse or fail to take all reasonable steps to prevent its occurrence. Had the applicant not specifically confined the relief sought to an order for costs on the ordinary scale, I would have had no hesitation in granting an order for costs as between attorney and own client.”

In order to do more than the three things identified above, the Labour Court will need to be empowered by the proposed amendment to s69 of the LRA. Given its importance, I deal with it under a separate heading.

The proposed amendment to s69

The proposed amendment arises from the general problem confronting employers that – more often than not – they are simply unable to identify the perpetrators of strike violence, and are thus made to suffer the “tyranny of the mob”. This term was coined by Navsa JA in SA Transport & Allied Workers Union v Garvas & Others (2011) 32 ILJ 2426 (SCA), in which
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.”

Tsogo Sun v Future of SA Workers Union

the following was held at para 50:

“The chilling effect of s 11(2)(b) 21 of the Regulation of Gatherings Act, 205 of 1993] described on behalf of the union is not only unsubstantiated but is contradicted by the police and the City of Cape Town, who presented unchallenged evidence that in their extensive experience the provisions of the Act have not deterred people from public assembly and protest. If anything, the regularity of public assembly and protest in the 15 years of the existence of the Act proves the contrary. The chilling effect that the provisions of the Act should rightly have is on unlawful behaviour that threatens the fabric of civilized society and which undermines the rule of law. 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.” (My emphasis.)

With reference to this finding, the Labour Court (per Van Niekerk J) held as follows in Tsogo Sun at para 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 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.” (My emphasis.)

This finding eloquently captures the dynamics of economic duress that I have addressed above. The finding gave rise to a thoughtful article by Prof Rycroft “Can a Protected Strike Lose its Status? Tsogo Sun Casinos (Pty) Ltd v/a Montecasino v Future of SA Workers Union & others (2012) 33 ILJ 998 (LC)” (2013) 34 ILJ 821. According to Prof Rycroft, “it is the last sentence that opens the door to argue that a strike marred by misconduct loses its protected status” (at 826). His central thesis is stated as follows at 827:

“These suggestions are grounded on the constitutional understanding of a strike; it is for the purposes of collective bargaining. If behaviour during the strike is destructive of that purpose then the protected status has been jeopardised.”

Although it appears to me unlikely that the Labour Court would interdict a protected strike on account of unlawful conduct committed during the course of it – because these are two different issues – the proposed amendment to s69 will enable this to occur (albeit in limited circumstances).

In terms of clause 9(d) of the Labour Relations Amendment Bill published at the end of June 2013, a new s69(12) is proposed. In the event of a picketing dispute having been referred to the CCMA / Labour Court in terms of s69(8) or (11), the amendment empowers the Labour Court to, amongst others things, grant urgent interim relief “suspending the picket or the strike”. In effect, this will enable the Labour Court to suspend a strike on account of the commission of violence committed during a picket, even if the perpetrators thereof cannot be individually identified. It is a means designed to
avoid employers being subjected to economic duress.

It must be stressed, however, that s69(12) would appear only to come into play in the event of the breach of picketing rules, and only those brokered or established by the CCMA, and does not give the Labour Court a general power to interdict a strike on account of strike violence. In the result, the amendment will only apply to the violence committed within the immediate vicinity of the workplace, and not to that committed off site - and then only if it is in breach of picketing rules brokered or established under the auspices of the CCMA.

In the article by Tembeka Ngcukaitobi referred to above, the author records (at 858) CO-SATU’s objection to the amendment as being as follows:

“This provision has far-reaching consequences since it would include the power to suspend a strike, and is capable of being opportunistically used by employers to frustrate industrial action. Currently the relief granted by the court is limited to any unlawful behaviour. Further it would render a collective right vulnerable to problematic action of individuals.”

While there may well be merit in this, the fact is that desperate times call for desperate measures.

The likely approach of the Labour Court to unprotected strikes

There is a school of thought that the time has come for the Labour Court to be uncompromising in upholding the dismissal of unprotected strikers. Given the statement in item 6 of the Code of Good Practice: Dismissal that participation in an unprotected strike, “like any other act of misconduct, … does not always deserve dismissal”, and the multi-faceted test for the fairness of the sanction of dismissal set in Sidumo & Another v Rustenburg Platinum Mines Ltd & Others (2007) 28 ILJ 2405 (CC), a wholly inflexible approach cannot be sustained. But what the Labour Court can do – and probably will do – is to adopt a strict approach where strikers breach the substantive limitations on the right to strike in section 65 and have made little or no attempt to comply with section 64.

When it comes to dealing with employees who have been dismissed for unprotected strike action after having disobeyed a court order, it seems likely that the Labour Court will view this as a severely aggravating factor. This along the lines of this finding by Conradie JA in his minority judgment in Steve’s Spar at para 120 (which has already been quoted in part above):

“It is becoming distressingly obvious that court orders are … not invariably treated with the respect they ought to command. It is a worrying tendency, one which can only be effectively combated by the courts’ displaying a marked reluctance to condone non-compliance. Obedience to a court order is foundational to a state based on the rule of law. The courts should by a strict approach ensure that it remains that way. I do not perceive any good reason why the appellants should not be penalized for their non-compliance. They cannot plead ignorance. Their union was closely involved. … There is little, then, that can be said in favour of exercising a discretion in favour of the appellants and I do not consider that they are, taking the above factors together, entitled to this court’s assistance.” (My emphasis.)

It warrants mention that in the judgment of the Court of Appeal of Botswana mentioned at the outset, the court refused an administrative law review based on the failure of the government to provide 3000 essential service workers with a hearing (not even by way of a show cause letter directed to their unions) before dismissing them after they failed to obey an Industrial Court order declaring their strike illegal and interdicting it. In doing so, the Court of Appeal relied on the finding of Conradie JA quoted above. It is also worth mentioning – and a lesson may lie in this – that the decision of the majority of the LAC in Steve’s Spar was that the dismissal of the strikers was unfair on account of them not having been afforded a pre-dismissal hearing, which resulted in them being reinstated with six months’ back-pay.
In addition, it seems to me that, taking its lead from the Constitutional Court’s judgment in SA Transport & Allied Workers Union & Another v Garvas & Others (2012) 33 ILJ 1593 (CC), which upheld the judgment of the SCA referred to above, the Labour Court will probably be inclined towards more substantial awards of compensation for losses attributable to unprotected strike action (and conduct connected therewith) under s68(1)(b) of the LRA. To the best of my knowledge, the highest award to date is R100 000 to be paid in instalments (Rustenburg Platinum Mines Ltd v Mouthpeace Workers Union (2001) 22 ILJ 2035 (LC); Algoa Bus Company v SATAWU & Others [2010] 2 BLLR 149 (LC)). A greater financial disincentive in the current climate seems appropriate.

**Bolder and more activist moves**

In closing, I wish to raise two issues which I believe require consideration or reconsideration with a view to addressing the epidemic of unprotected strike action and strike violence. I accept that they are controversial and would require the Labour Court or the LAC to adopt an activist approach.

The first issue relates to workers who an employer reasonably and bona fide believes to have committed acts of serious violence during the course of a strike, but cannot prove this in the ordinary course. Here there is a view that a way needs to be found to enable the employer to either: (i) dismiss them; (ii) selectively not re-employ them (in the event of a mass dismissal); or (iii) ward off their reinstatement in the event of their dismissal being found unfair.

In this regard, judgments such as that of the LAC in Blue Ribbon – where the employer was unsuccessful in its attempt to use operational requirements as a basis to dismiss a group of workers who it reasonably suspected (but could not prove) on bona fide grounds were the perpetrators of heinous acts of violence and was unsuccessful in warding off their reinstatement on the basis that a continued relationship with them was intolerable or impracticable – may need to be revisited. Our law labour recognises that, in exceptional cases, employees – who are not necessarily deserving of dismissal – can be dismissed for the greater good of the organisation. A dismissal at the behest of a third party to avoid strike action (Lebowa Platinum Mines Ltd v Hill (1998) 19 ILJ 1112 (LAC)) or a dismissal to avoid continued ethnic hostility (East Rand Proprietary Mines Ltd v United People's Union of SA (1996) 17 ILJ 1134 (LAC)) are examples of this.

The second issue relates to the reach of the strike definition – the premise being that where industrial action does not fall within the statutory definition, it is unprotected. In the current industrial relations climate, strikes are increasingly being called over demands that may be classified as unattainable, unlawful or not constituting “a matter of mutual interest”. In so doing, workers appear to be continuously pushing the boundaries of strike action. With a view to curbing strikes over these issues, and the violence that typically goes with them, the jurisprudence of the Labour Court and the LAC in relation to these issues could potentially be revisited and developed by the courts.

Regarding unattainable demands, in his article referred to above, Prof Rycroft opines that amongst the “implicit limitations” on strikes is that the demand “must be attainable”. As he puts it at 822-823:

“A strike is not functional to collective bargaining if … the demand is unattainable …. It has been generally accepted that it is not for the Labour Court 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.”

There is some support for this in the minority judgment of the LAC in Steve’s Spar at paras 113-114. (See also under the previous LRA, Barlows Manufacturing Co Ltd v Metal & Allied Workers Union & Others (1990) 11 ILJ 35 (T), and SA Commercial Catering & Allied Workers Union & Others v Transkei Sun
The leading judgment on unlawful demands is *TSI Holdings (Pty) Ltd & Others v National Union of Metalworkers of SA & Others* (2006) 27 ILJ 1483 (LAC). The principle emerging from this judgment is that a strike over an unlawful demand (in that case, a demand that a supervisor be dismissed unfairly) is unprotected (with the question having been left open whether this would constitute a strike as defined). There appears to exist scope for this principle being extended to demands that are indirectly unlawful – for example, a demand that an employer cease making use of breathalyser testing, which could arguably (and depending on the facts) be in breach of its obligation to ensure a safe working environment in terms of s 8 of the Occupational Health & Safety Act, 85 of 1993 (OHSA). There also appears to exist scope for demands that are contrary to public policy being classified as unlawful. (See in the contractual context, *Napier v Barkhuizen* 2006 (4) SA 1 (SCA).)

Turning to the term “a matter of mutual interest between employer and employee”, it has traditionally been interpreted widely by our courts so as to include, in effect, virtually everything except for disputes over the socio-economic interests of employees that may form the subject of protest action in terms of s 77 of the LRA. But as was held under the previous LRA, “[a]lthough the words could hardly be wider, it is clear that some limitation must be placed upon them, otherwise the result would often be absurd” (*Durban City Council v Minister of Labour & Another* 1948 (1) SA 220 (N) at 226). While it stands to be accepted that just because an employer may have the management prerogative, for example, determine shift patterns, this does not serve to place the issue beyond the reach of the term “a matter of mutual interest”, there does appear to be a limited range of management issues that do not lend themselves to collective bargaining (with strike action being part and parcel thereof). As an example, it is difficult to conceive how an employer can be expected to bargain collectively over its compliance with health and safety matters, in circumstances where s8 of the OHSA places a positive obligation on the employer to identify safety hazards and take reasonable precautionary measures forthwith to combat them. In the circumstances, industrial action over these and similar issues may arguably not constitute a strike as defined in s213 of the LRA (or otherwise not be protected).

**Conclusion**

The failure to obey interdicts prohibiting strikes and strike violence is reflective of serious socio-economic and political problems. Inevitably, the rule of law and the Labour Court’s credibility as an institution suffer as a consequence. To fix what is broken will require a partnership between government, unions and employers. Fortunately, some progress has been made on this front in the mining industry where organised labour (save for one union and one labour federation), organised business and the government have entered into a “framework agreement for a sustainable mining industry”. In this agreement, the parties jointly commit themselves to respect the rule of law. But the fact that this was necessary is reflective of the extent of the problems addressed in this article, and the extent of the work that needs to be done to claw back the rule of law, which is ultimately the foundation upon which our system of labour law is built.

**End Notes**

1) Available on SASLAW’s website – saslaw.org.za

2) Section 11 holds organisations who organise gatherings liable for damages arising from them unless they prove all the elements of s11(2) to escape liability, including that the damages were “not reasonably foreseeable”. The SCA dismissed a constitutional challenge to the section. On appeal, the Constitutional Court upheld the SCA’s judgment.

3) See s77(4) of the LRA, which provides that employees engaged in protected protest action forfeit protection from dismissal if their conduct is in breach of or in contempt of a Labour Court order. Another inducement to comply with a court order interdicting a strike is to be found in s68(1)(b)(i)(dd), which sets as a consideration for the quantum of compensation to be awarded for losses attributable to an unprotected strike as being whether there “was compliance with an order” interdicting the strike.

Anton Myburgh SC