A romantic idea of strikes means violence is far too easily tolerated

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Introduction

"[4] … Montecasino is a casino and entertainment complex situated in the Fourways area and which is owned by the applicant. The individual respondents were engaged in a protected strike called in support of a wage dispute between the applicant and the first respondent (the union). The applicant and the union had concluded a picketing agreement, which spelled out in some detail the manner in which the second to further respondents (the individual respondents) would exercise their right to picket in support of the strike. Regrettably, the picketing that occurred was anything but peaceful…"

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"… 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 … 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…"

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"…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…"

Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Workers Union & Others (2012) 33 *ILJ* 998 (LC)

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The question

- There is nothing romantic about violent strikes.

- They are unlawful, traumatic for everyone involved, deeply concerning for our labour relations and a threat to the rule of law and our democracy.

- Unfortunately, it is not uncommon. Have we become numb to workplace violence and intimidation? Why have we allowed this situation to persist as long as it has?

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Some context

- Violence during strikes is not new in South Africa.

- We have a complicated history of violence, also in industrial relations, from Rand Rebellion to Marikana.

- Constitutional rights to strike, fair labour practices and peaceful protest form the backbone of the LRA – mostly lip service paid to these ideals.

Some more context

- LRA brought many protections for Unions and their officials, office bearers, members and shop stewards.
- Unions have been emboldened by the LRA's protections.
- The Labour Court has done a reasonably good job of trying to keep errant Unions compliant with the LRA. It is however constrained by the LRA.

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The LRA

- In 2011 Halton Cheadle, Peter le Roux and Clive Thompson wrote (Business Day, 15 Nov 2011):

> *'Violence in private sector labour relations has also reached new post-1994 heights. Here, too, there is a need to introduce procedural obligations that go beyond pro-forma picketing rules. And a case can be made for the right to industrial action to be open to suspension by the Labour Court if that action is accompanied by egregious conduct.'*

- LRA has been amended several times since 1996. Little emphasis placed on addressing strike violence.

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The LRA

- By 2012 the LC had flirted with the idea of becoming an activist Court to address the problem.

> *"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 the labour dispute, one must question whether a strike continues to serve its purpose and thus whether it continues to enjoy protected status."*

The LRA

- This debate was met with excitement in the labour law community.

- However, implicit in the suggestion by the LC was that for a strike to lose its protected status the violence would have to be of such a nature as to render the strike dysfunctional i.e. egregious or gratuitous.

- The flip side of this coin - LC appears to have accepted that some level of violence should not only be expected, but accepted. This is problematic.

The LRA

- Prof Alan Rycroft commented as follows:-

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

The LRA

- On 19 December 2018 the Code of Good Practice: Collective Bargaining, Industrial Action and Picketing was published.

- The Code is soft-law, intended to provide practical guidance to those who wish to engage in collective bargaining or who seek to resolve disputes related to matters of mutual interest by way of industrial action, as a last resort.

- Code is the product of engagement at NEDLAC, and following the conclusion of an Accord on Collective Bargaining and Industrial Action by collectives of business, labour and government.

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The LRA

- The Code :

"(1) Violence during strikes and lockouts requires serious measures to prevent violence and induce a behaviour change in the way employees, employers and the police and private security, engage with each other during a strike or a lockout.

(2) …

(3) Prolonged and violent strikes have a serious detrimental effect on the strikers, the families of the strikers, the small businesses that provide services in the community to those strikers, the employer, the economy and community. Serious measures are needed to induce a behaviour change in the way that trade unions and employers and employers' organisations engage with each other in the pre-negotiation, negotiation and industrial action phases of collective bargaining."

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The LRA

- On 1 January 2019 the LRA was amended (again).
- Section 69 of the LRA was amended to require that picketing rules exist before any picket takes place.
- Also permits the LC to suspend a picket for non-compliance with the picketing rules, or to vary those rules.
- Sections 150A, B, C & D introduced to cater for advisory arbitration in the public interest.

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- Just before these amendments came into effect, Labour Court dealt with *Dis-Chem Pharmacies Ltd v Malema & Others* (2019) 40 *ILJ* 855 (LC).

> *"It has become an almost commonplace occurrence that where there is a protected strike, violence and unlawful behaviour inevitably follow. It is almost as if striking employees believe this is how things should be done. One only has to spend a week in the urgent court in this court to appreciate the gravity of the problem. A significant portion of the urgent roll is devoted to interdicting violence and unlawful behaviour during strikes. The situation perpetuates because it seems that there is very little consequence to transgressors, despite picketing rules and interdicts by this court being issued…"*

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- The LC indicated that the LRA requires pickets to be 'for the purposes of peacefully protesting'. This has important public policy considerations.

- LC referred to *Verulam Sawmills (Pty) Ltd v AMCU & others* where it had previously said the following about picketing rules:

> *"Not only are picketing rules there to attempt to ensure the safety and security of persons and the employer's workplace, but if they are not obeyed and violence ensues resulting in non-strikers also withholding their labour, the strikers gain an <u>illegitimate advantage in the power play of industrial action, placing illegitimate pressure on employers to settle</u>."*

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The LRA

- This is the nub of the problem. The LRA provides little to discourage Unions from engaging in violence.

- Violence impacts directly on the wage bargain ultimately struck. More violence = better settlement. A form of economic duress.

- The ineptitude of the SAPS has exacerbated the problem.

- Employers would rather concede to irrational demands than risk lives and property. Only employers with deep pockets and elaborate contingency plans can absorb a violent strike.

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Where to from here?

- The resort to violence is indefensible in modern labour relations, in a democratic society founded on the rule of law.

- The Constitution guarantees only a right to picket peacefully. Self-help is the antithesis of the rule of law, and the right to fair labour practices cuts both ways.

- Nevertheless, the problem is unlikely to go away or even be ameliorated without some form of legislative intervention.

- We should not be naïve – there is no political will to deal with this issue. Consider the labour broking issue as a contrast.

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Proposals on reform

- Violence of any form should not be permitted during a strike or any conduct in furtherance of a strike.

- Any violence should immediately lead to the suspension of a strike, upon application to LC by an employer.

- Even though there is an historical significance to the right to strike, there is nothing magical about it.

- No reason why right to strike should trump rights to life, property, freedom and security of the person.

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Proposals on reform

- A form of strict liability for Unions which is triggered when strikes turn violent. Once triggered, Unions would become liable for fines.

- Too often Unions wash their hands of the violence, claim ignorance or blame ‘rogue elements’ for the chaos.

- The liability would fall away where a Union is able to show a justifiable reason for not imposing the fine i.e. assisting the employer in identifying or investigating the violence.

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Proposals on reform

- Well-known rule in labour dispute resolution that where a relationship exists between an employer and a Union, costs orders should not be made.

- Rule has led to abuse, emboldening Unions to act unlawfully safe in the knowledge that any approach to the LC will be paid for by the employer.

- Time to revisit this rule.

- Unions who don’t abide by the rules should be saddled with costs orders, regardless of the existence of relationship.

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Proposals on reform

- Proposals are not 'union bashing' or an attack on the right to strike.

- Holding people or institutions accountable for their unlawful actions is something that should be encouraged and promoted in our society.

- Important to recognise that the violence occurs in the context of what is an employment relationship, in which employees owe a duty of good faith and is based on trust.

- Unions should not be allowed to escape censure by the courts and regulation from the legislature simply because the right to strike is constitutionally protected.

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Proposals on reform

- In 2011 the SCA, dealing with a protest march that had descended into anarchy in *SA Transport & Allied Workers Union v Garvis & others* (2011) 32 *ILJ* 2426 (SCA), remarked that:

> *"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."*

- The fact that the mob has assembled at the workplace does not confer additional protections or special status on it.

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Parting words

- The LRA, in its current form, does little to deal effectively with the tyranny of the mob.
- Time to leave behind the ideology and romantic ideas that underpinned the strike provisions of the act and deal decisively with violent strikes and those who engage in them.