

Losing your protection? When protected strikes turn bad

 By Jacques van Wyk

24 Apr 2024

Can a protected strike that was characterised by serious violence and intimidation “lose” its protection? In the event that a strike loses its protected status, is the dismissal of the striking workers substantively fair? This issue was considered by the Labour Court (LC) in the recent case of *African Meat Industry and Allied Trade Union and others v Shave and Gibson Packaging (2024)*.



Image source: LT Chan from [Pexels](#)

In June 2018, 161 members of the African Meat Industry and Allied Trade Union (Amitu) embarked on a protected strike in support of demands for wage increases. The employer, Shave and Gibson Packaging, embarked on a lockout in response to the strike and issued a notice which retracted their initial wage increase offer and stated that employees would be excluded from the workplace unless the workers accepted a zero (0%) wage increase.

During the strike, various acts of violence and damage to property were committed by the strikers. The employer sought, and was granted, an interdict prohibiting these actions. However, the unlawful actions of the strikers continued.

After weeks had passed, the strikers wanted to return to work. The employer refused to allow them to return to work and instead instituted disciplinary proceedings against them based on the following charges:

- participating in an unprotected strike that was not functional to collective bargaining and had become violent;
- derivative misconduct by not identifying the persons who were involved in the violence that ensued;
- intimidation and assault;
- contempt of the court order; and
- failing to remain in the designated picketing areas.

Why 'unlawful dismissal' doesn't mean 'automatic reinstatement'

Chloë Loubser and Caity Barbour 18 Apr 2024





Prior to the outcome of the disciplinary hearing being issued, the employer sent bulk SMSs, inviting employees to make written submissions explaining why they should not be found guilty of the alleged misconduct. This offer was made due to no attendance at the disciplinary hearing on the part of the strikers. Submissions were received from four employees, all of whom were subsequently reinstated.

All the strikers (other than the employees who were reinstated) were dismissed for misconduct. The employer argued that the strikers had been fairly dismissed as the strike had lost its “protected” status because it was marred with severe violence and intimidation; was protracted; and the strikers made unreasonable demands.

However, the employer failed to link the strikers individually to any criminal acts and failed to prove that they were aware of the culprits’ identities.

Labour Court finding

The LC found that while the strikers had collectively associated themselves with violence and intimidation due to the misconduct and virulent WhatsApp messages, only three strikers performed acts of intimidation, harassment and assault; and only 18 strikers continued to carry weapons after receiving the interdict.

Since the employer failed to link the strikers individually to the criminal acts or prove that they were aware of the culprits’ identities, the dismissal of the remaining strikers was ruled substantively unfair.

Moreover, the LC held that a protected strike does not lose its status, as such, on account of some strikers resorting to violence and intimidation, and that the employer was not entitled to rely on the claim that the employment relationship had been rendered intolerable and retrospective reinstatement was ordered.



Strike misconduct - you don't have to be violent to get fired

Lizle Louw and Amy King 12 Feb 2024



Importance of the case

The Constitution confers the right to strike upon all employees as it is essential to social justice and functional collective bargaining. It also provides a counterbalance to the employment relationship whereby employees usually have the

underhand.

The LC's decision highlights the importance of protecting the constitutional right to strike, even in the face of incidents of violence and intimidation by confirming that a strike marred by violence is not automatically rendered unprotected.

This raises the question, which is yet to be answered, of whether collective bargaining can remain 'functional' even when conduct in furtherance of a protected strike turns violent or when a strike demand is not attainable.

ABOUT JACQUES VAN WYK

Jacques van Wyk is a director in Labour and Employment Law at Werksmans Attorneys. He was named as a recommended lawyer in Labour & Employment by the Legal500 (2010-2012), and co-authored 'Labour Law in Action - A Handbook on the new Labour Relations Act - 1997' with Frances Anderson. Jacques specialises in commercial employment transactions arising during mergers and acquisitions, corporate restructures, executive employee terminations of employment, drafting employment contracts and letters of appointment; disciplinary codes and procedures; and grievance procedures.

- Losing your protection? When protected strikes turn bad - 24 Apr 2024
- No leniency for dishonesty in the workplace - 14 Mar 2022
- Impimpi Alive - whistleblowing system for minimum wage defaulters - 10 Apr 2019
- #RecruitmentFocus: What you need to know about the new National Minimum Wage Act - 9 Jan 2019
- Draft Code of Good Practice on equal pay for work of equal value - 29 Oct 2014

[View my profile and articles...](#)

For more, visit: <https://www.bizcommunity.com>